Metro Transport LLC, d/b/a Metropolitan Transportation Services, Inc. *and* Teamsters Local Union 41, a/w International Brotherhood of Teamsters.[1] Cases 17–CA–20061, 17–CA–20115, 17–CA–20138, 17–CA–20182, and 17–RC–11776

September 29, 2007

DECISION, ORDER, AND DIRECTION

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

On May 12, 2000, Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief, and 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,[2] and conclusions only to the extent consistent with this decision, and to adopt the recommended Order as modified and set forth in full below.[3]

I. INTRODUCTION

The unfair labor practice allegations in this case arose in the context of a 1999[4] effort by the Union, Teamsters Local Union 41, affiliated with International Brotherhood of Teamsters, to organize approximately 250 employees working for the Respondent, Metropolitan Transportation Services, Inc., which provides ground transportation services in the greater Kansas City area.

After a 13-day hearing, the judge issued the attached decision finding that the Respondent committed numerous violations of Section 8(a)(1) and (3) of the Act.

The Respondent excepts to the judge's findings that alleged discriminatee Dale Stripling was not a supervisor, that the Respondent violated Section 8(a)(1) by interrogating and threatening Stripling on March 1 and 2, and that it violated Section 8(a)(3) by discharging Stripling on March 3 and suspending six mechanics that same date for walking out in solidarity with Stripling. The Respondent also excepts to the judge's findings of 8(a)(3) violations for the April 1 discharge of employee David Lindgren, the April 16 suspension and April 23 discharge of employee Joseph Webster, and the May 17 discharge of employee Russell McIntosh Jr.[5]

We resolve the foregoing exceptions as follows. A panel majority (Members Liebman and Kirsanow) adopts the judge's finding, for the reasons he states and as further explained below, that the Respondent violated Section 8(a)(3) by discharging David Lindgren. A different panel majority (Members Schaumber and Kirsanow) reverses the judge and finds that Stripling is a supervisor. Accordingly, this same panel majority reverses the judge and dismisses the complaint allegations that the Respondent's interrogations of and threats toward Stripling violated Section 8(a)(1), and that its discharge of Stripling violated Section 8(a)(3). This same panel majority reverses the judge and dismisses the complaint allegations that the Respondent's suspension of six mechanics who

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

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

[3] We will modify the judge's recommended Order to conform to the violations found herein and in accordance with our decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). We will also modify the recommended Order in accordance with *Excel Container, Inc.*, 325 NLRB 17 (1997). The *Excel Container* date in the judge's notice-posting paragraph, March 1, 1999, corresponds to his finding that the Respondent violated Sec. 8(a)(1) on that date by threatening and coercively interrogating Dale Stripling. As explained below, we reverse those violation findings. Accordingly, the date of the Respondent's first unfair labor practice is March 2, 1999, when it unlawfully interrogated employee Victor Holiman concerning his reasons for supporting the Union. We shall also substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.,* 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

[4] All dates herein are in 1999, unless otherwise indicated.

[5] The Respondent does not except to the judge's findings that it violated Sec. 8(a)(1) by President and Chief Executive Officer William George's March 2 questioning of Victor Holiman about his reasons for supporting the Union; Manager Valerie Matula's mid-March threats to David Lindgren to reduce employees' wages if they brought in the Union; George's April 15 interrogation of Madison Reed concerning his distribution of union authorization cards; Manager Pam Reitmeyer's early May threat to Donna Smyers to cut employee wages if employees selected the Union; and Internal Director of Operations Christopher Dowd's late May/early June threats to Ronald Cox to supervise him more closely, discipline him, and discharge him because he engaged in union activity.

The Respondent's exception to the judge's finding that the Respondent violated Sec. 8(a)(1) by interrogating Russell McIntosh Jr. concerning his union sentiments fails to satisfy the minimum requirements of Sec. 102.46(b) of the Board's Rules. The Respondent supported its exception merely by stating that "[t]he clear preponderance of all the relevant evidence shows that the Judge's findings and conclusions are incorrect." The Respondent failed to explain, either in its exceptions or its supporting brief, on what grounds the assertedly incorrect findings should be reversed. Thus, we find, in accordance with Sec. 102.46(b)(2), that the Respondent's exception should be disregarded. See, e.g., *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006); *Oak Tree Mazda*, 334 NLRB 110, 110 fn. 1 (2001). Assuming arguendo that this exception were properly before us, we would affirm the judge's finding for the reasons he states.

walked out in protest of Stripling's discharge violated Section 8(a)(3). Finally, we unanimously adopt the judge's findings that the Respondent violated Section 8(a)(3) by discharging Russell McIntosh Jr.,[6] and, for the reasons he states as modified below, that the Respondent violated Section 8(a)(3) by its April 16 suspension and April 23 discharge of Webster.

II. THE DISCHARGE OF DAVID LINDGREN

David Lindgren was employed by the Respondent as an airport shuttle driver. In February 1999, Lindgren learned that he had received a near-perfect score from a "ghost rider," i.e., an individual contracted for by the Respondent to ride its shuttles and evaluate drivers' performance. Shortly thereafter, however—specifically, on February 23—Lindgren was orally counseled about smoking in his shuttle van. Then, on March 11, he was orally warned concerning an incident that happened on March 10, when an interaction with a passenger culminated in Lindgren threatening to put the passenger off the van if she did not terminate a cell-phone call. A memo prepared for Lindgren's personnel file stated, "This is to advise Dave that any further instances of this type of behavior will result in disciplinary action up to and including termination"; and the judge found that Lindgren was orally warned "as stated in the memo." Another complaint of rudeness to a passenger was documented in Lindgren's file on March 28. At that time, Shuttle Manager Jack Mawby pulled Lindgren's file and reviewed it. Despite the March 11 warning that "further instances of this type of behavior will result in disciplinary action up to and including termination," no such discipline was forthcoming. Indeed, Lindgren was not even spoken to about the March 28 incident.

Before March 29, the Respondent was unaware of Lindgren's union sympathies. That changed on March 29, when Lindgren attended a company meeting at which Respondent's president, George, introduced Mawby as the new shuttle manager. Lindgren sat in the front row, one of only two persons in that row, wearing an orange, 3-inch diameter "Vote Teamsters" button. When George came in, he looked immediately at Lindgren, who was seated just 10 feet away.

Shuttle drivers accept payment from passengers by cash or credit card and place the cash and credit-card receipts in a "ticket bag." Drivers generally turn in their ticket bags at the end of their shift. By arrangement with management, however, Lindgren took his ticket bag home with him after his shift ended and turned it in the following morning. In early February, a logistical change in Respondent's operations obviated the need for Lindgren to take his ticket bag home. After that change, Lindgren dropped off his ticket bag at shift's end about 90 percent of the time. However, Respondent never revoked Lindgren's authorization to take his ticket bag home. Accordingly, he continued to do so the other 10 percent of the time, and no one from management ever told him not to do so.

On March 31, at 5 a.m., Lindgren called off sick. He spoke with Shift Supervisor Dan Sanderson. Lindgren told Sanderson that he still had his ticket bag from the day before. Sanderson told him to bring the bag with him the next day when he reported for work. At 5:30 p.m., Mawby called Lindgren and asked him to bring in the ticket bag right then. Lindgren replied that he was sick and had been sick all day, and that Sanderson had approved his bringing the bag the next day.

On April 1, the Respondent discharged Lindgren, giving him the following three reasons: (1) smoking in a company vehicle; (2) customer complaints about poor service and bad attitude; and (3) "continued violation of policy by taking his ticket bag home instead of dropping it at the end of each shift." At the hearing, Mawby added "gross insubordination" as yet another reason for the discharge, citing Lindgren's refusal to bring in the ticket bag when Mawby asked him to.

The judge found each of these reasons pretextual. Observing that the last reported smoking incident had occurred more than a month earlier on February 23, the judge found it "stale" and "a blatant pretext." He similarly rejected as pretextual the claim of a "continued violation of policy" for Lindgren's handling of his ticket bag because Lindgren had been authorized to take his bag home, and that authorization had never been revoked. The judge also found that Mawby's shifting addition, at the hearing, of "gross insubordination" as yet another reason for the discharge "expose[d] [Respondent's] position as insincere and completely untrustworthy."

As for the second stated reason for Lindgren's discharge—continued customer complaints about Lindgren's service and attitude—the judge found that it had "some basis." However, he found that even this reason "smells of taint." The Respondent gave Lindgren

[6] Member Schaumber agrees with his colleagues that the Respondent violated Sec. 8(a)(3) when it discharged McIntosh. While he does not agree with the judge's finding that the Respondent knew about McIntosh's union activities, Member Schaumber agrees with the judge's conclusion that the Respondent's proffered reasons for the discharge are pretext. Extant Board precedent provides that unlawful motivation may be inferred from circumstantial evidence, including evidence that the employer's stated reasons for its actions were a pretext. See, e.g., *Whitesville Mill Service Co.*, 307 NLRB 937 (1992) (citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966)); *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992). In Member Schaumber's view, such an inference is warranted here.

only a single oral warning about customer service on March 11. (The earlier oral counseling concerned smoking in the van.) Although it memorialized the March 28 incident in Lindgren's file, the Respondent never spoke to Lindgren about it. Instead, Lindgren was simply discharged. The judge took note of the fact that the Respondent failed to afford Lindgren any intermediate disciplinary steps, such as a written warning or suspension. The judge acknowledged that the Respondent had no written progressive disciplinary system. Nonetheless, he found that the Respondent's willingness to jump on Lindgren's past customer-service missteps to justify a discharge, absent even a single "formal reprimand" for them, revealed that the Respondent's second stated reason for discharging Lindgren was also pretextual.

Having found each of the Respondent's stated reasons pretextual, the judge found that the real reason for Lindgren's April 1 discharge was Respondent's animus against his open display of support for the Union on March 29. We agree.

We begin by reviewing certain well-settled principles. Under *Wright Line*,[7] the General Counsel must show that a discharged employee's protected conduct was a motivating factor in the employer's decision. As part of his initial showing, the General Counsel may offer proof that the employer's reasons for the personnel decision were pretextual. *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003); see also *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995) ("[W]hen the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual . . . . the factfinder may not only properly infer that there is some other motive, but 'that the motive is one that the employer desires to conceal—an unlawful motive . . . .'") (quoting *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)).

Typically, once the General Counsel has established his initial case under *Wright Line*, the burden shifts to the employer to show that it would have taken the same action even in the absence of the employee's protected activity. But where it is shown that the employer's proffered reasons "are pretextual—that is, either false or not in fact relied upon—the [employer] fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)). Even assuming that the pretext evidence is insufficient to preclude analysis of the employer's rebuttal case, the employer's burden on rebuttal is not met by a showing merely that it had a legitimate reason for its action. Rather, the employer "must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984).

These principles apply here. The judge found, and we agree, that each of the reasons given for Lindgren's April 1 discharge was pretextual, i.e., either false or not in fact relied upon. As to the first reason, the smoking incident was more than a month old, and the Respondent had deemed that it warranted only an oral counseling. As to the third, Lindgren was not violating company policy; he was authorized to take his ticket bag home. As to "gross insubordination," Lindgren was not insubordinate. He simply told Mawby that he had been and was sick, and that Shift Supervisor Sanderson had approved his bringing the ticket bag the next day.

We also agree with the judge's finding of pretext as to the second stated reason for Lindgren's discharge. Our dissenting colleague relies on the validity of customer complaints about Lindgren's service and attitude to find that the Respondent rebutted the General Counsel's *Wright Line* case. We do not disagree that the Respondent *could* have discharged Lindgren for rudeness to customers. The question, however, is whether it has gone beyond merely articulating a legitimate reason for the discharge and shown by a preponderance of the evidence that it did, in fact, rely on that reason.

We find it has not. On March 11, the Respondent warned Lindgren that he could be discharged for an additional act of rudeness to a customer, and it documented that warning in Lindgren's file. On March 28, Lindgren was rude to another customer. This, too, was documented to Lindgren's file, which Mawby pulled and reviewed. Yet no action was taken that day, or on Monday, March 29, Tuesday, March 30, or Wednesday, March 31. On March 29, Respondent learned that Lindgren was prounion. On March 31, he called in sick and was given permission to drop off his ticket bag the next day. On April 1, Lindgren was discharged. Aware that it could not explain its delay in acting on the March 28 incident or its abrupt leap to the most draconian punishment in an employer's arsenal, the Respondent gilded the lily by invoking additional and transparently pretextual reasons for the discharge; and it threw in yet another reason at the hearing. Our dissenting colleague does not take issue with the judge's findings that these additional reasons were pretext. He singles out and relies on the

[7] 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 (1993).

one legitimate reason. In our view, that reason cannot be thus isolated. The fact remains that the Respondent also attempted to rely on patently pretextual reasons for the discharge. This suggests that the Respondent itself did not believe that rudeness to customers adequately explained the discharge. It also permits an inference that the true reason was an unlawful one the Respondent wished to conceal. *Laro Maintenance*, supra. That inference becomes compelling where, as here, the discharge followed hard on the heels of the Respondent's discovery of Lindgren's prounion stance. In these circumstances, we agree with the judge that the Respondent "rushed to rely on stale and unsupported grounds, or on whatever it took, to get rid of driver Lindgren." We thus affirm the judge's finding that the Respondent's discharge of Lindgren violated Section 8(a)(3) and (1) of the Act.[8]

III. THE SUPERVISORY STATUS OF STRIPLING

Members Schaumber and Kirsanow find, contrary to the judge, that by the time of the events at issue in this case concerning Dale Stripling, Stripling was a supervisor within the meaning of Section 2(11) of the Act.

Section 2(3) of the Act excludes from the definition of the term *employee* "any individual employed as a supervisor." Under Section 2(11),

> [t]he term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Possession of authority to engage in any one of the enumerated supervisory functions is sufficient to confer supervisory status on an individual, provided the authority is held in the interest of the employer and its exercise is not of a merely routine or clerical nature but requires the use of independent judgment. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

The Respondent selected Stripling to be the non-CDL[9] maintenance manager on December 15, 1998, and President George so notified about 120 employees at the Respondent's December 1998 Christmas party. No later than mid-February, Stripling possessed the authority to discipline the mechanics working in the non-CDL vehicle garage, as the following events show.

In early to mid-February, a mechanic refused to change a tire on a wheelchair van for Internal Director of Operations Christopher Dowd, who phoned George at home to complain. George then phoned Stripling and told him: "These guys work for you. You go out there and you tell them that they are to get the tire changed on the vehicle and if any one of them refuses you, you are to send them home or to terminate them." George reiterated Stripling's disciplinary authority in a meeting a few hours later with Stripling, Dowd, and Maintenance Director John Turney, stating that he "made it clear to [Stripling] that this is the exact reason why we put you [Stripling] in the position that you are in. If these guys refuse to do what you are asking them to do, you are to either send them home, write them up, or terminate them." Based on George's above-quoted statements, the judge found, and we agree, that George confirmed to Stripling that he possessed the authority to discipline any non-CDL mechanic who refused to execute his work orders.

Notwithstanding his finding that Stripling possessed authority to discipline, the judge concluded that he was not a statutory supervisor. The judge found that Stripling was merely a conduit for George's orders, that Stripling's exercise of disciplinary authority pursuant to those orders was limited to emergency situations, and that this "prearranged response for emergencies would not involve the exercise of independent judgment by Stripling." We disagree. Nothing in George's statements to Stripling limited Stripling's authority to discipline employees to emergency situations or indicated that Stripling would be merely a conduit for George's orders. There was also no indication that George intended to otherwise limit Stripling's authority by, for example, conducting an independent investigation of Stripling's disciplinary decisions. It may well be that George told Stripling what to do vis-à-vis the mechanic who refused to change a tire, but George acted because Stripling had failed to act. Moreover, in chastising Stripling for his failure to exercise disciplinary authority, and again at the meeting later the same day, George made clear that Stripling was empowered to impose differing levels of discipline. Absent any suggestion that Stripling should consult with George (or anyone else) before acting, the determination of what discipline to impose would necessarily depend on Stripling's independent judgment of what the situation warranted. See *Oakwood Healthcare*, supra

[8] In adopting the judge's finding that Lindgren's discharge was unlawful, Member Kirsanow finds it unnecessary to rely, as did the judge, on the fact that George fixed Lindgren with a cold stare as evidence of the Respondent's animus against Lindgren's union activity. Member Kirsanow finds ample evidence of animus to support the judge's violation finding in the Respondent's numerous unfair labor practices and its reliance on pretextual reasons to justify Lindgren's discharge.

[9] CDL stands for commercial driver's license.

at 693 (stating that independent judgment involves action "free of the control of others"). Thus, Stripling was a statutory supervisor because he possessed the authority to discipline employees using independent judgment. Cf. *Avante at Wilson, Inc.,* 348 NLRB 1056, 1057 (2006) (finding no authority to discipline where employer failed to furnish a basis for putative supervisor's belief that she possessed that authority, such as having been told that she possessed it by one of her superiors).[10]

Our dissenting colleague, in concluding that Stripling was not a supervisor, emphasizes that he had not yet fully assumed his new position as non-CDL maintenance manager. But supervisory status issues are not decided based on the position an individual holds. They are decided based on the application of Section 2(11). Thus, the issue is not whether Stripling had yet fully assumed all of his new duties as non-CDL maintenance manager. It is whether he possessed the authority to exercise, with independent judgment, at least one 2(11) function at the time he was discharged. In resolving this issue, we find George's February actions decisive. While dealing with the tire incident, George twice emphasized to Stripling that he possessed the authority—on his own—to discipline employees. That authority included the power to select among a variety of disciplinary options, up to and including discharge. Stripling's independent supervisory authority was thereby confirmed. Our colleague acknowledges that there was "a supervisory vacuum within the department," yet she fails to recognize that George's affirmation of Stripling's disciplinary authority was assuredly meant to fill that vacuum. We also reject our colleague's suggestion that George was dealing only with an isolated or emergency situation. George's categorical statements belie that conclusion: "If these guys refuse to do what you are asking them to do, you are to either send them home, write them up, or terminate them." The February event was not just a "single incident" in which Stripling was empowered to act for that incident alone. It was an event in which the Respondent clearly empowered Stripling—from that time forward—to exercise supervisory authority.

IV. THE ALLEGEDLY UNLAWFUL CONDUCT CONCERNING STRIPLING

Having found that Stripling was a supervisor at the time of his discharge, Members Schaumber and Kirsanow further find that the Respondent did not violate Section 8(a)(3) by terminating him for engaging in union activity. *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402, 404 (1982) ("The discharge of supervisors as a result of their participation in union or concerted activity—either by themselves or when allied with rank-and-file employees—is *not* unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act."), petition for review denied sub nom. *Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983).

Moreover, because Stripling was a supervisor no later than mid-February, we find, contrary to the judge, that the Respondent did not violate Section 8(a)(1) by Turney's March 1 interrogation of Stripling concerning how the union matter had gotten started and implied threats to Stripling about the effects of unionization, George's March 2 interrogation of Stripling about the Union and the employees' reasons for supporting it, and George's March 2 threat to Stripling to terminate him for attending a union meeting and to outsource labor if the Union came into the workplace. See *Concrete Form Walls, Inc.*, 346 NLRB 831, 836 (2006) ("It is axiomatic that supervisors are excluded from the protection of the Act."), enfd. mem. per curiam 2007 WL 1469039 (11th Cir. 2007); *NLRB v. Nevis Industries, Inc.*, 647 F.2d 905, 910 (9th Cir. 1981) (holding that, with limited exceptions not present here, employer conduct toward supervisors does not violate the Act).

V. THE SUSPENSION OF THE MECHANICS

Members Schaumber and Kirsanow find, contrary to the judge, that the Respondent did not violate Section 8(a)(3) by suspending mechanics Seth Hankins, Victor Holiman, Walter Boza, Jeremy Carr, Thomas Houle, and Joseph Webster for their March 3 walkout. The mechanics walked out to protest Stripling's discharge. As explained above, Stripling was a supervisor. Thus, the walkout, although concerted, was not protected by Section 7 of the Act unless the "'facts establish that the identity and capability of the supervisor involved has a direct impact on the employees' own job interests and on their performance of the work they are hired to do.'" *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1103 (2000) (quoting *Dobbs Houses*, 135 NLRB 885, 888 (1962), enf. denied 325 F.2d 531 (5th Cir. 1963)). In making this determination, the Board applies the first three parts of the four-part test set forth in *NLRB v. Oakes Machine Corp.*, 897 F.2d 84, 89 (2d Cir. 1990): "(1) whether the protest originated with employees rather than other supervisors; (2) whether the supervisor at issue dealt directly with the employees; [and] (3) whether the identity of the supervisor is directly related to terms and conditions of employment." See *Southern Pride Catfish*, 331 NLRB 618, 620 (2000); *QSI, Inc.*, 346

[10] Because we find that Stripling was a supervisor based on his possession of authority to discipline, we find it unnecessary to pass on whether Stripling's assigning work to the mechanics also established supervisory authority.

NLRB 1117, 1117 (2006) (unlike some courts of appeals, including the Second Circuit, the Board does not impose a "reasonable means" requirement on employees' concerted activity).

Here, the protest clearly originated with the employees. Webster testified that upon learning that Stripling had been fired for his union activity, the mechanics "were all upset. We went outside." Holiman testified that the group "got together" and said, "[I]f Dale [Stripling] is fired, I'm walking, are you with me . . . . [W]e came to an agreement if Dale was terminated we would walk in protest." Houle testified that "if Dale was to leave we were going to leave also." Boza testified that the walkout was "[i]n protest of Dale Stripling being let go . . . for union activities." Stripling testified that he heard Hankins tell Turney that if Stripling was leaving, Hankins was "walking out and so is [sic] a lot of other people."

Even assuming that the second step of the *Oakes Machine* test is also met, i.e., that Stripling dealt directly with the mechanics, we nonetheless find that the March 3 suspension allegation must be dismissed because, crucially, there is no relationship between Stripling and the mechanics' terms and conditions of employment. The record shows that the mechanics were concerned solely with Stripling's employment situation; they made no mention whatsoever of their own. This is the more remarkable considering that only the day before Stripling's discharge, the mechanics had given Stripling a list of grievances with the request that Stripling deliver it to George.[11] This list contained 14 numbered issues relating to working conditions (poor heat, leaking roof), economic items (including pay raises and overtime), and one communication matter ("Monthly shop meeting with Billy [George] or anyone that will listen."). Yet the mechanics spoke not one word about these issues when they walked out of the workplace to protest Stripling's discharge, and the Respondent made no mention of the list of grievances when notifying the mechanics that they were suspended or, subsequently, that they could return to work. In these circumstances, the evidence fails to demonstrate that Stripling's identity and capability as the mechanics' supervisor had a direct impact on the mechanics' own job interests. Cf. *QSI*, supra at 1128 (finding that employees walked out to protest termination of managers and supervisors perceived by employees to support their position that warnings and discipline issued by the safety department were unfair, an issue directly related to employees' terms and conditions of employment). Accordingly, the mechanics' walkout was unprotected, and therefore the Respondent did not violate Section 8(a)(3) by suspending the mechanics for participating in the walkout.

Our dissenting colleague faults us for not "discern[ing]" a "relationship between the presentation of grievances, the discharge, the walkout, and the retaliation," i.e., Stripling's discharge. But there is no need to discern anything where the record evidence is clear. Here, the record shows that the employees walked out to protest Stripling's discharge. They said nothing about their list of grievances. They simply agreed that if Stripling was discharged, they would walk out to protest that discharge. Our colleague submits that the mechanics "elected not to pour salt into the wound" by linking their walkout to the list of grievances. Aside from being sheer speculation, our colleague's submission strikes us as counterintuitive: given that the mechanics were willing to take the highly confrontational action of walking off the job, it is unlikely that they concealed their true motives for doing so out of fear of giving some incremental offense.

VI. THE UNLAWFUL CONDUCT CONCERNING WEBSTER

The judge found that the Respondent's April 16 suspension and April 23 discharge of employee Webster violated Section 8(a)(3). As fully set forth in his decision, the judge found that Webster engaged in union activity, that the Respondent was aware of his union activity, and that the Respondent suspended and discharged Webster for his prominent union activity, not (as the Respondent contends) for doing private vehicle repair work on company time. We agree with the judge.

In finding that the General Counsel met his initial burden of proving that Webster's suspension and discharge violated Section 8(a)(3), the judge relied in part on "the animus flowing from the March 3 walkout," in which Webster took part. As explained above, however, the walkout was unprotected; thus, we do not rely on this aspect of the judge's analysis. Nonetheless, we find, as did the judge, that the General Counsel sustained his burden under *Wright Line*, supra, to prove that Webster's protected activity was a motivating factor in his April suspension and discharge.[12]

Under *Wright Line*, the General Counsel meets his initial evidentiary burden by establishing that the employee

[11] George testified that he received the list of grievances on March 2.

[12] Member Liebman finds that the March 3 walkout was protected, that the Respondent violated Sec. 8(a)(3) by suspending Webster (among others) on March 3, and that the judge properly relied in part on the Respondent's animus "flowing from the March 3 walkout" to find that the General Counsel sustained his burden of proving that Webster's April suspension and discharge were unlawful. She agrees with her colleagues, however, that the General Counsel met his burden in this regard even without the animus flowing from the walkout.

engaged in protected activity, the employer knew of that activity, and the protected activity was a substantial or motivating reason for the employer's action. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Direct evidence of unlawful motivation is often unavailable; such motivation may be established by circumstantial evidence and the inferences drawn from that evidence. *Rogers Electric,* 346 NLRB 508, 518 (2006). As stated above, an inference of unlawful motivation may be drawn where the employer's stated reasons for its challenged employment action are found to be pretextual. See, e.g., *Toma Metals, Inc.*, 342 NLRB 787, 797 (2004) (citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966)). Departure from past practice may also support an inference of unlawful motivation. *Exelon Generation Co., LLC*, 347 NLRB 815 , 815 fns. 3, 10–11 (2006).

In finding that the General Counsel met his burden under *Wright Line*, the judge relied on several considerations other than the March 3 suspensions. First, when mechanics (including Webster) used the Respondent's parts to do private vehicle repair work, Turney's past practice was simply to bill the mechanics at the end of the month for parts they took from the shop. Departing from that practice, Turney reported Webster's private repair work to Human Resources Director McCann. Second, the Respondent alleged that Webster performed private repair work on a Friday (company time) rather than a Saturday (personal time), when, in fact, as the judge found, Webster performed the work on Saturday. Third, the Respondent put forward, after the fact, various rules purportedly regulating private vehicle repair work, whereas, in fact, the prevailing rule was that mechanics could use the garage for private work as long as they did so on their own time and the work did not interfere with the Respondent's business—conditions with which Webster complied. The judge found that the Respondent deliberately distorted both Webster's actions and its own rules to concoct a basis for discharging a union activist for his union activity. Moreover, there is further evidence of the Respondent's union animus in its violations of the Act predating Webster's April 16 suspension and April 23 discharge. Thus, the Respondent violated Section 8(a)(1) by George's March 2 interrogation of employee Holiman concerning his reasons for supporting the Union, Matula's mid-March threats to employee Lindgren to reduce employees' wages if they brought in the Union, Dowd's mid-March interrogation of employee McIntosh concerning his union sentiments, and George's April 15 interrogation of employee Reed concerning his distribution of union cards. In these circumstances, the General Counsel's initial *Wright Line* burden is more than adequately established.

If the General Counsel meets his initial burden, the burden of persuasion shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. However, as stated above, where, as here, the reasons given for the Respondent's action are pretextual, "the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, supra. Accordingly, without relying on the Respondent's suspension of Webster in March, we adopt the judge's conclusion that the Respondent violated Section 8(a)(3) by suspending and discharging Webster in April.

VII. THE CHALLENGED BALLOTS

In Case 17–RC–11776, a representation election in a stipulated unit of the Respondent's employees was held on September 10, 1999, after the relevant events in the instant consolidated unfair labor practice cases. The tally of ballots showed 93 votes in favor of representation by the Union, 93 against, and 9 challenged ballots. Five of those nine challenged ballots were cast by alleged discriminatees in the unfair labor practice cases—David Lindgren, Dale Stripling, Russell McIntosh Jr., Rodney Saxton, and Dale Speelman—all of whose ballots were challenged on the basis that the voters were not employed by the Respondent at the requisite times. On motion of the General Counsel, the judge consolidated with the instant unfair labor practice cases that portion of Case 17–RC–11776 concerning challenges to the ballots of these five individuals. Based on our findings above and on the judge's unexcepted-to dismissal of allegations that the discharges of Saxton and Speelman were unlawful, we overrule the challenges to the ballots of Russell McIntosh Jr. and David Lindgren and sustain the challenges to the other three ballots.[13]

ORDER

The National Labor Relations Board orders that the Respondent, Metro Transport LLC, d/b/a Metropolitan Transportation Services, Inc., Kansas City, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or union activities or other protected concerted activities.

[13] In accordance with his conclusion that the Respondent lawfully discharged David Lindgren, Member Schaumber would sustain the challenge to his ballot as well.

(b) Threatening to supervise employees more closely, issue more discipline, and discharge employees if they engage in union or other protected concerted activities.

(c) Threatening to reduce employees' wages if the Union is voted in as the employees' collective-bargaining representative.

(d) Suspending and discharging employees because they engage in union or other protected concerted activities.

(e) 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 Joseph Webster, David Lindgren, and Russell McIntosh Jr. full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Joseph Webster, David Lindgren, and Russell McIntosh Jr. whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of David Lindgren and Russell McIntosh Jr. and the unlawful suspension and discharge of Joseph Webster, and within 3 days thereafter notify the employees in writing that this has been done and that the suspension and discharges will not be used against them 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 at 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 all of its Kansas City, Missouri facilities copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 17, 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 facilities 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 March 2, 1999.

(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.

[14] 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."

DIRECTION

IT IS DIRECTED that the Regional Director for Region 17 shall, within 14 days from the date of this Decision, Order, and Direction, open and count the ballots of David Lindgren and Russell McIntosh Jr. The Regional Director shall then prepare and serve on the parties a revised tally of ballots and take further appropriate action.

MEMBER LIEBMAN, dissenting in part.

On December 15, 1998, Dale Stripling was selected to *eventually* take over the new position of non-CDL maintenance manager. No party contends that Stripling was actually installed in this new position at that time, or then possessed supervisory authority, and the majority does not disturb that finding. As I explain below, Stripling's status as a statutory employee never changed and, on the date of his discharge, he was an employee. Thus, contrary to my colleagues, I would find those violations of the Act that depend on Stripling's employee status.

I.

Stripling worked in the parts department. The reason that Stripling was not installed in the new position of non-CDL maintenance manager immediately is that he still occupied the position of parts manager, a nonsupervisory position. He remained in that position until his discharge on March 3, 1999.

Stripling was the only nonsupervisory employee in the parts department and was continuously swamped with work duties. Stripling testified that he and Maintenance Director John Turney "were always behind" in completing duties in the parts department and that his promotion "depended on getting somebody" to replace him. Stripling worked 55 to 70 hours per week to keep up with the workload in the parts department. As the judge found,

"it would be impossible for Stripling to assume the duties, responsibilities, and authority of the NonCDL Maintenance manager while he remained the parts manager. He could not do both jobs."

When the Respondent discharged Stripling for engaging in union activities, he had not been replaced in the parts department and was still performing on a full-time basis there. Thus, the factual predicate for Stripling's promotion—finding a successor for him in the parts department—never occurred.

II.

In finding that Stripling was a supervisor for non-CDL maintenance, the majority brushes aside this reality. Further, no party contends that Stripling was ever "in charge" of directing the mechanics in the non-CDL vehicle garage, and the majority does not find that Stripling was responsible for assigning work to the mechanics.[1]

Rather, the majority relies solely on Stripling's purported authority to exercise discipline with independent judgment. The foundation for this finding is essentially one incident. In early or mid-February, the Respondent's president and chief executive officer, William George, was telephoned (and apparently awakened) at home around 5:45 a.m. and informed that a tire needed to be changed on a vehicle. Not surprisingly, this perturbed George and, as he stated later in the day, "if it takes the president of the company to get a tire changed in the morning, then I had a serious, serious problem." George told Stripling exactly what he should do in these circumstances: "you go out there and you tell them that they are to get the tire changed on the vehicle and if any one of them refuses you, you are to send them home or terminate them." George told Stripling, "[T]hese guys work for you." Later that day, George told Stripling that he should "either send them home, write them up, or terminate them."

I agree with the judge that this single incident does not satisfy the Respondent's evidentiary burden to show that Stripling possessed independent judgment to discipline non-CDL maintenance mechanics.[2] Initially, the fact that it was necessary to telephone and awaken the president and CEO of the Company at 5:45 in the morning over a tire changing incident strongly suggests that there was a supervisory vacuum in the department. This is consistent with the undisputed fact that Stripling was still handling a full workload in the parts department and was neither in charge of the non-CDL mechanics nor responsible for discipline. As with work assignments (which the judge found was still overseen in the non-CDL department by maintenance director Turney), discipline was not overseen by Stripling either.[3] Second, the tire-changing incident was an isolated or, as the judge found, an "emergency" situation and does not establish that anything meaningful had changed as to Stripling's responsibilities, or lack thereof, since the previous December. Third, Stripling, at most, was empowered to act as George's conduit, perhaps so that George would not be awakened again at 5:45 in the morning. As noted, George told Stripling what he was supposed to do if a mechanic failed to change a tire. Nothing in this incident establishes that Stripling now had the authority to invoke discipline with independent judgment nor, in context, did George empower Stripling to impose different levels of discipline based on the exercise of independent judgment.[4]

In these circumstances, Stripling was not a supervisor based on a purported authority to discipline with independent judgment. The condition for his promotion had not been satisfied (finding a replacement for him in the parts department) and the purported basis for supervisory status was a single incident that left Stripling's nonsupervisory status unchanged and, at most, establishes that Stripling was empowered to act as a conduit for discipline, at the behest of George.

Because I would find that Stripling was not a supervisor, I would find, in agreement with the judge, that the Respondent violated Section 8(a)(3) when it discharged Stripling for engaging in union activities and violated Section 8(a)(1) by interrogating Stripling and threatening him because of his union activity. I would also overrule

[1] The majority does not pass on whether Stripling had the authority to assign. For the reasons set forth by the judge, I would adopt the judge's finding that he did not possess such authority. As the judge found, assignments to the mechanics were made by Turney.

[2] The burden of proving supervisory status, of course, rests with the party asserting that status. *Oakwood Healthcare, Inc*., 348 NLRB 686 (2006).

[3] The majority says that it is not significant that Stripling had yet to assume the duties of the non-CDL maintenance manager position, and that the issue, rather, is whether he possessed authority to discipline with independent judgment. But Stripling's state of limbo regarding his assumption of duties is crucial to the issue of his authority to act with independent judgment. Thus, as the judge found, the reality is that maintenance director Turney was "blocking that vesting of authority" until the Respondent found a replacement for Stripling in the parts department.

[4] The Board has long held that isolated conduct pertaining to emergency or flagrant situations does not establish the exercise of independent judgment. *Loffland Bros. Co*., 243 NLRB 74, 75 fn. 4 (1979). Here, the mechanics initially were refusing to follow the instructions of director of operations Christopher Dowd to change the tire. George was told that this was "because they don't like Chris." In view of this act of insubordination toward Dowd, George enlisted Stripling to act as his conduit to get the tire changed, with specific instructions regarding how the matter was to be addressed. Contrary to the majority, this isolated act with firm instructions from George, in an emergency situation, does not constitute an exercise of independent judgment.

the challenge to Stripling's ballot. I would further find, in agreement with the judge, that the walkout in protest of Stripling's discharge was protected activity and that the Respondent's suspension of six employees for participating in the walkout to protest his discharge violated Section 8(a)(3).

III.

Even assuming, arguendo, that Stripling was a supervisor, I would find that the employees' walkout protesting Stripling's discharge was protected and the discipline imposed on them unlawful.

Contrary to the majority, there is a clear connection between Stripling's discharge, the walkout, and the employees' presentation of grievances to management concerning their own terms and conditions of employment. Stripling credibly testified that, on March 2, George asked Stripling to meet with employees and bring to his attention any of their problems in the shop. Following up on George's request, Stripling met with employees that day and told them that George wanted to meet with them to discuss their problems. The employees openly told Stripling they were "intimidated" by George, and did not want to meet with him to discuss grievances, but would submit a list of grievances that Stripling could take to George for consideration. In effect, whether or not he was a supervisor, Stripling was acting as a conduit between George and employees, who trusted Stripling. Later that day, employees gave Stripling a list of 14 detailed grievances pertaining to a host of problems concerning working conditions and economic issues. Stripling then gave that list to management, and George examined the list on March 2.

George's response to the employees' list of grievances (and to Stripling's role in following up on George's request to meet with employees) was to discharge Stripling the next day, March 3. George told Stripling that the issues that Stripling was bringing up (i.e., the employees' list of grievances) had existed before and that Stripling had acted improperly. When employees heard about Stripling's discharge on March 3, six of them engaged in a walkout to protest Stripling's discharge—and were disciplined for doing so.

The majority finds that the employees were concerned solely with Stripling's situation and that there was "no relationship" between Stripling and their own terms and conditions of employment. It finds it "remarkable" that employees would not be concerned about their own working conditions after Stripling's discharge, considering that they had just given Stripling a list of grievances to present to management. What is remarkable, rather, is that, on this record, the majority fails to discern the direct relationship between the presentation of the grievances, the discharge, the walkout, and the retaliation in response to the walkout, all of which were an interrelated single sequence of events. The discipline of employees in response to their walkout over Stripling's discharge—after he acted as a conduit to present their grievances to management—chilled employees' in the exercise of their protected right to present grievances to management. Stripling's discharge was closely related to their conditions of employment because his discharge effectively "put the kibosh" on any likelihood of resolving those grievances (not to mention the likelihood that employees would ever feel free to air their grievances). Employees could see what happened to Stripling for his role in transmitting their concerns about working conditions and economic issues—retaliation. Further, Stripling's discharge had a negative impact on employees' working conditions because it removed from the workplace a person who they evidently trusted to be a conduit for the presentation of their grievances. See *Bob Evans Restaurants*, 325 NLRB 138, 142 (1997), enf. denied on other ground 163 F.3d 1012 (7th Cir. 1998) (walkout over discharge of supervisor who acted as a "buffer" between employees and management protected because of negative impact on employees' working conditions).

The majority places undue emphasis on the absence of a specific reference by employees to the list of grievances when they walked out on March 3. As they told Stripling regarding a prospective meeting with George, employees were "intimidated" by George. In this context, and having seen what happened to Stripling after he presented their list of grievances, it is not surprising that they elected not to pour salt into the wound by expressly telling George that they were walking out based on the list of grievances that Stripling had presented to George on their behalf.[5]

Accordingly, for these reasons, I find that the walkout was protected and that the Respondent's discipline of employees in retaliation for the walkout violated the Act.[6]

MEMBER SCHAUMBER, dissenting in part.

I agree with my colleagues in all respects but one: contrary to them, and to the judge, I would find that the Re-

[5] The majority claims it is "counterintuitive" that the Respondent's employees would not be more confrontational with the Respondent regarding the specific reasons for the walkout. In my view, it is understandable that a group of unrepresented employees who, as it turns out, are victimized by the commission of numerous unfair labor practices because of their organizational activities, would be circumspect about the details of their walkout so early in the organizing process. Regardless, the sequence of events makes the relationship seem obvious.

[6] I would also find, with respect to the suspension and discharge of employee Webster, that the General Counsel met his evidentiary burden, even assuming the absence of animus flowing from the walkout.

spondent did not violate Section 8(a)(3) of the Act by discharging employee David Lindgren. In my view, the Respondent demonstrated that Lindgren would have been discharged, even absent his union activities, because of continuing customer complaints.

Lindgren worked as an airport shuttle driver for the Respondent. The Respondent said that it discharged Lindgren on April 1 for, among other things, continued customer complaints about poor service and bad attitude. The judge found that these reasons were pretext and that Lindgren was fired for his protected activity on March 29, when he wore a Union button to a meeting held by the Respondent. I disagree.

This issue is subject to the burden-shifting analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 495 U.S. 989 (1982). Even assuming arguendo that the General Counsel met his initial burden to demonstrate that Lindgren's discharge was motivated, at least in part, by his protected activity, I find that the Respondent effectively rebutted that showing.

The record shows that the Respondent received several customer complaints against Lindgren in the days preceding his discharge. On March 9, then-Shuttle Manager Larry Hugunin received a report from the airport of a complaint by a passenger who had just left Lindgren's van. The passenger complained that Lindgren was very rude, would not answer her questions, and was otherwise brusque. Hugunin wrote a report of the complaint.

On March 10, a passenger who had been riding alone with Lindgren reported to the Respondent that, on the way to her hotel from the airport, she requested that Lindgren change the direction of the air vent because cold air was blowing on her. Lindgren said that if she did not like where the air vents were, then he would put her out of his van at the street corner. The passenger became very upset and telephoned the Respondent's customer service number while she was still in the van. Lindgren yelled at her to get off the phone or else he would put her out immediately. The passenger got off the phone, but later called the Respondent from her hotel and discussed the incident with then-Assistant Manager of KCI Shuttle Dan Sanderson.

Prior to speaking with the passenger on March 10, Sanderson had been paged by Hugunin to find out what was going on with Lindgren.[1] Sanderson pulled Lindgren from his route and told him that the Respondent cannot have passengers feeling threatened. After speaking to Lindgren and the passenger, Sanderson wrote up the incident.

[1] Customer service had informed Hugunin of the passenger's call.

On March 11, Hugunin interviewed Lindgren about the March 10 threat and orally warned him that any further instances of rudeness or threats to passengers would result in disciplinary action, up to and including discharge.

Despite this warning, the Respondent received another customer complaint about Lindgren. On March 28, a passenger who had ridden in Lindgren's van that morning informed the Respondent that she had had "a very unnerving experience" riding with Lindgren. The passenger complained to the Respondent that Lindgren was rude to her when she wanted to carry her laptop computer rather than allow him to load it with the luggage, that Lindgren snapped at her when she sat in the front seat, that Lindgren began spelling his name for her when he saw her start writing a note, that Lindgren argued with her when she told him she was just noting her departure time, and that Lindgren yelled at another passenger who opened the van door for her. The complaining passenger told the Respondent that Lindgren "made her feel very uncomfortable riding with him." Following this third complaint, which occurred on the heels of the Respondent's warning to Lindgren, the Respondent discharged him on April 1.

The judge found, and my colleagues agree, that while there was some basis to find that multiple customer complaints were received against Lindgren, the Respondent's reliance on those complaints was pretextual. They rely on shuttle manager Jack Mawby's "delay" in responding to the March 28 complaint.

The record does not support my colleagues' characterization of the discharge as a "delay[ed]" reaction to the customer complaints. The Respondent terminated Lindgren on April 1, 3 days after it received the March 28 customer complaint, and only 2 days after Mawby, who made the decision to discharge Lindgren, formally assumed his responsibilities as the new shuttle manager. In my opinion, this is not an unreasonable delay. My colleagues consider this 3-day interim evidence that the Respondent discharged Lindgren not because of his final customer complaint (and the poor record of which it was part), but because of his March 29 appearance at a company meeting with a union button on his jacket. Less than 24 hours separate these two events. In my view, there is no meaningful difference between a 3-day "delay" and a 2-day "delay." Accordingly, I simply do not agree with the suggestion that this 3-day interim demonstrates that the Respondent did not rely on customer complaints against Lindgren when deciding to discharge him.

Consequently, contrary to my colleagues, I would reverse the judge, and find that the Respondent met its

Wright Line burden of establishing that it would have discharged Lindgren even in the absence of his protected activity.[2]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union support or activities or other protected concerted activities.

WE WILL NOT threaten to supervise you more closely, issue more discipline, or discharge you if you engage in union or other protected concerted activities.

WE WILL NOT threaten to reduce your wages if you select Teamsters Local Union 41, affiliated with International Brotherhood of Teamsters (the Union), or any other union as your collective-bargaining representative.

WE WILL NOT suspend, discharge, or otherwise discriminate against any of you for supporting the Union or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

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

WE WILL make Joseph Webster, David Lindgren, and Russell McIntosh Jr. whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of David Lindgren and Russell McIntosh Jr. and the unlawful suspension and discharge of Joseph Webster, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the suspension and discharges will not be used against them in any way.

METRO TRANSPORT LLC, D/B/A METROPOLITAN TRANSPORTATION SERVICES, INC.

Lyn R. Buckley, Esq., for the General Counsel.
Earl J. Engle, Esq. and *Stephen J. Owens, Esq. (Stinson, Mag & Fizzell),* for the Respondent.
Michael T. Manley, Esq. (Blake & Uhlig), of Kansas City, Kansas, for the Union.

RICHARD J. LINTON, Administrative Law Judge. Scripture has it, that when Daniel prepared to cross examine the two elders who accused Susanna of adultery, he had the two accusers separated before he began his cross examination.[1] One elder then testified that the infidelity took place under a mastic tree (a small evergreen shrub), while the second described the tree as an oak. Daniel's courtroom tactics saved Susanna, and the elders suffered the justice dictated by Mosaic law. Dn. 13:50–59. In our case, in which there was sequestration, the differences in descriptions (especially in Rodney Saxton's case) would be downright amusing if they were not given under such serious circumstances.

Although this is essentially a discharge case in the setting of a union organizing campaign, the outcome may open the way to determine whether Teamsters Local Union No. 41 won or lost a September 10, 1999 representation election conducted by NLRB Region 17 among certain employees of Metro Transport LLC, d/b/a Metropolitan Transportation Services, Inc. (MTSI, herein).[2] Most of my findings favor the Government.

I presided at this 13-day trial in Overland Park, Kansas beginning August 31, 1999 and concluding on October 7, 1999. Trial was pursuant to the July 27, 1999 Second Amended Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing, as subsequently amended, issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 17 of the Board. Such pleading is based on unfair labor practice charges filed against MTSI beginning March 2, 1999 with the charge in the first case, 17–CA–20061, and ending with the charge filed (and

[2] In light of the manner in which I would dispose of this finding, I need not discuss the judge's findings with respect to the Respondent's other asserted grounds for discharging Lindgren. Nevertheless, I do not find remarkable Mawby's inclusion as grounds for the discharge each of his concerns about Lindgren's behavior and performance. While these grounds may have been stale or arguably inaccurate, they do not detract from Mawby's ultimate conclusion that Lindgren's various deficiencies rendered him, at least in Mawby's opinion, unsuitable for employment with the Respondent. Moreover, it is hardly uncommon for employers to seek to buttress a termination with any available grounds (however flimsy). That fact alone does not render the stated grounds a pretext for an unlawful motive.

[1] Professor Wigmore notes that this is one of recorded history's first invocations of witness sequestration. 6 Wigmore, *Evidence,* Sec. 1837 (Chadbourn rev., 1976).

[2] Unless otherwise indicated, all dates are for 1999.

later amended) in the last case, 17–CA–20138, by Teamsters Local Union 41 (Union, Teamsters, or Local 41).

The pleadings establish that the Board has both statutory and discretionary jurisdiction over MTSI, that MTSI is a statutory employer, and that the Union is a statutory labor organization. The parties stipulated (1:49–50) that Coach USA is the parent corporation of MTSI, that Coach USA has both a regional office and a corporate office in Houston, Texas, and that MTSI falls under the jurisdiction of Coach USA's Houston regional office. At its website, of which I take official notice (only for background), Coach USA reports that it was formed from several companies in 1995, went public in 1996, and itself has been acquired by Stagecoach PLC. http://www.coachusa.com/info.html. Coach USA apparently acquired (3:390; 8:1379, George) MTSI about 1996, or possibly 1997. At its own website, Stagecoach reports that its acquisition of Coach USA was made in July 1999. http://www.stagecoachplc.com/north.html.

During the trial the complaint was amended. Early on the parties used a convenience exhibit (GC Exh. 2),[3] that incorporated certain amendments into the existing complaint. That convenience exhibit was superseded by another (GC Exh. 46) (5:678–679), that incorporated the final changes to the Government's complaint. Thus, General Counsel's Exhibit 46, while not itself a pleading issued by the Regional Director for NLRB Region 17 (and while it does not control if it conflicts with the record), is treated by all parties, and here, as the trial complaint. Unless stated otherwise, further references to the "complaint" are to General Counsel's Exhibit 46.

From about March 1 to about June, the complaint alleges, MTSI, through various company officials, including President and Chief Executive Officer (CEO) William M. George and Chief Operating Officer (COO) David J. Stephens, committed some two dozen independent violations of Section 8(a)(1) of the Act, including coercive interrogations, economic and physical threats, and removal of union literature "from areas where employee notices unrelated to the Union have been allowed." MTSI denies. Although George is a "Jr.," he gives (2:281) his name without that suffix. Accordingly, as does the complaint, I here follow George's apparent preference. The parties stipulated (1:54) that George is known as "Billy," and many of the record references to him are by that familiar name.

The complaint also alleges that MTSI violated Section 8(a)(3) of the Act by firing six employees and temporarily suspending others. Admitting that it discharged and suspended the named employees, MTSI denies that it violated the Act by such disciplinary actions.

On July 16 the Union filed a petition (GC Exh. 3) in Case 17–RC–11771 for a representation election among certain MTSI employees. That petition was withdrawn when an agreement was made for an election date, and a new petition (GC Exh. 4) was filed on July 26, in Case 17–RC–11776. (1:33–34.) The stipulated election agreement (GC Exh. 5), approved by the Regional Director for NLRB Region 17 on August 4, provided for an election to be conducted on September 10, 1999 in the following unit (mail ballots were sent to one group of the employees):

> All full-time and part-time charter bus drivers, town car limo drivers, mechanics, porters, parts employee, shuttle bus drivers, special services drivers, KCI Shuttle ticket sellers, and carwash employees employed by the Employer at its facilities located in the Greater Kansas City area, but EXCLUDING taxi cab drivers, share fare drivers, dispatchers, call takers, Conoco station employees, building maintenance, vehicle security, supervisors and guards defined by the Act, and all other employees.

As the tally of ballots (GC Exh. 54) reflects, of approximately 250 eligible voters, 5 ballots were void, 93 ballots were cast for the Union, 93 were cast against, and 9 voters cast challenged ballots. Thus, the 9 challenges were sufficient in number to affect the results of the election. No objections were filed.

NLRB Region 17 initially, it appears, planned not to consolidate any of the challenge issues with the instant case. Near the end of the first week of the trial, the General Counsel (as I usually refer to the General Counsel's trial attorney) announced that a new charge, Case 17–CA–20311, had been filed and was under investigation, and that the Government was not seeking any delay or consolidation. (4:666–668.) During the adjournment following the first week of trial, the General Counsel filed a motion (GC Exh. 56), dated September 16, to postpone the scheduled resumption from September 27 to November 8 to give time for NLRB Region 17 to complete the investigation in the "closely related" cases of 17–CA–20311 and 17–RC–11776. I denied by order dated September 17. (GC Exh. 57.) The General Counsel's September 20 special appeal (GC Exh. 58) was denied by the Board by its order (GC Exh. 59) of September 24.

At the September 27 resumption, the General Counsel moved (GC Exh. 53; 5:683–685, 797–798) that Case 17–RC–11776 be consolidated with the instant case respecting five employees whose ballots were among the nine challenged, for such five also were named as discriminatees in the complaint in the instant case. The five named are: David Lindgren, Russell McIntosh Jr., Rodney Saxton, Dale Speelman, and Dale Stripling. (The five were challenged by the Board agent because their names did not appear on the eligibility list.) The record fails to show whether alleged discriminatee Joseph B. Webster attempted to vote in the election of September 10.

As such limited consolidation, respecting names already in this case, would not prolong this proceeding, I granted the motion. (6:910.) When it came time for the General Counsel to rest the Government's case in chief, the General Counsel moved to rest conditioned on the right to reopen in order to present evidence on any issues NLRB Region 17 found, in its investigation, to have merit in Cases 17–CA–20311 and 17–RC–11776. (8:1408–1415; 9:1431.) Denying the motion, I deemed the General Counsel fully rested. (8:1412, 1415.) As of the close of the trial, it appeared that there would be a partial

[3] References to the 13-volume transcript of testimony are by volume and page. Exhibits are designated GC Exh. for the General Counsel's, R. Exh. for those of Respondent MTSI, and CP Exh. for those of the Charging Union. (Only two CP Exhs. were identified and neither was offered.)

withdrawal and a partial dismissal of the outstanding cases. (13:2047.) That means some issues from those cases possibly remain outstanding if the partial dismissals were appealed.

Following the (conditional/deemed) resting by the Government, MTSI moved to dismiss the complaint respecting (8:1422) President George's threat to kill (complaint paragraph 5f), and the discharges of Dale Speelman (8:1415) and (8:1419) Dale Stripling. I denied MTSI's motion to dismiss the three allegations. (8:1425, 1419, 1422.) MTSI thereafter presented its case in defense, including its defense as to the three allegations it had moved to dismiss.

Of the 33 witnesses who testified (some more than once), the General Counsel called 17 (including some witnesses under FRE 611(c)), and MTSI called 18 (including two managers who had been called by the Government). The General Counsel recalled two of the Government's witnesses at the rebuttal stage. MTSI offered no surrebuttal. President George (whose testimony appears in seven of the transcript volumes) was called by both parties at least once, and George also was called to the witness chair as issues arose that he could address. As requested by the Government (1:7, 15), sequestration of witnesses, with certain exemptions, was imposed (1:30, 34).

George's sixth and final time to be called occurred when MTSI moved (12:1872) to reopen its direct examination of George (after all cross examination, except for one reserved area, had been completed 2 days earlier) to cover, with an asserted 10 questions, a major topic that had not been covered earlier. The General Counsel objected that the Government would be prejudiced. (12:1872–1873.) As I expressed at trial (12:1875), a party may not recall (during the same stage of the trial) a witness as a matter of right. If the rule were otherwise, a party could piecemeal testimony of witnesses depending on cross examination and other trial developments. The trial would be extended, and the result would be chaos. Accordingly, such a motion must be addressed to the trial judge's discretion. To assist in determining a proper ruling, I permitted MTSI to call George on an offer of proof in a question and answer format. The General Counsel could then articulate specifically how the Government would be prejudiced. [The offer of proof included cross and redirect examination.] After a recess, the General Counsel and the Union withdrew their objections to the offer of proof, and I received George's testimony, adduced on the offer, as part of the record evidence. (12:1903–1904.)

The General Counsel and MTSI filed posthearing briefs.[4] (The General Counsel also submitted a proposed order and notice.) By motion dated December 17, MTSI requested leave to file an 18-page Reply Brief respecting factual matters. I grant MTSI's unopposed motion. *Fruehauf Corp*., 274 NLRB 403 at JD fn. 2 (1985). On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make these

FINDINGS OF FACT

A. Procedural Matters

1. *Brady v. Maryland* does not apply

By its pretrial letter (R. Exh. 1) of August 12, MTSI's counsel asked the Government to produce, before August 31, all exculpatory evidence obtained during the Government's investigation of the charges. Confirming an oral position, the General Counsel, by letter (R. Exh. 2) of August 27, explained (in denying) that pretrial discovery is not available in Board proceedings. What the General Counsel should have written is that general pretrial discovery is not available to private parties. The Congress (as it has for some other federal agencies) provided the equivalent of such for the Government in the form of an investigative subpoena under 29 U.S.C. 161(1).

At least six circuit courts have upheld the Board's authority to use investigative subpoenas duces tecum (SDTs). See *NLRB v. North Bay Plumbing,* 102 F.3d 1005 (9th Cir. 1996); *NLRB v. Carolina Food Processors*, 81 F.3d 507, 551 (4th Cir. 1996) (cites *Link v. NLRB,* 330 F.2d 437, 440 (4th Cir. 1964), where it noted that, in issuing a subpoena under 29 U.S.C. 161(1), the Board's powers are analogous to those of a "Grand Jury"); *NLRB v. Kingston Trap Rock Co*., 222 F.2d 299 (3d Cir. 1955) (quoting the "grand jury" phrase from *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186 (1946)); *NLRB v. Anchor Rome Mills*, 197 F.2d 447 (5th Cir. 1952); *NLRB v. Barrett Co.*, 120 F.2d 583 (7th Cir. 1941); and *Cudahy Packing Co. v. NLRB*, 117 F.2d 692 (10th Cir. 1941). A party may even be required to compile data. *EEOC v. Citicorp. Diners Club*, 985 F.3d 1036, 1038–1039 (10th Cir. 1993). In the process, the courts have rejected all counter arguments presented, including the due process objection that investigative SDTs allow the General Counsel to have the unilateral right of pretrial discovery. As to the latter, see, for example, *NLRB v. Carolina Food Processors*, 81 F.3d 507, 512–513 (4th Cir. 1996).

Shortly after the trial opened, MTSI moved (1:18) that I order the Government to comply with MTSI's request for production of all exculpatory evidence as stated in R. Exh. 1. MTSI had no legal authority to cite in support of its motion. I denied (1:19) MTSI's motion on the basis that such production, while it is the procedure applied in federal criminal cases as required under *Brady v. Maryland,* 373 U.S. 83 (1963), is neither required nor applied in Board proceedings. See *North American Rockwell v. NLRB,* 389 F.2d 866, 873–874 (10th Cir. 1968); *Pan American Electric,* 328 NLRB 54 fn. 3 (1999); *Caterpillar,* 313 NLRB 626, 627 fn. 4 (1994); *Carpenters Local 608 (Various Employers)*, 304 NLRB 660, 662 (1991); *Multimatic Products,* 288 NLRB 1279, 1342–1343 (1988); and *Erie County Plastics Corp.,* 207 NLRB 564, 570 fn. 29 (1973), enfd. mem. 505 F.2d 730 (3d Cir. 1974). Accordingly, I reaffirm my trial ruling denying MTSI's motion.

2. Employee then, supervisor now. Leading questions?

About late February 1999, Victor L. Holiman, then a Town Car and Limousine mechanic, helped get the union organizing started, and he was one of the two employee-contacts with

[4] Oddly, for all but two of the over two dozen Board cases cited in its brief, MTSI cited the slip opinion number rather than the page of the bound volume (and all volumes were bound). Therefore, no jump cites are given. The preferred practice is to include jump, or spot, cites. *Somerset Welding & Steel,* 304 NLRB 32, 47 fn. 41 (1991), enfd. in part, remanded on other point 987 F.2d 777 (D.C. Cir. 1993); Schwarzer, *Guidelines for Discovery, Motion Practice and Trial,* 117 FRD 273, 278 (1989).

Dennis R. Speak, Secretary Treasurer of Teamsters Local Union 41. (6:926, 949.) Holiman is one of six mechanics who engaged in a 2-hour walkout on March 3 on learning of the discharge of Dale Stripling (whose status as an employee or as a statutory supervisor is a disputed matter to be addressed in a moment). MTSI suspended the six, and then recalled them to report for work on Monday, March 8. The suspension is alleged as a violation of Section 8(a)(3), and I discuss it later.

About mid-July 1999 MTSI promoted Holiman to Service Manager, with the authority (according to Holiman) to hire and fire employees. (6:912, 917.) At trial the General Counsel called Holiman and announced an intent to question him under FRE 611(c) as a person "identified with" MTSI. (6:913) Objecting, MTSI argued that the Government should not be permitted to ask leading questions for the period, predating Holiman's mid-July promotion to Service Manager, when Holiman was not a supervisor or agent of MTSI and was not listed as such in the complaint. (6:913–914, 916.) Countering, the General Counsel argued that, because of Holiman's supervisory status, she had not been able to pretry him because established law precludes the Government from initiating contact with a supervisor or agent absent the approval of Respondent's attorney. (6:914, 927.) See, for example, 1 NLRB Casehandling Manual 10056.6 (June 1989). Both parties said that they had no case authorities to cite in support of their respective positions. (6:917–918.)

Stating that I would not apply a "hard and fast" rule (6:921), I thereafter sustained (6:926) an objection by MTSI to a leading question (mid-sentence) that addressed the time period of March 1 and, apparently, was going to cover whether a majority of the employees had signed cards. Observing that the witness appeared to be attempting to answer all questions, I ruled (6:927) that no need had yet been shown for the General Counsel to propound leading questions to Holiman (for the time predating July 1999). Although the fact had not then been disclosed, I note now that the Government was not proceeding entirely in the dark even without the benefit of a pretrial interview with Holiman. Thus, during the precomplaint investigation stage, Holiman had given a four-page typed affidavit on March 29, and I directed that such statement be turned over to MTSI for cross examination. (6:948–949.) Later, sustaining the General Counsel's objection to an area beyond the scope of direct, I ruled that MTSI would have to call Holiman as its own witness, out of order, but that it could do so following the cross examination while the witness was on the stand. MTSI declined to do so at that time (6:958–961), and never later called Holiman.

B. MTSI'S Operations

Through its divisions and related companies, MTSI operates passenger ground transportation services in the greater Kansas City area. President George (2:282; 10:1554) and COO Stephens (9:1488–1490) testified that the Charter Division consists of motorcoaches, minibuses, transit buses, and trolleys. There is a Limousine and Town Car Division, a Special Services Division, which consists of wheelchair vans, the KCI Shuttle, and airport shuttle service, a Grayline Tour Division, the KC Trolley Corporation, and a Taxicab Lease and Dispatching Division. MTSI apparently was formed in 1984 (12:1875, George), and George joined it in 1985 (8:1379). MTSI, as George explains, grew very fast through corporate acquisitions (with several of the acquisitions coming in the 1990s). Before itself being acquired by Coach USA, MTSI operated as distinct companies, or divisions, as part of the MTSI corporate family. (2:302; 8:1379; 10:1554–1557.)

MTSI provides the dispatching service for independent contractors who drive Yellow Cabs. MTSI also provides maintenance and repair facilities for its vehicles. (2:282; 9:1488–1490; 10:1554.) Maintenance Director John L. Turney testified (11:1841) that MTSI's business operations are conducted from two facilities, located approximately four blocks apart. The main location is at 522 Locust Street, and the other facility is at 401 Charlotte Street. Both are in Kansas City, Missouri. As George further reports (10:1554), MTSI owns a Conoco Service station, located at the Locust Street address, where it fuels vehicles. In its maintenance department, MTSI operates three sections: CDL, non-CDL, and taxicabs. (10:1554–1555.) "CDL" is an abbreviation for commercial driver's license. (10:1555.)

C. Overview of the Union's Organizing Campaign

About late February the Union began an organizing drive at MTSI's facility. Mechanic Thomas Houle reports that he was one of the original five employees who met with the Union. By March 1, Houle asserts, some 15 of the 18 shop employees had signed authorization cards for the Union. (6:973–974.) Then mechanic Victor L. Holiman also was one of the five, Houle advises. (6:1014.) As already noted, Holiman confirms that he was one of the original group. (6:949.) Recall also that about mid-July 1999 Holiman was promoted to Service Manager. (6:912, 917.)

By letter dated (Friday) February 26, 1999, the Union's Dennis R. Speak addressed a letter to George and MTSI. Aside from typed inscriptions on the letter that refer to "via FAX" to MTSI, the evidence adduced by stipulation is that the letter was faxed on March 2 to Coach USA in Houston [presumably handled at Coach USA's regional office there]. From there it was faxed to MTSI on March 2. (1:61–62.) By this faxed letter, which MTSI received from Houston on March 2, Speak advised George and MTSI as follows (GC Exh. 6 at 3):

> Please be advised that there is an on-going Teamsters Local 41 organizing drive at your facility.
>
> Seth Hankins, Victor Holiman, Thomas Houle and Dale Stripling has [have] been placed on the In-House Organizing Committee.
>
> These employees have been informed of their rights to post and distribute literature, pass out authorization cards, get Union Authorization cards signed, discuss the Union and its advantages on or off the property during non-production time.
>
> Any intimidation, interrogation, isolation, interference, threats, coercion, segregation, surveillance[,] reprisals, promises, discipline, suspension, discharge, discrimination or any other type of illegal activities because of their Union Activities on behalf of Teamsters Local 41 will be met

with Unfair Labor Practice Charges being filed at the National Labor Relations Board.

During March and April the Union faxed additional letters (GC Exhs. 7, 8, 9, 10) to MTSI announcing that a total of 23 more employees had joined the In-House Organizing Committee. During the preelection campaigning, MTSI's clearly expressed position was that it opposed unionization and that it preferred to remain nonunion. Even so, George testified, George sent a memo to all employees telling them that, while MTSI did not think a union was in their best interests, if they did select the Union as their bargaining representative, MTSI would do its best to reach an agreement with the Union. (10:1599–1600.) Eventually, as earlier noted, an election was conducted on September 10, ending in a tie vote of 93 to 93 with the 9 challenged ballots being determinative.

D. Supervisory Status of Dale Stripling

1. Introduction

MTSI intended to promote Parts Manager Dale Stripling to the supervisory position of Maintenance Manager, Non-CDL.[5] The first question is, did it do so before President George fired Stripling on March 3, 1999. No, says the Government, and yes says MTSI. The answer is no, the Government contends, because Stripling was never relieved of his duties in the parts department, and because, in practice, Maintenance Director Turney overruled Stripling on every non-routine matter that Stripling might have exercised the discretion of a real supervisor. As of his March 3 discharge, Stripling was merely a conduit (for conveying or executing Turney's instructions), not someone who was allowed to make independent decisions. (Br. at 48–49, 53.)

Seeing the evidence in a different light, MTSI contends that power was transferred and that Stripling had begun exercising it before he was fired. (Br., 26–31) That actually brings up the second question, which is: Even if there were some kind of limited promotion, did real supervisory authority ever pass?

The case is a close one. Even though I agree with MTSI respecting many of the disputed facts, I find that such facts fail to show that Stripling was a statutory supervisor at the time of his discharge. At trial, I expressed the opinion that, if I had to make a ruling then (that is, a Bench Decision), "I almost would be inclined to dismiss" because I was leaning toward the view that the evidence showed that Stripling was a statutory supervisor. (8:1422.) But that was then, and this is now. (That is, what probably would have been a Bench Decision in MTSI's favor on the issue, now, after a study of the record, turns into a written decision favoring the Government.)

2. Material facts

a. December 15, 1998 selection for promotion

Dale Stripling began work with MTSI on February 11, 1998 in the Parts Department training to replace Chuck Harris who soon would be retiring. Stripling's immediate supervisor was Maintenance Director John Turney, the person who interviewed him and hired him. (7:1125–1126.) The only other employee in the parts department was Gary Claxton, the parts driver, or "runner." (7:1125–1126, 1206, Stripling; 10:1556, George.)

In August 1998, George testified, MTSI opened a second garage about four blocks away from the main garage. The CDL maintenance work (diesel engines) was moved there, and Terry DeMoss was hired as the CDL Maintenance Manager reporting to Maintenance Director John Turney. (10:1555–1556.) There were about four to five CDL mechanics. (6:923, Holiman.)

Even after the hiring of DeMoss, there seems no dispute that Turney was "spread too thin," and had more work than he could handle. Indeed, the bipartisan description is that Turney looked like an octopus, with people grasping each leg and pulling him in eight different directions. (2:257, 260, Webster; 7:1205, Stripling; 10:1557–1558, George.) Accordingly, George testified, in about November 1998 he, COO Stephens, and Turney began discussing the idea of creating the position of Maintenance Manager, Non-CDL. They agreed to do so, and Turney was given the task of hiring for the new position with the "transition into the position" to have the official date of December 15. George asserts that Turney "selected to hire," or "hired," Stripling, and George approved the "selection." (10:1557–1558.) Unlike in most other areas, this testimony by George is mushy at best. By "hiring," George apparently means "selecting," for no one contends that Stripling was installed, even on a limited basis, in the new position by December 15. Later I discuss George's testimony about the date when Stripling became salaried, and that topic has a bearing here. At this point, it is sufficient to say that, at most, effective December 15 Stripling was selected to be the person who eventually would be installed in the new position of NonCDL Maintenance Manager.

b. Christmas party announcement

Following dinner at the December Christmas party, George made some announcements and awards. While not all employees were present, about 120, including Stripling, attended. George announced that Stripling had been promoted to the new position of NonCDL Maintenance Manager "and would be assuming it shortly." (10:1560–1561.) Stripling's new position was shown on an enlarged copy, set on a poster board, of a revised organization chart that was standing in a corner of the room. (10:1561–1562.) A copy of MTSI's revised organization chart (R. Exh. 13) is in evidence. The evidence did not sufficiently show that Respondent's Exhibit 13 is a copy of the document from which the enlarged chart (the one displayed on the poster board at the Christmas dinner) was made. Nevertheless, the record shows that the organization chart in evidence (R. Exh. 13) correctly reflects MTSI's organizational structure beginning January 1, 1999 and into early March 1999, the time frame that is relevant here. (9:1436, 1442, Stephens.) The chart (R. Exh. 13) shows Maintenance Director John Turney reporting directly to George, and, reporting to Turney, are Terry DeMoss, Maintenance Manager-CDL, and Dale Stripling, Maintenance Manager-NonCDL. Two other slots are shown as reporting to Turney. One is that of the "Parts Manager," and it is shown as "Open." (Recall that Stripling had

[5] No party contends that, as parts manager, Stripling was a statutory supervisor. Stripling's title there was a term of description (he managed parts) rather than a color-coded badge reflecting a grant of supervisory authority over people.

been the parts manager.) The fourth position shown reporting to Turney is that of "Vehicle Wash Supervisor," with no name listed.

When January 1 arrived, nothing changed for Stripling. He remained the parts manager. In the days and weeks following the Christmas dinner, Stripling and Turney frequently discussed what Stripling's new position would consist of. Initially, Turney said that he wanted Stripling to take charge of the taxicab group. They set a target date of March 1 for Stripling to take over. They even discussed, but rejected as untenable, the idea that Stripling could handle the new position as well as that of parts manager. Turney said he would try to hire someone for the parts department. (7:1137–1138, 1273.)

c. January announcement to mechanics

Around mid to late January, Maintenance Director Turney convened a meeting of the mechanics. Some 12 to 14 mechanics, from "both sides" of the shop, plus Turney and Stripling, attended. [6] [Although the record does not clearly show the number of taxicab mechanics, there is a suggestion (7:1211) that the number, at the time, was six to eight.] Turney told the mechanics that Stripling would be coming on board as his assistant on the taxicab side, and that Stripling would be in charge of their schedule and their work because, in effect, that was where Turney needed help. Turney said he was trying to hire someone for the parts department. Turney then departed the meeting, leaving Stripling in charge. Stripling told the mechanics that he would try to help solve problems in the shop, and try to obtain pay raises for those who deserved such. (7:1141–1143, 1208–1213, 1222–1223, Stripling.) At one point Stripling describes this as a "preparation" meeting for what "would happen" when a replacement parts manager was hired. (7:1212.) Turney does not describe this meeting in his own subsequent testimony.

Following that meeting with the mechanics, either the same day or the next, after (7:1238) Turney "told me I would be taking over on the cab side," Stripling went around to all the mechanics (not just the taxi mechanics) in the shop (the main garage) asking each one a series of questions, including the correct spelling of their names, when they started at MTSI, their birth date, their starting pay rate, their current pay rate, and the date of their last pay raise. Stripling's purpose was to be prepared when he took over the duties of being a manager. To those who were reluctant to give some or all of the information, he told them that it was just for him personally, and that perhaps they would get a cake on their birthday. To at least one mechanic Stripling said that perhaps he would be able to get the mechanic a raise when he (Stripling) got in the position to do so, and with a couple of other he and they joked that maybe he could get them a raise but it had to go through Turney. Most, but not all, gave the information.

d. Parts department applicants

Thereafter, Turney called in a couple of potential replacements for Stripling in parts. The first person, one "Dennis," worked in parts less than 3 days and quit. (7:1143–1144, 1223–1229.) The second person, Charlotte Holt, was never hired because, as far as Stripling is aware, Turney was never able to contact her. Although Turney sent Holt to see Stripling, and Stripling conversed with her, I credit Stripling that the conversation was not a hiring interview, but more of an opportunity for the boss (Turney) to receive an opinion from someone (Stripling) with experience in the area. (7:1144–1145, 1229–1231.) The third person, Jeremy Carr, came to see Turney. As Stripling knew Turney was expecting Carr, Stripling proceeded to ask Carr, a young man of about 18 years, a few questions about his work experience. After Turney interviewed Carr, Turney asked for Stripling's opinion. Stripling expressed the view that Carr was "a pretty neat kid for 18." (7:1145–1146.) The record shows that Turney hired Carr as a mechanic during that January-March time frame. (7:1099–1101, Boza.) Carr presumably is the same Jeremy Carr named in the complaint as one of the walkout participants and alleged suspension discriminatees.

e. Job description

COO Stephens asserts that, sometime in the January-February time frame, he, George, and Turney met with Stripling and, using the job description for Terry DeMoss, the CDL Maintenance Manager, they came up with a job description (R. Exh. 14) for Stripling's new position of NonCDL Maintenance Manager. (9:1444–1448, 1497–1498.) George (10:1560) denies that he had any input into this process, and Turney (11:1831) does not include George. Turney asserts (11:1831, 1848) that he gave Stripling a copy of the job description for the new position sometime in January. Stripling denies ever receiving such. (7:1141.) Crediting Stripling that no copy of the job description (R. Exh. 14) ever was given to him, I nevertheless credit Stephens that he and Turney did confer with Stripling during the drafting of the document.

In *Boardwalk Motors*, 327 NLRB 784, 790 (1999), Judge David G. Heilbrun observed that the written job description (for shop foreman) of Anthony Mattos was "weighted with nonpersonnel responsibilities, such as concerned tool inventories and shop equipment." Here, even more than there, the job description, with two main categories (Job Summary and Job Functions) and four sub-categories under Job Functions (Daily Operations, Parts Department, Asset Management, and Cleanliness/Safety with a total of some 19 items), is heavily weighted toward nonpersonnel matters (that is, it is weighted toward secondary indicia of supervisory authority). There the job description provided specifically that the shop foreman would interview job applicants for technician positions and "make effective recommendations for hiring." The Board upheld Judge Heilbrun's decision finding no supervisory status. Here the job description has only four personnel items. The first, found under Job Summary, states that the manager is to "Provide daily guidance and supervision to the mechanics and porters in the non-CDL vehicle garage." Although Stephens understands that such entry provides authority for termination of employees, he cannot recall any conversation in the meeting to that effect. Still, Stephens asserts that in subsequent conversations Stripling indicated "that he knew he was responsible for the operations of the garage in the morning hours and through-

[6] The implication is that the meeting did not include the mechanics under CDL Maintenance Manager DeMoss.

out the day. (9:1447.) Not crediting this generalized and unpersuasive testimony by Stephens, I find that, at most, Stripling acknowledged in conversations with Turney and, possibly, with Stephens that he was aware that, as soon as he assumed the role of the NonCDL Maintenance Manager, he would have and exercise that authority.

Under the Daily Operations category, the other three personnel items provide (R. Exh. 14 at 1):

> Issue work orders to mechanics and follow up on progress.
>
> Maintain staffing levels ensuring that all shifts are covered with appropriately trained individuals.
>
> Be involved in both the hiring and disciplinary decisions for the department.

Stripling acknowledges his understanding (in conjunction with the January meeting with the mechanics when Turney turned the meeting over to him and departed) that he would be in charge, but asserts that his assumption of that function depended on his being put in that position, and to his knowledge he was never put in that position. (7:1210.) In short, the intention was for him to be in charge of the six or eight taxi mechanics, and the "whole thing," but such could not take place until he was replaced as the parts manager. Indeed, it would be impossible for Stripling to assume the duties, responsibilities, and authority of the NonCDL Maintenance Manager while he remained the parts manager. He could not do both jobs. He and Turney had set March 1 as the target date for the transition to occur. (7:1138, 1211–1212, 1273–1274.) As of Stripling's discharge on March 3, no one had been hired as Stripling's potential replacement as parts manager. (7:1143.) In light of these matters, the fact that the purported job description (R. Exh. 14) contains a subcategory for Parts Department renders the document entirely suspect for anything other than, possibly, an initial proposal to be considered. It did not, I find, ever advance beyond the initial discussion stage.

f. Work assignments

Respecting the issuance of work orders, the record reflects that Maintenance Director Turney had mechanics assigned to positions based on the function of the vehicle. Thus, the Special Service vans were serviced by certain mechanics, and the taxicab mechanics by another set of mechanics. If Turney needed help on the taxi side, he simply would switch a mechanic to help out there. As the taxi mechanics knew that the owner drivers waiting for a repair had priority, they simply switched from what they were doing to work on the higher priority item. (6:989–993, 1008–1010, Houle; 7:1184–1185, Stripling.) In fact, many times the department managers and taxi drivers would take work orders or taxicabs direct to the mechanics that serviced their vehicles. (7:1184–1185, Stripling) Mechanics frequently would riffle through the work orders to find the ones they could get out the quickest or find work they wanted to do. (6:991, 1008–1009, Houle; 7:1185, Stripling.) All of this was routine and the standard operating procedure for the shop. Even when Stripling on occasion asked mechanics to do work, and even if such were to be deemed to assignment by him of work in accordance with the established work arrangement of the shop, such routine and minor orders are not sufficient to convert an employee into a statutory supervisor. *Boardwalk Motors*, 327 NLRB 784, 791–792 (1999); *Victoria Partners,* 327 NLRB 54, 63 (1999) (leadperson Leysen); *Adco Electric*, 307 NLRB 1113, 1120 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993).

Actually, after the January announcement by Turney to the mechanics that Stripling would be assisting him with the taxicab section, it would happen that, if Stripling did ask a taxi mechanic to switch from one job to another, the mechanics, such as Kenny Harris, simply went to Turney and complained and Turney would countermand the reassignment on the spot. (7:1111–1112, 1124, Boza.)

g. The February tire-changing incident

Two February incidents have a ostensibly close bearing on the supervisory issue. One incident occurred (it is unclear which incident came first) about early to mid-February when Christopher Dowd, Internal Director of Operations (11:1800, 1816), arrived at his usual early time (around 5 a.m.) and encountered difficulty getting a mechanic to change a tire on a Special Services van that was needed immediately for a trip for the handicapped. When Stripling arrived about 5:25 a.m., Dowd made known his needs. Stripling said that he would check and see what mechanics were at work. Stripling found that none of the Special Service mechanics was present, and that only three other mechanics had arrived. Dowd telephoned George at home. George called the shop and, on reaching Stripling (Turney normally did not arrive until 8:30 to 9 a.m.), and ascertaining from Stripling who was at work, told Stripling, as Stripling testified (7:1165, 1246), "You either get somebody to fix that tire right now or when I get down there there won't be anybody working there."

The version George gives (10:1562) for this incident (which he dates as February 2, and beginning with a telephone call from Dowd at 5:46 a.m.) is rather different. George asserts Stripling said that the mechanics were refusing to do it "because they don't like Chris." George then told Stripling (10:1564):

> Dale, these guys work for you. You go out there and you tell them that they are to get the tire changed on the vehicle and if any one of them refuses you, you are to send them home or to terminate them.

Stripling testified that he then went into the shop and asked mechanic Kenny Harris to change the tire, and Harris said he did not want to but that he would. Harris changed the tire. Dowd already had asked these mechanics to do the work (they did not work on that side of the shop), but they refused because, Stripling testified (7:1244), "they don't like" Dowd. (7:1165–1166, 1243–1245.)

About 9 a.m. that morning George convoked a meeting in his office to address the incident. Present were George, Dowd, Turney, and Stripling. According to Stripling (7:1166–1168, 1246–1247), George announced that he would not tolerate being awakened at 5:15 a.m. over a tire-changing problem, and that he expected everyone involved to take care of the situation. If George said anything about it being Stripling's responsibility,

"I don't remember it," Stripling asserts. Stripling denies that George told him he should take disciplinary action against, or even get rid of, anyone who refused to change a tire. As they left the meeting, Turney admitted to Stripling that it was Turney's fault there was no Special Services mechanic on duty because he had switched two of them on an incorrect understanding of when they were to report to work.

In their testimony, neither Dowd, Stephens (whom George also places in attendance), nor Turney addresses this meeting. George's rather different version (on a key point) of the meeting is that he told the group [at the meeting some of the verb tenses would have been different, and George mixes his description with his quoted remarks] (10:1564–1565):

> With 650 people and all the managers I have in place, if it takes the president of the company to get a tire changed in the morning, then I had a serious, serious problem and one that I would start changing managers if that was the case. I explained the whole situation to everyone. I made it clear to Dale that this is the exact reason why we put you in the position that you are in. If these guys refuse to do what you are asking them to do, you are to either send them home, write them up, or terminate them. Everyone had responsibilities. I explained to him the significance, as I just explained to everybody here, about the dialysis patients and the wheelchair vans, established the priorities, should something like that come up again, and told them I never expected to get a phone call like that again. I would come down and change the tire, but there would be fewer people around when I got finished.

At some point in the meeting George and Stripling discussed the appropriate staffing levels and work on the wheelchair vans. As Stripling was coming in early and Turney [assertedly] staying later,[7] "there was no question in anybody's mind in the meeting," George asserts, "that Dale [Stripling] was responsible for the mornings and for the staffing." (10:1565.)

George appears to have at least one thing right, and that is the fact that he had (at the time) a "serious, serious problem" with receiving correct information about what was going on in the shop (garage). Crediting Stripling concerning Turney's admission to him (that the mixup in mechanic coverage that morning was Turney's fault—a goof that Turney so graciously allowed Stripling to take the heat for), I note the opinion which Stripling expressed at trial is that George may well have thought that supervisory authority already had been vested in Stripling. However, as Stripling continues, the reality is that Maintenance Director Turney was blocking that vesting of authority until such time as Turney had found a replacement for Stripling in the parts department (because Stripling could not do both jobs) and, as of Stripling's discharge, no such replacement had been hired. (7:1210, 1212, 1246, 1274.)

In fact, Stripling testified, aside from the March 1 target date that he and Turney had discussed (7:1138, 1273), no one ever (7:1138) gave him a specific date that he would be the NonCDL Maintenance Manager, and no one ever (7:1273) told him, in effect, "Today is the day; you are now the NonCDL Maintenance Manager."

As between the two versions of the Dowd incident, I credit George. Observe that Stripling's account of the early morning situation describes the mechanics as not wanting to help Dowd because they did not like him. George's version records this as the pivotal point for George's succeeding remarks that, "Dale, these guys work for you, . . . and if any one of them refuses you, you are to send them home or to terminate them." George could well have said, either at the beginning or at the end, the threatening remark that Stripling had better get someone to fix the tire or when George arrived they would all be fired. Such a remark is not inconsistent with the more measured and detailed version as given by George and, indeed, George acknowledges that he also said essentially that in the 9 o'clock meeting later that morning. The point is, however, that George, as I find, spoke at least the remarks that he describes when he spoke with Stripling about 5:50 a.m., and he essentially reiterated these remarks about discipline, including termination, at the meeting barely 3 hours later.

Note that George did not tell Stripling (either at 5:50 a.m. or at the 9 o'clock meeting) that Stripling was to advise the mechanics that Stripling was merely relaying a message from George that any termination would be by George. Instead, George said, "You are to . . . terminate them." Note also that this incident was at least several days before any union activity occurred and certainly before MTSI and George became aware of any union activity. In short, as of early February 1999, President George confirmed that Stripling had a managerial role, and that in his role as a manager, Stripling had the authority to discipline, including discharge, any shop mechanic who refused to execute his work orders (at least concerning critically important work), and George reaffirmed this at the meeting in his office just over 3 hours later. I so find.

h. February incident with Linda Chapple

Turn now to the second incident that, according to the testimony, occurred about the second week of that February. Taxi Leasing Manager Linda Chapple was in charge of leasing vehicles to the taxi drivers, collecting payments from the drivers, and getting those taxis repaired when necessary. Before February 1, Chapple would go into the shop and herself assign the repairs to the mechanics. That changed on February 1, when, Chapple testified, Stripling took over the assignment of repair work for the taxicabs. She then gave the work orders to Stripling, and Stripling would take them to Buster (Davis), the mechanic, who would make the repairs. If the taxi drivers were waiting, MTSI treated their repair needs as a high priority because of the expensive down time involved. Chapple frequently observed Stripling reassign the mechanic from what he was doing to handle the higher priority taxicabs that had drivers waiting. (10:1640–1643, 1646–1647.)

About the second week of February, Chapple asserts (10:1643), Chapple had several drivers waiting for repairs to their cabs. Chapple found Stripling in the parts department talking on the telephone. When Stripling waved her off, Chapple went out and asked mechanic Buster Davis if he could put brakes on a tax for her. Davis could not because he was ill and

[7] In fact, Stripling arrived some 3 hours before Turney did and left 2 or more hours after Turney departed. (7:1127, 1131–1132, 1204.)

was about to leave for home. Chapple then went over to the other side of the shop, where mechanics work on the large buses and Special Services vehicles. She there asked Victor Holiman if he would put the new brakes on the taxicab. Holiman did so. (10:1643–1644.)

Shortly afterwards, Stripling called Chapple on the telephone and, in a "disgusted" tone, told her that she had no business pulling a mechanic from the other side to perform the taxi work "because they were in a pay dispute." Stripling told Chapple (10:1645): "I will distribute this work for your taxis from now on." Stripling also said, Chapple asserts (10:1645), that he "supervised all the taxi work." Thereafter, Chapple gave all taxi repair work to Stripling. (10:1645.) Chapple acknowledges that, until he left MTSI, Stripling did his previous work in parts plus, she adds, "he was supervising taxis, too." (10:1649–1650.)

Stripling gives a different account. He first denies that he worked directly with Chapple on repairs of the taxicabs, saying that she talked with him only if she could not reach Turney. Respecting the incident when Buster Davis got sick, Chapple then went to mechanic Kenny Harris who, Stripling asserts, declined her request to repair the taxicab. As Turney had not yet arrived for work, Chapple came to Stripling who himself then went to Kenny Harris. When, Stripling reports, Harris simply ignored Stripling's request, Stripling went to Victor Holiman, who worked in the different section of Town Cars and Limousines, and asked him "as one man to another." Holiman agreed to do the work and did so. (7:1265–1267.)

After Holiman started the work, Stripling went to Chapple and told her that if she ever had a problem like that again she should "come and see me." He told Chapple this because, if necessary, he would do the work himself. (7:1267.) Even though he tells everyone that he does not know anything about working on cars, Stripling claims that he does. (7:1267–1268.) Yet Stripling admits that, in his pretrial affidavit, he states (7:1268): "I am not a mechanic. I could not inspect any work. I am the best parts man there is, but I do not work on vehicles. I do not work even on my own car." Stripling confirms that he does not work even on his own car. (7:1268.)

The evidence on this incident is a bit skimpy, and on brief each of the parties unfortunately covers the testimony only of its own witness. From what evidence there is, however, I credit the essentials of Chapple's version. Thus, I find that, about February 1, Stripling took over the assignment of work to the taxi mechanics. Although Chapple fails to describe who said what that resulted in this change, the change is consistent with the January meeting that Maintenance Director Turney held with the mechanics when he told them (before he departed the meeting, leaving Stripling in charge of the balance of the meeting) that Stripling would henceforth be assisting him by being in charge of the work and the schedules of the taxicab mechanics.

The other key aspect of this incident is that Stripling (whose account on this item is not all that far from Chapple's description) laid down "Stripling's law" for Chapple respecting the taxi mechanics: (1) Chapple had no business asking other mechanics to work on taxis; (2) Stripling would distribute the repair work for the taxis because (3) he "supervised all the taxi work." In short, this incident is consistent with both the vesting of supervisory authority in Stripling and the public defense of his supervisory turf associated with such vesting.

i. Stripling becomes salaried

Although the basis of Stripling's pay is not especially pertinent (because it is not one of the primary indicia), the timing of its change is relevant to the extent it throws light on the issue of whether Stripling actually became vested with even one of the primary indicia authority of a statutory supervisor. From his hire until mid-February, Stripling was paid at the hourly rate of $9.00. Stripling worked 60 to 70 hours a week. Sometimes he received all his overtime pay, and sometimes not. His average weekly total gross pay was about $635. Beginning in the fall of 1998, Stripling and Turney discussed placing Stripling on salary so that his paycheck would be stabilized at what his average weekly income had been. (7:1133–1134, 1213–1216, 1221, 1261, 1273.)

Stripling acknowledges that his last two weekly paychecks before his discharge were salary checks for $635 a week as the payroll record (GC Exh. 60; $634.61) reflects, with the first check, dated (Friday) February 26, being for the week of February 15 through February 19. (7:1133, 1213, 1217–1218.) Stripling was not told in advance that his February 26 check would be a salary check, and he learned only when he inspected it. (7:1214.) Stripling knew that all supervisors at MTSI are salaried. (7:1213.) From that knowledge base, Stripling answered in the affirmative to the question, on cross examination, of whether he knew that his being salaried meant that he was a supervisor or manager. (7:1213.) Of course, that syllogism is faulty because it twists Stripling's follow-up explanation—which is, "You were on salary if you were a supervisor." (7:1213.) Thus, even though all supervisors are salaried, it does not necessarily follow, in logic, that all those on salary are supervisors. And, in fact, the latter is not true at MTSI, for mechanic Joseph B. Webster was salaried. (2:176; GC Exh. 61 at 1—hours listed as a double zero.)

This brings into question Stripling's "admission" that, as of his March 3 discharge, he knew that he was a supervisor. (7:1222.) I attach no weight to that "admission" for two reasons. First, it was one of law rather than of fact. Second, the record is ambiguous here. That is, for the last 3 to 4 months of 1998, Stripling had talked with Turney about becoming salaried. Stripling's purpose, at least his original purpose, was to stabilize his weekly paycheck (7:1133–1134, 1273), rather than to secure a promotion to supervisor. As the weeks turned into 1999, the salary concept merged into the discussion of when Stripling could take over as the NonCDL Maintenance Manager. (7:1134.) It is not clear, therefore, whether Stripling, in expressing this "admission," was equating his new salary with confirmation that he actually had been promoted (and before there was any replacement parts manager), or whether he was thinking that anyone on a salary is a supervisor. The ambiguity is compounded by the fact, as just noted, that his original purpose apparently reflected the view that he did not have to be a supervisor or manager to be salaried.

At one point on cross examination (and the first mention of the topic), Stripling denied that anything was ever said to him

about there being a 60-day waiting period, once he made the move to the manager's job, before his pay would be switched to salary. (7:1221–1222.) Addressing this point, George asserts that, up to about the fall of 1997, MTSI's policy was to pay the higher wage rate or salary as associated with a promotion. But after a "couple of bad situations" of promotees in positions where either they or MTSI was unhappy, and returning them to their former positions meant either cutting the new pay or leaving them at their now higher and "overpriced" (for the old position) pay level, MTSI changed its policy. Under the new policy, if, after 60 days, both the employee and MTSI are happy with the promotion to the new position, then the pay increase for the new level is made effective. (10:1559.)

In that connection, recall George's testimony (10:1557) that the "official" date for Stripling's promotion into the new position was December 15, 1998. George identified a "Payroll Change Status" document (R. Exh. 19) for Stripling. (10:1558.) This single page document, bearing George's initials of approval (10:1558) and, ostensibly, the signature of Turney, shows a promotion of Stripling from "Parts Manager" to "Service Manager," and a change in the pay rate from $9.00 per hour to "634.61" per week, with an effective date, for this payroll action, of (Monday) February 15, 1999. Based on this payroll change status, it appears, Stripling's February 26 pay check for the week beginning February 15 was generated and delivered to Stripling as his first salary check.

j. Turney's limited testimony

Oddly, Maintenance Director Turney gave only very limited testimony respecting Stripling: that Turney helped develop the job description (R. Exh. 14), and then gave a copy to Stripling in January, a few days after Stripling was promoted (11:1830–1831); that Stripling's promotion was not a "grow into the job type thing," but came after a conversation on whether Stripling wanted to try it, then the announcement, and then "he started out;" and that Turney does not recall when Stripling went on salary, (11:1848–1849).

If Stripling moved into his new position of NonCDL Maintenance Manager over all the main shop's mechanics in, as suggested (by both Turney and George), the early days of January, one must wonder why Turney, in the January meeting with those mechanics, told them (Stripling's account is undisputed) that Stripling was "coming on Board" to help him with [just] the taxicab mechanics. Of course, Stripling could be a true statutory supervisor of just the taxi mechanics. This discrepancy (supposedly full manager in early January, yet later that month Turney announces to all the mechanics that Stripling will be helping him with the taxicab mechanics) highlights the rather bizarre handling of Stripling's "promotion." Of course, the facts could look bizarre only because of post event efforts to twist them to fit the needs of the moment.

k. Taxi bonuses

Another incident to discuss pertains to Stripling, the taxi mechanics, and bonuses. For the last year or so, taxi mechanic Joseph B. Webster testified (2:176), the taxi mechanics were eligible to receive a weekly cash bonus from a cash pool. The pool, or pot, was funded by MTSI's depositing $50 every time a taxi driver was serviced. If a taxi driver was turned away (sent home because the mechanics could not reach his cab for repair), then no money was placed in the pot of award money. If two drivers were turned away, $50 was removed from the bonus pot. Turney determined who was rewarded. Webster was upset by Turney's operation of the fund because, while the purpose was to reward those who were there and did the work, Turney nevertheless gave full bonuses to those (such as Larry Clark and Kenny Harris) who were not there all week. (2:176, 209–210, 249–2150.) Turney does not address this topic in his own testimony.

Around early to mid-February, Stripling testified (7:1196-1197), Turney gave the bonus sheet to Stripling and asked him to write down the names of the mechanics that he thought should receive a bonus based on performance ("what went on") and attendance. Turney said he wanted Stripling to see how it was done because one day Stripling would be doing it. Stripling submitted the list, recommending about five mechanics, but omitting the names of Larry Clark and Kenny Harris because they had not been at work every day of that week. The "next day" (the next Monday, apparently), Stripling learned from the taxi mechanics that all of them, including Clark and Harris, had received the taxi bonus. The taxi bonus was "the topic of conversation every Monday morning by every body." That was the only week Stripling ever worked on the bonus list. (7:1186, 1195–1197, 1257–1260, 1275.)

Although Stripling learned through hearsay that Turney had rejected his recommendation as to Clark and Harris, MTSI did not object to the testimony, and the circumstances (a topic in the whole shop) indicate trustworthiness. Because of these factors, and because unobjected-to hearsay is waived, I consider the information as to the inclusion of Clark and Harris for the truth of the matter asserted. *Daufuskie Island Club & Resort*, 328 NLRB 415, 420 (1999).[8]

The undisputed evidence on the bonus matter is significant for several reasons. First, it shows that, as of early to mid-February, Turney was still referring to a future event in terms of Stripling's assuming even the limited role of manager over the taxicab mechanics, much less the full capacity of the NonCDL Maintenance Manager (or even that of the "Service Manager" mentioned on Respondent's Exhibit 19, the February 15 "Payroll Status Change" form).

Second, the taxi bonus incident gives question to George's assertions to Stripling that he had authority even to terminate mechanics who refused his orders (at least orders beyond those to make ready vehicles that are critically needed). Thus, the question is: How could Stripling be deemed to have the authority to fire a mechanic (other than, possibly, one who was refusing to repair a critically needed vehicle) when he could not even effectively recommend that two slackers be left off the taxi bonus list for a single week?

Third, it seems telling that Turney did not thereafter bother to solicit Stripling's recommendations for the bonus list. Once was enough, it seems, and Turney thereafter handled it him-

[8] For one of the cases cited there, *Iron Workers Local 46,* 320 NLRB 982, 982 fn. 1 (1996), enforcement was denied 149 F.3d 93 (2d Cir. 1998). Such denial was on other grounds.

self—as he had done all through January. We know there was a "thereafter" because shuttle van mechanic (7:1070) Walter Boza advises that, even after Stripling had been fired, the taxi bonus program was still in operation because Turney included him when Boza helped out one week with the taxis. (7:1105–1106, 1121.)

l. White uniform shirts—badge of authority

Admittedly a minor factor to be considered (because it is one of the secondary indicia), the matter of uniforms is relevant in a close case such as this. *Adco Electric*, 307 NLRB 1113, 1120 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993). In the shop, Turney wore gray work pants and the white uniform shirt of a supervisor, whereas the uniforms for the mechanics were gray pants and gray shirts. Stripling wore street clothes. In the parts department, he would have worn the same gray plus gray as the mechanics, but his orders (twice) for uniforms wound up, it appears, in the black hole into which all requisition snafus disappear. (7:1109–1110, 1190–1192.) Mechanic Walter Boza testified that, as Service Manager, Victor Holiman wears his supervisor's uniform every day, just as Turney does. (7:1121.) When George, in July 1999, told Holiman of his promotion to Service Manager, he also informed Holiman that at first he would just be in charge of the taxi section, but later he would be over the whole shop. The purpose of this staggered assumption of duties, as George advised, was to give Holiman a chance to get his "feet on the ground." (6:956.)

Stripling asserts that Turney told him that Turney would require Stripling to wear a white shirt "when" Stripling took over the taxicab section. (7:1191.) The timing of this conversation, in relation to the January meeting with the mechanics, is not developed. As Stripling testified that he never wore a uniform (7:1190), I interpret that to include the assertion that he never wore the white shirt of a supervisor.

3. Conclusions

Under established law, the burden of persuasion is on the party (MTSI, here) contending that a worker (Dale Stripling, here) is a statutory supervisor. *Adco Electric*, 307 NLRB 1113, 1120 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993). I conclude that MTSI failed to discharge its burden of proof.

Dale Stripling, I find, never became vested with the authority of a statutory supervisor. The December announcement by George spoke of a future event. The January announcement by Maintenance Director Turney to the mechanics (the meeting where Turney left Stripling in charge) may have been intended to signal a transition of power to Stripling, but, in fact, Turney never permitted the vesting to take place. Thus, whenever Stripling tried to exercise any discretion, he was undermined by Turney who would countermand his orders switching taxi mechanics from on job to another and who rejected Stripling's recommendation not to include two of the mechanics as among those who should receive the taxi bonus for one week about mid-February. That Turney approved as to the others is meaningless, for Turney had been awarding it to all—something Stripling recommended against for just a single week. Tellingly, in the 2 to 3 weeks or so left before Stripling's discharge, Turney did not even ask for Stripling's recommendations.

As for the expressions by President George that Stripling had authority to discipline, even discharge, any mechanic (and not just a taxi mechanic), it is clear that George was addressing the situation when MTSI had a critical need for a vehicle and the mechanic was refusing a direct request to correct whatever malfunction was keeping the vehicle out of service. Such authority simply authorized Stripling to serve as a conduit for George's orders that, in such emergency situations, he discipline or discharge any mechanic who so refused. That prearranged response for emergencies would not involve the exercise of independent judgment by Stripling.

To the extent Stripling sought to claim any supervisory authority for himself (as in his February conversation with Taxi Leasing Manager Linda Chapple), such claim, as I have described, was thwarted by the countermanding efforts of Maintenance Director Turney. Respecting Stripling's being placed on salary, and the internal payroll status change showing a change from Parts Manager to Service Manager effective February 15 (R. Exh. 19), such a document, and the fact of a salary, in the context of this record, proves to have been only a paper change, with a paper title of Service Manager, but with no vested authority of a statutory supervisor.

Finally, on the one item that would have cost MTSI practically nothing—the clothing of Stripling with a supervisor's white uniform shirt—even in that MTSI failed. MTSI bypassed the opportunity (later taken respecting Victor Holiman) to give Stripling the visible emblem of an MTSI supervisor—the white-shirt badge of supervisory authority. I find that such failure was no accident, and that the failure of MTSI (of Turney, actually), to deliver the white shirts to Stripling is yet another sign that, notwithstanding the theoretical position on paper, no actual statutory authority (especially not power to exercise independent judgment) ever passed to Dale Stripling. I so find. In short, at all times Dale Stripling remained a statutory employee.

E. Course of Events

1. March 1, 1999

a. Turney interrogates Victor Holiman

Recall that, by March 1, some 15 of the 18 shop mechanics had signed cards for the Union. On (Monday) March 1, around 12:30 p.m. [not a.m. as the transcript reflects], Maintenance Director Turney called mechanic Victor Holiman to his office. Once Holiman was seated, and the door closed, Turney asked, "Are you aware of a union uprising here." When Holiman answered yes, Turney replied, "That's all I want to know." That ended the conversation, and Holiman left Turney's office. (6:928–931.)

On brief, the Government (on this and the other independent 8(a)(1) allegations) neither cites authority in support of the allegation, complaint paragraph 5(a)(i), nor argues as to why the question would be unlawful. Agreeing with MTSI that Turney's question would not reasonably be viewed as coercive, I shall dismiss complaint paragraph 5(a)(i) respecting this first of several incidents on March 1. *Coronet Foods*, 305 NLRB 79, 82, 84 (1991), enfd. 981 F.2d 1284 (D.C. Cir. 1993).

b. Turney interrogates Dale Stripling[9]

The second interrogation on March 1 occurred about "midday" when Turney called Stripling into his office and asked if Stripling had heard any rumors from Kenny Harris about the Union. Stripling answered no, that he had heard such rumors from everyone. Turney said "Okay," and Stripling left the office. Although Turney names mechanic Harris as a possible source, the overall tenor and brevity tend to show that the conversation would not reasonably be viewed as coercive. Accordingly, I shall dismiss complaint paragraph 5(a)(i) as to this second incident.

c. "What's in is in"

The third incident of March 1 occurred 30 to 60 minutes after the second one. As Stripling was walking by Turney's office, Turney motioned (vision was through a glass window) for Stripling to come in. After indicating for Stripling to shut the door, Turney said that he did not know how the Union had gotten started, but he knew that it would not be allowed in MTSI. It had been there once before and, Turney said, Turney knew that George ("Billy") would not allow it under any circumstances. Turney said that if the Union came in, employees like Buster Davis would not be allowed to work or hold his job because he had heart trouble. Neither would Kenny Harris be able to hold his job. Stripling listened without saying much, and left when Turney finished. (7:1149–1150.) By these undenied remarks, Maintenance Director Turney impliedly threatened that President George would take unspecified action against employees in order to keep the Union out, and threatened, that if the Union did get in, MTSI, contrary to its past practice, would impose such stringent employment conditions that employees with health or behavior problems no longer would be tolerated but would be terminated.

On brief (at 14), the General Counsel lists these remarks as being in support of complaint paragraph 5(b) (threat of futility). As the remarks do not threaten futility in supporting the Union, there is a variance. However, as MTSI did not object to the variance and move to strike the testimony because of such variance, the matter was tried by implied consent. FRCP 15(b). As I stated at the close of the trial (in discussing the Government's motion to conform), that any evidence introduced without objection has been tried by implied consent. "What's in is in." (13:2048–2050.) I therefore find that, by Turney's remarks, MTSI impliedly threatened employees with unspecified adverse actions in an effort to keep out the Union, and threatened employees that, if the Union did get in, MTSI would impose such stringent employment conditions that employees with health or behavior problems no longer would be tolerated but would be terminated. By so threatening, I find that MTSI violated Section 8(a)(1) of the Act as alleged in complaint paragraph 5(b), as that allegation was amended by implied consent.

[9] Taking the position that Stripling is a supervisor, MTSI regrettably does not pause to brief any of the alleged independent 8(a)(1) conversations with Stripling.

d. Second interrogation of Dale Stripling

About 6:15 p.m. that same March 1, Turney asked Stripling if he had any idea how the union matter had gotten started. Stripling replied that he had heard it had originated with other Coach USA drivers who were in town to help handle a convention. Turney repeated his earlier statement that, if the Union came in, employees with health or attendance problems, such as Kenny Harris, Buster Davis, and Him Hilton, would not be able to retain their jobs. (7:1150.) As this interrogation now focuses on the source of the union sentiment, with the vice compounded by the threat about loss of jobs by those vulnerable to termination, I find that Turney's question reasonably would be deemed coercive. Consequently, I find that MTSI, by this coercive interrogation by Maintenance Director Turney, violated Section 8(a)(1) of the Act, as alleged at complaint paragraphs 5(a)(i) and 7.

2. March 2, 1999

a. Introduction

President George was on vacation in San Diego (California, presumably) from Thursday, February 25 until his return to work on Tuesday, March 2. On George's return to work that morning, COO Stephens reported on events during his absence. One such matter was the union activity. Stephens handed George a "reddish pink" union flyer which touted some 25 protections by law during a union's organizing drive,[10] and reported that Stripling gave it to Turney who had given it to Stephens. Later that morning in his office, George met with Stripling. Stephens attended, but, in his testimony, does not address this meeting. Although the time of this first meeting that day is not specified, subsequent events would place the conversation at about mid-morning.

b. George's first meeting with Stripling

At this mid-morning meeting, with Stephens attending, George asked Stripling what he knew about the union matter, what was going on, who was involved, and what the issues were. Stripling replied that there were some mechanics involved, primarily Victor Holiman and some others, who were disgruntled and upset at John (Turney). Turney, Stripling reported, had promised to order the mechanics service manuals for some new vehicles that MTSI had purchased, but the service manuals never came. The mechanics felt that Turney had lied to them, and that their needs were not being addressed.

Concerned over this report, George told Stripling (10:1567):

> Dale, you and I have had several discussions. This is why you were put in the position because we knew John was stretched too thin. If these guys needed that, you needed to get them ordered. If John told you no and you felt it was important, you should have come to me.

Stripling answered, "You're right." George fails to tell us how the meeting ended. Stripling was not asked about this

[10] George's reference probably describes a copy of the two-page flyer (GC Exh. 49; one page printed on front and reverse), "35 Things Your Employer Cannot Do!", which is in evidence (5:695) regarding a later time frame.

meeting during his testimony, and he was not called as a rebuttal witness. When cross examining George, the General Counsel did not cover this conversation. As the parties do not mention this conversation in their briefs, it is unclear whether the General Counsel agrees or disputes that it occurred. George's account sits in the record as an orphan, unclaimed by any party.

George's undisputed account has a troublesome aspect. An item which seems rather unnatural, without more foundational support, is the last statement, that Stripling should have appealed to George if Stripling felt the matter was important (plus the "You're right" attributed to Stripling). There is no evidence here that MTSI had a Open Door policy, either formal or informal, whether for employees or for supervisors and managers. Absent any evidence that George had ever told his staff that his door is open, and that no one could retaliate against those using that open door, it appears rather naive and inconsiderate for President George to suggest that a supervisor should have jeopardized his career by going over his department manager's head direct to George. This part of the story is troublesome, and it makes George appear as if he is trying to find an excuse or a scapegoat for bad policies that caused employees to seek out a union for help. Moreover, what George presents as this first meeting that day with Stripling could be an embellishment of what took place in the meeting that both Stephens and Stripling describe as, seemingly, the first meeting they attended that day in the presence of each other and George, that being what I denominate below as George's second meeting with Stripling.

Also, observe that if George actually received the faxed copy (GC Exh. 6) of the Union's first letter around 9 a.m. that March 2, and saw Holiman's name as one of the in-plant organizers for the Union, George's blood pressure could have spiked. Then, he first could have called in Holiman and could have begun the conversation with an obscenity (as I describe in a moment).

Nevertheless, the fact of and basic content of the meeting seems to fit the sequence of events. Although Turney had first called in Victor Holiman, it was for one brief question. And most of Turney's remarks thereafter to Stripling were in the nature of threats. He did not ask the important questions that George did of Stripling on March 2, and, by George's account, it was from Stripling that he received the first report describing the nature of the problem, including Holiman's involvement. Shortly thereafter, George, it appears, called in Holiman for a meeting.

Although this conversational orphan is not claimed by any of the parties, it appears that it is targeted by the complaint. Thus, complaint paragraph 5(a)(ii), alleging interrogations by George on March 2, alleges "two separate incidents." It appears that this conversation with Stripling is the first one, and the conversation with Holiman is the second. Apparently the General Counsel simply overlooked asking Stripling about this orphan conversation. As George acknowledges asking Stripling about union matters and who was involved, and as MTSI failed to show that Stripling was a statutory supervisor, I find that such interrogation violated Section 8(a)(1) of the Act, as alleged at complaint paragraph 5(a)(ii).

c. George meets with Victor Holiman

(1) Facts

On brief (at 9) the General Counsel lists this conversation as one of the two separate interrogations alleged at complaint paragraph 5(a)(ii), plus a threat of reduced wages and benefits, as alleged in paragraph 5(c).

Shortly before George left for his long weekend vacation at the end of February, mechanic Victor Holiman came in and asked for a $3000 loan from MTSI. Holiman dates the occasion as about Monday, February 22 (6:950–951), whereas George places (10:1592) the incident as his last day in the office, Wednesday, February 24, before his vacation departure. Holiman either did (10:1593, George) or did not (6:951–952, Holiman) give the purpose of the loan. Although such an amount was far above the $500 usual maximum loaned to employees, as it was Holiman requesting (10:1603), George asked about collateral (6:952–953; 10:1593) and suggested that Holiman come back after George had returned from his short vacation and they would see if there were a way to "make it happen." (10:1593.)

Holiman testified that he signed his union card at the end of February or first part of March. (6:949.) He asserts that the occasion of his request for a $3000 loan came before the union activity in the shop. (6:932, 952.) As no copy of Holiman's union card is in evidence (MTSI apparently did not serve a subpoena for it to be produced), we do not have the benefit of the date on his card. The record suggests, however, that he probably signed the evening of Thursday, February 25. That would be the evening before the February 26 letter (GC Exh. 6 at 3) which the Union faxed to MTSI on (per stipulation, 1:61–62) Tuesday, March 2, from Coach USA at Houston. Previously, in the section covering the overview of the Union's organizing campaign, I quoted the text of the letter. In the second paragraph of the letter, Holiman is one of the six employees named there as the (first) members of the Union's "In-House Organizing Committee."

Although the time of receipt of the Union's February 26 letter is not at issue concerning this March 2 meeting, it will be relevant elsewhere. I therefore note that the parties unsuccessfully attempted to stipulate on the time of receipt at MTSI that March 2, with MTSI contending the receipt time was between 2:30 p.m. and 3:00 p.m. (1:45), and the General Counsel presumably asserting an earlier hour. The fax times at the top of the cover page (on March 2 at 8:54—presumably a.m.) is from a different fax number shown on pages two and three, the latter two being "From Coach USA Operations" at 9:42 a.m. I shall not dwell on this any further, and I do not address whether the fax machine with the "9:42 a.m." time was still operating on daylight savings time, thereby accounting for the fact that pages two and three show a later time than the cover page. As the parties did not resolve this point by their stipulation, and as no witness testified concerning this matter, I make no finding here and I turn now to the meeting between Holiman and George on Tuesday, March 2.

On that occasion, Holiman testified, Turney came and told him to report to George's office. Holiman places his time of arrival at about 10:30 a.m. to 11 a.m., with just he and George

being present. (6:931.) The dispute over the ensuing conversation is not so much as what was said, as it was the placement of some words and the interpretation to be placed on George's purpose in asking certain questions. As the allegation, complaint paragraph 5(a)(ii) is that George made a coercive interrogation on this occasion, in the usual case the purpose of the questions might have no bearing. Here the purpose is relevant to how an employee in Holiman's situation reasonably would interpret George's remarks. Thus, George asserts that when, on his return, he learned of the union matter and that Holiman was involved in it, he became concerned that there could be a connection between Holiman's request for a large loan of $3000, and his involvement with the Union. That is George wondered whether Holiman was seeking to use the union matter as leverage to persuade George to grant him the loan. (10:1593–1595.)

Holiman testified persuasively. During cross examination, for example, he freely acknowledged that an additional work or topic was mentioned in the conversation. Also, keep in mind that, as of the time of this March 2 conversation in George's office, Holiman's request for a $3000 loan was still outstanding (6:953–954) even though he later (6:966) "blew it off." As I credit Holiman, the account which follows generally is that of Holiman. (6:931–937, 949–950.) To the extent that an item is from George, it is because it is not inconsistent with Holiman's version.

On this occasion, presumably after Holiman was seated, I find that the essentials of the conversation occurred as follows, with "BG" for George and "VH" for Holiman (6:932–937, 949–954, 966, 968–969):

> BG: I take it as a fucking insult. Last week you came in to borrow money, and this week you're on a union committee. I find it ironic that you ask me for a loan and one week later your name is on a committee for the Union for union activities.[11]
>
> VH: Wait a second. This one has nothing to do with the other. They are coincidental.
>
> BG: What do you expect to get out of this? You are my highest paid mechanic.
>
> VH: Equipment, manuals, and better benefits.
>
> BG: It doesn't make any sense to me with the Union. Kenny Harris will have more seniority than you and will be making more money that you. How would you feel about that?
>
> VH: I don't care. I'm just concerned about myself. I asked John Turney about going to school for continuing education training, and for some shop manuals so we can properly service our vehicles.
>
> BG: That should be no problem. I've never denied anyone anything such as that.
>
> VH: Back in July Turney told me he had ordered the service manual for every vehicle in the MTSI fleet. In either September or October I asked again and still no manuals.
>
> BG: Why didn't you come to me?
>
> VH: I think I went through the proper chain of command by going to John Turney. But he lied. It doesn't take anybody 3 or 4 months to get a manual. The people in the shop are tired of his lying and the bull shit. His lying is the subject of a joke even in the front office. [Joke answers question of how one tells if Turney is lying: "If his mouth moved." (6:934.)]
>
> BG: Get a list of all the shop vehicles, years and types, so we can make sure that the manuals are ordered.
>
> VH: I will. [Meeting ends.]

(2) Discussion

MTSI contends (Br. at 7–8, in effect, that there is no violation because a reasonable person would conclude that George was merely trying to be sure that Holiman was not trying to use his place on the Union's organizing committee as leverage to persuade George to grant Holiman's outstanding request for a large (six times the normal $500 loan) personal loan. MTSI possibly would have a persuasive argument had George terminated the meeting when Holiman answered George's opening remarks with, "Wait a second. This one [the union matter] has nothing to do with the other [the "other" being the loan]. The are coincidental." Instead, George plunges ahead determined to uncover the reason or reasons his highest paid mechanic would seek to help from outsiders to solve any problems in the shop.

Even with these questions, had MTSI defended on the basis that Holiman was an openly announced in-plant union organizer, as verified by a letter from the Union received by fax that very morning, dismissal of the allegation would appear to be appropriate. *Beverly Enterprises*, 322 NLRB 334, 334 fn. 1 (with then Chairman Gould dissenting), 344 (LPN Pickus) (1996), modified on different point 139 F.3d 135 (2d Cir. 1998). Of course, as MTSI took the position that the Union's fax was not received until the afternoon of March 2, this defense was not available to it. Thus, as Holiman was not then an open and declared union supporter or announced in-plant organizer, George's questions would tend to be coercive. Accordingly, I find that President George's questioning that March 2, 1999 of mechanic Victor Holiman, concerning his reasons for supporting the Union, violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(a)(ii).

Respecting the threat allegation, the General Counsel does not point to the remark or remarks that constitute the threat, nor does the Government articulate its theory here. Guessing at the Government's theory, I suppose that it impliedly contends that George, by bringing up the matter of the pending loan request, was impliedly threatening "employees with the loss of wages and benefits if they supported the Union." (Complaint paragraph 5(c).) I see no such threat. Moreover, crediting George to this limited extent, I find that a concern he had (in addition to finding out Holiman's reasons for supporting a union) was to make sure that Holiman was not trying to engage in a watered down blackmail attempt by using his name on the Union's committee to scare George into granting a $3000 loan. Apparently satisfied on that score right away, George then launched

[11] The suggestion is strong that George already had received from Coach USA's Houston office the faxed copy (GC Exh. 6) of the Union's February 26 letter naming the first six members (including Holiman) of the Union's in-plant organizing committee. Before that letter, no one had mentioned any union committee.

into questions about what Holiman expects to get out of unionization of the facility and the impact on George of possible (but unnamed) union contractual provisions respecting the usual incidents of seniority, for example. Finding no threat, I shall dismiss complaint paragraph 5(c).

d. George's second meeting with Stripling

Around 1 p.m. that March 2, George asserts, he held another meeting with Stripling in the presence of Stephens. George does not recall whether Turney was present. Apparently preceding the meeting, or possibly in the meeting (George's description is unclear), George learned that Stripling had attended a meeting with union organizers. This left George "flabbergasted." Reminding Stripling that he was a member of management, George told Stripling that Stripling had not gone to Human Resources Director Janet McCann, to COO Stephens, or to George regarding any problems, but instead had taken issues outside MTSI to get them resolved "when you had the power to resolve them yourself to begin with." (10:1568.) George does not tell us either the purpose of the meeting, or how it ended.

COO Stephens asserts that the purpose of the meeting, which Turney also attended (in his own testimony, Turney does not address this meeting), was to discuss whether there were any conversations about union activity in the garage and if so to ascertain the issues. Stripling was invited because he was the "garage supervisor." In fact, George reminded Stripling at the meeting that he was part of management. Stripling said that he understood, but "gave no real response." (9:1449.)

Stripling's version is quite different. Stripling testified that he and Turney both went to George's office (presumably they were summoned) where George and Stephens were present. When Turney and Stripling were seated, George, who was pacing behind his desk, addressed Stripling with, "I should terminate you right now." George said that he thought Stripling was part of the management team, and that any problems in the shop should be brought to his attention. He said the Union was not coming in under any circumstances, and that he would outsource all the labor that was in the shop. He could do that, George emphasized. George said he wanted Stripling to meet with the mechanics and asked if Stripling could do that. Stripling replied that he could, and that they would want to meet with him. Stripling did not dispute George's statement that he thought Stripling was part of the management team because George is a "forceful" person who "controls a meeting." "He does. It's a gift." In short, Stripling felt it wiser to keep a "shut mouth" since George apparently thought, contrary to fact, that Stripling already had been made a manager. (7:1150–1151, 1237, 1274.) Stripling acknowledges that George said that Stripling had the authority to fix the problems in the shop. (7:1187.)

On brief (Br. at 15) the General Counsel lists George's statements as the support for complaint paragraphs 5(d) (threat of discharge) and 5(e) (threat to outsource mechanical work). As noted earlier, MTSI waived its briefing respecting the independent 8(a)(1) allegations pertaining to Stripling on the basis that Stripling was a statutory supervisor. As I have found that MTSI failed to prove that Stripling was vested with the authority of a statutory supervisor, it follows that any statements to Stripling that reasonably tended to be coercive, because of his perceived involvement in union activities, violated Section 8(a)(1) of the Act.

Respecting this meeting, I credit Stripling's account. The testimony of George and Stephens on this meeting, while having a touch or two consistent with Stripling's account, are not at all believable. Indeed, the versions of George and Stephens are a bit inconsistent with the other. That is because elements of George's story (castigating Stripling for going outside MTSI to union organizers to solve shop problems, for example) are consistent with Stripling's account, whereas Stephens appears to describe an information gathering meeting. Aside from the fact that Stripling gave a more detailed version, his account, delivered with persuasion and credible demeanor, sounded more natural. I do not credit Stephens' add-on prefix that Stripling said he "understood" that he was part of management (although he "gave no real response"). Crediting Stripling's account, I therefore find, as alleged, that on this occasion MTSI violated Section 8(a)(1) of the Act by the threats of President George, as alleged in complaint paragraphs 5(d) and 5(e).

e. Mechanics submit grievances to Stripling

Immediately following the "I should terminate you right now" and "outsource all the labor" meeting in George's office, Stripling rounded up the mechanics for a quick meeting in the lunchroom. When they were assembled, Stripling informed them that President George was aware of the union organizing, that George had received a fax naming employees on the organizing committee,[12] and that George wanted to have a meeting with them so that he could discuss the problems with them.

After some discussion among themselves, the mechanics stated that they had been to meetings before with George, that they were intimidated by him, that they did not want to meet with him, but would submit a list that Stripling could take to George. At that point Stripling left and went to the parts department. After a while mechanic Larry Clark brought him the list. (GC Exh. 16.) An hour or so later Stripling tendered the list to Turney, advising Turney that the mechanics did not want to meet with George because they were intimidated by him. [13] Stripling then returned to the parts department. (7:1152–1153.) Agreeing that he received General Counsel's Exhibit 16 on March 2, George asserts that it was Stripling who gave it to him. (2:291; 10:1596.) I need not resolve who handed George the list, although it seems quite possible that it was Stripling who did so. The unsigned list (GC Exh. 16), "Memo: To Billy From Shop," contains 14 numbered grievances and desires pertaining to working conditions (poor heat, leaking roof), economic items (including tools, schooling, pay raises, daily overtime, and more), and one communications matter ("Monthly shop meeting with Billy or anybody that will listen"). As me-

[12] As Stripling's account of the meeting does not include any remarks by George asserting that he had received such a fax, Stripling's report of such to the mechanics is hearsay, and I do not treat the reference to such a fax as substantive evidence.

[13] Turney denies ever seeing GC Exh. 16 or receiving a list from the mechanics. (11:1849–1850.) COO Stephens also denies ever seeing the list. (9:1498.)

chanic Joseph B. Webster explains, at least one school, provided by A.C. Delco, would have been free, but Turney would not send the mechanics. (2:190, 251.)

3. March 3, 1999

a. Stripling fired

Around 10:30 the morning of March 3, George discharged Stripling. Those two, plus Stephens and Turney, were in George's office. The accounts of Stripling (7:1154–1156, 1238), Stephens (9:1450–1453), and George (10:1568–1569), while not the same, are essentially consistent. George told Stripling that his actions had so disturbed him that he had lost several hours sleep the preceding night, that the issues Stripling was bringing up had existed before, that Stripling had been put in place to resolve these issues, that Stripling went outside MTSI for assistance rather than to MTSI's management, that George felt Stripling was incapable of being a manager, that Stripling was not loyal to the company, that Stripling was part of the management team, that Stripling was not protected by the laws that protected other organizers, and that another employee had reported that Stripling had asked him to sign a union card, and that George had no choice but to terminate Stripling because he was involved in union organizing and that is not appropriate because you are a supervisor. Stripling simply said that there was not much for him to say at that point. I discuss his discharge under the discrimination allegations.

b. Six mechanics walk out

Before Stripling had cleaned out his locker, the mechanics learned that he had been fired. Thus, mechanic Seth Hankins went to the locker room, where Stripling was cleaning out his locker under Turney's observation, and there learned that Stripling had been fired. Turning to Turney, Hankins told Turney that "it was a crock of shit" and that if Stripling was leaving "I'm walking and so is a lot of other people." (7:1157, Stripling.)

Six of the mechanics (Walter Boza, Jeremy Carr, Seth Hankins, Victor Holiman, Thomas Houle, and Joseph Webster) decided to leave in protest of Stripling's discharge. (6:938–939, Holiman; 6:975, Houle.) They locked up their too boxes, clocked out (other than the salaried Webster), went to the parking lot, and drove to the Union's hall. There the Union's Dennis Speak persuaded them that they could be more help at MTSI, where they could vote, and they returned and clocked back in about 1 p.m. They had been gone about 2 hours. They were met by COO Stephens and Turney and, momentarily, by George. When questioned, the employees said that they had been at lunch. (6:943, Holiman; 6:1005, Houle; 7:1075, 1115, Boza.) George told the employees that they were suspended (9:1517, Stephens) because they had walked off the job. (2:292, George; 7:1076, Boza.) When one of the mechanics denied that it was a walkout, George said that right now they were suspended pending an internal investigation. (7:1076, Boza.) On Sunday, March 7 Stephens called and left messages for the six to return to work the following day. All six returned to work the next day, March 8.

Complaint paragraphs 6(c) [suspension] and 8 [violates Section 8(a)(3)] attacks the suspension as being unlawful. I address the alleged unlawfulness later.

c. President George warns mechanic Boza

(1) Facts

Complaint paragraph 5(f) alleges that, on March 3, President George threatened "to kill employees because the employees engaged in" union and protected activities. By its answer, MTSI denies.

Before launching into its case in defense, MTSI moved that I dismiss the allegation. Seeing George's "threat" as a reaction of "animal exuberance" in the emotion of the moment, when concern for the safety of his family was at issue, and as not directed at any protected activities, I nevertheless declined, at that point, to dismiss only because George had not given his full testimony on the issue. (8:1424–1425) At close of the trial I granted (13:2053) the renewed (13:2050) motion to dismiss complaint paragraph 5(f). I now reaffirm that ruling.

The incident was triggered as the six mechanics walked out through a door leading to the parking lot. Then mechanic Victor Holiman recalls that someone (he remembers no details of identification) was waiting to enter as the group of six walked (one at a time) through the door. (6:967.) About the moment the six walked through the door, one of them, Walter Boza, said, "I know where Billy lives." (6:941, 961, Holiman.) About 20 feet later (6:962) Boza added a comment to the effect that they could picket (possibly mentioning getting a few thousand pickets) in front of George's house. (6:941, 961, 969–971.) As Holiman explains (6:693), someone standing by the door as the group walked through could have heard Boza's first statement (knowing where George lives) but not the second (picketing George's house).

Donna Chadwick manages MTSI's next door Conoco service station. On that day, Chadwick testified, her daughter, Angela LaBee, telephoned her to say that she had heard Wally Boza tell a group of mechanics say that he knew where "Billy" lived and that they could go out there, and that they all got in their cars and left. LaBee told Chadwick that she thought it was some kind of threat, that she was concerned for George's family, and she thought George should know.[14] (10:1637–1638.)

Unsuccessful in reaching George, Chadwick called and reported the matter to COO Stephens. Nothing was said to Stephens about any picketing because here daughter had not told her about any picketing. (10:1638–1639.)

Stephens testified that Chadwick called and asked if he was aware that some of the mechanics had walked out. When Stephens said yes, she told him that one of the mechanics, Wally Boza, had made the statement, "I know where Bill George lives." Chadwick said nothing about any picketing. Stephens then called George and reported Chadwick's report of Boza's remark about knowing where go lives. (9:1454–1457.)

George testified that he received word from Stephens that some of the mechanics had walked out. George drove over to

[14] As this evidence was offered for the limited purpose of course of action (not for the truth), I overruled the General Counsel's hearsay objection. (10:1637.)

confer about this with Terry DeMoss at the other garage. On George's return trip, Stephens reached him on the cell phone. Stephens told George that Chadwick had called and reported that Wally Boza had commented, "I know where Billy lives," and that the mechanics then left the building. (10:1570–1571.) George perceived Boza's statement to be a threat to go to his home. He first called his wife, explained the situation to her and told her to call the police if Boza showed up. George then (about 11:10 a.m.) called the local police and explained the situation to them, gave them a description of Boza, and asked that they treat any 911 call from his home as extremely serious. (10:1572.)

All this concern by George largely was based on the fact that Boza (before he was hired at MTSI) had dated the woman whom the Georges previously had employed as a babysitter. After meeting Boza, the Georges gave their approval for Boza to accompany the sitter to the Georges' home on Saturdays. This went on during the period of August–November 1998. In that time, MTSI, with George's approval, hired Boza as a mechanic. In November an incident occurred that caused the Georges to doubt the wisdom of the sitter's judgment as to what the children should see on television, and the Georges therefore terminated the relationship. (10:1573–1575.) It appears that some time later Boza and the former sitter ended their relationship.

George took Boza's statement, about knowing where George lives, "extremely seriously." This is because (10:1576):

> The man had been to my house, he knows how my alarm system works. He has had access to keys to my house. He knows where my kids sleep. He knows what their routine is. It was not somebody making an idle threat in my opinion.

With this background in his mind, when George suspended the mechanics, he then walked over and spoke to Boza. Boza and the other mechanics were in something of a semicircle facing George. There is no dispute that George, addressing Boza, launched into an emotional outburst. Thus, with his opening elegancy, "As for you motherfucker" (7:1076), George dropped his social inhibitions and delivered this warning to Boza (7:1076, Boza):

> If you ever threaten my family again, I will kill you. I will kill you. I will kill you.

Boza denied threatening George's family, but George replied that he had notified the police, that Boza was subject to arrest in the city of Leawood (where George lives), that "work is work and personal is personal," and "if you ever threaten my family again, I will kill you." Again Boza denied the charge, to which George said, "Like I said, work is work and personal is personal and you will leave here in a body bag." (7:1076.)

Not disputing Boza's account (which is supported by the testimony of others), George agrees (2:292) that he told Boza he understands that Boza had made a threat against him, and that if George caught him around his house threatening his wife or children, that "they will need a body bag to retrieve what is left."

While the two accounts are not the same, they are not inconsistent. Crediting both witnesses, I find that both renditions were delivered, with George's version, other than the very first line, being words he added toward the end of Boza's version and in connection with the reference to a body bag.

As Boza acknowledges (7:1085), when the mechanics returned to work the following Monday, March 8, George came over and warmly welcomed him back to work. This time, with George having calmed down, Boza was able to explain that he loves George's children and would never harm George's family. "I simply stated that we can picket in front of your house." George replied, "Okay, I'm sorry. Maybe I should have got all the facts before I went off the handle. But it's okay. Just remember, work is work and personal is personal." Boza said he agreed. George said he had heard a report (involving a reported confession of theft by the former sitter to the police, 10:1575–1576) concerning Boza's "former" fiancée (the former sitter, apparently). Boza responded, "That's not me." George said, "I agree. Work is work, personal is personal." George repeated that he was glad Boza was back at work, and Boza repeated that he was glad to be back.

(2) Discussion

First, it is important to recognize that George's warning to Boza was defensive, not offensive, in nature. Unlike the post-discharge offensive threat to kill in *Precision Window Mfg.,* 303 NLRB 946 (1991), enf. denied 963 F.2d 1105 (8th Cir. 1992), George's defensive statement was really a warning that "if" Boza were ever to threaten George's family again, then, and only then, would George kill Boza.

Moreover, as the Board noted in *Precision Window*, the Board takes into account whether the "misconduct" (the typical cases discusses employee misconduct) was an "emotional reaction" to discrimination (or, in other cases, provocation) against the employee. Here it is very clear that George reacted very emotionally to what he (and others) considered a threat ("I know where Billy lives") to George's family. George's emotional reaction was in direct response to Boza's provocation.

And here, unlike in *Caterpillar*, 322 NLRB 674, 676–677 (1996, vacated 1998), where machine operator (and sometimes union representative) George Boze, in an informal grievance session, called a supervisor a "mother fucking liar" and "You motherfucker." Pointing a finger at the supervisor, Boze threatened, "I'll deal with you on the outside." In shaking his finger at the supervisor, Boze's finger struck the supervisor in "the top part of his body." The Board found that Boze's touching, done in a moment of "animal exuberance,"[15] did not exceed the bounds of lawful conduct, and neither, in context, did the threat. Even if the threat, a "spontaneous and impulsive outburst," exceeded the protections of the Act, the Board found that it was provoked by various illegal acts of the supervisor.

In our case, George's emotional and defensive warning to mechanic Boza, delivered in a moment of "animal exuberance," was based on the reported provocation by Boza ("I know where Billy lives") that (given Boza's knowledge of George's house and family) alarmed George concerning the safety of his family. Moreover, the employees who were present and heard

[15] Citing *Milk Wagon Drivers Union v. Meadowmoor Dairies,* 312 U.S. 287, 293 (1941).

George's emotional warning knew of Boza's provocative remark and heard George warning Boza not to threaten George's family or George would kill Boza. As now Service Manager Holiman describes, George's warning to Boza was all in the nature of, "Stay away from my house and my family." (6:966.)

George's warning of March 3, 1999 to mechanic Walter Boza was defensive in nature, and no words connected the warning to any picketing or other protected activity. George's phrase of "work is work, and personal is personal" is an ambiguous reference. In the context of this record, the phrase simply means: "If you have some problem with me at work, don't try to resolve it by threatening to come out to my home and harm my family." In light of news reports in recent years of employees who (for example) have been fired and then returned to shoot their former supervisors, President George's emotional reaction, while impulsive and excessive, nevertheless was understandable. Later admitting to Boza that he should have gotten all the facts before he flew "off the handle," President George apologized to mechanic Boza. (7:1085.) Had George also apologized to the other mechanics who witnessed George's emotional warning to Boza on March 3, that would have been an even nicer show of class, but, on this record, it was not legally required. I reaffirm my ruling dismissing complaint paragraph 5(f).

4. March 1999—Other incidents

a. March 15—George interrogates Madison Reed

(1) Facts

Complaint paragraph 5(a)(iv) alleges that, in two separate incidents in March or April, President George coercively interrogated employees. According to the briefs, these incidents relate to driver Madison Reed. There is a dispute whether Reed was an independent contractor (driving a taxicab) rather than an employee driving in the Town Car and Limousine Division (TCL). It seems clear that Reed was a full-time driver in TCL during the relevant time, and had been for several months, from about April-May 1998 to about the same time in 1999. (4:582, 641–642.) While no taxes were deducted from his paycheck during the time he drove for TCL, and he received no W-2 tax form, neither did he receive a Form 1099 [for independent contractors]. Management apparently admitted to him its concern that income taxes had not been withheld, and that if he did not pay the taxes, MTSI would have to do so. (4:656–657.) The record could have been better developed by introducing copies of the pay records to help make matters a little clearer. The fact remains, however, that it was MTSI's burden to prove that this worker was not a statutory employee. MTSI failed to discharge this burden. Accordingly, I find, that during all relevant times here, Reed was a statutory employee.

By its letter of (Friday) March 12, 1999, the Union informed MTSI of 13 more named employees who had been placed on the Union's in-house organizing committee. Of the 13, Reed was the first one named. According to the letter (GC Exh. 9), it was to be sent by fax. Within a couple of days, Reed testified (4:587, 596), he had a conversation with President George. For convenience, I shall use the date of Monday, March 15.

On that Monday, Reed testified, as he was in TCL, George walked up to him and told him that he could not participate in or be a part of the union situation because "You're and independent contractor." Reed said he still would like to help. Stating that Reed was on the Union's organizing committee, George asked if Reed had signed a union card, and Reed said yes. Reed then switched the conversation by asking if George had threatened to kill a man, and that turned the conversation to the Boza incident. (4:587–592, 653, 659–662.)

Denying that he asked Reed whether he had signed a union card, George asserts that, after receiving the Union's letter naming Reed, and others, he told Reed, "Madison, you understand you're not an employee. You're an independent contractor. If you are getting cards signed, they are not going to be valid." (George does not explain where he got that idea.) That ended their hallway conversation. (10:1582–1583.)

Reed's account is detailed, and, except for one aspect, is internally consistent, including a lengthy reference to the Boza matter. George does not specifically deny that they discussed the Boza incident. While I tend to credit Reed's detailed account, one aspect is puzzling. Why would George, who had just received the faxed letter showing that Reed was on the Union's organizing committee, ask Reed whether he had signed a Union card? Although that makes little sense, sometimes people do strange things. Fortunately, we have Reed's pretrial statement (R. Exh. 5), received (over the General Counsel's objection) simply to show context for matters asked about. (4:663–664.) The answer appears there in Reed's pretrial account at page 3 paragraph 7. It even clarifies George's mistaken view that, as an independent contractor, any cards Reed got signed would not be valid. Thus, the affidavit shows that George told Reed he could not be involved "in the organizing committee" because Reed was an independent contractor. That has more logic to it than saying any cards Reed obtained would be invalid. After the statement that Reed could not be involved on the organizing committee because he was an independent contractor, the statement continues (R. Exh. 5 at 3):

> I told him I didn't know what he was talking about. He said I was on the in-house organizing committee. I didn't know I was on the in-house organizing employee. He said I signed a card [said I must have signed? Asked if I signed?] and I said yeah I signed a card and I would like to help.

Reed's pretrial statement (R. Exh. 5), dated August 25, 1999, actually is the result of a telephone interview conducted several weeks earlier, on July 14, and the unsworn statement was mailed with the Board agent's transmittal letter (GC Exh. 45) of the same date. (4:629–630.) Reed's pretrial statement (R. Exh. 5), of six typed pages, contains closing lines that Reed has read the statement, understands the contents, and states "under penalty of perjury that the foregoing is true and correct." Although not an affidavit, Reed's pretrial statement is the statutory (28 USC § 1746) "Unsworn declaration under penalty of perjury."

Other than the one glitch (right at the point, unfortunately, where George probably either tells Reed that he must have signed, or he asks Reed whether he signed), Reed's pretrial account possibly makes more sense than the testimony because the mid-July time frame was closer to the event described than

was his September testimony and George's October testimony. Reed's pretrial statement (R. Exh. 5) was not offered for impeachment as to this aspect, nor was it shown to Reed to refresh his recollection and to help him give a more accurate version of what actually was said on this point by him and George that March 15.

(2) Conclusions

In crediting Reed concerning this March 15 conversation about the union card, I do so as modified by the context of Reed's pretrial statement. Thus, the context shows that George's question about the card signing was a natural response to Reed's statement to George that Reed did not know what George was talking about and, apparently, Reed saying that he did not know that he was on any union organizing committee. Quite naturally anyone then either would have stated, "Well, you must have signed a card," or asked, "Didn't you sign a card?" In short, George was simply making his statement or asking the card question only by way of an explanation as to how Reed's name was on the Union's fax, or even the beginning of an inquiry (had Reed's answer been that he had not signed) into whether the Union was mistaken, or worse, about Reed's having authorized it to place his name on the in-house organizing committee. In any event, it was not an interrogation seeking to determine whether an employee, with no announced position about the Union, was a union supporter. I therefore find no merit to the allegation about the March 15 interrogation.

[Given the context provided by Reed's pretrial statement, one has to wonder how NLRB Region 17 concluded that the exchange constituted a violation of the Act and included it in the complaint. Even more in point, one has to wonder why the prosecutor did not show Reed his pretrial statement, to refresh his recollection, so that he could correct his garbled trial version of the card-signing question. This episode does not do either NLRB Region 17 or the prosecutor proud.]

But even if President George's question about the card signing should be considered without the benefit of the context provided by Reed's pretrial statement, so that the question possibly can be termed somewhat intrusive, I still find no violation. There was some factual basis for George to think that Reed was an independent contractor. Any question by George about signing a card was in the context of the position George expressed about independent contractor status. The circumstances indicate that the one question would not reasonably have been viewed as coercive. *Beverly Enterprises,* 322 NLRB 334, 344 (LPN Pickus) (1996), enf. denied 139 F.3d 135 (2d Cir. 1998); *Piezo Technology*, 253 NLRB 900, 910–911 (1980). Accordingly, I shall dismiss complaint paragraph 5(a)(iv) respecting the first incident alleged.

b. March—Chris Dowd interrogates Russell McIntosh

(1) Facts

In March 1999 Russell McIntosh Jr. drove wheelchair vans in MTSI's Special Services Division working under the supervision of Internal Director of Operations Christopher R. Dowd. (8:1295; 11:1800, 1816–1817.) Dewey Bird, McIntosh's cousin, drove for MTSI's TCL Division. Bird supported the Union. (8:1301.) Although McIntosh solicited and distributed cards for the Union, and signed a Union card about February 26, he never wore any union insignia. (8:1301, 1317–1318.) Some time in March, McIntosh asserts, he was conversing with Bird in the Special Services office. Bird was wearing his Union hat and Teamster's jacket. As the conversation ended and Bird walked away, Dowd called McIntosh into the conference room. With just Dowd and McIntosh present, Dowd asked whether McIntosh had been talking to Bird about the Union. McIntosh replied that Bird was his cousin and that he therefore could talk with him about any topic. Dowd told McIntosh not to get involved in the Union because "Billy" [George] gets upset when he finds out people have been talking with Union people. That ended the conversation. (8:1302–1303.)

At least once a week (no time frame given), McIntosh further testified, Dowd would call McIntosh into his office and ask McIntosh what he thought about the Union, and how McIntosh thought the Union would help the employees.[16] McIntosh would reply that the Union could help in various ways. Dowd always would mention that George gets upset when the employees talk about the Union. McIntosh took Dowd's comments as trying to discourage him from supporting the Union. (8:1304–1305.)

Dowd denies that he ever talked with McIntosh about the Union, and he specifically denies the asserted post-Bird conversation—"No, we never had a conversation like that." (11:1812–1813.)

(2) Conclusions

McIntosh testified credibly and in some detail respecting the Bird-related conversation. Although his account of the other impromptu meetings (offered to show knowledge) had little detail, his testimony sounded persuasive. The "knowledge" conversations are plausible in that they show Dowd attempting, to some extent, to dissuade McIntosh (who, as not an open advocate of the Union, could have been perceived by Dowd as an employee he might could dissuade from supporting the Union). Given the threatening portion (that George gets upset about conversations between employees about the Union) of the post-Bird conversation, Dowd's mid-March interrogation of McIntosh on that occasion reasonably would be perceived as having an ominous quality to it, a quality calculated, I find, to discourage McIntosh from deciding to support the Union. Accordingly, I find that, by his interrogation of Russell McIntosh in mid-March concerning whether he was talking with a fellow employee about the Union, Manager Christopher Dowd violated Section 8(a)(1) of the Act, as alleged by complaint paragraph 5(a)(v) (first incident).

c. Mid-March—Valerie Matula interrogates David Lindgren

(1) Facts

Complaint paragraph 5(i) alleges that, in two incidents, Managers Pam Reitmeyer, in early May, and Valerie Matula,

[16] The General Counsel offered this portion to show company knowledge in relation to the discharge allegation, complaint paragraph 6(k), treated later. (8:1304.)

about mid-March (the second incident alleged), threatened to cut employee wages if the Union were voted in. MTSI denies.

In March 1999 Valerie Matula was the General Manager for MTSI's KCI Shuttle service (transportation between the Kansas City International airport and area hotels), and she also supervised MTSI's customer service representatives. (12:1910.) David Lindgren was a shuttle driver (5:814; 12:1910), and his fiancée, Donna Smyers (3:559; 5:886), a ticket agent (3:548)—a Customer Service Representative (CSR) (5:818)—at the airport.

About mid-March driver Lindgren, having just completed his shift, stepped to the smoking area just outside the drivers' ready room of the main garage. The time was around 3 p.m. to 3:30 p.m. Manager Matula, also a smoker (12:1915), was there talking with another person. Lindgren lit his cigarette. In a few moments, Matula completed her conversation with the other person and then came over and began a conversation with Lindgren. Although the first topic the two talked briefly about was the health of CSR Donna Smyers, Matula switched from that topic to the union matter by stating that she opposed having the Union come in. If the Union were to come in, Matula said, the pay for the CSRs would be reduced from $8 an hour to $6 an hour. Matula said that would create a lot of problems with retaining her present staff and in attracting any new employees. Lindgren just listened. Matula added that George had told her this. Matula did not elaborate on how or why such a pay cut would occur. Lindgren denies that Matula said her comment was based on the contract the Teamsters had in Houston, and that if that contract were adopted in Kansas City then the result would be a reduction in pay for the CSRs. (Indeed, Lindgren asserts, the Teamsters contract did not surface in Kansas City for another 2 to 3 weeks, and he did not obtain a copy of it until after his April 1 discharge.) The short conversation ended when Matula left to attend a meeting. (5:816–819, 884–887.)

Although Matula briefly denies (12:1910, 1918) Lindgren's accusation, on cross and recross-examination she acknowledges several points, or related points, that confirm, in part, Lindgren's version: (1) That she is a smoker; (2) that she spoke with Lindgren in the smoking area of the main garage in mid-March; (3)that Donna Smyers had health problems; (4) that Matula has spoken with Lindgren about Smyers' health problems; (5) that turnover among CSRs has been high; (6) that if the Union came in and pay were reduced there would be greater difficulty in retaining CSRs; (7) that Matula has discussed with Assistant Shuttle Manager Pam Reitmeyer what impact there would be on the CSRs if the Union came in; and (8) one of Matula's concerns if the Union came in would be the possibility that the pay rates of the CSRs might be reduced. (12:1915–1919.)

(2) Conclusions

Lindgren testified with specificity, with a natural flow, and with a favorable demeanor. By contrast, Matula was unconvincing. except as she acknowledges the specifics supporting Lindgren's account. Crediting Lindgren, I find that his mid-March conversation with Manager Matula occurred as he describes.

Arguing (Br. at 22) that complaint paragraph 5(I) should be dismissed, MTSI contends, in part, that no violation occurred as alleged because any remark Matula made was isolated and there is no proof that she had the power to implement the alleged threat.

Respecting MTSI's argument as to Matula's remarks being "isolated," the short answer is that the statute does not excuse threats that are "isolated." If the threat is unlawful, then, isolated or not, the violation must be remedied. As for the lack of power argument, MTSI's remarks here were not that she was going to reduce the pay rates, but that, as she went on to explain, President George had informed her (5:818–819) that such would be the result if the employees brought in the Union. MTSI does not question George's power.

Even if Matula actually mangled a lawful explanation of the collective bargaining process as given by George in a meeting with his managers (as possibly happened), what counts is what Manager Matula said to employee Lindgren, regardless of whether Matula mangled the information she had received from George. See *Flamingo Hilton-Laughlin*, 324 NLRB 72, 113 (Paragraph 10ee) (1997), enfd. in part, remanded on other point 148 F.3d 1166 (D.C. Cir. 1998). Accordingly, I find that MTSI, by Manager Matula's mid-March remarks to driver David Lindgren, threatened employees with a reduction in their wage rates if they brought in the Union, and thereby violated Section 8(a)(1) of the Act, as alleged by complaint paragraph 5(i).

d. March 18—George threatens to cut hours

(1) Facts

Complaint paragraph 5(j) alleges that, about March 18 or 19, President George threatened to cut employee hours if the Union were voted in. MTSI denies.

On March 18 and 19, 1999 (Thursday and Friday) George conducted mandatory meetings with the TCL Division drivers, with two meetings being on that Thursday, and one being on that Friday. George taped the Friday (12:1898) meeting. (R. Exh. 21; 2:195; 10:1577, 1580; 12:1898–1899.) A transcription (R. Exh. 20) of the tape is in evidence. (12:1897.) The implication is that George delivered substantially the same speech to each of the three groups, apparently then taking questions after his main talk. (The record does not show whether George used a prepared text or notes for his main talk.)

Before the tape and the transcript were in evidence, the General Counsel called George under FRE 611(c) and, at one point, asked him about some of the remarks about overtime and part time employees in his speech. (2:295–296.) The General Counsel cites these remarks, along with the tape and the transcript. (Br. at 21.) In its reply brief (Reply at 5–6), MTSI contends that remarks (about overtime and hours) have been taken out of context by the General Counsel, with the proper context shown in the transcript, especially at page 6.

The General Counsel makes no contention here (and made none at trial) that the Government is relying on statements that George made either before or after the tape recording, or that the tape recording is defective. Indeed, after the General Counsel listened to the tape, the parties, including George while a witness, made changes in the transcript. The transcript in evi-

dence (R. Exh. 20) is the revised version following that correcting process. (10:1579, 1582; 12:1892–1897.) Accordingly, as the transcript (being an agreed substantially correct reproduction of the tape's text) reflects the actual statements George made at the meeting, I shall focus only on the transcript of George's remarks, and I shall disregard George's testimonial description (2:295–296) of what he said in the speech about overtime and hours.

The transcribed remarks (R. Exh. 20) reflects that, somewhat past the midway point of his main speech, George addressed the theme of the competitive nature of the type of personal transportation business of MTSI's industry. After giving specific numbers for hourly rates and the amount charged to customers for an average Town Car trip, George asked the driver how the small difference left over would pay a rumored $13 per hour that Teamsters drivers were receiving. George told the drivers that MTSI was at the top of the market in pay and benefits for drivers, but that many of MTSI's competitors were mom and pop operations (husband driving, has a car phone, and wife does the billing), and "that's who were competing against." And (R. Exh. 20 at 5):

> All of the propaganda that keeps coming back that we're going to get this, get that, someone needs to sit down and say wait a second. If we're all charging about the same price, because that's what competition dictates in this market, and this company is at the high end of the wage scale and the high end of the benefit package, can somebody explain where this magical union mathematic formula comes to cause all of the sudden everyone's going to get paid more.

Turning to the topic of overtime, the General Counsel asserts that George told the drivers that if the Union got in and managed to obtain overtime pay for the employees [translated, that means through collective bargaining], "rather than pay overtime, the Respondent will just cut the employees' hours, and bring in part time employees to work evenings and weekends." "This was a serious threat to the livelihood of these employees. Much of their work is in the evenings, " and they "rely heavily on gratuities." (Br. at 21.) [Of course, this argument would amend the allegation, shifting the focus of the complaint paragraph from retaliation for an election victory by the Union to the consequences of collective bargaining.]

As MTSI observes, that is not the text of the speech. Respecting overtime, George told the drivers that federal law exempts MTSI's industry from the requirement of paying overtime. Because of this, the drivers can work as many hours as they desire so long as they do not exceed DOT (Department of Transportation) regulations respecting the number of hours.

If MTSI were to agree [during the collective bargaining process, it is implied] to pay overtime, "which I can tell you we wouldn't," then part time drivers could be hired so that no one would work more than 40 hours.

(2) Conclusions

The short answer here is that no evidence even addresses the allegation—retaliation because of an election victory by the Union. On that basis, I dismiss complaint paragraph 5(j). However, should it be deemed proper to address the evidence, I shall do so.

As MTSI points out, George said that MTSI, already exempt under the law from having to pay overtime, would not agree to pay it. But if (during the collective bargaining process) MTSI did agree to pay overtime, it would not mean that the drivers would continue with their same hours, with over 40 hours to be paid at time and one half. Instead, under (it is implied) collective bargaining, while the drivers would get premium pay for any hours over 40, nothing required that MTSI work the drivers more than 40 hours a week. Moreover, to avoid overtime pay so as to remain competitive," MTSI simply would hire part time drivers to work evenings and weekends after their regular jobs (when most part-timers would be needed), and have MTSI's drivers work the day shift.

George was not making some threat to cut hours in retaliation for the Union's possible ability to persuade MTSI to grant overtime pay for all hours over 40. Rather, George, after describing in detail MTSI's need to remain competitive, simply pointed out that if (contrary to MTSI's position of no overtime) the Union persuaded MTSI to agree to overtime pay, then, in effect, that extra cost would have to be offset in order for MTSI to remain competitive. Thus, the potential extra cost of overtime would have to be offset by hiring part time drivers while maintaining the hours of all drivers below the triggering point (over 40 hours) for the premium rate of overtime. There is nothing unlawful with an employer's so advising its employees. *Radio Broadcasting Co*., 277 NLRB 1112, 1123 (1985), enfd. mem. 802 F.2d 448 (3d Cir. 1986); *Morse's Foodmart of New Bedford,* 230 NLRB 1092, 1099 (Burgess/Moniz mid-December) (1977).

Finding no unlawful threat to reduce hours, whether as alleged or as discussed, I shall dismiss complaint paragraph 5(j).

e. March 22—Rodney Saxton fired

The second person named in the complaint as having been unlawfully fired is (in date order) Rodney Saxton. It is alleged that he was unlawfully suspended on March 22 and illegally fired on March 25. I cover the discrimination allegations later.

5. April 1999

a. President George and driver Madison Reed

(1) Facts

Recall that George and Madison Reed had a conversation on Monday, March 15. I now cover the second interrogation alleged in complaint paragraph 5(a)(iv). Reed testified that the second incident occurred about a month after that of March 15, or about April 15. (4:593–594, 596.) This second interrogation, earlier deleted from the complaint (1:9), later was restored over MTSI's objection. (4:596–602, 630–631.)

On this April 15 occasion Reed was called to George's office. Reed asserts that when he entered, George rose and remained standing (as did Reed) during their conversation. Just George and Reed were present. George began by saying that Reed had been distributing union cards at the Conoco station. Reed denied the accusation. George then called Reed a "lying cocksucker," and said that Reed would have to make up his mind whether he wanted to work in TCL or to drive a taxicab.

(4:594, 602–603, 647–649, 658.) On the latter statement, about making up his mind, Reed at first denies (4:649) that George said anything about Reed's getting on the payroll. He then concedes (4:649–650) that in his pretrial statement (R. Exh. 5 at 4) he reported that, "George told me that I had to make up my mind if I wanted to be a cab driver or if I wanted to work in the Town Car Limo department and get on the payroll. I had been wanting to get on the payroll and I told him I would like to be in the Town Car Limo department."

George does not address this specific event, other than to deny ever having called Reed a "lying cocksucker." (10:1583.)

After this April 15 conversation with George, Reed began the application process to become, on MTSI's books, a regular employee of TCL. He first aborted the process when he decided that he perhaps could not pass the physical examination. (4:603, 651–652.) Later he took the exam and passed. Even so, as of the trial he was a taxi driver. (4:577, 603.) It appears that Reed, apparently after he passed the medical examination, renewed his application to be a TCL employee, but that his application was denied. It also appears that in Reed's opinion he was rejected because he is black. As of the trial, Reed had not filed a racial discrimination charge with the EEOC against MTSI. (4:636–638; R. Exh. 5 at 4–6.) Reed concludes the text of his pretrial statement by expressing the opinion that MTSI is still refusing to hire him in TCL "because of my Union activities; "and that, therefore, "I was forced to drive a cab because of my Union activities." (R. Exh. 5 at 6.)

(2) Conclusions

Recall that Reed drove exclusively in TCL for about a year, from April-May 1998 to April-May 1999. (4:577, 641–642.) On this April 15 occasion, it was Jeff Brown, the TCL supervisor (4:577) who called Reed and instructed him to report to George's office. (4:594.) Respecting the independent contractor issue, I find, as I did respecting the situation as of March 15, that Reed, as of April 15, 1999, was still driving exclusively for TCL even though he was not officially (on the Company's personnel and payroll records) an employee of TCL. Accordingly, I find that MTSI has failed to show that, as of the April 15, conversation, Reed was in independent contractor rather than a statutory employee.

As for the April 15 conversation itself, I generally (but not entirely) credit Reed's version respecting the cards and Conoco over George's extremely brief denial. Observing that Reed's asserted question about the rumor that George would not pay blacks what he pays whites is a poor fit in the sequence (Reed did not initially include it, and it is not included in his pretrial version, R. Exh. 5 at 4), I find Reed did not ask that question of George or that George supposedly did not answer. (George impressed me as a person who would never be at a loss for words, particularly in defending his actions or motives.)

On the relevant point, however, Reed was clear and detailed (including his summons and the undenied fact that Reed was not invited to be seated). Moreover, the obscenity which Reed attributes to George is consistent with George's tendency at times to lean on the handy crutch of vulgarities rather than to activate his mental cyberspace to call up, select, and express language that is both tasteful and tactful.

Accordingly, I find that, on this occasion, President George accused then TCL driver Madison Reed of distributing union authorization cards at MTSI's next door Conoco station. While such an accusation, in some circumstances, could be a threat, here it appears to have been an accusation with the expectation of an answer. That is, the accusation served as a question—an interrogation. Reed denied the accusation.

The Government alleges this interrogation to have been unlawful. Aside from its arguments of no violation, because Reed was an independent contractor, and that Reed should not be credited, MTSI contends (Br. at 11), that even if Reed is credited there is no violation because George lawfully could ask a known union organizer if he had been passing out cards.

An employer is not free to coercively interrogate open union supporters concerning their reasons for supporting a union. *Beverly California Corp*., 326 NLRB 153, 157 (1998). Here, Reed had been summoned to President George's office. Only George and Reed were present. Rather than attempting to give the meeting a casual air, George deliberately kept it super formal—even penal (as if Reed were a prisoner brought to stand before the warden)—by standing as he addressed Reed with accusatory language, "You have been over at the Conoco handing out authorization cards." Although the purpose of George's inquiry here appears to have been about the same as the March 15 incident, to advise Reed that it was a waste of time for him, as an independent contractor, to be getting union cards signed, the circumstances here are substantially, different. And these different circumstances (summons, president's office, penal atmosphere, and accusatory to on the interrogation) all lead to the conclusion that the interrogation would reasonably to coerce employees in exercising rights protected by the Act. Accordingly, I find that, by President George's interrogation of driver Madison Reed that April 15, 1999, MTSI violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(a)(iv) (second incident).

b. Chris Dowd and mechanic Thomas Houle

(1) Facts

Complaint paragraph 5(a)(vi) alleges an April interrogation by Internal Director of Operations Christopher R. Dowd. MTSI denies. The supporting testimony was given by mechanic Thomas Houle who, in the time relevant here, was a mechanic for the wheelchair vans in the Special Services Division. (6:973) Recall that Director Dowd was in charge of the Special Services Division (SSD). (11:1800, 1816.) Recall also that Houle is one of the four employees named on the Union's first letter (GC Exh. 6 at 3) to MTSI, and received (per stipulation, 1:61–62) by MTSI on March 2.

One morning in about April, Houle testified, Dowd and he were discussing "what was going on with the wheelchair vans at that time." As soon as they completed that topic, Dowd, it is asserted, "commenced asking why we thought we needed a union." While he cannot recall his precise answer, Houle states that essentially he answered with the question of why was George so adamant about not having a union. To this Dowd replied that at no time would George allow a union to come into the shop. As Houle recalls, nothing else was said. (6:979–980.)

Dowd denies the question and the threat. In fact, Dowd asserts that he and Houle do not talk about nonwork items, and that they would never discuss union matters. "We don't talk. I say good morning to him and he doesn't say anything to me." "If I talk to him it is strictly about a mechanical problem, showing him what is wrong with a vehicle." Although asked, Dowd never explains how it came about that he and Houle speak only in relation to mechanical problems. (11:1811–1812.)

For his part, Houle generally agrees with Dowd's assessment, but Houle makes a distinction between work and nonwork matters. Respecting the former, Houle freely acknowledges (6:1032, 1037) that: (1) virtually on a daily basis (6:1037–1038) he and Dowd have "butted heads" respecting job procedures and mechanical problems; (2) he considers Dowd, as a manager, to be a "complete asshole" (6:1037–1038); and (3) he has told other employees that (6:1038) he would like to see Dowd fired because Dowd tries to control the whole company by sticking his nose into work affairs that are outside the jurisdiction of his position. As for nonwork matters, or pertaining to Dowd as a person, Houle has not had these problems with Dowd. (6:1037–1038.)

On March 15 Dowd issued a "Written Warning" (R. Exh. 10) [not attacked in the complaint] to Houle for using, 2 days earlier, "profanity on the radio"—"what's this shit with 725." This was one of those occasions, Houle explains, where he and Dowd had argued over work matters, and Houle had lost his temper and slipped as to the one word. (6:1024, 1032.) As Houle credibly reports (6:1030–1031), however, the use of profanity over the radio was not uncommon, and before the union activity no instructions were given not to do it and nothing was said about it when profanity was used. About late August 1999, after a driver reported over the radio to Dowd that a van would not be repaired in time, Dowd said, over the two-way radio, "Tell the mechanics down there to pull their heads out of their asses and get me some fucking vans out." (6:1035-1036) Such communications are heard by the mechanics over the radios in the vehicles. (6:1030, 1034.) By comparison, the Charter Division's January 1999 handbook of policies and procedures for its drivers provides (GC Exh. 12 at 22):

> Cursing over the radio will [be] dealt with harshly and promptly. If you cannot control yourself or your language on the radio, then this is not the job for you.

Dowd's obscene blast (both insulting and hypocritical) did it for Houle who then transferred to the Trolley Division. (6:973, 1035.) The record does not reflect whether Dowd received a written warning, or other discipline, for his use of obscenity over the radio.

(2) Conclusions

Both Houle and Dowd testified rather extensively, covering a variety of topics. (Oddly, the General Counsel had no (6:1003) written pretrial statement from Houle, a major witness.) Whatever their credibility on other topics, both witnesses testified with a favorable demeanor as to this matter. From the standpoint of plausibility, either account could be believed. I have considered the other matters, such as the written warning (R. Exh. 10) of March 15 from Dowd to Houle. The fact of that warning could be interpreted to reflect adversely on the motives of both witnesses (resentment as to Houle, retaliation for union activities as to Dowd). As a factor in weighing credibility, therefore, the March 15 warning is a wash.

Where the evidence on an issue is in equipoise, the party loses that has the burden of persuasion on that issue. That party here is the Government. The bottom line is that, in a situation of this type, the party with the burden of persuasion on the issue should offer some additional bit of evidence to carry the issue rather than simply relying on its witness to win first place in the "I said" and "He said" beauty contest, or arguing that the opposing account is simply not plausible. That additional something could have been some corroborating evidence that Houle and Dowd have discussed nonwork matters before. Although Houle implies that he and Dowd talked, at least briefly, about nonwork matters when Dowd sometimes would bring in his car and work on it on a Saturday (6:1037–1038), no specifics are given. A witness to any such conversations would have corroborated Houle. Similarly, testimony by another mechanic who worked in the area next to Houle could have, if true, testified that he has seen Dowd walk by in the mornings, that Dowd would say "Good morning" to Houle, that Houle replied in kind (Dowd asserts, 11:1812, that his "Good mornings" to Houle would evoke no response), and that he heard them, on several occasions, talking about the weather and sports, but that when they talked about mechanical matters, they usually argued. These examples certainly do not exhaust the possibilities. There was no corroborating testimony. As the "something more" is missing here, I shall dismiss complaint paragraph 5(a)(vi).

Complaint paragraph 5(a)(v), alleges "at least two" interrogations by Dowd in "March or April." The March interrogation, involving Russell McIntosh, has been addressed earlier. The April incident is not treated by the parties on brief, and either the Government's witness did not show (no supporting evidence presented), or the allegation duplicates complaint paragraph 5(a)(vi). In either event, I now dismiss complaint paragraph 5(a)(v) as to the alleged April interrogation by Director Dowd.

c. April discharges

The complaint alleges three April discharges to be unlawful—David Lindgren about April 1, Joe Webster on April 23 (after suspension on April 16), and Dale Speelman on April 27. I cover the discrimination allegations later.

6. May 1999

a. Pam Reitmeyer and CSR Donna Smyers

(1) Facts

Complaint paragraph 5(i) alleges that, about early May, KCI Shuttle Assistant Manager Pam Reitmeyer (name misspelled at this point in the complaint) threatened to cut employee wages if the Union were voted in. MTSI denies. The Government's supporting witness was Customer Service Representative (CSR) Donna Smyers who works for Reitmeyer who in turn reports to KCI Shuttle General Manager Valeria Matula. (3:548; 12:1907–1908.)

Smyers asserts that at work she and Reitmeyer are friends. (3:559, 561–562.) In early May, Smyers testified, she went to Reitmeyer's office to make some copies. (3:549, 562, 570.) During the 10 minutes or so that Smyers was there, she and Reitmeyer engaged in some small talk ("chit-chatting") about their children, work, and other aspects of life. (3:550, 562–564, 568–569.) No one else was present. (3:570.) Although she does not recall how the topic arose, Smyers recalls that Reitmeyer brought up the subject of the Union. Reitmeyer said that, "Off the record," if the union [vote] passed, "our salary" [presumably a reference to the pay of the CSRs] would be cut back to $6.50 per hour. (3:550, 563.) Smyers, who at the time was earning $9 per pour (3:560–561), out of concern said, "I hope not." (3:550.) When Reitmeyer said "Off the record," Smyers simply listened. (3:563, 567, 569.)

Smyers denies that Reitmeyer said anything about a Houston contract between Coach USA and the Teamsters in which, apparently, the CSRs in Houston are paid $6.50 per hour, and that if MTSI agreed to such a contract the new rate for MTSI's CSRs would be $6.50 per hour. (3:564.)

Smyers also describes a similar conversation held with Reitmeyer about mid-May in the breakroom. (3:550–552, 562.) Another CSR, whose identity Smyers cannot recall, was present. (3:550, 569–570.) This brief "5-minute conversation" occurred as Smyers and the other two were about to leave to begin work for the day. (3:565, 569.) On this occasion, Smyers testified (3:550–554, 565–566, 569), the conversation again was small talk about such matters as their general health. Again Reitmeyer brought up the union matter by saying that if a union did pass that the CSRs' pay would be cut back to $6.50 per hour. This time Reitmeyer added that there had been a meeting (no date specified) at George's office, attended by George, KCI Shuttle General Manager Matula, Reitmeyer, and possibly another, in which George had stated that if a union did pass, that the pay of the CSRs would be cut back to $6.50 per hour. As with the office conversation, Smyers denies that, in this mid-May breakroom conversation, Reitmeyer said anything about a Teamsters contract with Coach USA in Houston, and that if MTSI were to agree to the terms of that contract then the CSR pay rate would be $6.50 per hour.

In describing this mid-May breakroom incident, Smyers does not quote Reitmeyer as prefacing her remarks with, "Off the record." Later Smyers does count this incident as one of only two "off the record" conversations she has ever had with Reitmeyer (3:568), and then suggests, from the nature of the question (3:569), that Reitmeyer also, in the breakroom conversation, prefaced her union remarks with "Off the record." Accordingly, I find that, in describing both occasions, Smyers quotes Reitmeyer as prefacing her union remarks with the opening phrase of, "Off the record."

In her very brief testimony on the topic of the alleged threat, Reitmeyer denies the threat described in both conversations, although she does not deny having conversations as such on the two occasions described by Smyers. (12:1906–1907.) On cross examination, the Government established that Reitmeyer attends meetings downtown with Matula, and that, on occasion, George attends those meetings. (12:1908.) Then asking the proverbial "one question too many," the General Counsel further established that Reitmeyer had not personally attended any (management) meetings where the Union had been discussed. (12:1909.)

It would be strange if Reitmeyer, as an admitted supervisor, had not been included in any management meetings where the Union was discussed. Typically, an attorney is brought in to educate the supervisors on the "Do's and Don'ts" of a union organizing campaign. In fact, however, there is no record evidence that MTSI ever had such educational sessions for its managers and supervisors.

(2) Conclusions

CSR Donna Smyers testified favorably and, except for one point, I generally credit her as against the brief denial given by Assistant Manager Reitmeyer. The one exception is the part in Smyers' account of the mid-May breakroom conversation where she quotes Reitmeyer as saying that Reitmeyer was present in the downtown meeting when George allegedly said that if the Union came in then the pay for MTSI's CSRs would be cut back to $6.50 per hour. As noted, Reitmeyer testified—and favorably, I find—that she personally did not attend any meetings in which the Union was discussed. Accordingly, I find that Reitmeyer, in making what would be a threat, was conveying what General Manager Matula had told her about the meeting with George, and that Smyers, misunderstanding, thought that Reitmeyer had said that, contrary to fact, she was present at the meeting.

Respecting the early May incident in Reitmeyer's office, MTSI argues no violation because Reitmeyer's remarks were "casual" in nature and, in any event, and citing *NLRB v. Champion Laboratories,* 99 F.3d 223 (7th Cir. 1996), as she had no power to implement such a threat, there could be no violation. As to the nature of the conversation, the fact that Reitmeyer wanted her remarks to be "off the record" show, by definition, that her subsequent remarks were not considered either by her or by Smyers as casual. Reitmeyer wanted her remarks to be held in confidence. Failing to obtain any such pledge of confidentiality from Smyers, Reitmeyer plunged ahead, thereby assuming the risk that Smyers might report her comments. Finally, the context of Reitmeyer's remarks reveal an absence of any joking or bantering between friends. Indeed, Smyers merely listened.

As for the factor of no power to implement the threat, MTSI labors under two misperceptions. First, in citing *NLRB v. Champion Laboratories*, MTSI actually refers to the Respondent's position there. The Court held otherwise. See 99 F.3d 223 at 228. Second, in arguing that the General Counsel failed to show that Reitmeyer herself had power to reduce wages, MTSI confines its reading of the allegation to the latter portion while forgetting that the preamble states that the principal is MTSI. Thus, the threat alleged, and the threat uttered, is not that Reitmeyer herself would cut wages, but that MTSI would do so.

It is clear, and I find, that MTSI, acting through its supervisor and agent Pam Reitmeyer in early May 1999, "threatened to cut employee wages if the Union" were voted in. By so threatening, MTSI violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(a)(i) (incident of early May 1999).

It matters not that the message (threat) which Reitmeyer conveyed very likely was a garbled version of a perfectly lawful explanation by George to his managers about the collective bargaining process and what would happen if MTSI adopted the Houston contract. MTSI had the obligation to make sure (by written handouts, if necessary, as well as by oral instructions) that its managers and supervisors understood any explanation given to them about the collective bargaining process. As Poor Richard might observe, "Well done is better than well said." *Poor Richard's Almanack 1737* (Benjamin Franklin, Writings, The Library of America, 1987, at 1205).

Turn now to the breakroom incident of mid-May. Smyers testified favorably and I credit her account as against Reitmeyer's terse (12:1907) "No." Although the breakroom conversation of mid-May appears to have been slightly more casual than the office conversation in early May, nevertheless, Reitmeyer prefaced her union remarks with, "Off the record." Clearly the situation here was not similar to the joking and bantering context as described by the Court if *NLRB v. Champion Laboratories,* 99 F.3d 223, 229 (7th Cir. 1996). Under all the circumstances here, including the fact that in her mid-May remarks Reitmeyer specifically identified President George as the source of the threat, ordinarily I would find that MTSI, if so alleged, had violated Section 8(a)(1) of the Act.

The procedural question is whether this second incident, the mid-May threat, is covered by an allegation. When Reitmeyer first mentioned the mid-May incident, MTSI objected. (3:551.) Observing that NLRB Region 17's practice is to give a parenthetical notice if there is more than one incident for an independent 8(a)(1) allegation (3:530, 551), as is reflected several times with the instant complaint, the General Counsel conceded that, on this occasion, that had not been done. Even so, the General Counsel argued, the mid-May incident was encompassed within complaint paragraph 5(a)(i) [which simply alleges the threat, as if singular, in "Early May, a more precise date being presently unknown to the General Counsel."] and paragraph 5's preamble. The pertinent clause of the preamble provides, "On or about the dates in 1999 set forth below . . . ." (3:551–552.) Buying that argument, I overruled MTSI's objection. (3:552.)

On reflection, I conclude that I made a bad purchase. The allegation describes a threat arising from, so far as the English language indicates, a single incident that occurred in about "Early May." Had Smyers described only one incident with a mid-May date, rather than an early-May date, there would be no problem because the "on or about" clause of the preamble would save the allegation. Instead, a second incident was added to the evidence—over MTSI's objection—without even the benefit of a motion by the General Counsel to amend complaint paragraph 5(a)(i) by adding either "(Two separate incidents")" or, more accurately, "and again in mid-May."

Because I purchased tainted goods, my action of overruling MTSI's objection denied MTSI due process. It cannot be said that my error was harmless (that is, that MTSI's cross examination was thorough and because Assistant Manager Reitmeyer did not testify for another month), for the fact remains, there is not now, and there never was, a pleading to support the evidence of this mid-May incident. The matter was not tried by implied consent, for MTSI objected. (MTSI cannot be faulted for failing to persist in objecting. One objection is quite sufficient.) Accordingly, as there is no pleading to support the mid-May incident, and as the matter, tried over MTSI's objection, was not litigated by implied consent, I shall not make a finding (as I would were there a supporting pleading) that, on this mid-May occasion, MTSI violated Section 8(a)(1) of the Act by threatening to cut employee wages if the employees voted in the Union.

It also is immaterial that MTSI has not reurged its objection on brief, or that, in fact, it has not articulated its objection. I see the error, and recognize it as prejudicial error, and that is enough. Although this is not a criminal case, and I am not the prosecutor, the spirit of the American Bar Association's 1908 original[17] Canons of Professional Ethics, Canon 5,[18] has compelling moral force: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done." To similar effect, see *Berger v. U.S.*, 295 U.S. 78, 88 (1935) (". . . not that it shall win a case, but that justice shall be done.") (Sutherland, J.).

b. Chris Dowd and Ron Cox

(1) Facts

Two allegations are involved here. The first is complaint paragraph 5(d) which alleges (in the second of two incidents) that, about late May or early June, Internal Director of Operations Christopher R. Dowd threatened to discharge employees because the employees engaged in union activity. MTSI denies. For the same time period, the second allegation, complaint paragraph 5(g) alleges that Dowd threatened "to more closely supervise employees and to impose discipline" because the employees engaged in union activities. MTSI denies. For both allegations, the Government's chief supporting witness was Ronald Lee Cox, a driver of wheelchair vans in SSD. (1:64–65, 84.)

In late May to early June [late May, for convenience], Cox testified, two employees, Richard Newland and Craig DeJanes, handed him a union flyer as he came to work. Cox then entered the building and, after clocking in, was holding the flyer in his hand and proceeded to the counter in the dispatch office where the drivers pick up their route sheets from the dispatcher. At the counter, Cox looked at the paper as he stood just a foot or so away from Dowd. After looking down at the paper, which was open, Dowd looked Cox "in the eye" and told Cox that he could be terminated for "that." (1:67, 71, 84–87, 99.) [While Dowd would naturally look down at a paper that Cox was holding, even if they were the same height, the phrase "looking down" is better understood as a reflection of the different heights of the two men. Dowd appears to be about 6 feet 2 inches, and Cox about 5 feet 7 inches.]

Taking his route sheet, and apparently not responding to Dowd's termination remark, Cox went downstairs and outside to report the incident to Newland and DeJanes. Dowd followed Cox downstairs and, as Cox was talking with Newland and

[17] Preface to *Model Rules of Professional Conduct* (ABA, 1999 ed.).

[18] F.R. Shapiro, *The Oxford Dictionary of American Legal Quotations* 352 (Oxford Univ. Press, 1993).

DeJanes, and writing a memo of the incident, Dowd came up to them. DeJanes told Dowd that he could not fire Cox over this. Cox then proceeded to his van. Dowd followed him and angrily told Cox that he had "started a war" with Dowd, that Dowd was going to write Cox up for everything he did, that the Union might get in but that Cox would not be there, and that the Union could be paying Cox's salary [meaning, presumably, that the Union would have to supplement the unemployment compensation payments] because of this matter. Cox testified that there was nothing unusual in his stopping on the way out to talk a few minutes with Newland and DeJanes, and that employees frequently talk a few minutes about sports, their routes, and other matters. Not only is Dowd aware of the practice, but he often joins in, Cox asserts. (1:67–69, 98–99.) Cox normally arrives about 5 a.m., and usually departs on his route between 5:15 a.m. and 5:30 a.m. (1:64–84.)

A day or two later, Cox advises (1:69, 87–88), Dowd came up to him on the lot where they part the vans and told Cox that "everything is fine" and "I'm not having a war with you." Even so, Dowd did not tell Cox then, or later, that Cox had the right to engage in union activities, and that no reprisals would be taken against him if he exercised that right. (1:69–70.)

KCI Shuttle driver Richard Newland confirms that he and DeJanes were passing out union flyers in the parking lot that morning, and that they talked a bit with Cox when he arrived. (5:746–747, 788–789.) About 10 minutes of so after Cox went inside, he came out to say that Dowd had just threatened him. [MTSI objected to this as hearsay. I discuss this in a moment.] Cox did not describe the threat. Newland and DeJanes told him to document it, and Cox wrote out a note for them to give to the Union. They later submitted the note to the Union. (5:747, 750, 789.)

There is no indication that MTSI subpoenaed the Union to produce any statements given to the Union by the witnesses. Presumably the Union never turned Cox's note over to the Government, for it was not listed by the General Counsel as a pretrial statement being turned over to MTSI for its cross examination of Cox. (1:83–84.) Note, however, that MTSI asked only for all "affidavits," not all pretrial "statements" of the witness. (1:83.)

Dowd came downstairs and told Cox that he should not be there talking with Newland and DeJanes. Cox, apparently still writing at that point, completed his note and then he and Dowd walked away from Newland and DeJanes to where the vans were parked. Newland did not hear what was said between Cox and Dowd over at the van. (5:750–751, Newland)

Denying that he told Cox that he would fir him for reading a union flyer, Dowd acknowledges that he "had a discussion" with Cox as Cox was clocking in because Cox was "passing out literature to drivers as they were going on the routes. Dowd told Cox that he "couldn't do that on Company time."[19] Dowd also told Cox that there could be a written warning and [it] could lead to termination for "causing other drivers to run late on routes." Asked what Cox was doing to trigger the warning, Dowd testified that as John Mason [the dispatcher, 1:85] was passing out routes to the drivers, who had reported to work and had to start their routes to make their 6:00 a.m. pick ups of their dialysis patients, Cox, who already had clocked in, was delaying the drivers from starting on their routes. (11:1810–1811.) Dowd does not address whether he followed Cox outside or whether they had a conversation outside at Cox's van.

(2) Conclusions

Crediting Cox and Newland, who testified favorably, I do not believe Dowd, who testified unpersuasively respecting this matter. (I credit Newland that he and DeJanes did not follow Cox and Dowd over to Cox's van, and I find that Cox was mistaken in that regard.)

Dowd's version is that Cox was distributing literature to drivers in the dispatch office. As Cox had just received a flyer for himself, it seems highly unlikely that he had accepted a bunch more to distribute when he had not even finished reading his own copy as of the time he clocked in. In all, Dowd's rather brief version, which does not specifically address Cox's account of events outside at Cox's van, is not credible.

I attach no weight to Cox's report to Newland and DeJanes outside that Dowd had just threatened him upstairs. The General Counsel argued that the statement should be deemed admissible nonhearsay under FRE 801(d)(1)(B) [consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive], as a prior consistent statement in view of MTSI's denial, in its answer, of the threat (5:747–750), and, in any event, would be admissible because (5:750) it is part of a "larger conversation" that had occurred just a few minutes earlier.[20] Overruling MTSI's hearsay objection, I received the testimony subject to briefing by the parties. (5:750.) As neither party submitted argument or authorities about the matter on brief, I consider the evidence as forfeited.

Briefing would had to have addressed the issues of whether the General Counsel's first ground could apply when Cox was not the witness at the time of the offer, plus the application to the matter of *Tome v. U.S.*, 513 U.S. 696 (1995). Preliminarily, the indications are, were I to reach the matter, that the General Counsel's first ground (not hearsay because admissible as a prior consistent statement) is without merit. As for the second ground (the "excited utterance" exception), I note that it is questionable whether a proper foundation was laid in order to apply the excited utterance exception. With the issue abandoned by the parties, I need make no ruling beyond that of attaching no weight to Cox's "threat" statement.

Respecting the merits of the allegation, MTSI argues (Br. at 15–16) that, regardless of whatever credibility findings I make, no violation occurred because Dowd's reference to the paper was vague and not specifically a reference to a union paper. As Cox's description shows that Dowd looked at the open union flyer in Cox's hand, and then into Cox's eye, it is clear, and I find, that an employee reasonably would have concluded, as did Cox, that Dowd was aware the flyer was a union paper, and that

[19] Cox denies that Dowd told him that he thought Cox was "fooling around and should be working." (1:86.)

[20] Applying a charitable interpretation to this second ground, I assume that the General Counsel possibly means that Cox's report of a "threat" would be an admissible hearsay exception under FRE 803(2) as an "excited utterance."

Dowd's subsequent threat was triggered by the fact that Dowd believed the paper to be a union flyer.

MTSI's fallback position is that Dowd effectively repudiated any threat that was made when, a day or two later, Dowd told Cox that there was no war and that all was fine. (On brief, the General Counsel does not address the repudiation concept.)

In support of its disavowal argument, MTSI cites [without benefit of page numbers] *Action Mining,* 318 NLRB 652 (1995), and *Stanton Industries,* 313 NLRB 838 (1994). But there, unlike here, the respondents met the Board's test for effective repudiation, including (unlike here) informing affected employees that they had a right to engage in union activities and that no reprisals would be taken against them if they did so. As those assurances were not given here, I need not determine whether any other aspects of the Board's repudiation standard, set forth in *Passavant Memorial Hospital,* 237 NLRB 138 (1978), were not met.

Finding no merit to MTSI's defenses, and having generally credited the Government's witnesses on these allegations, I find that, as alleged in complaint paragraph 5(d) and 5(g), MTSI threatened employees with, respectively, discharge, and to closely supervise employees and to impose discipline, all in violation of Section 8(a)(1) of the Act.

c. John Turney and Walter Boza

(1) Facts

Complaint paragraph 5(k) alleges that, about May or June, MTSI, by Maintenance Director John Turney, "Threatened its employees with unspecified reprisals." MTSI denies. Shuttle van mechanic (7:1070) Walter Boza provided the Government's supporting testimony for the allegation. Because Turney, during his testimony, did not address this issue, Boza's testimony is uncontradicted.

In late May, Boza testified, Boza received a job offer for more money from a car dealership. (7:1086.) When Boza picked up his MTSI paycheck, he informed Turney of the offer. [Boza did not specifically state whether he asked Turney for any consideration, but the implication is that Boza asked whether MTSI would give him some kind of raise to keep him from leaving.] To Turney's questions, Boza said that the car dealership was offering him a starting rate of $9.90, and that his MTSI pay was $9. Turney said that, with all that was going on with the Union, he did not know what he could do, but that he would run it by go. Turney then added (7:1087):

> Mr. George is going to do whatever he can to stop the Union from coming in, and I don't know if he'll be able to get this done or if I'll be able to get this done, but I'll see what I can do.

A few days later Turney called in Boza and told him that, with the union organizing going on, he would not be able to give Boza a raise because it would look like MTSI was trying to buy Boza's vote against the Union. (7:1087.)

(2) Conclusions

MTSI argues (Br. at 25) that no violation is proved because Turney's response was too ambiguous to constitute a threat, citing "*Markus Hardware, Inc.*, 243 NLRB [903], 102 LRRM 1353 (1979)." Without the benefit of a jump cite by MTSI, I am unable to ascertain, from the multiple issues covered in *C. Markus Hardware*, 243 NLRB 903 (1979), just which incident or finding it is there that MTSI relies on to support its argument.

The Government (which, on Br. at 21, covers this allegation in two sentences) reduces its argument, theory, and authorities to the 10 words of its heading for the topic—"Threat to do everything possible to keep the Union out." From those 10 words, the General Counsel at least favors us with the portion of the testimony that the Government contends forms the threat of "unspecified reprisals." Unfortunately, we are left to guess at the Government's theory of how the facts fit some legal rule.

Indeed, MTSI's argument, that Turney's response for a pay increase "was too ambiguous to constitute a threat of loss of a benefit" (Br. at 25), reflects MTSI's uncertainty as to what theory the Government is advancing. MTSI has speculated that the Government must be contending that the testimony shows the "threat of loss of a benefit" (rather than the implied promise of a benefit).

Actually, the variance between the allegation and Boza's undisputed account (which I credit) of Turney's statements suggests that the sponsoring witness failed to testify (and that, when the Government rested, the General Counsel should have moved to withdraw the allegation from the complaint). In any event, finding that Maintenance Director John Turney's late May statements (whether taken together or singularly) to mechanic Walter Boza do not constitute a threat of "unspecified reprisals," I shall dismiss complaint paragraph 5(k).

d. May discharge

About May 10 MTSI suspended Russell McIntosh Jr. On May 17 it fired him. I discuss his case when I reach the discrimination allegations.

7. June 1999

a. Introduction

The allegation here describes two incidents of removal of union literature. Complaint paragraph 5(h) alleges that, about June 2 and again about June 4, MTSI, by Internal Director of Operations Christopher Dowd, "Removed union literature from areas where employee notices unrelated to the Union have been allowed." MTSI denies. [The allegation originally cited three incidents, with the third having been perpetrated, allegedly, by Sales Manager Woody Kinney around March or April. In the absence of any evidence on the Kinney incident, the General Counsel withdrew that portion of the allegation. (9:1431–1432.) We are left with the June 2 and June 4 incidents.]

In the course of presenting the Government's evidence on this allegation, the General Counsel sought to amend the allegation to broaden its scope. (5:708.) MTSI objected and argued surprise and prejudice in that, as no prior notice was given, MTSI had made no investigation or interviewed any witnesses about the expanded scope. (5:709–711.) As we had just returned from a 3-week adjournment, during which the Government had failed to give notice to MTSI of any intention to amend the complaint in this respect (apparently on the basis that the Government itself did not learn until the morning of the

motion to amend, 5:710), and as the proposed amendment, especially if it required a continuance of any kind, would delay the General Counsel's resting the Government's case in chief, I sustained MTSI's objection and denied the General Counsel's motion to amend the complaint. (5:711–712.) After additional proposed evidence, objections, and a renewal of the motion, I reaffirmed my ruling limiting the evidence to the two dates alleged in complaint paragraph 5(h). (5:731.)

The General Counsel complains (Br. at 19) that my rulings limiting the Government's evidence to the allegations of the complaint were "overly restrictive." A large part, it seems, of the General Counsel's lament is that I sustained objections to questions asking about the conduct of Leroy Jones, a custodian. Jones was not named as one of MTSI's agents, and there is no allegation that any manager, such as Director Dowd, instructed Jones to do anything unlawful. The problem is that the Government simply was without the foundational pleadings to sustain its proposed evidence. MTSI properly objected, and I sustained its objections.

The General Counsel offered evidence, for the limited purpose of showing animus, about an incident on June 19 when President George told Kansas City International Airport Shuttle driver Richard Newland to remove a union cap he was wearing. (5:733–736.) The parties do not brief this animus incident. George credibly explains that, while, union buttons would be permitted, the hat has to be (with one exception) a MTSI hat. George said nothing about the three union buttons that Newland was wearing. The one exception is that the driver, at the customer's request, may don a hat of the customer, such as that of a sports team. (10:1583–1585.) In find no animus from the June 19 incident.

Similarly, evidence was received, for the limited purpose of animus, that about August George removed union literature from the wall in the car wash. (3:527–536, 541–543.) At one point the General Counsel sought to amend the complaint by adding the incident to paragraph 5(h) (3:529), but later withdrew (5:534) the motion to amend. On brief (Br. at 20) the General Counsel improperly argues that the matter was tried by implied consent when George later addressed this incident. By the General Counsel's "implied consent" argument, the Government apparently contends, impliedly, that if evidence is received for the limited purpose of animus, then a respondent may not cross examine and later respond to animus evidence, but must stand mute or risk a finding of amendment by implied consent. That argument is so silly that it tends to reduce the Government's credibility on its other positions.

Car wash attendant George Coleman testified about the August matter. Although Coleman had read the two page document posted on the wall in the car wash lounge, he could not give any specifics about the document or its contents other than that it pertained to the Union. Credibly denying that he had ever removed any union notes, George acknowledges that what he removed on that occasion was a two-page blue and white NLRB election notice. He did so because the election notice was posted "in an area that we normally don't post anything for employees." (10:1585.) The General Counsel (Br. at 20) improperly argues that George "admitted" to removing "union literature." I find no animus (by MTSI or George) from this August incident. Turn now to the two incidents actually alleged in the complaint.

b. June 2, 1999

(1) Facts

Shortly before 5 a.m. on June 2, driver Newland testified, he posted union literature on the KCI Shuttle bulletin board where employees previously have posted other non-work literature. (5:717–718, 784–788.) Newland posted a flyer about a union meeting plus another union flyer covering a topic he cannot remember on the KCI Shuttle bulletin board. A few minutes later, Newland observed Director Dowd "pulling the notices down off the Shuttle bulletin board." (5:717–718.) As Newland was some 25 to 30 feet away, when Dowd walked off Newland walked over to the board and saw that Dowd had removed the two union notices, leaving up the drivers' schedule (the schedule was the only other paper that was on the bulletin board).

Dowd testified that just about every morning he goes around turning on lights and computers, helps pick up trash and removes papers left on tables or posted in inappropriate places. He has removed union literature from specific places (such as the windows to George's office, from the sides of microwave ovens, from entry ways, and tables), but not from places where employees had posted in the past, not from any company bulletin boards, and specifically not from the KCI Shuttle bulletin board. Moreover, while Dowd has told the custodians to pick up trash and mop certain areas, he has not instructed the custodians to pick up Union literature such as Dowd does. (11:1811, 1822–1823.) In short, I have a credibility dispute to resolve between Newland's account and that of Dowd.

(2) Discussion

Unfortunately, the General Counsel (Br. at 19) asserts that Dowd "admitted that he routinely pulled down union literature whenever he saw it, and that he instructed janitors to do the same. (11:1822–1823, Dowd)" It is distressing to see a federal prosecutor distort evidence in this fashion. Contrary to the unacceptable statements by the Government, twisting the testimony of Dowd to suggest that Dowd admits pulling down union literature regardless of where he finds it, there is no such admission. Indeed, just the opposite—Dowd denies it!

The Government's distortion of the evidence unfortunately tends to pollute the atmosphere in which the credibility resolution must be made. If I now credit driver Newland, it will appear that my resolution is the product of the Government's pollution. If I credit Dowd, it will appear that I have overcompensated for the General Counsel's misdeed. While the latter choice would not penalize MTSI, the appearance would taint the decision. The dilemma here is very similar to the equipoise situation in which the Government loses. Accordingly, because the prosecutor's misconduct has the effect either of denying MTSI due process or tainting the decision on this allegation, I shall, on that basis alone, dismiss complaint paragraph 5(h) (incident of June 2, 1999).

c. June 4, 1999

(1) Facts

Driver Newland testified that the early morning of June 4 he posted on the KCI Shuttle bulletin board two, perhaps three, items—a notice of a union meeting, a copy of "35 Things Your Employer Cannot Do!", and a copy of a settlement agreement (the latter on a glass case enclosing such matters as city licenses). At 5:08 a.m., Newland testified on direct examination (5:722–725), some 30 to 45 minutes after his postings, Newland observed Dowd in the hallway, some distance from the Shuttle bulletin board, and Dowd was carrying the union notice that Newland had posted earlier. On cross examination Newland testified that when he emerged from the restroom (time not specified), he observed that custodian Leroy Jones was pulling the proposed settlement agreement (not otherwise identified) off the glass case, and saw him crumple it up and throw it toward a trash can. When the paper landed on the floor, Jones remarked, "People can read that best when it's on the floor." (5:783–784.) On redirect examination, Newland recalls seeing Dowd, but does not recall whether he had any union literature that morning. (5:793–794.)

Dowd's testimony, described earlier under the June 2 incident, covers both that date and June 4. (11:1811, 1822–1823.)

(2) Conclusions

As the credibility dispute here is not close, I find no due process problem as I did with the June 2 incident. On direct examination here, Newland mentions Dowd but omits Jones. For his description of the incident on cross examination, Newland mentions Jones, but leaves out Dowd. Given a third shot (or, more specifically, offered the chance to say whether he had seen Dowd), on redirect examination Newland asserts that, while he did see Dowd the morning of June 4, he does not recall whether Dowd was carrying any union literature.

I am sure that Newland was a sincere witness. However, it is clear that his account of the June 4 incident is hopelessly unreliable. Crediting Dowd as opposed to Newland's conflicting and confused version, I shall dismiss complaint paragraph 5(h) (the June 4, 1999 incident). Having now dismissed both of the remaining incidents (the original third incident was withdrawn earlier by the General Counsel, as previously noted), I now shall dismiss complaint paragraph 5(h) in its entirety. Turn now to the discrimination allegations.

F. Alleged Acts of Discrimination

1. Dale Stripling unlawfully fired March 3, 1999

As discussed earlier, I found that Dale Stripling was not a statutory supervisor when President George fired him on March 3 because of his involvement in union activities. By so discharging Stripling, and as alleged in complaint paragraphs 6(a), (l), and 8, MTSI violated Section 8(a)(3) of the Act, and it must offer him reinstatement and pay him backpay, with interest. *Adco Electric*, 307 NLRB 1113, 1113 fn. 1, 1126 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993).

2. Six mechanics unlawfully suspended March 3, 1999

a. Additional facts

Most of the facts concerning the walkout were summarized earlier. Recall that, at President George's instruction to ascertain what issues were troubling the mechanics, Dale Stripling, on that March 2, went and spoke with the mechanics. Shortly thereafter, they gave him a list (GC Exh. 16) of their grievances. Recall that the following day, March 3, shortly after Stripling had been fired, mechanic Seth Hankins, in the locker room where Stripling was packing up to leave, learned that Stripling had been fired. Hankins told Maintenance Director Turney that it was a "crock of shit," and that if Stripling was leaving, Hankins was "walking" and so would be a lot of others. (7:1157, Stripling.) Leaving the locker room, Hankins went and informed other mechanics that Stripling had just been fired. (6:938, Holiman; 7:1073, Boza.) Mechanic Joseph Webster testified that, when the guys asked Stripling what was going on, strip said that he had been fired for being involved in union activity. (2:192.) The six who, moments later walked out, conferred and decided that it was unfair, that they would walk out in protest, and that they would go to the Union's hall to seek help. (6:938, Holiman; 6:975, Houle; 7:1073, Boza.) Mechanic Walter Boza heard Maintenance Director Turney, who had walked up to Seth Hankins, ask Hankins who all was leaving. Hankins replied, "Anybody with balls I'm taking with me." (7:1074.)

Although Boza concedes that he did not know why Stripling had been fired (7:1114–1115), the connection is implicit between the list of grievances submitted to Stripling on March 2 for his submitting to President George, and then, the very next day, Stripling's discharge. As mechanic Houle testified, on cross examination, the list of grievances was to be submitted to George to "try to resolve everything." (6:1–14.)

b. Discussion

It is immaterial that the mechanics did not, among themselves, expressly state that the motivation for their walkout was their belief that President George was retaliating against Stripling for his union activities and for having been associated with obtaining the list of grievances. Although mechanic Webster testified that he understood that Stripling said he had been fired for being involved in union activity, it is not clear that the others were aware of that.

From the standpoint of MTSI, it knew there had been a walkout, and when the six returned, they were suspended for having walked out. [Webster, who actually had returned to his work station, situated in a separate bay, was suspended by Turney moments after the others were suspended. (2:194–195.)] However, the only communication from any of the mechanics to management as to the cause of the walkout, and before the suspension, was the comments by mechanic Seth Hankins to Maintenance Director Turney before the walkout. From these comments, Turney, and therefore MTSI, knew that the cause of the walkout was MTSI's discharge of Dale Stripling, and MTSI knew that the walkout was concerted. The mechanics never told management just why they thought Stripling's discharge was unfair. Indeed, even as late as the trial the mechanics did

not articulate a specific reason, or reasons, as to why they considered Stripling's discharge "unfair."

On brief (Br. at 23–24), the General Counsel argues, in effect, that the unfairness perceived by the mechanics was that Stripling, who was prominent in their union activities, had been singled out for discharge shortly after passing their list of grievances to management. That is, the implied perception was that Stripling's discharge was in retaliation for his involvement in the union activities and his close association with the mechanics who, along with Stripling, were leading the union organizing. As there is no express evidence so stating that to be the reason underlying the "unfair" statement, the question is whether the evidence impliedly shows that to be the reason. I find that it does.

In the lead case of *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), although the employees there made very little reference the morning of the walkout to management about the bitter cold, their previous complaints of the cold, coupled with, it appears, management's own assumption that the bitter cold condition was the reason, was enough to gain the protection of the statute.

Here management knew several things. First, it had just received, the day before, the Union's letter (GC Exh. 6) bearing Stripling's name as one of the Union's in-plant organizers. Second, it knew that the other three so named were mechanics. Third, it knew that the mechanics, also on March 2, had submitted a list of grievances (GC Exh. 16). Fourth, it knew that the mechanics submitted their list through Dale Stripling. Fifth, it knew from mechanic Seth Hankins, through Maintenance Director Turney, that Hankins was taking as many mechanics as he could on a walkout to protest the unfairness of MTSI's discharging Stripling. (That is, MTSI knew that the walkout was a concerted protest of Stripling's discharge, and that the protest was being led by at least one member of the Union's organizing committee to protest the discharge of another member of that committee.) Indeed, MTSI itself characterized the action as a walkout. Finally, MTSI knew that it had in fact fired Stripling because of his union activities, although it viewed the discharge as lawful because it (specifically, President George) considered Stripling to have been a statutory supervisor.

With at least these factors in its knowledge database, MTSI reasonably may be charged with drawing the obvious inference that the mechanics who walked out had viewed Stripling's discharge as singling him out in retaliation for his union activities (an inference which, in fact, is true), with such, in their view, including his role in presenting their list of grievances to management. All these knowledge factors, I find, are enough to bring the mechanics' concerted walkout within the protection of the statute, as outlined by the Supreme Court in *Washington Aluminum*. It is immaterial that President George had fired Stripling on the stated basis that he was a supervisor and, as such, was disloyal for engaging in union activities, for I have found that Stripling was not a statutory supervisor.

Because the concerted walkout was protected, it follows, and I find, that, as alleged in the complaint, MTSI violated Section 8(a)(3) of the Act by suspending the six mechanics until Monday morning, March 8, 1999. MTSI must make the six suspended mechanics whole, with interest.

3. Rodney Saxton fired March 22, 1999

a. Introduction

Complaint paragraph 6(g) alleges that MTSI suspended Rodney Saxton about March 22 and fired him about March 25. MTSI admits. Complaint paragraph 6(l) alleges that MTSI so disciplined Saxton because of his union activities. MTSI denies that allegation and the further allegation, complaint paragraph 8, that Saxton's discipline violated Section 8(a)(3) of the Act.

Saxton had been discharged once before, on December 24, 1998. While working as a security guard (he carried no weapon), Saxton drove a van home without management's permission. He admitted this, and was discharged. About 3 weeks later, around January 20 (GC Exh. 109), on the recommendation of Human Resources Director Janet McCann and Security Director Corky Maxim, MTSI rehired Saxton as a car wash attendant with the understanding, at least on Saxton's part, that after 90 days he could return to security. (2:284–286, George; 3:425–426, Saxton; 9:1459–1460, Stephens; 11:1727–1733, McCann; R. Exh. 29; GC Exh. 109.)

About March 1 Saxton signed a union card and began wearing union insignia at work. Different managers, including President George and Maintenance Director Turney, saw him wearing the insignia. Saxton was one of many who wore the Union's insignia. No one from management ever commented to him about his union insignia. (3:427–428, 467–468.) By March Maintenance Director Turney had told Saxton that he was doing a "pretty good job" in the wash bay. (3:428–429.)

By its faxed letter (GC Exh. 9) of March 12, the Union notified MTSI, care of George, that another 13 employees had joined the Union's in-plant organizing committee at MTSI. Saxton's name was one of the 13 specified in the letter. Because of an incident that occurred the early evening of Sunday, March 21, Maintenance Director Turney, on Monday, March 22, suspended Saxton pending an investigation. (3:453–454, Saxton) COO Stephens assigned the task of investigating to Human Resources Director McCann. (9:1468; 11:1734.) Following his receipt of the incident reports, submitted by various persons to McCann, and McCann's emphatic recommendation of discharge (9:1469; 11:1737),[21] on Friday, March 26, and in the presence of Maintenance Director Turney (3:454; 9:1529), Stephens (9:1470, 1528–1529) fired Saxton.

McCann prepared Saxton's termination document (GC Exh. 108) and had planned to conduct the termination interview. However, that early afternoon she was called away and Stephens substituted for her. (9:1528–1529; 11:1737–1738.) The text of the termination document reads (GC Exh. 108):

> Unauthorized use of company vehicle. Rodney removed a company vehicle from the premises for a period of time. This is the second time this employee has done this.

To the upper right of this text appears a column, under the heading of "Discharge," of 10 reasons with boxes to the left of the reasons. Three of the boxes are checked: Safety Violation,

[21] McCann testified that, after she had gone to bat for Saxton to get him rehired, she was "ticked off" by Saxton's repeating the same type misconduct that got him fired the first time. (11:1737.)

Insubordination, and Other. At trial McCann testified that the document reflects all the reasons for the discharge of Saxton. (11:1738–1739.) At the bottom of the document, the form impliedly asks whether the terminating employee is subject to "Rehire." In the blank provided, McCann printed an emphatic, "NO !!" Asked about the exclamation points, McCann testified that she put the points there because she did not want Saxton to be brought back into the company. "He had been given two chances, and you know these are very serious things that he had done, and he is not the kind of employee that MTSI needs or wants." (11:1739.)

By the time of her testimony, McCann had retired after nearly 40 years of working at various places, with her last year being at MTSI. Apparently because of her short tenure with MTSI, McCann receives no pension from MTSI. (10:1598; 11:1711, 1739.) At different points in the record, including the Saxton case, questions about race were asked. As the record reflects, both McCann (3:466) and Saxton (11:1797) are black persons.

The vehicle in question was the "orange truck" (a pickup, actually), also known as the parts truck. (3:526; 9:1467.) The car wash attendants use the orange truck to ferry themselves to MTSI's Charlotte Street property, some four blocks away. (3:429, 447, 526; 9:1467–1468.) Saxton describes the orange truck as an old wreck that would be unable to "squeal" tires [something Saxton allegedly did with the truck around, roughly, 6 p.m. that March 21], and asserts that its state license tags had expired. (3:447, 450.) Dale Stripling describes it as a "rust bucket." (7:1199–1200, 1260.)

Stephens prepared (9:1526) his own three-entry "outline" of three dates—Saxton's first termination (a two–sentence description of the basis), Saxton's rehire date of January 20, and, beside the (incorrect) date of "3/21/99" he typed, or had typed, the following statement (GC Exh. 109):

> Terminated for unauthorized use of a company vehicle, driving parts truck off the lot from 6:45 p.m. to 7:20 p.m. unable to locate.

To the same effect is MTSI's opening statement at trial. (9:1433) Notwithstanding the foregoing, at trial President George announced (2:287, 289–290) that there was a secondary reason on which COO Stephens based his decision to discharge Saxton, and that secondary reason was the fact that, and as part of the same incident, Saxton damaged a vehicle known as the "Magic Bus" in a driving accident and failed to report the fact.[22] Indeed, McCann also testified (11:1735–1736.) her investigation disclosed, in part, that Saxton had damaged the Magic Bus in an accident, and that she had so reported to Stephens. The incident reports do so inform. On brief, although summarizing all aspects of the incident (including suspected intoxication and damage to the Magic Bus, as well as the unauthorized use of the orange truck, lying to a supervisor that he did not take it, and being insubordinate by refusing to remain on the premises), MTSI nevertheless relies on the single reason listed in the termination document (Br. at 40):

> Saxton was discharged on December 25, 1998 for taking a Company vehicle off the property without permission. This fact shows that his March 1999 discharge, for the same misconduct, was not discriminatorily motivated.

b. Material facts

(1) Saxton group

Except for a couple of important inconsistencies, the versions of the three car wash attendants (the Saxton group) are roughly corroborative. On this Sunday, March 21, George Coleman worked the day shift. He arrived shortly before 7 a.m. and he and Saxton left shortly after 6 p.m. to walk to their bus stops. (3:524, 537–540.) Saxton also worked the day shift. (3:524.) Presumably Saxton arrived around 7 a.m. The parties stipulated (3:452) that MTSI's records show that Saxton clocked out at 6 p.m.

Ramon McGlothen was scheduled to begin work about 3 p.m., but he arrived, and began working, about 5:45 p.m. (3:513–514.) Coleman and McGlothen are brothers. (3:506.)

The collective version of the Saxton group (the carwash attendants) is that Saxton and Coleman left a few minutes after 6 p.m. walking to catch their buses that departed, roughly, about 6:30 p.m. Saxton reports that he had to walk 5 or 6 blocks to catch his bus at 10th and Main streets. (3:477.) Coleman explains that he and Saxton walked together on Grand Street and then separated at 9th Street, with Coleman proceeding west and Saxton south. (3:526, 541.) Coleman went to the Pavilion in the Center City Square where the buses come in and turn around. (3:526, 540–541.) As the General Counsel puts it (Br. at 45), "Whatever happened after 6:00, it did not involve Rodney Saxton."

It would have helped had the parties offered a map of the area. Absent such, I take official notice of Rand McNally's 1999 Road Atlas and the Missouri map on page 58, and the "Central Kansas City" inset also on that page. As reflected there, and confirmed by www.mapquest.com, the central district lies just south of a deep bend in the Missouri River. The inset shows (not shown on Mapquest) a "Town Pavilion" bordered on the west by Main Street, on the north by 10th Street, and on the south by 11th Street and, apparently, two blocks east, by Grand Avenue. Locust Street appears to be some three blocks to the east of Grand.

Recall that MTSI's main facility is located at 522 Locust Street, and its other facility some four blocks away at 401 Charlotte Street. (11:1841, Turney; 12:1934, Culp.) As the maps show, Locust and Charlotte run north and south, with Charlotte three blocks farther east from Locust. [The fourth block in distance is reflected in the different street numbers.] MTSI's main facility appears to lie just north of IH-70 at Locust and 5th, and that MTSI's Charlotte Street property is situated some three blocks east and one block north of the main facility at Locust and 5th Street. In short, it appears that the Pavilion, where the buses turn, is about six blocks south, and another two blocks or so west, from MTSI's main facility at 522 Locust.

[22] With its psychedelic colors, the "Magic Bus" is a minibus that is used for "pub crawls" and parties, including parties for children. It is a party bus. (2:288; 3:429–430; 9:1539, 1544–1545, 1547.)

This geographical information will assist in understanding testimonial references to, for example, walking to the bus stops.

(2) MTSI group

Turn now to see what MTSI asserts did happen after 6 p.m. that March 21. The whole sequence of events, as MTSI's witnesses report it, began about 6 p.m. just after Trolley Driver George Lewis had parked his trolley near the Conoco gas station at the end of his shift. (11:1781, 1784.) As Lewis was standing by his trolley, he heard a crashing noise. Turning, he observed that, some 125 to 150 feet away the driver of MTSI's Magic Bus had backed the vehicle into a pole. When the driver pulled up and then emerged to inspect the bus, Lewis recognized him as Saxton. Lewis could see that Saxton appeared agitated and could hear him muttering something as he made his inspection. Saxton then reentered the bus and drove it very fast to the Conoco gas pumps, stopping near where Lewis was standing. Saxton looked directly at Lewis, who also looked at Saxton. Saxton then drove out, proceeding, as Lewis assumed, to where he normally would park the Magic Bus. (11:1781–1782, 1785.)

As the Magic Bus drove by him in departing, Lewis observed that the rear was damaged, with fiberglass broken and parts [not specified] missing. Lewis then walked over to the pole. Lewis describes the pole as a "20-inch [diameter] pipe" that holds up a billboard. Next to the pole was a little bush, or small tree, and Lewis saw that it had been splintered by being backed into. Lewis saw [unspecified] parts from the Magic Bus lying on the ground. (11:1782, 1785–1786.) Deciding that the "right thing to do" was to report the matter (11:1794–17950), Lewis went to the dispatcher, Jenny Winston, and informed her that the Magic Bus had been damaged when Saxton backed it into a pole. (11:1781–1783, 1786.)

Confirming that Lewis made the report, former dispatcher Winston testified that Lewis also submitted a broken piece, or pieces, of red glass of the type that could have come from a tail light. Winston then telephoned Ray Culp, the road car supervisor, and asked him to go to the lot, inspect the Magic Bus, and to investigate the incident. Winston then prepared a short one-paragraph report of the incident, and placed a copy on the desk of her manager, B. J. Garcia. (10:1606–1609.) Although Winston's written report (R. Exh. 16) begins "On March 21, 1999," the report itself is dated "03-31-99," with the "3" being an obvious correcting strike-over of a "4." As for the month and date of "31" rather than "21," Winston explains that she could have written those incorrect and correcting figures because the evening work on her shift frequently was very busy and she sometimes made mistakes when writing dates, but that she wrote the report on March 21. (10:1607–1608.)

As Road Car Supervisor Ray Culp explains, his duties include investigating accidents involving MTSI vehicles. (12:1920.) On receiving the call, about 6:20 p.m. at a downtown location from dispatcher Winston, Culp testified, he proceeded to MTSI's "bus barn," that being the property on Charlotte Street, arriving there about 6:35 p.m. (12:1921.) On cross examination, Culp acknowledges (12:1930) that the one-page form (R. Exh. 17) that he completed to report his investigation shows a time of 6:00 p.m., which Culp describes as being probably when the dispatcher called him. From that, I gather that Culp concedes that his times are off by about 20 minutes. In other words, he actually arrived at the Charlotte lot about 6:20 p.m.

On arriving at the lot, Culp testified, he inspected the Magic Bus and discovered damage to its right rear end. Before Culp could begin taking pictures, Saxton, driving the orange truck, wheeled into the lot, squealing the tires, and pulled up next to Culp's "road car." Culp asked Saxton what had happened to the Magic Bus. Saxton responded that it was in that condition when he washed it. Culp then proceeded to take pictures [no pictures were offered into evidence] of the damage and to write his one-page (R. Exh. 17) report. Although the car wash attendant is supposed to clean the inside of the bus, Culp testified, that had not been done, for there were empty beer cans and other trash in the vehicle. (12:1921–1922, 1930–1935.)

As Culp took pictures and began writing his report, he noticed Saxton enter the bus. Curious about this, Culp looked inside the front door. He observed Saxton with a brown bottle in his hand and coming to a standing position by the cooler. Saxton put the brown bottle under his shirt and inside his belt and dismounted from the bus. Saying he had to go, Saxton got in the orange truck and, with the orange truck throwing gravel, left the lot in the same fashion as he had entered. Culp places Saxton's departure at about 6:45 p.m. [As earlier noted, Culp's times appear to be some 20 minutes later than actual times.] During Saxton's brief (10 minutes or so) presence at the lot, Saxton's condition was unfavorable, with Culp describing Saxton as "staggering, speech was slurred, evasive, he didn't want to get too close to me." Culp thought that Saxton had been drinking and was intoxicated. Culp acknowledges that he did not see Saxton drinking on this occasion. Culp concedes that he understands that the Magic Bus has been damaged on other occasions, and that the damage is not always repaired immediately. (12:1931.)

In view of Saxton's apparently intoxicated condition, Culp called Jim Glover, apparently a fellow road car supervisor, because Culp understood that Glover had been a police officer and probably had experience with intoxicated drivers. Glover called COO Stephens who, Glover reported to Culp, suggested that they locate Saxton and have him take a breathalyzer test. He and Glover proceeded to search at the main location, 522 Locust, finding the orange truck about 7:30 p.m., but after a search of the property, and nearby lots, did not locate Saxton Maintenance Director Turney arrived at the 522 Locust facility a few minutes after 7:30 p.m. (12:1924–1926.) Although Culp testified that the orange truck was not "missing," he did so in the context of saying that he never filed a report with the police. (12:1932.) By his "not missing," Culp meant, I find, that the truck's absence had not reached the stage for reporting to the police that the vehicle was "missing" (stolen).

COO Stephens reports that Security Director Corky Maxim paged him about 6:35 p.m. Stephens called Maxim and was told about Culp and the Saxton situation. Stephens called Culp and learned that Saxton had smelled of alcohol, that Culp had seen Saxton driving erratically, that Culp had told Saxton to remain at the lot, but that Saxton had gotten into the orange truck and driven off erratically. Saxton told Culp to find an-

other supervisor and to locate Saxton and then call Stephens. A couple of minutes or so later, about 6:50 p.m., Stephens called Maintenance Director Turney and described the situation. Shortly after 7 p.m., Culp called Stephens and reported that he and Road Supervisor Glover had been unsuccessful in locating either Saxton or the orange truck. A few minutes later, about 7:20 p.m., Turney called from the main facility to report the same—he had searched the 522 Locust property with Culp and Glover, and neither Saxton nor the orange truck was on the property. Just before Turney called Stephens, Turney and the others heard a loud noise outside on the lot. Checking, they found the orange truck, but no Saxton. Turney reported the Magic Bus had been wrecked, that it appeared it had been backed into the pole on the north end of the car wash, and that the Magic Bus was dirty. The reports, of course, were offered and received only as to motivation, not for the truth of their contents. (9:1461–1467.)

Maintenance Director Turney asserts that, after Stephens called him, he physically walked both locations of 522 Locust and 401 Charlotte. He found the Magic Bus at the Charlotte Street facility. The bus was dirty and had not even been washed. Turney saw that the bus had been damaged at the right rear. The tail light glass was broken, and there were still wood fragments there from the telephone pole, or street light pole, that the bus had hit. "it is a wooden pole." Turney apparently called Stephens twice, the first to make an initial report, presumably of no success at finding either the orange truck or Saxton. While he was on the phone, Turney asserts, he heard tires squealing on the "back lot." Hanging up with Stephens, Turney went out to investigate. He found the orange truck parked on the west end of the 522 Locust property. The time was about 7:25 p.m. The truck had not been there when he checked earlier. The truck's hood was still warm to Turney's touch. Turney called Stephens back and reported the news that the orange truck was back, but there still was no sign of Saxton. This was about 7:30 p.m. (11:1840–1844, 1857.)

About 5 minutes later, or around 7:35 p.m., Turney spoke with Ramon McGlothen at the car wash, inquiring whether McGlothen had seen Saxton. McGlothen replied that he thought Saxton had left with his brother Reggie and George Coleman about 6:30 p.m. to 6:40 p.m. to catch their buses. Turney testified that he believed Saxton had taken the orange truck because he was the last one seen driving it, the truck was not on the premises when Turney first investigated, and he had found no evidence that anyone else had driven it. Turney acknowledges that he had no input in the decision to discharge Saxton. (11:1844–1845.)

[McGlothen estimates that Saxton and George Coleman left on foot for the bus stop about 6:33 p.m. About 20 minutes later, or 6:53 p.m., a road car supervisor came and asked about Saxton. McGlothen advised that Saxton had left. Some 15 minutes later (or about 7:08 p.m.), Turney arrived and inquired. McGlothen told him that Saxton and Coleman had left to catch their bus. Another 30 minutes or so later (thus, about 7:40 p.m.), Turney and the road car supervisor returned together. Turney got partly out of the car and again asked about Saxton. McGlothen told Turney that the last time he had seen Saxton was when he and Coleman started walking to the bus stop. (3:509–510, 518–520).]

Asked on redirect examination how he determined which pole the Magic Bus had hit, Turney testified (11:1862):

> The damage was on the right rear, and the pole, which is at the bottom corner of the driveway, there was still pieces of the lens laying at the base of the pole and there was still fragments of wood stuck in the decal of the Magic Bus.

c. Discussion

If credibility (including demeanor) of the witnesses here was equal, and the opposing stories had no flaws or admissions, so that only plausibility of the opposing stories (seen in their best possible light) were considered, the version of the Saxton group would win hands down. Why? Because it is the story that is both simple and logical. Contrasted with that simplicity and plausibility, the story of the MTSI group seems both illogical and bizarre.

Recall that Saxton and Coleman had worked a long day—some 11 hours. As anyone who ever has cleaned and washed his car can appreciate, projecting that work effort across 10 hours or so (not counting a lunch period or breaks) would make for some pretty tired workers. Indeed, the work list (GC Exh. 44) they submitted for that date shows, under the column for "Details" (3:434), that they washed some 18 vehicles. Now consider the fact that these workers had to walk some eight blocks to their bus stop. If Saxton walked with Coleman until the two separated at 9th and Grand streets (3:526, 541, Coleman), or a good six blocks into their walk to the bus stop, then Saxton, if he did engage in after-work shenanigans with the orange truck, had to have doubled back (once Coleman was out of sight) and walked the six blocks back to the 522 Locust facility where (3:475–476) the orange truck is parked.

Appearing to be about 38 years old and, as of the trial, in reasonably good health, Saxton presumably could have put forth the physical effort to do this had he had a strong incentive to do so. But would joyriding in the orange truck, and nipping from the "small brown bottle," qualify as that strong incentive? That is one scenario, and one based on a theory that Saxton acted alone. Actually, MTSI's position impliedly argues that Saxton and Coleman acted together and that McGlothen supported them. (That is, it is the Saxton group, not the MTSI group, that has conspired to perjure themselves.) For example, Culp and Turney describe the orange truck as not having been cleaned on the inside, with Turney specifically stating that the outside also was dirty because the truck had not even been washed. All of that contradicts the testimony of the Saxton group. Even McGlothen testified that as he arrived he observed Saxton coming out of the orange truck with a mop, and it appeared that he and Coleman were finishing with the job of cleaning the Magic Bus. (3:508, 515.)

Regardless of questions posed as if the opposing versions were internally consistent and free of contradictions, the fact is that flaws abound in both versions. For example, Saxton's story (3:494) that he told George Coleman, before they washed the Magic Bus, that the bus was damaged, is disputed (3:544–546) by Coleman. Also, about 6:03 p.m. or 6:04 p.m., shortly after he punched out [recall that the parties stipulated (3:451–

452) that Saxton punched out at 6 p.m.], Saxton supposedly locked up the car wash because no one remained. (3:452, 478–479.) Yet we know that Ramon McGlothen was there because he had just started his shift barely 20 minutes earlier. (3:513, 521, McGlothen.) The related issue, that Saxton locked up the car wash itself, appears to be a nonissue based on a miscommunication between the lawyers and the witness. As the car wash itself cannot be locked (3:521, McGlothen), what Saxton apparently was describing was that he locked his personal locker. As Coleman explains, each attendant has a personal locker where he keeps his supplies, for which he is held accountable. Because of this financial responsibility, the attendants make sure they lock their lockers before they leave. (3:543–544.) I attach no weight to the "locking" matter.

The MTSI group has its own discrepancies, with the most glaring being the contradictory descriptions of the pole. Recall that Trolley Driver Lewis described the pole as a 20-inch (diameter) metal pole that supports a billboard. (As earlier noted, the Locust Street facility is situated a couple of blocks north of IH-70. Presumably the billboard faces either IH-70 or the ramps on the north side of the interstate highway.) The pole's description by Lewis makes sense in light of the close proximity to a freeway. But one question about the version of Lewis is that the Magic Bus really hit the shrub, or small tree, and possibly not the pole at all. Unfortunately, no photograph of the pole and its botanical neighbor is in evidence to show us the size and juxtaposition of the two. Nor is there any diagram in evidence to show us where the pole and shrub are located on the premises at the Locust Street facility.

Moreover, of the photographs that Supervisor Culp admittedly took that day of the Magic Bus, not one of such photos was identified or offered in evidence. Thus, we have no visual confirmation of Lewis's story that the fiberglass body of the Magic Bus was damaged. Such aids could assist even in understanding just how Saxton could have backed into the pole/shrub and damaged the Magic Bus (an event Saxton denies). Indeed, a key question exists concerning the wreck itself. If, as Lewis describes, the wreck occurred close to 6 p.m., and the Magic Bus was on the main property somewhere near the car wash, then, if the minibus had just been washed, it would seem that Saxton would have driven the bus to the Charlotte location where it has to be parked, and then ferried himself back in the orange truck. However, assuming that Saxton parked it at the main lot for some reason, and backed into a pole, the time of the incident would be consistent with the story that the bus had been cleaned and washed. If so, then the Lewis version seems at odds with the version of Culp and Turney, particularly the latter, that the bus was still dirty and the trash not removed.

Maintenance Director Turney's description of a wooden pole, first described as a telephone pole, then as a pole supporting a street light, of course raises additional questions. Again, with neither photographs nor a diagram in evidence, the lawyers have left the jury in the dark as to where the wooden pole is located on the premises, what the pole actually looks like and what its function is, where it is located in relation to the metal pole described by driver Lewis, and where it is located in relation to the spot where Lewis was standing when he heard the crash of the Magic Bus into a pole or shrub. Respecting that crash, none of the broken glass submitted by Lewis to the then dispatcher, Jennie Winston, was offered in evidence, nor was any photograph of such offered, nor was there any testimony that such broken glass came from a minibus, much less from the Magic Bus.

It is time to turn from the many disputes and discrepancies to the single, biparty agreement—Saxton admits certain critical factors given in Culp's story. Thus, although Saxton asserts that he did not drink (alcohol) at work that day (3:452–453, 499, 501), or damage the Magic Bus by bumping into a pole (3:430, 452, 469, 499), he admits that Culp (referred to as "Richard" by Saxton), at the Charlotte Street lot, told him that someone had reported that he had wrecked the Magic Bus (3:430, 468) [although moments later (3:473), Saxton asserts that he could not remember whether Culp had so told him]; admits that he returned (after washing the Magic Bus) to the Charlotte Street lot in the orange truck (3:430, 474–476) where "Richard" [Supervisor Culp] told him that he smelled of alcohol and asked if he had been drinking (3:473–474, 499, 501); and admits (3:475) that Culp said he wanted to talk with Saxton but that he told Culp he had to leave to catch his bus. In short, by his own admissions, Saxton places himself on the Charlotte Street lot in a conversation with Culp that, as described by Saxton, matches at least some of the essentials as described by Culp. Thus, looking to the time estimates in order to determine what happened quickly fades into mostly irrelevance when we see that, regardless of the exact time, on this occasion Saxton did have a conversation with Supervisor Culp at the Charlotte Street lot. And, as just stated, Saxton admits several of the essentials of that conversation as described by Culp.[23]

According to Saxton, he returned to the Charlotte lot in the orange truck on that occasion to retrieve the keys to the coaches (apparently a ring of keys) which he had left in the Magic Bus. (3:500) But that story is disputed by George Coleman who tells us that it was he who took the orange truck to the Charlotte lot and retrieved the keys. (3:525–526.) In short, Saxton confirms critical elements of Culp's version. Although the timing is off by several minutes (anywhere from 10 minutes to 30 minutes), I place very little weight on the time estimates given. This is so because, with all the disputed facts, I anchor resolution of the facts to the single undisputed biparty event—that Saxton did drive the orange truck to the Charlotte Street lot somewhere around 6 p.m. or 6:30 p.m. where he did have a conversation with Supervisor Culp. Saxton's admissions about Culp's questions about drinking, and that Culp told him of the report that Saxton had wrecked the Magic Bus, all fit with the reports that driver Lewis and Supervisor Culp made that day. Moreover, Saxton even admits that Culp said he wanted to talk with him further, a request that Saxton declined.

Granted, Saxton's admissions do not prove that he damaged the Magic Bus, that he wheeled into the Charlotte Street lot screeching the tires on the orange truck, or that he thereafter went joyriding in the orange truck for some 45 minutes. Even

[23] On brief, the General Counsel does not address these critical admissions by Saxton. By failing to avail itself of this last opportunity to explain to the jury why these admissions are insignificant, rather than crucial, the Government does itself, and Saxton, a disservice.

so, by confirming at least some of Culp's story, Saxton lends credence to the rest of Culp's version—thereby providing the foundation for COO Stephens to form a good faith belief that the reports he received were substantially accurate.

If the Government established a prima facie violation, it is very weak. One point of potential disparity relied on by the Government is that Maintenance Director Turney never disciplined mechanic Larry Clark who had removed a vehicle from MTSI's premises in January 1999, supposedly without permission. (7:1194–1195, Stripling.) As Stripling there observes, however, Turney said that Clark had a set of keys for the vehicle, thereby implying that Clark had permission to drive the vehicle off the premises. I find no disparity in the Clark matter.

Timing is a possible factor. Recall that Saxton began wearing union insignia about March 1. However, a lot of other employees were wearing union insignia. The more significant date is March 12 when the Union faxed its letter to MTSI naming additional members of the Union's in-plant organizing committee. Saxton was one of those named in the fax. But for timing to be a significant factor, the evidence would need to show that the whole incident (the Magic Bus and the orange truck) was fabricated, that MTSI's several witnesses (some still employed at trial, but some not) on the matter conspired to commit perjury, and that, as the General Counsel writes (Br. at 45), the alleged misconduct simply "did not happen."

Another point made by the Government is that then Human Resources Director McCann did not interview Saxton, Coleman, or McGlothen in her investigation of the facts. The General Counsel sees in this a predetermined outcome to get rid of a prominent union supporter. Perhaps this point would serve to help establish a prima facie case. Nevertheless, I view it more as a reflection of the personal disappointment which McCann felt by the perceived betrayal by Saxton of the trust she had placed in him when she recommended to Stephens that Saxton be rehired. In short, McCann was angry ("ticked off") at Saxton over this perceived betrayal. Her failure to make a thorough investigation was a reflection of, if anything, her anger at that perceived betrayal, and not a reflection of any union animus. Respecting the possibility of union animus, and although I certainly do not consider it controlling, I note that McCann comes from a family of union members, and that a union benefits program paid for some of her college expenses. (11:1712.)

As earlier summarized, COO Stephens made the decision to discharge Rodney Stephens. Notwithstanding that McCann reported the Magic Bus matter to Stephens, the sole stated basis for the discharge was Saxton's unauthorized use of the orange truck. When such misconduct was combined with his previous discharge for the very same offense, the combination dictated the discharge decision.

In view of Saxton's admissions respecting his conversation with Supervisor Culp on the Charlotte Street lot, it is apparent, and I find, that the essentials of Culp's report were correct, and that COO Stephens relied in good faith on the reports he had received. Thus, Stephens reasonably believed that Saxton, for some 45 minutes or so, had removed the orange truck from MTSI's property not only without any permission from management, but in a context of reports that minutes earlier he had damaged the Magic Bus, that he may have been drinking, and that he had refused to remain and discuss the matter with Supervisor Culp. In view of Saxton's pre-union discharge just 3 months earlier for the single violation of an unauthorized use of a MTSI vehicle, it is clear that the very same offense on March 21, in the context of evidence that he also had damaged the Magic Bus, serve to carry MTSI's burden of persuasion (even assuming that the Government established a prima facie case) on its affirmative defense that it would have discharged Rodney Saxton even had there been no union activity in progress at MTSI.

As motivation is the issue, and assuming that the Government established a prima facie case (a very generous assumption), MTSI did not have to prove that the misconduct occurred, but only that it acted in good faith on the belief that the incident occurred and that it would have taken the same action even in the absence of any Union activity. I find that MTSI proved that it acted in good faith, and that it would have imposed the disciplinary penalty, as it had done in December 1998, even in the absence of any union activity. Accordingly, I shall dismiss complaint paragraph 6(g).

4. David Lindgren fired April 1, 1999

a. Introduction

Complaint paragraph 6(h) alleges that, about April 1, 1999, MTSI discharged David W. Lindgren. Admitting that much, MTSI denies that such action violated the statute.

At the very beginning of Lindgren's testimony, MTSI moved (5:799) that Lindgren be disqualified from testifying on the asserted ground that he had violated the order (1:30, 34) sequestering the witnesses. MTSI then asked a few questions on voir dire. (5:800–804.) That was followed by MTSI's brief voir dire examination of President George, with cross examination by the General Counsel. (5:806–809.) MTSI then renewed its motion. (5:810.) The gist of this voir dire evidence is that George, earlier standing by the witness room for about 2 minutes, could hear, through the closed door, some of the voices, especially the strong, deep voice of witness Richard Newland who apparently was standing next to the door. Newland, in the presence of Lindgren and Dale Stripling (Stripling was exempted from sequestration as the General Counsel's designated assistant, 1:30, 34; 5:811), made a few comments about a couple of items he had been asked about by MTSI on cross examination. Such items were unrelated to the testimony to be given by Lindgren. Denying (5:811) MTSI's motion to disqualify, I ruled that MTSI could renew its motion if it later appeared that the witness-room comments in fact had a bearing on Lindgren's testimony. Apparently because no such development occurred, MTSI never renewed its motion.

During nearly all of Lindgren's last 5 months before his termination, Larry Hugunin was the manager of KCI Shuttle. It appears that Hugunin died about July 1999 (3:556; 10:1615)—that is, before the trial of this case began. On the fifth day of the trial, the General Counsel moved to amend complaint paragraph 4 (listing the supervisors and agents) to name Hugunin as the Shuttle Manager during 1999 to about April 1. (5:829.) [Two days earlier the General Counsel started to make such a motion as to Hugunin, although sparked in relation to a differ-

ent incident, but then withdrew the motion. (3:554–558).] The unstated purpose of the motion was to overcome a hearsay objection by MTSI (5:824) to managerial actions (including statements, none alleged to be unlawful) by Hugunin during the time specified. Stated differently, in effect the Government wanted to charge MTSI with knowledge and responsibility for any of Hugunin's conduct, including statements, during this time period.

MTSI objected to the motion to amend on the grounds that, (1) the amendment, offered on the fifth day of trial, was too late inasmuch as the General Counsel was not far from resting the Government's case in chief; (2) Hugunin was dead; (3) because Hugunin was dead, he could not be called as a witness to rebut any testimony about himself; (4) because Hugunin was dead, MTSI could not interview him and, based on such an interview as normally would occur with a witness, investigate and gather rebuttal evidence to the extent such would be in addition to any testimony that Hugunin would be able to provide if still alive; and (5) aside from the fact that Hugunin was deceased, whatever rebutting facts might be available in an investigation would not now be obtainable by MTSI because of the lateness of the proposed amendment to add Hugunin's name to the complaint. (5:830–831.)

Arguing that MTSI would not be prejudiced, the General Counsel observed that, as Lindgren had worked for Hugunin until just a few days before a new shuttle manager (Jack Mawby) came in and fired Lindgren, MTSI could not claim surprise that evidence would be offered about interactions between Hugunin and Lindgren. (5:831–832.) I conditionally granted the motion to amend, stating that MTSI could renew its objections after the evidence was introduced. (5:833.) I granted MTSI a continuing objection to anything attributed to Hugunin (for the purpose of binding MTSI). (5:833, 856.) MTSI did not renew its objection to the amendment and, indeed, offered an unsigned, and typed, file memo (R. Exh. 23), over Hugunin's typed name, concerning asserted oral warnings to Lindgren. With the General Counsel expressing no objection, I received the one-page document into evidence. (10:1620.) Ordinarily I exercise discretion by not receiving such documents (for the truth of their contents) as a business records exception to the hearsay rule when the documents have been prepared and filed after the employee has been publicly identified as a supporter of a union in the midst of a union organizing campaign. See Pierce v. Atchison Topeka and Santa Fe Ry. Co., 110 F.3d 431, 443–444 (7th Cir. 1997) (not error for trial judge to exclude a file memo that was prepared in circumstances showing that memo had "litigation potential"). I discuss this later when we reach that point.

[On the file memo R. Exh. 23, the typed name is spelled "Hugunin." At trial, the General Counsel accepted MTSI's spelling of the name as "Huginin." (5:829–830.) In its Reply Brief at 8, MTSI switches to the spelling as shown in Hugunin's file memo. As the version on the typed memo probably is the correct spelling of Hugunin's name, it is the spelling which I adopt in this decision. I now correct the record to show that spelling for his name, especially respecting the amendment granted adding Hugunin's name to complaint paragraph 4. (5:829–833).]

On brief (Br. at 45–46) MTSI renews its objection (5:833) that anything said by Hugunin would be hearsay (which is when I granted the continuing objection). MTSI specifically addresses only a particular point (an asserted, by the Government, approval by Hugunin that Lindgren could take home the driver's money bag and bring it in the next day for an audit), and reurges only its hearsay objection. From this, it is apparent that MTSI does not renew its objection to my ruling granting the General Counsel's motion to amend complaint paragraph 4 by adding Hugunin's name. (Presumably MTSI wants to enjoy the benefits of that ruling by having in evidence Hugunin's memo, R. Exh. 23, described above.) Accordingly, I need not revisit my ruling granting the Government's motion to add Hugunin's name to the complaint as a supervisor or agent.

MTSI now argues on brief that FRE 804 precludes the testimony about Hugunin because it assertedly is hearsay, and because the General Counsel failed to give MTSI advance notice of the Government's intent to attribute to MTSI, through witness Lindgren, asserted statements by former Shuttle Manager Hugunin. The latter item seems to be a reference to the advance notice requirement of FRE 807. Such advance notice is not required in unfair labor practice proceedings before the Board. *Sheet Metal Workers Local 28 (Borella Bros.)*, 323 NLRB 207, 209 fn. 2 (1997). As for FRE 804, MTSI's argument fails to clarify how that rule applies. I find that it does not. In effect, the Government offered, and I received, testimony about statements by then Shuttle Manager Hugunin as admissions by a party opponent under FRE 801(d)(2). Given the amendment adding Shuttle Manager Hugunin's name to complaint paragraph 4 (as a supervisor or agent), receipt of that testimony was proper.

So far as I can determine from the record, MTSI never amended its answer to admit or deny the amended complaint paragraph 4 respecting Hugunin's status. While I assume that MTSI would have admitted the allegation (subject to its objection that the amendment should not be allowed at all), I shall treat the lack of an answer as a denial. The parties never stipulated to the supervisory status of Shuttle Manager Hugunin. While the record may well have sufficient evidence to establish Hugunin's status as a statutory supervisor, I need not make that finding. Instead, I find that an abundance of record evidence demonstrates that Shuttle Manager Hugunin was MTSI's statutory agent during the relevant time. Accordingly, I find that any credited evidence of statements, or conduct, by then Shuttle Manager Hugunin are imputed to MTSI. *Delta Mechanical,* 323 NLRB 76, 77–78 (1997). Even so, I shall apply the "closest scrutiny" to statements attributed (by either party) to then Shuttle Manager Hugunin. *West Texas Utilities Co*., 94 NLRB 1638, 1639 (1951), enfd. 195 F.2d 519 (5th Cir. 1952).

At various points in the record, there are references to MTSI's policies and procedures, as if MTSI had, during the relevant time, either a single employee handbook or policy and procedures manual, or such for each of its several Divisions. There is in evidence a 29-page document (GC Exh. 12) titled, "CHARTER DEPT., Policies & Procedures For Drivers." Although this policy manual, bearing the date of "January 1999" (GC Exh. 12 at 2), ostensibly is relevant to the case of former Charter Driver Dale Speelman, there certainly are provisions

that, in practice if nothing else, could certainly be expected of the drivers in MTSI's other Divisions.

For example, under "Driving Performance," the various admonitions such as not to speed and to be alert surely, in practice, would apply to any of MTSI's other drivers. (GC Exh. 12 at 6–7.) What to do after a traffic accident surely would apply to all drivers. (P. 7.) Respecting AM/FM radios (p. 9), a point that comes up in Lindgren's case, the requirement ("NO EXCEPTIONS") is that, if on, it must be tuned to FM 106.5. There is even a section on driver "Etiquette," with such universal application as (p. 21), "Drivers should always be extremely polite at all times." While one of the etiquette rules prohibits smoking when "clients are with you," there is no rule expressly prohibiting smoking by the driver in a MTSI vehicle regardless of whether there are "clients" or passengers present. There is a "Disciplinary Table" (p. 24) of three specific items of prohibited conduct, with the fourth being "Driving/Customer Complaints." As to all offenses, progressive discipline is provided, with a final reservation to management of the "right to accelerate" the punishment "in instances of extreme disregard for policy and procedures." Finally, the parties were unable to stipulate that the last five pages (pp. 25–29), pertaining to accidents and the Safety Review Board, pertained to all MTSI drivers. They did stipulate (11:1759) that those pages pertained at least to driver Speelman.

As to any overall MTSI handbook, or any corporate manual for policies and procedures, President George advises that there is none. This condition apparently results, as George reports, MTSI's rapid growth. (12:186.) Over a period of months before the union organizing campaign became public, MTSI developed a handbook for MTSI employees, and was about to "unveil" it when news of the organizing campaign arrived. On the advice of its lawyers, MTSI postponed publication of the handbook until the organizing matter was resolved. (12:1878, 1886, 1903–1904.)

b. Background

Lindgren began working for MTSI in June 1996 as a KCI Shuttle driver. (5:812.) As a shuttle driver, Lindgren's job was to pick up and transport travelers back and forth between the Kansas City International Airport and various hotels and motels in the area. (10:1622.) After about 6 months at this work, Lindgren was promoted to a driver trainer position, and that job "kind of merged into being the assistant to the" morning ("A.M.") shift supervisor. Thereafter Lindgren worked, off and on, as the "A.M. shift supervisor." As a part-time or acting shift supervisor, Lindgren would handle customer complaints, certain disciplinary matters, and schedule drivers, among other duties. (5:813.) About October 1998 MTSI offered Lindgren the supervisor position full time. In the full time position of shift supervisor, Lindgren would had to have switched to a salary-based pay system. Because he would have suffered an annual reduction in pay of some $10,000 under a salary system, Lindgren declined the offer. He thereafter served as a shuttle driver, although he assisted part of the time in "putting out" drivers (seeing that drivers were there to fill the prearranged schedule). (5:814–816, 896–898.)

During February-March 1999, Lindgren was doing this work of shuttle driver and, for about 2 hours a day on 2 days a week, assisting Shift supervisor Dan Sanderson in "putting out" the drivers. (5:814, 896.) The purpose of this assistance for 2 hours on 2 days a week (one week on the weekend, and the next on a Thursday and Friday) was to provide Sanderson, the person normally doing that work 7 days a week, with a break, for those 2 days, from having to rise and begin his day at 3:30 a.m. (5:815, 896.)

No contention is made that, as of his discharge, Lindgren was a statutory supervisor. The record reflects that, in his part-time work of assisting Sanderson, Lindgren performed routine duties not calling for independent judgment. As Lindgren observes (5:896), he was not acting as the shift supervisor, but merely filling in for Sanderson, serving only in "putting out" the drivers from a schedule prepared by others and calling substitutes from an alternate list. "I did not have any authority to do anything except for that." . . . "I had none of the other responsibilities." (5:896.) In light of this testimony, and all the record, I find that Lindgren's very next reported statement, "I became A.M. Shift Supervisor" (5:896, L. 22), is a misprint, and that he actually testified, "I did not become A.M. Shift Supervisor." I hereby correct that portion of the record (5:896, at L. 22) to read as just described.

From August 1998 and into April 1999, Dan Sanderson's formal title was KCI Shuttle Assistant Manager. (10:1651.) To avoid the stress of that position, in about April 1999 Sanderson switched to driving town cars and limos in the Town Car and Limousine Division (TCL), which was the work he was doing as of the trial. (10:1651, 1669, 1675.) Sanderson, it appears, was Lindgren's immediate supervisor. (5:823–824; 10:1652.) Larry Hugunin became KCI Shuttle Manager about April 1998. (5:860–861.) Hugunin, who (as previously noted) apparently died before the trial began (3:556; 10:1615), was succeeded by Jack Mawby in the last week of March 1999 (10:1614).

At a company meeting held Tuesday, March 31, and attended by some 12 shuttle drivers, President George formally introduced Mawby as the new KCI Shuttle Manager. (5:819–822, 873, 894; 10:1857.) As we see later, at this meeting Lindgren openly wore a large union button on his clothing. (5:819.) Around March 22 Lindgren had signed a union card. (5:816, 864, 869.) The exact date he signed is not shown because the card was not identified and no copy was offered in evidence. In any event, it was not until the March 30 meeting that Lindgren acted in a manner to openly announce his support of the Union. (5:864)

As we learned much earlier, Valerie Matula has been KCI Shuttle General Manager since December 1998. (12:1910, Matula.) Even so, Mawby reports directly to COO Stephens who, of course, reports to President George. (10:1630.) The January 1, 1999 organizational chart (R. Exh. 13) lists Matula as "Airport Operations Manager" (the title alleged in the complaint). Whatever Matula's correct title, at trial she acknowledged (12:1911) that Lindgren was one of MTSI's more experienced drivers at KCI Shuttle. For one 10-day period (apparently during his stint as a part-time or acting shift supervisor), while the managers were at a convention in Las Vegas, Lindgren ran the shuttle operations as the sole supervisor on the

premises. For some 4 to 6 weeks after Hugunin had transferred from TCL, Lindgren served as Hugunin's unofficial trainer in the operations at KCI Shuttle. (5:860–861.)

As the record reflects, even the very good shuttle drivers draw an occasional complaint from customers. (5:855.) Aside from an oral caution, the complaints about minor matters rarely, it appears, generated any sort of formal disciplinary notice from Shuttle Manager Hugunin. Former Assistant Shuttle Manager Sanderson testified that Hugunin preferred to conduct oral counselings before issuing any written warnings. (10:1656.)

About early to mid-February 1999, Lindgren learned, from Shuttle Manager Hugunin, that he recently had been evaluated by a "Ghost Rider." The quoted term describes the representative of a service, contracted for by MTSI, to ride shuttles and evaluate the performance of the drivers. Hugunin informed Lindgren that the ghost rider had given Lindgren a near-perfect score, with the sole gig being that Lindgren had his van's radio tuned to FM 96.5, a station which plays classical music, rather than to FM 106.5, the "smooth jazz" station required by President George. (Lindgren suggests that he was aware of this requirement.) Saying that he knew that Lindgren played the classical music, and admitting that he should have said something to Lindgren sooner, Hugunin now told him, in effect, to keep his radio tuned to FM 106.5. (5:854–855.) MTSI did not offer any evidence that its "Ghost Rider" service had not visited or evaluated Lindgren in about February 1999.

c. Events take unfavorable turn for Lindgren

(1) February 23, 1999—Smoking caution

Following that mid-February point of the ghost rider's evaluation, events took an unfavorable turn for Lindgren. This is true as to incidents only partially disputed, and certainly when disputed events are counted. The first (or what I treat as the first) incident was an oral caution (or warning) by President George that Lindgren should not be smoking in the MTSI van. The date is not clear. In his account (10:1586–1587), George does not specify the date. Lindgren describes it as occurring from 2 weeks to 5 weeks before he was fired. (5:842, 870, 894.) Lindgren admits that it could have been 4 to 6 weeks before his April 1 termination. (5:842.) Hugunin's "3-9-99" file memo, after an opening sentence that "The following issues have been discussed with Dave Lindgren," has the smoking incident as its first descriptive paragraph (R. Exh. 23):

> Despite having been counseled about smoking in the vehicles, Dave was observed on 2-23-99 smoking in his vehicle. This was addressed with him on 2-23-99.

George testified that Lindgren's route coincided with George's route to work in the mornings, and George frequently passed Lindgren on George's way to work. [24] (10:1586.) One morning as George passed Lindgren, he observed that Lindgren was smoking. George told Lindgren's supervisor. Some 3 to 4 days later, George (presumably as the two were traveling in their vehicles) again observed Lindgren smoking. This time George, as he (later) walked from his office toward the garage, passed a smoking area very close to where George parks his car. Lindgren was there in the smoking area. George told Lindgren (10:1586–1587):

> Dave, you look so sharp in your uniform, yet I see you driving a van with a cigarette out there. I hate to lose you as a driver, but you know what our rule [is] on smoking in the vans. Please don't let me catch you again, because I'm going to have to do something about it.

Admitting the possibility of a date similar to February 23, as noted earlier, Lindgren denies that he had been smoking, and explains that it was out of respect for George, who had handled the matter with personal warmth and courtesy, that Lindgren did not defend himself but simply agreed not to do it again. Lindgren kept that promise. (5:842, 870, 873, 877, 880.) Conceding that he has smoked while in the vehicle, Lindgren dates the last such occasion as being during the cold weather, perhaps around the first of the year. (5:868–870.) Lindgren thinks it possible that what George saw was a white pen that Lindgren sometimes has in his hand while driving because Lindgren would use the pen to make notations on his trip logs. (5:867, 879.) Lindgren does not explain why he would make such notations while driving or why it was his sometimes habit to keep the pen in his hand while driving after having made such notations. Lindgren may have such a white pen, and made notations with it, but I am unpersuaded that he sometimes retained it in his hand while he drove. I credit George's account, and his testimony that he notified Lindgren's supervisor.

Lindgren acknowledges that Sanderson, before the incident where George told him not to smoke in the vans, asked him about the matter, saying that George had told Sanderson. (Thus, Lindgren reports that the conversation with Sanderson and the caution, or warning, by George were no more than a day apart. 5:880.) Lindgren then gave his denial of smoking in the van, explaining to Sanderson that perhaps George had seen the white pen that Lindgren may have been holding in his hand. (5:866–867, 880.) Sanderson does not address this conversation and therefore does not tell us whether, in that conversation, Lindgren denied smoking and offered the possibility that what George saw was a white pen in Lindgren's hand and whether, if such explanation was given, that Sanderson believed it.

Because the witnesses agree that George did caution (or warn) Lindgren on this occasion not to smoke in MTSI vehicles, I shall accept the date of February 23 as shown in Hugunin's file memo (R. Exh. 23). Although Hugunin's typed memo bears the identification date of "3-9-99," the third descriptive paragraph of the text refers to an event occurring on March 11. Whether March 9 is merely the initial date the memo was started, not finalized, I need not decide. As has been noted, Hugunin's name is typed. No evidence was presented explaining whether Hugunin normally did not sign whatever file memos he authored.

[24] George lives in Leawood, KS (2:281) which, on an atlas, is shown as far south of the KCI airport and just to the east of Overland Park, KS, which is just east of where IH-435 (west) turns and runs east. Presumably Lindgren's route took him to some motels or hotels on the south side of downtown Kansas City.

(2) March 9, 1999—Trip to airport

Although Hugunin's memo has a five-line description of an asserted complaint by Lindgren of rudeness (refused to answer questions and was "brusque") to a passenger on the way to the airport, no specific evidence was presented concerning the matter aside from Lindgren's denial (5:866), on cross examination, that on March 9 he had received a written warning from Hugunin and his further denial (5:866) that, on such date, Hugunin had discussed with Lindgren Hugunin's unhappiness with Lindgren's work performance. As the memo does not claim that Lindgren was told of the complaint, I do not infer that any such notice was given. The asserted complaint, however, is consistent with Sanderson's testimony (10:1654–1655) that, before March 10, there had been complaints of a minor nature lodged against Lindgren that Sanderson had not memorialized in writing. On March 9, however, I find that Hugunin did receive, as the memo asserts, the complaint and that he did memorialize it for Lindgren's file.

(3) March 10, 1999—Threat to dump

This incident is the most serious of any described. A female passenger from the airport to the Westin Hotel, once the other passengers had disembarked, complained that cold air was blowing on her. Things thereafter went from bad to worse in the conversation between her and Lindgren. According to Sanderson, who investigated the matter and spoke with the passenger, the passenger reported that Lindgren was very rude to her and eventually threatened to set her off the van (that is, set her walking). When the passenger, "Paula" (last name not recalled by Sanderson), began calling on her cell phone, Lindgren threatened to put her out of the vehicle if she did not terminate her call. She complied. (10:1652–1653, 1673–1675; R. Exh. 22.) Sanderson's two-page handprinted report (R. Exh. 22) of March 10, giving details of the incident, is in evidence.

Lindgren's version, that he simply tried to comply with the passenger's wishes about the air, possibly could have presented a credibility conflict except for a damaging admission he makes. In the course of his description (on direct examination, no less), Lindgren admits that he asked the passenger "if she would like to get out." (5:848.) No airport passenger, especially a female passenger, would want to hear that implied threat to put her on the street somewhere between the airport and her hotel. I consider Lindgren's admission of this terrorist threat fatal to his credibility on this matter. Even if trip records (not introduced) were to show, for example, that Lindgren transported the passenger to the Crown Plaza Hotel (Lindgren's version, 5:846–848), rather than to the Westin Hotel, as Sanderson recalls in his memo (R. Exh. 22 at 2), the critical mass of the passenger's complaint of a threat to dump is essentially admitted by Lindgren. I find that the incident occurred essentially as Sanderson describes at trial, as supplemented by his March 10 file memo (R. Exh. 22).

Respecting the incident, the passenger, using her cell phone, apparently had been able to reach MTSI's customer service representatives. They called Shuttle Manager Hugunin who in turn paged Sanderson to find out "what was going on with Dave." (R. Exh. 22 at 1.) As Lindgren acknowledges, he was summoned to "the Barn" where he spoke with Sanderson. (5:849, 871.) They talked about the matter, plus whether Lindgren was tired or had any personal problems, there and on the way to take Sanderson to pick up a vehicle. (5:849.) In his version of the conversation with Sanderson, Lindgren implies that Sanderson simply asked for Lindgren's account and that Sanderson never admonished him that MTSI could not tolerate threats to passengers. (5:849.) A major difference in their descriptions is that, as Sanderson details in his memo, he told Lindgren that MTSI could not have passengers feeling threatened. After determining that Lindgren had calmed down and was not a threat, he told him to return to work. (10:1654; R. Exh. 22.) That evening Sanderson wrote his memo and placed it on Hugunin's desk either then or early the next morning. (10:1655, 1674.) I credit Sanderson and the description that he gives in his memo.

[Frankly, it is both a disappointment and a mystery how the Government (Br. at 33), with a straight face, could write, and citing the pages showing this terrorist threat, "In each instance of a customer complaint, Lindgren's conduct was completely reasonable and tactful. [Page cites omitted.] Just not completely successful." Indeed, as the threat was admitted during direct examination, I assume that it was listed in Lindgren's pretrial affidavit and that the Regional Office therefore was aware that Lindgren had made this terrorist threat. Such being the assumption, the least the Government should have done would have been to acknowledge that which Lindgren admits, and then, having displayed the candor required by the rules of ethical conduct, honorably argued that the threat does not defeat the complaint allegation. Unfortunately, the Government's course of recitation and argument shows neither candor nor honorable argument.]

The next day would have been March 11, and that is the date shown in Hugunin's memo in the seven-line paragraph briefly describing this incident, including the threat. The foregoing paragraph in Hugunin's memo is followed by this concluding paragraph (R. Exh. 23):

> There have been indications of attitude problems prior to this and Dave has been talked to. This is to advise Dave that any further instances of this type of behavior will result in disciplinary action up to and including termination.

Lindgren denies that Hugunin talked to him about his attitude or said that he thought Lindgren had a poor attitude and that he needed to improve his attitude. Instead, Lindgren asserts that Hugunin just asked Lindgren if he was tired or had any personal problems. Lindgren said yes he was tired, but that he had no personal problems. Hugunin specifically denies that Hugunin threatened potential discharge if there were any further instances of poor attitude. (5:867–868.) The last paragraph in Hugunin's memo, as quoted above, suggests that it was Hugunin who interviewed Lindgren and delivered the potential discharge warning. If that happened, it gives context to Sanderson's testimony (10:1655, 1674–1675) that, after he placed his memo (R. Exh. 22) on Hugunin's desk, and their subsequent discussion about it, he was not thereafter asked to speak further with Lindgren.

Sanderson testified that he wrote his March 10 memo (R. Exh. 22) because, first, the threat of setting a passenger off the

van was rather drastic, and, second, while previous customer complaints had been "small scale," they now were becoming more frequent and more serious, and that the threat of setting off had to be documented. (10:1654–1655.) In his (March 11, apparently) conversation with Hugunin, Hugunin expressed his concern that matters seemed to be escalating. Both Hugunin and Sanderson expressed the view that the incidents—specifically the threat—were becoming more serious. (10:1655–1656.)

Neither party saw fit to offer into evidence samples of previous file memos by Hugunin, or incident reports, or written warnings, or what his practice was as to any of this. Indeed, the same is true as to Sanderson's practice. However, although Lindgren asserts that the accepted "procedure" respecting incident reports is that they are dated and signed by both a supervisor or manager and the employee (5:856, 871), Lindgren concedes that after arrived and took over, Hugunin exercised his discretion not to follow various polices of MTSI. The implication is that, after Hugunin took over as shuttle manager, the practice respecting incident reports, as with many other established company procedures, was changed. (5:871–872.) Indeed, as earlier noted, Sanderson testified that Hugunin preferred to give oral counselings before putting anything into writing on the belief that he could resolve such matters without having to take any "drastic" measures. (10:1656.) Any such "writing," it seems, could well be nothing more than a memo to the file rather that a formal incident report signed by both management and the employee.

In view of the foregoing, I conclude as follows respecting the last paragraph of the Hugunin memo (R. Exh. 23) to Lindgren's file. Disbelieving Lindgren's denial, I find that Shuttle Manager Hugunin interviewed driver Lindgren about the March 10 threat incident, and orally warned him (on March 11, I find) as stated in the memo. In view of the serious nature of the threat, Hugunin's failure to impose any formal written discipline on driver Lindgren seems extremely tolerant. Indeed, notwithstanding Sanderson's view that the threat was a serious matter, and the seriousness prompted him to document the incident (10:1655–1657), he apparently never recommended to Hugunin that formal discipline should issue. Thus, he apparently limited himself to discussing with Hugunin that the seriousness of Lindgren's behavior was becoming more frequent and more serious. Sanderson concluded that this was not proper conduct. (10:1655–1656.)

Less than 2 weeks later, as noted earlier, Lindgren signed a card for the Union.

(4) Late March 1999—Mawby's orientation

KCI Shuttle Manager Jack Mawby describes several events as occurring during his first 2 or 3 days on the job. The sequence is a bit confusing. In any event, one of the first things Mawby assertedly did, in the process of his familiarization program, was to visit the dispatch center and listen to the drivers' conversations with the dispatchers. According to Mawby, he noticed that Lindgren was "insubordinate and he would refuse to do things that they would ask him to do specifically, and at times, ignore them." Mawby considered Lindgren's conduct inappropriate. [No specifics of the asserted conduct are described.] The next day, as Hugunin was driving Mawby around and introducing him at hotels as the new shuttle manager, Mawby asked Hugunin whether Lindgren's radio-conduct was typical of him. Hugunin replied that it was and stated that he "should have fired him several months ago." (10:1615–1617.) Although there was no objection to the Hugunin conversation or to the remarks that Mawby attributes to Hugunin, I treat the matter as I do other conversational remarks that were offered (for example, 10:1618, 1621) for "state of mind" as bearing on motive and course of action. That is, I do not consider the conversation for the truth of the contents of the remarks. However, as Mawby made the decision to discharge Lindgren (R. Exhs. 25, 26), the remarks are not hearsay when considered only as they bear on the decision-maker's "state of mind," which is to say, his motive for making his subsequent decision to discharge.

Around the same time, Mawby spoke to then Assistant Shuttle Manager Sanderson to obtain his opinion about Lindgren's performance. Sanderson reported that Lindgren's file contained [that Lindgren "had things written up in his file"][25] memos of previous warnings for smoking and customer complaints. Mawby did not then check Lindgren's file, but did so after Lindgren received his next customer complaint. In reporting this to Mawby, Sanderson specifically described the incident of the cold air blowing on the woman passenger (the incident involving Lindgren's threat to the woman passenger to set her off the van at the next street corner) that had happened earlier that March. (10:1617–1619.) Sanderson describes a related conversation, but he places it in connection with a conversation about the next customer complaint. (10:1658.)

Before turning to the next incident, I address Mawby's description here. As we see later, Mawby does not assert that he relied on the specific matters he describes here (Lindgren's "insubordination" on the radio to the dispatchers; Hugunin's remarks that such conduct was common for Lindgren and that Hugunin should have fired Lindgren months earlier.) MTSI does, however, citing it on brief. (Br. at 41–42.) Observing that MTSI did not see fit to call any of the dispatchers to confirm even one instance of the "insubordination" that Mawby supposedly heard, I attach no weight to this testimony by Mawby because of the lack of corroboration and for the further reason that I do not believe Mawby. Respecting credibility, I observed that Mawby seemed to have poor recall of details and the sequence of events. Moreover, he testified with an unfavorable demeanor. I credit Lindgren that neither Mawby nor anyone else ever spoke to him about any "combative" conversations with dispatchers. (5:895–896.) As for the Hugunin's supposed statement that he should have fired Lindgren months earlier, I have no basis to consider it because I attach no weight to the supposed radio "insubordination" of Lindgren.

(5) March 28, 1999—Rudeness to passenger

This last customer complaint involves a woman passenger who was carrying a laptop computer on Sunday morning, March 28. The incident is briefly described by Sanderson at

[25] Sanderson testified that he had never inspected Lindgren's file. (10:1672.)

trial (10:1657–1660, 1667–1668, 1672–1673, 1675–1676), and in more detail in his file memo (R. Exh. 24) of that date. The passenger complained of rudeness by Lindgren that started with loading of her luggage. Lindgren assertedly became irritated when she wanted to carry her laptop rather than have it loaded with the bags. Lindgren acted further irritated when a male passenger assisted in opening the forward door for her, yelling at the man, "Don't ever touch my van." Lindgren was additionally irritated when she sat in the front passenger seat, saying that he did not like passengers in the front. She offered to move but he "snapped" that she could remain. Lindgren became hostile when she began writing a note. Although the note was to record her time of departure (possibly for her own time or billing records), Lindgren, apparently assuming otherwise, started spelling his name for her. This led to a dispute as to whether she was going to report Lindgren and the passenger simply put away her note. All this transpired before most of the other passengers had been picked up. The penultimate paragraph of Sanderson's two-page memo reads (R. Exh. 24 at 2):[26]

> She stated that Dave made her very uncomfortable riding with him. She also noted that he did not wear his seat belt which helped to add to her uneasiness riding with him. To sum up her ride she stated that "It was a very unnerving experience." It was also mentioned that she would of tipped him ever after all of the above except for the fact he handled her luggage in the [undescribed] fashion he did at the hotel.

Once again, although Lindgren disputes portions of the foregoing (he asserts that MTSI, to avoid any damage claims, prefers that passengers carry their laptop computers), Lindgren admits that the passenger did sit in the front seat, that (for safety reasons) he normally prefers not to seat any passenger in the front seat, and that he told a seated male passenger assisting in opening the front door for the complainant that he, Lindgren, would seat the passengers and that, for convenience and safety in getting in and out at his many stops, he does not wear a seat belt unless it is snowing. On the main point, Lindgren asserts that the passenger asked for his name, and that he spelled it for her. (5:851–854.)

I do not credit Lindgren to the extent his version departs from the essentials of Sanderson's report. In making this finding, I need not pass on Lindgren's explanation of MTSI's policy about wanting passengers to carry their laptop computers. While that has some surface logic, no party introduced any written policy of MTSI concerning loading baggage into the shuttle vans. Overall, there is enough similarity in the two accounts to call for a finding, which I make, that the passenger's version, as reported by Sanderson, is substantially accurate.

Not until redirect examination was Sanderson asked whether he discussed this incident with Lindgren. Even then the questions assumed that he had and, to complicate matters, lumped the March 10 incident (R. Exh. 22) with this one in asking whether Lindgren had denied them. Although Sanderson also answered in the affirmative, I discount that, and find that his answer (that Lindgren did not deny, but his version was "radically different") applies only to the March 10 incident—as to which there is no dispute that Sanderson interviewed Lindgren about the threat incident. In short, Sanderson never specifically states that he confronted Lindgren concerning the March 28 complaint by the passenger with the laptop.

Manager Mawby asserts that Sanderson submitted to him his report on this last customer complaint. (10:1618.) As Mawby states (10:1620–1622), and Sanderson confirms (10:1658), the two discussed the incident and the fact that it represented "continuing customer complaint problems with Mr. Lindgren" (10:1622, Mawby); and (10:1658, Sanderson) a level of "seriousness" in the repeated complaints by customers.

Following his discussion with Sanderson about the latter's report (R. Exh. 24), Mawby pulled Lindgren's personnel file and inspected it. (10:1618–1619.) He there found Hugunin's mid-March memo (R. Exh. 23), and Sanderson's written report of the March 10 incident (R. Exh. 22). (10:1619–1621.) He saw the March 28 report (R. Exh. 24) before it was placed in the file, and the other two documents (R. Exhs. 23 and 22) on inspecting the file. Aside from the March 28 report, the other two documents (R. Exhs. 23 and 22) were the only notes or reports in Lindgren's file. Mawby was checking Lindgren's file to see what history there was of customer complaints or of disciplinary action. Had there been any such documents in the file other than the specified ones he found, Mawby concedes that he presumably would have found them. (10:1634–1635.)

To conclude this section, as of March 29, after the report (R. Exh. 24) on the March 28 incident was placed in Lindgren's file, that file contained three documents reflecting adversely on Lindgren. As I have found, only two incidents were mentioned to Lindgren: (1) Lindgren was told by Sanderson about February 23 that President George had reported seeing him smoking in a MTSI van, and (2) the March 10 incident involving the threat to dump a woman passenger off the van who was complaining about cold air blowing on her. Additionally, as I have found, then Shuttle Manager Hugunin, as recorded on the Hugunin memo to Lindgren's file, orally warned Lindgren on March 11 that any further display of rudeness or threats to passengers would result in discipline for Lindgren up to and including discharge.

In making these findings, I have considered Lindgren's various denials—that, before his discharge, he was not told of any performance problems (5:854), was not aware of any 1999 complaints aside from the March 10 incident (5:860), he was never given any formal oral warnings or written warnings (5:841) incident reports (5:877), and, indeed, he never received "any warnings whatsoever" (5:854). Asked what he considered President George's oral caution/warning to him to be, he described it as, in effect, a courteous request that Lindgren not smoke in a MTSI vehicle. Even so, he concedes that he could have been in trouble for smoking in a MTSI vehicle. (5:877–878.)

Although Lindgren tends to view himself in a rose-tinted mirror, the record supports a finding, which I make, that before Lindgren's discharge, neither Sanderson nor any other management person ever told Lindgren of the March 28 complaint (R. Exh. 24) of rudeness to the laptop lady, and no one ever

[26] Covering nearly a page and a half on 11 inch by 14 inch paper, the memo would be very close to two pages of standard size paper.

asked for his version of the incident. Respecting motive, the testimony of MTSI's managers need not be accepted at face value, but will be weighed to determine whether, even if David Lindgren was experiencing a behavior problem, any discipline was imposed in good faith, or whether it was motivated by his support of the Union. Respecting that support, previously not public, turn now to the company meeting of March 30.

d. March 29, 1999—"Big Orange" knowledge

On Monday, March 29, Lindgren and some 11 other (5:820, 865; 10:1587) shuttle drivers attended a company meeting at which President George formally introduced Jack Mawby as the new KCI Shuttle Manager. (5:821–822, 873.) Lindgren initially dates the meeting, in accordance with the "about March 29" date presented in a question, as March 29. (5:819.) He later corrects the date to March 30 because the meeting occurred 2 days before his April 1 discharge. (5:894.) For reasons I discuss toward the end of this section, I find that the correct date is that of March 29 because it conforms to the sequence of dates he gives as he developed a bad cough and became ill.

The main significance of the meeting is that it is the occasion of Lindgren's public notice to management of his support of the Union. (No complaint allegation attacks anything said by management at the meeting.) Wearing a large (3-inch diameter), orange background, "Vote Teamsters" button (the "Big O") on the outside of his shirt above the left pocket (5:819, 265), Lindgren sat on the front row next to dispatcher Sue Holliver (the only two on the front row), while most of the others sat at the back of the room. (5:819–820, 865, 891.) The room itself was about 25 to 30 feet deep and 20 to 25 feet wide, or a little smaller than the hearing room for our trial. (5:820–821.) As the KCI Shuttle Division had some 36 full time drivers and about 6 part time drivers (10:1668, Sanderson), it would appear that George probably divided the drivers into about three groups to make his announcement, with Lindgren attending one of those group meetings.

The meeting was scheduled for 4 p.m., with George arriving slightly afterwards, for he called it to order shortly after 4 p.m. (5:819–820.) When George came in, he looked immediately at Lindgren, seated just 10 feet in front of George. (5:820, 891.) As Lindgren describes it, George "immediately" (5:820) looked "straight at me" (5:888), and (5:820) "if looks could kill, right about then I would have dropped dead. Right on the spot." Lindgren "felt a cold chill run up and down my back." (5:888.) George said nothing to Lindgren then or at any time during the meeting. (5:887.)

The meeting lasted close to an hour, with George using about 45 minutes of the time to talk about, for the most part, the Division's business and its problems in operations, including customer service. (5:820, 822, 873–874, 888.) About mid-way through his talk, George said that "heads were going to roll" of any drivers not toeing the mark."[27] (5:822, 873–874, 888.) When he said that, George fixed Lindgren with a cold stare of the "one on one eye contact" of "eyeball to eyeball." (5:822, 887–893.) Asked, on cross examination, whether Lindgren thought that George was telling Lindgren that George was unhappy with Lindgren's customer complaints and his smoking (in MTSI vehicles), Lindgren responded, "I suppose he was unhappy with my union button, sir." (5:893.) George said nothing to Lindgren about the Union button, and no management person did either before Lindgren was fired 2 days later. (5:893–894.)

During the course of the meeting, George would gaze briefly at others in the room, and even had brief conversations with some of the attendees about issues. But that brief gazing was entirely different from the two occasions when George fixed Lindgren with a cold stare. (5:888–891.) Asked whether he stared at Lindgren, George testified that he simply gazed at each driver, including Lindgren, in the room at various times, making eye[28] contact per his training on how to address a group. (10:1587.) George does not expressly deny staring at Lindgren, or giving him a "if looks could kill" stare at the beginning of the meeting, nor does he assert that he never saw the "Big O" on Lindgren's shirt.

Taking a page from the Government's book on devotion to accuracy, MTSI incorrectly states (Br. at 42) that George "denied" staring at Lindgren (citing the page, 10:1587, given above). At most MTSI, after acknowledging the difference, could have argued that George's response impliedly denies. Respecting that unmade argument, I am unpersuaded.

Similarly, MTSI distorts the record by writing (Br. at 42, citing Lindgren's testimony at 5:887–890) that George was "not" looking directly at Lindgren when he made his "toe the mark" statement. No one is perfect, of course, and even lawyers and judges can overlook a bit of testimony somewhere in a large record. But how could MTSI overlook Lindgren's testimony that, in delivering his "toe the mark" warning to the drivers, George was:

> He was looking at me when he made that particular remark. [5:822.]
>
> He looked directly into my eyes when he said that. [5:887.]
>
> It was just a cold hard stare. He looked straight into my eyes. [5:889.]
>
> That one on one eye contact. [5:891.]
>
> "Yes, sir, you did"—(Confirming my phrase, "eyeball to eyeball," characterizing Lindgren's descriptions following an objection that MTSI's repetitious questions were becoming argumentative. [5:892–893.]

And if the foregoing list is not enough, MTSI followed that with its own questions that included phrases such as (5:893), ". . . when you said Bill George gave you the eyeball to eyeball stare. . . [.]" And (5:893):

> Q. And at the time he was staring at you. He was telling people they needed to toe the line?
>
> A. Yes, sir.

[27] Incorrectly rendered in the transcript as "tow" and "toll" the mark, the idiom "toe the mark" derives from sports (track and field).

[28] To conform with my notes, and the context, I correct the transcript which (10:1587:7) omits the word "eye."

But let us turn back to the meeting. As George completed his portion of the meeting, he introduced Jack Mawby as the new shuttle manager. (5:821–822, 873.) Mawby then spoke for 10 minutes or so, and the meeting ended. (5:820, 822.) We are not given a description of Mawby's remarks. The relevant point here (not addressed in the briefs) is whether Mawby saw Lindgren's Big Orange "Vote Teamsters" button. With Lindgren sitting on the front row, and Mawby presumably facing the group as George did, the real question is how could Mawby not have seen the "Big O" on Lindgren's chest staring Mawby in the face. Although Mawby disclaims knowledge of Lindgren's union activities before Mawby fired him (10:1627), Mawby fails to assert that he did not see Lindgren's Big Orange. In view of the circumstances, I infer that Mawby did see the "Big O", which Lindgren was sporting on the outside of his shirt, and I do not credit Mawby in his denial of knowledge that, before the discharge, Lindgren was supporting the Union.

President George, who did not cover the meeting generally, also does not assert whether he observed Lindgren's big orange union button, nor does he deny knowledge of such visible support of the Union by Lindgren. I find that President George observed Lindgren's wearing of the Big Orange. On the first occasion, when George entered the room, I find that George gave Lindgren a "drop dead" stare. Midway through the meeting, in connection with the "toe the mark" topic, I find that George fixed Lindgren with a cold stare. As George so observed the union button, I find that he thereby gained knowledge of Lindgren's newly visible support of the Union. I further find that George's knowledge also would be imputed to KCI Shuttle Manager Mawby. This latter is especially true because, as I summarize later, Mawby, assertedly after making his decision to discharge Lindgren, reported to George and to COO Stephens on the decision that he had made and before the discharge was effected.

e. March 31, 1999—Match point

(1) Introduction

We come now to the make-or-break events—individual conversations between Lindgren and Sanderson and Lindgren and Mawby. As no one, apparently, taped any of the conversations, resolving credibility will be crucial. But first, a review of the date sequence and then some background.

As earlier noted, when Lindgren initially dated the Big Orange meeting, he gave the date as (Monday) March 29. (5:819.) On cross examination he at first confirmed that date (5:864), and did not correct its reference (5:887) until (5:894) toward the conclusion of cross examination when he fixed the correct date as having been on March 30—2 days before his April 1 discharge. As already noted, I find that March 29 is the correct date based on the days described in the development of Lindgren's cough. As we shall see, on March 31 (and that date is not in question) Lindgren asserts that he told Sanderson and then Mawby that he was sick that day. (In fact, he did not report to work on March 31, a Wednesday.)

Lindgren's work days apparently ended about 5 p.m. (For example, Lindgren testified that he had some 4 to 5 hours left to work following the March 10 (threat to dump) incident. (5:851.) That incident began about mid-morning (R. Exh. 22 at 1), and concluded after a meeting with Sanderson, the ending time probably being around 11 a.m. or a little later—consistent with Lindgren's description of the hours he had left to work. Thus, when the "Big O" meeting concluded about 5 p.m., Lindgren's work day, it appears, would have been done.

When Lindgren's testimony in terms of when his cough developed, the sequence starts with his acceptance (in response to a question) that the "Big O" meeting took place on (Monday) March 29. (5:819.) Following his initial description of the meeting, Lindgren, on being asked how his health was that day, replies (5:823, emphasis added), "It wasn't bad. It got a great deal worse *the next day*. I had a persistent cough. I just couldn't seem to stop. I have [had] a tickle in my throat and I just couldn't seem to shake it *the next day*." Clearly, Lindgren's reference to "the next day" is a reference to Tuesday, March 30, as the date that he developed a cough. The very next question asks about the events on March 31 (when Lindgren called in at 5 a.m. to report that he was sick).

Despite this rather clear sequence, Lindgren later moves the Big Orange meeting from March 29 to March 30 in rather strong testimony (5:894):

> Q. You said the meeting was on the 29th?
>
> A. . . . I was terminated on the 1st of April. The day prior to that I was sick. The day prior to that was the meeting.
>
> . . . .
>
> A. Sir, if there are 30 days in March then it was on the 29th. If there are 31 then it was on the 30th.

By so testifying, Lindgren appears to eliminate Tuesday, March 30, as the first day that his health "got a great deal worse" because of the persistent cough. (5:823.) Yet on cross examination Lindgren explains that, by the end of the day on March 30 he was not feeling well, that he had the "cough" and that he was feeling "very poorly." (5:882–883.) Then, in describing what took place the early morning of Wednesday, March 31, Lindgren tells us that "once again" (that is, for a second day) he did not feel very good, and that the "cough had kept me awake most of the night. I was pretty tired. And the cough was hanging on," so he called in, assertedly, sick. (5:823–824.)

March certainly has 31 days, and in view of Lindgren's strong ending testimony, the temptation is to leave the "Big O" meeting on Tuesday, March 30. I decline to do so because that would confuse the rather clear sequence of Lindgren's description of his (claimed) sickness. Thus, he asserts (5:882) that he did not have a bag on March 29 (that is, he did not take the money bag home with him that night after the "Big O" meeting). The next day his cough developed and he started feeling ill. By the end of the day he was felling "very poorly," so bad that he did not want to take the time to audit the contents of his driver's (money) bag so, in a "judgment" call, he took the bag home with him that Tuesday night, March 30. (5:882–883.) As mentioned, Lindgren's version is that the morning of Wednesday, March 31, he reported sick. That is disputed by Sanderson and by Mawby. Before turning to the different versions, we first need some background.

(2) Background

When KCI shuttle drivers sell tickets to passengers, the drivers accept payment by cash or credit card. Each driver stores the tickets, cash, and credit card receipts in a "driver's bag" or "money bag." (5:833–834, Lindgren; 10:1622, Mawby) By the end of a typical day, the bag will contain those items in a total value of about $1200. (5:882.) Drivers are responsible for the entire $1200, and should they lose the bag, they must make the full amount good to MTSI. (5:835, 882.) MTSI "policy," or at least the practice (5:835–836), is for the drivers, at the end of their shifts, to audit the contents of their money bags, turn in the audit slip, put the money bags (with contents) in a "drop safe" located in the hallway outside the dispatch office, time out, and go home. (10:1622–1623, Mawby.) During the relevant time, Human Resources Director McCann, presumably the next morning, opened the safe and counted the bags to see that each driver had dropped his into the safe. If a bag was missing, she reported that fact to Hugunin, to Hugunin's successor Mawby, or to Sanderson. (10:1665, Sanderson.)

Testimony varies on the time required to perform the audit. Lindgren asserts that it takes 10 to 20 minutes (5:883), Mawby gives the time as from 10 to 12 minutes on an extremely busy day, but as little as 1 or 2 minutes on a light day (10:1623), and Sanderson offers a time of no more than 5 minutes (10:1665–1666). The time estimates probably all have a basis in experience, with the outside limits no doubt being the exceptional times. As the estimates by Mawby and Sanderson included a bit of helpful detail, I find that the usual audit time, for a typical day, and not having a make a recount, would be 5 to 7 minutes. However, if a driver were feeling ill, possibly causing a recount, and possibly working a little slower because not feeling well, the audit even for a typical day could take 10 to 15 minutes. (As we see in a moment, the required audit time assertedly has a direct bearing on our events.

Lindgren asserts (5:834) that, about 6 months, or perhaps longer, before his termination, he persuaded Shuttle Manager Hugunin that it would save MTSI money, and make things more convenient for Lindgren, for Lindgren to ride home, at the end of the day, from the airport with his fiancée, (3:559; 5:886) Donna Smyers, who works at the airport (3:548; 5:834). Lindgren reports that, at the time, Smyers would drop him off at the 522 Locust Street "Barn." (The "Barn" is located at the main facility, 522 Locust Street. 5:692.) Lindgren apparently arranged to end his driving day at the airport so that he and Smyers could ride home in their only vehicle. (His MTSI van apparently was driven by someone thereafter who presumably left it at the "Barn," or other arrangements were made. The testimony is unclear.) In any event, Hugunin, apparently happy (5:835) that the arrangement would save MTSI money [Lindgren never explains how MTSI would save money from this arrangement], approved the deal. Under the arrangement, Lindgren would drop his driver's (money) bag in a small safe at the airport. (5:835.)

From the airport Lindgren's money bag would be transported downtown for the auditing process. [At least during 1999 before his own discharge, Dale Stripling, apparently in the mornings, frequently, then usually, went to the airport and picked up all (16 in number) such bags and returned them for the auditing process. (7:1140, 1197–1198).] On three occasions Lindgren learned that the auditing had not been done. Observing that this system was not working, Hugunin suggested that Lindgren take the money bag home with him each night and bring it in the next morning when he reported for work. Lindgren thereafter took the bag home each night, and returned with it the next morning. (5:835–837.)

This new arrangement went on until about early February. At that time MTSI changed its policy on where certain vehicles were located. The result was that Lindgren now (early February) ended his days downtown, at the "Barn," rather than at the airport. Ostensibly, therefore, Lindgren's need to take the money bag home ended in early February. Indeed, 90 percent of the time thereafter, Lindgren make his audit and dropped his bag (downtown) at the end of his shift. However, because Hugunin "never amended" his authorization for Lindgren to take the bag home, Lindgren still did so occasionally (about 10 percent of the time) and no one from management ever told him not to take the bag home.[29] (5:835, 837–838.)

According to Sanderson, he considers that other drivers who have taken their bags home did so by accident because they did so only rarely. By contrast, Lindgren did so frequently. Yet, Sanderson admits, he never documented any of these frequent occasions and his asserted counselings of Lindgren over the matter. (10:1665, 1670–1671.) I note that Dale Stripling credibly reports that, even of just the 16 money bags he was scheduled to pick up each day at the airport, "once a week at least" a bag would be "missing"—meaning, presumably, that a driver had failed to drop his bag at the airport the night before. (7:1198.)

(3) March 31, 1999—Lindgren misses work

(a) Facts

All agree that on this Wednesday, March 31, Lindgren did not work. The principal dispute is what Lindgren said when talking first with Sanderson and later with Mawby. Lindgren was to report for work at 5:45 a.m. According to Lindgren, a persistent cough had kept him up most of the night and he did not feel well enough to work. He called the "Barn" at 5 a.m. and told Shift Supervisor Sanderson that he would not be in that day. Lindgren assertedly explained that he was sick with a persistent cough and little sleep. Lindgren reported that he had his driver's bag with him that he had not dropped off the night before. He and Sanderson, Lindgren asserts, discussed whether Lindgren's fiancée (Smyers) should drop it off at the airport, but they ended up deciding that Lindgren should just bring it in the next day when he reported for work. (5:823–824, 881.)

About 5:30 p.m. that day, Lindgren testified, Shuttle Manager Mawby telephoned Lindgren and asked if he had a driver' bag. Lindgren confirmed that he did, and explained that he had reported that to Sanderson that morning, and that they had decided that Lindgren could return it when he came in the next day. Mawby asked Lindgren to come in right then and bring the bag. Lindgren said he was sick and had been sick all day and that he would bring it in "tomorrow morning." Mawby

[29] As we shall see, Sanderson disputes this latter point. (10:1665, 1671.)

told him to report directly to him when he arrived. (5:838, 895.)

Sanderson's version is different in critical respects. According to Sanderson, Lindgren simply called and reported that he would not be at work that day. Sanderson asked why, and Lindgren answered that he was not coming in. Lindgren gave no explanation, and he did not say that he was sick. Sanderson reminded Lindgren that he had the driver's bag. Lindgren replied that he would bring it in the next day when he came in. Sanderson said that was not acceptable, and that the bag needed to come in immediately. To this Lindgren responded, "Well, I'll bring it in the next day, when I come in." Surprised that Lindgren would refuse, in view of his previous counselings on the matter by then Shuttle Manager Hugunin, Human Resources Manager McCann, and by Sanderson himself, Sanderson apparently did not argue the point any further. (10:1660–1661, 1664–1665.) At some point that day (time and method not specified) Sanderson reported the matter to the new shuttle manager, Jack Mawby. (10:1660–1661.) For reasons not explained on the record, Sanderson made no file memo concerning this matter. (10:1671.) Indeed, as noted above, Sanderson never documented any of the "counselings" that he supposedly gave Lindgren over the driver's bag (10:1671), and, as Lindgren's personnel file shows, neither did anyone else. Indeed, Hugunin's mid-March memo (R. Exh. 23), which seemingly covers the topics of all counselings assertedly given to Lindgren, makes no mention of the driver's bag. I am unpersuaded that any such counselings ever occurred.

Mawby testified that it was "dispatch" (that is, not Assistant Shuttle Manager Sanderson) who reported (to someone not specified) that Lindgren had called and was not coming in, giving no reason. Later that day, Mawby reports, the "people who pulled the pouches" advised Mawby that Lindgren's ticket bag was not there and so Mawby called Lindgren at his home. (10:1624.) When Lindgren acknowledged having the bag, Mawby asked him to bring it back because he had Company money and tickets. Lindgren refused to bring it back, saying, "I will not bring it back. I'll bring it back the next time I come to work." To Mawby's repeated request, Lindgren repeated his answer. Mawby asserts that Lindgren did not say when he was coming in and he did not claim that he was sick. At that time, Mawby testified, he decided that he was going to terminate Lindgren for "gross insubordination to me" and for refusal to bring back Company property plus the "continual or habitual customer complaints that, to Mawby, indicated he was driving away customers and that he was a detriment to the business. (10:1624–1627.)

Mawby prepared a one-page handwritten file memo (R. Exh. 25), dated March 31, covering the event. Interestingly, the memo begins that Lindgren had called Sanderson to report that he was not coming in. The second paragraph reports that it was later, when Lindgren called the dispatch office, that Lindgren reported that he still had "Bag 35." The paragraph continues that such is a violation of company policy, and that Lindgren has continued to do this "after repeated discussions with previous managers who informed him that the practice was not acceptable." In the third and final paragraph, Mawby records that, in view of Lindgren's continued violations of company policies "and increasing customer complaints, I have decided to terminate his employment." Before Lindgren's discharge (the next day), Mawby asserts, he was not aware that Lindgren supported the Union, and, Mawby asserts, Lindgren's union activities had nothing to do with Mawby decision to discharge Lindgren. (10:1627–1628.) As I found earlier, in fact Shuttle Manager Mawby did observe Lindgren's "Big O" and the company meeting on Monday, March 29, and gained personal knowledge in that fashion, plus imputed knowledge through President George.

Mawby concedes that, following his writing of the file memo describing his decision to discharge Lindgren, he went to COO Stephens and to President George and reported to them the fact of his decision to discharge shuttle driver Lindgren. (10:1630–1631.) No description of that conversation, or conversations, is given in the record.

(b) Conclusions

For the following reasons, I credit Lindgren and his account of the events this day. First of all, I do not believe anything that Jack Mawby says unless it is corroborated, directly or inferentially, by other credited evidence. Mawby's demeanor was unfavorable, and critical pats of his story give off a false ring. I do not trust Mawby. By contrast, and despite his imperfections as a witness, alleged employee Lindgren had a far more persuasive demeanor, and I certainly credit him as against Mawby. True, I have found against Lindgren as to certain incidents, and he tends to view himself from a self-centered perspective. Nevertheless, he clearly prevails over Mawby.

Sanderson is a closer call, but I credit Lindgren. As a witness, Sanderson appeared to reflect a certain stress. Recall that he changed jobs not long after Lindgren's discharge, attributing his departure from management as an effort to avoid the stress there. Sanderson's demeanor, despite his seeming sincerity, reflected stress. Because of these contrasting elements in Sanderson's demeanor, I find his testimony, especially as to March 31, less reliable than that of Lindgren.

Now consider plausibility. Assuming that Lindgren began developing a cough on Tuesday, March 30, it was entirely consistent with his recent (since early February) 10 percent practice to take his money bag home and do an audit the next morning. That practice had not been officially terminated by Shuttle Manager Hugunin. If Hugunin had felt that Lindgren had been doing anything wrong concerning the money (or ticket) bag, he surely would have included it with all the other topics in his mid-March memo (R. Exh. 23). As noted early, I am unpersuaded that there were any counselings respecting Lindgren and the driver's (ticket/money) bag.

With his cough getting worse late on Tuesday, March 30, it is very likely, given the perversity of bad coughs, that the condition became even worse through the night. Thus, when Lindgren called Sanderson the early morning of March 31, Lindgren's version of the call is quite plausible, and Sanderson's far less so. As to the latter, the record shows that Lindgren is a person who works many hours a week to earn extra money. Recall that he declined a full time position of shift supervisor because he could earn more by driving (including all the extra hours and tips). Nothing in the record indicates

that Lindgren, giving no reason, would tell Sanderson that he was not coming in to work that day.

Moreover, if Sanderson really told Lindgren that it was "not acceptable" for Lindgren not to bring in the driver's bag, then surely Sanderson, as he had done for the March 10 and March 28 incidents, would have prepared a memo either to the file or to Mawby. He did neither. Mawby's testimonial account for that day suggests that he never heard anything from Sanderson, although Mawby's file memo (R. Exh. 25) states that Sanderson did tell him that Lindgren had called to say he was not coming in. Later, Mawby evidentially learned from "the dispatch office" that Lindgren had called to say he still had his driver's bag.

What I find is this. Lindgren's conversation with Sanderson occurred just as Lindgren describes. Because Lindgren was sick that day, he could bring the money bag with him the next day. Sanderson then told Mawby that Lindgren was sick and not coming in. Whether Sanderson mentioned the money bag is uncertain. Recall that Mawby concedes that, supposedly after his decision to discharge Lindgren, Mawby told COO Stephens and President George what he was going to do. The probability is that such conversations with Stephens and George came during the day on March 31, and that the occasion was seized on to distort and then advance it as the basis for getting rid of a newly minted "Big O."

Whatever happened among the MTSI managers, I find that the telephone conversation in the late afternoon that day meets the description given by Lindgren, and not the description of blatant insubordination given by Mawby. Thus, while Lindgren did say he would not take the money bag in at that point (already at the end of the day), he explained that he was sick, and had been all day, and that, in such circumstances that morning, Sanderson had approved his bringing the bag in when he reported for work the next day.

As for Mawby's file memo (R. Exh. 25) of that date, there is no credible evidence supporting the assertion that Lindgren had continued to take the bag home despite "repeated discussions with previous managers who informed him that the practice was not acceptable." Recall that Mawby, in searching Lindgren's personnel file, found only the file memos previously identified, and that, had there been anything else, Mawby would have found it. Now we have Mawby's assertion that unnamed "managers" in undated discussions had told Lindgren, on repeated occasions, that taking the driver's gag home was unacceptable—yet no file memo makes any reference to and such discussions. lndeed, in Hugunin's file memo, dictated or typed about March 11 (R. Exh. 23), he lists no such item, yet he covers such comparatively mundane matters as smoking and a customer complaint at the airport. If anything, Hugunin's failure to mention in his memo (R. Exh. 23), any such discussions indicates either that there none, or that, whatever may have been said, the nature and tone were so mild as not to justify even an "honorable mention."

As for Mawby's third paragraph about "Lindgren's continued violations of company policies and increasing customer complaints, "there is a basis for that, as I have found, respecting customer complaints. Although, as I found, Lindgren was not confronted by management about the March 28 incident of rudeness to a passenger, Sanderson (who prepared a file memo, R. Exh. 24) notified Mawby and Mawby inspected Lindgren's file. The problem facing MTSI here is the fact that it did nothing about it until Lindgren called in sick, and then, as I find, Mawby converts a plea of illness into insubordination for Lindgren's refusal to leave his "sick bed" to deliver the bag right then. Mawby's decision overreaches the facts.

Despite Mawby's testimony (10:1626–1627) that he decided to discharge Lindgren for his "gross insubordination" in refusing to bring in the driver's bag, no such basis is listed in his written (R. Exh. 25) grounds explaining his decision or, as we see in a moment, in the written termination paper (R. Exh. 26) that Mawby submitted to Lindgren the following day. Clearly Mawby, at trial, attempted to shore up the strength of MTSI's position by shifting to a new motivating reason—insubordination. Mawby even likened Lindgren's holding of the driver's bag as a form of theft. (10:1626.) So much overkill exposes MTSI's position as insincere and completely untrustworthy.

As for any insubordination, there was none because Lindgren was sick. Perhaps Mawby did not include that in his written reasons out of recognition that Lindgren was ill, but at trial changed his mind and included it in his testimony. In any event, I find no merit to any ground of insubordination. Proceed now to the day of the discharge.

(4) April 1, 1999—Lindgren fired

There is no dispute that, on Lindgren's arrival at work the next morning, April 1, that Mawby fired him. Just the two of them were present. Mawby does not contest Lindgren's version that Mawby said that Lindgren no longer fit the profile of a driver for KCI Shuttle. For grounds, Mawby, according to Lindgren, listed (1) smoking in a company vehicle; (2) a customer complaint, and (3) had taken the driver's bag home the previous day. Mawby pushed a discharge form across the table for Lindgren to sign, but Lindgren refused to do so because, he stated, standard company procedures had not been followed. (5:839–840.)

The termination report (R. Exh. 26), which Mawby had filled out (10:1628), states that the termination was a "Discharge." Of the 10 boxes provided for checking off one or more reasons, the last one, "Other," was checked. (The box for "Insubordination" was left blank.) The text reads (R. Exh. 26):

> Continued violation of company policy—smoking in MTSI vehicles—continued customer complaints about poor service & bad attitude—continued violation of policy by taking his ticket bag home instead of dropping it at the end of each shift.

Mawby added, "Refused to return key—time card—pager. Walked out." This line, not part of the basis for the discharge, refers to the fact that Lindgren, surprised and emotionally upset at his discharge, walked out to take a smoke and calm down before turning in the MTSI items to Sanderson. (5:840–841.) Mawby added his line about that when he took the form up to Human Resources Manager McCann, who signed as a (R. Exh.

26) "Witness."[30] (10:1628–1629.) Mawby never bothered to cross out the line or to add that, after a smoke, Lindgren turned in the items.

(5) Disparity evidence

The General Counsel offered certain examples of named drivers who either were not warned, or if warned, were not fired. (Br. at 33) I attach no weight to this evidence. For the most part, no relevance or materiality is shown other than that someone received a warning, or a customer complaint. In most examples the witness (Lindgren as to some, and Special Services Driver Ronald Cox as to others) knew only part of the story, with no information on what facts were considered by management, or even whether a warning issued. No management witness was called to testify concerning the examples, and no personnel documents, or stipulations about the lack of documents, were offered as evidence. No relevant comparison was articulated. Moreover, respecting the examples given by driver Cox concerning events in the Special Services Division under Internal Director of Operations Christopher Dowd, no showing was made that the same MTSI policies there apply to drivers in the KCI Shuttle Division. Thus, for example, it was not established that MTSI has an overall employee handbook, or universal policies and procedures manual. As we have seen, Shuttle Manager Hugunin apparently had managerial discretion, and exercised it, to go slow respecting formal discipline. That is in marked contrast to the written provisions prevailing in the Charter Division under the employee handbook (GC Exh. 12) in force there.

Finally, the only example cited for which relevance was shown is that of shuttle driver Gary Watkins. Lindgren testified that Watkins drew customer complaints because of his gruff personality. Apparently while acting as shift supervisor, Lindgren took some of these complaints and passed them on to Shuttle Manager Hugunin. Watkins was not discharged, and to the best of Lindgren's knowledge, Watkins was still driving as of the trial. (5:859–860.) But in the classic manner of shooting one's self in the foot, by mentioning the Watkins case, the Government managed to show, when Lindgren was cross examined, that Watkins just happens to have been a "visible" supporter of the Union. (5:898.) Obviously so, for he is among those named on the Union's letter (GC Exh. 9) of March 12 to MTSI as one of the Union's newest in-plant organizers!

Speaking of such letters from the Union, the Union's letter (GC Exh. 10) of April 13, naming Lindgren as one of three new in-plant organizers, was a bit late for the purpose of serving notice on MTSI respecting Lindgren.

f. Discussion

From the written termination report (R. Exh. 26), the stated grounds for the "continued violations" of company policy, as fully quoted above, are: (1) smoking in MTSI vehicles; (2) customer complaints, and (3) taking ticket bag home. Respecting the first ground, the last reported incident of such smoking was way back on February 23. MTSI does itself damage by advancing this item, as if it were some kind of ongoing violation, as a ground. I find it to be false, and a blatant pretext.

The second ground, continued customer complaints, has some basis, as noted earlier. Even so, the inclusion here smells of taint. This is so because former Shuttle Manager Hugunin had not seen fit to go beyond an oral warning (as documented in Hugunin's typed memo, R. Exh. 23). Even as to Hugunin's memo, MTSI receives the benefit of any doubt in that the memo is not signed, Hugunin (who died before the trial) was not available to be cross examined about it, and Lindgren denied it.

There is no evidence that MTSI had a written progressive disciplinary system as a required policy for the KCI Shuttle Division. Even so, the fact that Jack Mawby, as the new shuttle manager, would be inclined to (almost literally) jump on driver Lindgren's past mistakes to justify a current discharge, especially in the absence of a single formal reprimand (that is, in writing and signed, or not disputed, by both parties), gives pause. Even Mawby, who already was in the saddle at KCI Shuttle when Sanderson told him of the March 28 rudeness to a customer (the laptop lady), did not see fit to require a formal reprimand. In short, I find that this ground is added as an additional pretext.

Finally, inclusion of the ticket-bag ground is not supported by any documentation in Lindgren's personnel file, or any solid evidence beyond a possible oral mention to drop the bag. Again, I find that this unsupported ground is only a pretext.

In addition to the weak or nonexistent support for the foregoing grounds, I find that manager Mawby's distortion of His March 31 telephone conversation with Lindgren is persuasive evidence that Mawby, either on his own or at the suggestion of President George, rushed to rely on stale and unsupported grounds, or on whatever it took, to get rid of driver Lindgren.

Why this difference as to Lindgren when union supporter Gary Watkins, at least as of the trial, was still employed, as were the three others who wore union buttons to the March 29 Meeting? First, while the other three wore union buttons on March 29, they sat among those at the back of the room. Even assuming that George and Mawby saw those buttons, it was Lindgren who was up front and almost in the face of George and Mawby with his big orange "Vote Teamsters." Thus, Lindgren could be viewed as almost confrontational in the position he took in the room. Similarly, although Watkins was prominent, by virtue of being named an in-plant organizer, nothing suggests that he ever was confrontational about it. Finally, the record does not show what discipline, if any, has been imposed on these others, although Lindgren suggests, on cross examination (5:865), that the other three button-wearers have been discriminated against in some unspecified manner.

In short, Lindgren's sporting of his "Big O" at his front-row position (with only one dispatcher also on the front row), right in the face of President George, generated a "drop dead" look at Lindgren when George first arrived, and a "cold stare" at him later when George was speaking about drivers needing to "toe the mark." These expressions of facial animus by George toward Lindgren were directly attributable, I find, to Lindgren's "Big O" and especially to the fact that Lindgren had positioned

[30] Small wonder that such personnel documents, particularly when made during an organizing campaign, engender little or no trust when offered as "business records."

himself right there in George's face—as if taunting George with the big orange union button.

As we saw in the Boza matter, when President George feels that his family has been threatened, he can threaten violence. While Lindgren's conduct was not a physical threat to George, George's reaction demonstrates that he saw Lindgren's conduct as a type of attack against him personally. On that day, driver David Lindgren sealed his own doom. Clearly, George conveyed his anti-Lindgren sentiments (based on Lindgren's "Big O") to the new shuttle manager, Jack Mawby

Now Mawby's record shows that he had advanced rapidly up to the ranks of management. He surely does not need to be told twice that Lindgren no longer fits the profile of a KCI Shuttle driver.

But I need not rely on any finding that President George dictated, or even prompted, Lindgren's discharge. It is enough for me to find, as I do, that KCI Shuttle Manager Mawby had knowledge of driver Lindgren's union activities, and that each of the grounds offered by Mawby for his decision to discharge Lindgren is a pretext. That is, either the ground was stale (smoking), unsupported (describing Lindgren's taking the ticket bag home as a "continued violation," when Lindgren had never been told that he no longer had permission to do this), or (as to customer complaints) a delayed reaction activated after Lindgren's wearing of his "Big O" late Monday, March 29. Solidifying my findings is the fact that at trial Manager Mawby added the shifting reliance on Lindgren's supposed "insubordination" in their telephone conversation of late March 31. There was no such insubordination, and Mawby's own documents, his termination decision (R. Exh. 25) and the termination document (R. Exh. 26) make no reference to such.

Based on the foregoing, and all the record, I find that the Government has proved, by a preponderance of the credible evidence, that, as alleged, MTSI discharged David Lindgren because of his support of the Union. Because MTSI's reasons for discharging Lindgren are all pretexts advanced to mask the real reason (anti-union animus) it discharged Lindgren, MTSI is unable to attempt to show, as in the case of a mixed motive (one unlawful and the other lawful), that it would have taken the same action even had there been no union activities. Accordingly, I find that, as alleged, when it discharged David Lindgren because of his support of the Union, MTSI violated Section 8(a)(3) and (1) of the Act. MTSI must reinstate Lindgren and make him whole, with interest.

5. Joe Webster fired April 16, 1999

a. Introduction

At first glance, whether the Government established a prima facie case here appears to be a close question. Complaint paragraph 6(i) alleges (with the conclusory paragraphs) that MTSI violated Section 8(a)(3) and (1) of the Act when it suspended Joseph B. ("Joe") Webster on (Friday) April 16, 1999, and then fired him a week later on April 23. Admitting the events, MTSI denies violating the Act.

Hired September 1, 1995, Webster worked principally as a salaried taxicab mechanic for MTSI until his April 1999 suspension and discharge. (2:174–176, 207.) He actually began with MTSI in 1984 driving a cab, then drove for several years with another company that President George bought. (2:174–175.) Webster was one of the early supporters of the Union, and he was named as one of six additional in-plant organizers by the Union in its March 2 letter (GC Exh. 7) to MTSI. As earlier discussed, Webster was one of the six mechanics who walked out on March 3 in protest of the discharge that date of Dale Stripling. The six were suspended, and I found that suspension to have been unlawful. From early March until his April 16 suspension, Webster always wore union insignia and he would participate in lunchtime union rallies on the parking lot on Fridays by carrying a picket sign for a few minutes during the lunch period. On the Friday afternoon that he was suspended, April 16, he also had carried a picket sign for about 10 minutes during the lunch period. The sign's legend read, "Respect is a Teamsters contract." (2:181–183, 196–197, 242–243.) Webster acknowledges that he experienced no adverse job consequences during all the weeks of his visible support of the Union until his April 16 suspension and subsequent discharge. (2:254–256.) That, of course, has to be considered as not counting the fact that he was one of the six suspended on March 3. Moreover, there is no evidence that any member of management ever said anything to Webster about his Union insignia or any of his other union activities.

About 2:30 p.m. Friday, April 16, Webster was escorted by Maintenance Director Turney to the office of Human Resources Director McCann. At that meeting, McCann inquired about an event about mid-February when Webster worked on a private vehicle (a Ford Explorer) of a young, impecunious friend of TCL driver Todd Price. McCann inquired whether Webster had permission to do the work, whether any of the work occurred on MTSI's time, whether he received any money for his work, and whether he kept the money. Webster explained that Dale Stripling had asked him to help the owner by doing the work, that Maintenance Director Turney knew that he was doing the work, that almost all the work, aside from a short conversation with Turney, was done on Saturday, February 13, and that he had received $180 in cash. (At trial, Stripling denies that he requested that Webster do the work. 7:1254–1255.) After a second meeting a couple of hours later, McCann suspended Webster with the indication that termination was a possibility.

McCann's version does not have the division of labor so allocated as Webster gives, but instead simply lumps it together as part on Webster's time and part on MTSI's time. By coincidence, Webster was on vacation the following week, the week of his suspension. When he returned for his paycheck on Friday, April 23, McCann informed him that he was terminated for "theft." (That is, he was fired for stealing in the sense that he was being paid twice, including the time that he was on MTSI's paid time. As part of the time was MTSI's time, that apparently decided the matter and, for MTSI and McCann, determined the outcome. An additional factor was that Webster had not paid for some $57 in parts, ordered through MTSI. Webster concedes that he needed to pay for the parts, but that he was waiting for a ticket (a bill) from Turney. With all the events at work, plus buying a house, as Webster asserts, he simply had forgotten about the debt.)

The General Counsel (Br. at 25, 29) suggests that it was Webster's union activities, "especially" the walkout and including the picketing that Friday April 16—"the proverbial straw that broke the camel's back"—that sparked the investigation, suspension, and discharge. Indeed, (Br. at 27), "The only precipitating factor for the discharge two months later was Webster's picketing in the union rally on April 16." But as indicated above, picketing was not something that Webster just started on that Friday, April 16. He had been picketing at almost all the Friday union rallies, and so testified. (2:243–244.)

MTSI's position is much simpler. What happened, it asserts, is that in early April Maintenance Director Turney came across the two parts invoices for the work, and recognized them as parts for the Ford Explorer. After checking with Todd Price and then with Webster, Turney reported the matter to McCann. Her investigation promptly followed.

In short, on first consideration, the timing factor does not appear to favor the Government. Moreover, as noted above, before April 16 Webster, aside from his early March suspension along with the other five mechanics, suffered no other job discrimination, and there is no evidence that any antiunion animus was ever directed his way concerning either his union insignia or any of his union activities. If timing does not favor the Government, and no animus was addressed against Webster individually, other than as flows from the early March suspension of the six who walked out to protest the discharge of Dale Stripling, what shows that the Government established a prima facie case? The General Counsel does not articulate what specific elements of a prima facie case exist here (aside from the timing argument). Presumably the walkout suspension, as technical as it possibly might be considered (as opposed to any individual animus), would add some weight toward a prima facie case.

b. MTSI's policy for private work by mechanics

President George asserts that MTSI's policy has been in effect since 1984 and provides (12:1876–1877):

> Any mechanic that is working on a non MTSI vehicle during Company time must have a repair order [a MTSI document that, in effect, formally marks it as the work of MTSI] and the funds and profits or proceeds from that must go to the Company. If they want to work on a personal vehicle, a friend's vehicle, wife, girlfriend, whatever, they can do it in their non working hours as long as they receive prior permission from their supervisor. But in no way shape or form are they to profit from that. It is more of a convenience that they can use the lift and the facilities.

Even if a supervisor were to permit a mechanic to work on MTSI time but keep the money, that "would be considered theft." (12:1877, George.)

As George explains, the reasons for the rule, especially the repair orders and no cash aspects, boil down to this—insurance coverage. On MTSI's Garage Keeper's Liability insurance policy, premiums assertedly are based on a percentage of the labor costs. No repair ticket, no insurance coverage. For example, George explains, if a mechanic, for a private cash deal, were to replace a vehicle's brakes during his off time on a Saturday, but at MTSI's garage, and the brakes failed resulting in personal injuries and property damage, MTSI would be exposed to liability, with no insurance coverage, in any claim for damages. This is because the insurance company's representative would come in and audit MTSI's records (the repair orders, specifically) to see if there was a repair order for the work on the brakes. If no repair ticket (and therefore no insurance premium, and therefore no insurance coverage), MTSI would be on its own. This is the method by which the insurance company keeps the insured company "honest," as George reports. The penalty of no coverage, in the absence of a repair order, is the insurance company's hammer over MTSI's head. "It is a very big risk that we run every day in repairing vehicles." If cash changes hands, "that person [the mechanic] is our agent, [and] we are in the loop in case of a liability." It is a "very, very, serious issue." (12:1877–1878, 1883–1885, George.)

No insurance agent, particularly from MTSI's insurance carrier, nor any insurance expert, testified in confirmation of George's understanding of the matter. Nevertheless, and particularly in view of the fact that his account of MTSI's insurance coverage is not disputed, I accept as substantially correct George's description of MTSI's insurance coverage. As I find later, however, George came to his concern about this "serious" matter very late in this case.

Even so, it does not help MTSI if its corporate policy as to this remains in the office of President George and does not get communicated to the mechanics. Despite George's self-assured testimony (12:1886) that all the mechanics know about the policy (presumably just as George described it at trial), George admits that the rule is not posted anywhere nor is it contained in any employee handbook because MTSI does not have any employee handbook. (12:1878, 1885–1886.) Announcement of the rule to new employees is left up to Maintenance Director Turney to convey during his orientations for new mechanics. However, George does not attend those sessions, so he is unable to tell us that he has personal knowledge that Turney has informed the new mechanics of MTSI's policy on this matter. And unfortunately, whatever orientation outline Turney (presumably) follows is not in writing. (12:1885–1888.)

During his own testimony, Turney did not address the matter of his orientations for new mechanics and what he tells them, if anything, about MTSI's policy respecting working on private vehicles, repair orders, and cash. Turney does assert that his rule has always been—no work for cash. (11:1860–1861.) As I note later, Turney did not impress me as a reliable and trustworthy witness. I do not credit him on this, or on anything not consistent with my findings.

Webster tells us that most of the private work done by the mechanics is done (in MTSI's garage) on Saturdays. (2:220–221.) George asserts that he works every Saturday, and that when he passes through the garage and sees a mechanic working on a non-MTSI vehicle (and they stand out like a "sore thumb" among all the taxicabs and MTSI's fleet vehicles), he always stops and asks the mechanic whether he has received permission from Turney to work on the vehicle. (12:1886.) This not only is because, as noted (12:1876, 1886), mechanics must have such permission, but, apparently, they must obtain such permission of each such occasion. George does not give

us any examples (names or approximate dates) of his Saturday inquiries. I do not credit George as to this. First, he was not persuasive in the telling. Second, his personal attention as this, but lack of personal attention to the orientations claimed as to Turney, seems strangely different. Third, as noted, he gives not one name of a mechanic he ever spoke with about this. Forth, elsewhere George asserts (12:1882) that management does not police MTSI's corporate policy by going out and asking about car titles to verify that the vehicle belongs to a relative or friend and that, it is implied, not work for cash. Thus, his two descriptions get rather complicated. At times George can be persuasive. This is not one of those times.

From George's clear reason (insurance coverage) for MTSI's policy, to Turney's merely indirect, at best, claim that he tells the mechanics "no cash work," we take a somewhat different turn with COO Stephens' explanation for the corporate policy. According to Stephens, the rule is to keep track of work in the garage and parts. For work done on company time, the proceeds must be turned over to MTSI because, otherwise, the mechanic would be getting paid twice. For work done during the mechanic's off time, but with his supervisor's permission, there would be no repair order and therefore the mechanic (9:1480) "would be able to keep the moneys."

To the extent that MTSI has a corporate policy as described by George, I find that it was never, during the time relevant here, communicated to the mechanics. The clearest articulation of the policy that was communicated to the mechanics comes from Webster in his description of what Maintenance Director Turney told him on the subject. As Webster reports, in 1998 Turney, explaining Turney's rule for the garage, told Webster (2:183, 220–221):

> You can use the garage any time you want, as long as it is on your own time and it doesn't interfere with Company business.

As to that item, Webster testified persuasively, and I credit him. Notice, however, that Turney's statement of policy fails to mention a key item—work done for cash. That is because, I find, Turney said nothing about it. Furthermore, I do not credit Turney's claim (11:1860–1861) that he has never (knowingly) allowed any work for cash. At many points, and this is one of them, Turney did not testify persuasively. I do not believe him on this.

The General Counsel's position is that the practice in the garage has been that many mechanics (some more than others) frequently worked (normally on their off time) at the premises, on private vehicles for cash, and that they kept that cash, all with the knowledge, even administrative assistance, of Maintenance Director Turney. As with many of the Government's assertions, its description of the evidence is unreliable. The General Counsel's citations on brief (Br. at 26, 28) generally consist either of hearsay (example, "After I was fired, Larry Clark told me. . . .", 2:184, Webster); hearsay assertions of work done by others for cash (7:1087–1088, Boza; 7:1170, Stripling); or broad, generalized assumptions (such as by Webster, "We do outside work. We just keep the money. That's the way it has always been. . . . We always keep the money." 2:224–225.) As to "always" keeping the money, I note that, on cross examination, Webster concedes that, before the incident in question here, Webster had done cash work on only one occasion. (2:241.) Moreover, as if suggesting that there was an informal practice of "Don't ask, Don't tell," Webster asserts (2:219–220):

> Well, it [the rule] was that you could work on any outside vehicle. Because technically, they didn't know whose vehicle it was we worked on. . . . We are not required to tell them if we are working on our own car, or if we are working on a customer's car for hire.

Webster asserts that mechanic Bill Lemons did work for cash during his off time. (No foundation was given to support this assertion.) Indeed, Lemons would have disabled Honda cars towed to the garage where he would work on them. One of these sat on a jack stand, with a wheel off, for 2 months. The car was so situated that Webster had difficulty moving his (MTSI) vehicles into his stall to perform his MTSI work. Webster complained half a dozen times to Turney before Turney made Lemons move the jacked-up old Honda. (2:185–186.) Evidence such as this could support other direct evidence of knowledge by Turney of a commercial venture, but in theory Lemons could have been repairing a relative's Honda. Thus, it is not direct evidence that Turney was aware that Lemons was doing work for cash. In fact, Webster's testimony that Lemons was doing the work for cash is nothing but unsubstantiated hearsay.

Mechanic Walter Boza gave a rambling account that mechanic Larry Clark, in Boza's presence, would tell Turney that Clark had just made some money by changing tires or installing spark plugs. No approximate dates are given for these events, and it is unclear whether Clark supposedly was describing work he had done just minutes earlier (as if on work time, unless it was a Saturday), or work that he had done at some more distant point. Initially Boza described the occasion as Clark's "coming up to me," but switched to Turney when the General Counsel mentioned Turney's name. (7:1091–1092.) Boza did not impress me as reliable in this convoluted description. I find that the incident or incidents that he describes were conversations he had with Clark, at which Turney was not present.

Dale Stripling testified that mechanics did private work, and that it went on "all the time," with probably "Terry Tinnin and Larry Clark" doing more of it than anyone else. (7:1170.) Ironically, it appears that Tinnin (sometimes spelled in the record as "Tinin") may well be the "Terrance Tennin" named on the Union's faxed letter (GC Exh. 7) of March 2 advising MTSI that he (plus Webster and a few others) was one of the newest in-plant organizers for the Union. The problem is that there is no non-hearsay evidence showing (1) that the work was for cash, and (2) that Turney knew it was for cash.

The only cited incident showing that Turney was aware of cash changing hands is described by mechanic Walter Boza, and his incident occurred in June, roughly 2 months after Webster was fired. On this June occasion, a man came through the garage seeking help to change a flat on his Jeep. When the man came to him, Boza told the man to ask Turney. At the man's request, Turney said that anyone willing to do so, could. As Boza was not very busy, he agreed to go along to help. The

Jeep was about 2-3 blocks away. After Boza changed the flat, and put the flat in the back of the Jeep, the man drove Boza back to the shop where he gave Boza $20. After thanking the man, Boza went in and told Turney that he had changed the flat and that the man had given him $20 for helping him. Turney said "Good." (7:1088–1089.) On Brief (Reply Br. at 6) MTSI observes that this incident is controlled by the fact that Turney gave permission for Boza to do the work. Turney does not address the matter in his testimony.

Testifying that he was unaware whether mechanics received tips, George allowed that such might occur. George was not asked about Boza and his $20 "tip," but George, testifying about tips by cab drivers to the porters who (as part of their jobs) change the cabs' oil, states (12:1882):

> If the cab driver chooses to tip a porter, we have no knowledge of it. It is really beyond our control so we don't have a policy on it.

The $20 incident involving Boza (whose uncontested account I credit) certainly seems to be a "tip" rather than a "cash for hire." Whatever similarity it has to Saturday mechanical work for cash is far too remote to serve as support for any finding here other than it is an immaterial incident—even with Turney's knowledge and permission.

In short, no credible, non-hearsay evidence shows that Turney (or anyone in management) had specific knowledge that any mechanic was receiving cash for his work on non-MTSI vehicles. The amount of hearsay evidence suggests that something like an informal "Don't ask, Don't tell" practice could have been in place, but the evidence does not establish even that informal practice.

There is no dispute that, on non-MTSI vehicle work for which the mechanics have permission to do, MTSI permits the mechanics to order parts through its parts department. MTSI adds a 10 percent markup to cover MTSI's administrative expense. No repair order is prepared because it is not a MTSI job. (12:1882–1883, George.) As for the private work for which permission [whether generic or job-specific] was given, and parts ordered through MTSI, Stripling would keep a monthly tab, or "ticket." At the end of the month he would give the ticket to Maintenance Director Turney who, in turn, would come around to the mechanics to collect for the tab each owed to MTSI. (2:186–187, 274–277, Webster.) Eventually that is what Turney did here (11:1866), only he gave Webster the bill (GC Exh. 18, dated April 16) on the day, Friday, April 23, that Webster was fired. (2:273–279.)

c. The Ford Explorer

(1) Facts

In mid-February (the specific date is in question) Todd Price, a TCL driver (2:198; 11:1832), told Maintenance Director Turney that his out-of-town friend, Tad, was having trouble with his Ford Explorer. Price asked if MTSI would be interested in repairing the Explorer. Turney had Webster inspect the Explorer. Webster concluded that the intake manifold gasket on the Explorer was leaking. Because this would be complicated and time consuming, Turney told Price that MTSI did not desire to do the work, and suggested that Price advise Tad to take the Explorer to Midway Ford, explaining that Midway Ford was open 7 days a week around-the-clock, and that they had told him they could get on the job right away. So testified Maintenance Director Turney. (11:1832–1834, 1852–1853.) Webster agrees that he checked the Explorer and so diagnosed the problem. (2:221–222.)

As Price apparently worked until about 4 p.m. (2:200), it apparently was close to 5 p.m. when Webster reached his diagnosis of the cause of the Ford Explorer's problem. Webster asserts that, about an hour after he checked the Explorer, in fact after 6 p.m. (2:224), Dale Stripling, Price, and "Tad" came to him. Stripling reported that "the kid" (Tad) had problems because Turney did not want to do the work and a Ford dealer was quoting a price of $500 plus parts and Tad had less than $200. Stripling asked if Webster "could help this kid out." Webster told them that he usually did not do this, but as a favor to Price, whom Webster knew, he would come in on Saturday (February 13) and do the work.[31] (2:198, 222–223, 239–240) Although Stripling denies that he asked Webster to do the work, with one exception he does not deny the other details of Webster's foregoing description. (7:1254) [The exception is that Stripling asserts that Turney never told him that he did not want a MTSI mechanic working on the Explorer because MTSI did not have enough time to do the work. (7:1256.)] In fact, Stripling asserts that Turney told him the Ford dealer wanted about $500, that the young owner had less money than that, and that Turney later told him to get parts because Webster would be working on the vehicle on Saturday. "John [Turney] told me that, and I got the first part that he needed." (7:1181–1182.) Actually, Stripling identified (7:1177–1180, 1255) the invoices for two parts, with the first invoice bearing the date of (Friday) February 12 (GC Exh. 79) and the second of (Saturday) February 13 (GC Exh. 80).[32]

Turn back now, respecting the dates, to Turney's testimony. He begins the topic answering a question that directs his attention "to around February 11, 1999. . . ." (11:1832.) February 11 was a Thursday. Turney himself did not specify the date except as he did not correct the date given him in the question.

When MTSI's counsel, in questioning Turney on direct examination, moved to the next topic, he did so with a question directing Turney's attention to a specific date, a date that was a Friday. Thus (11:1834, 1853, 1863):

> Q. I direct your attention to (Friday) February 12, 1999. On or about that date did you learn that Joe Webster was working on a green Ford Explorer?
>
> A. Yes I did.
>
> Q. How did you come to that information?
>
> A. I saw the truck in the garage and he was having trouble with the firing order on a V-6 and I just inquired about the truck and asked him who sent it up to be worked on because I remembered it was Tad's truck and he [Webster] told me that Dale [Stripling] had told him to go ahead and work on it.

[31] Stripling reports that Webster never came in on Saturdays to work. (7:1182, 1254.)

[32] Copies of the two invoices were first marked as R. Exh. 3 but could not be authenticated through Webster. (2:235, 266.)

Right away we have a subtle and important dispute about the dates. The foregoing places Webster as working on the Explorer on Friday—a regular work day for Webster. Webster's account of his agreement to do the work specifically provides that Saturday would be the day. The first part ordered was for either an intake or exhaust manifold gasket (7:1178, Stripling), which is consistent with Webster's diagnosis of the problem as being a leaky intake manifold gasket (2:222). It is likely that the order was placed the same day for the part so that Webster could have it to do the work the next day. As it also is likely that the (Friday) February 12 date on the invoice (GC Exh. 79) is the same date as the date Stripling placed the order, I find that it was Friday, February 12, 1999, when mechanic Webster made his diagnosis of the problem. To the extent Turney intended to place the diagnosis on Thursday, February 11, and Webster's initial work on Friday, February 12, I do not credit him.

On Saturday, February 13, Webster arrived at the garage about 8 a.m. to work on the Explorer. With the Explorer upstairs, Webster went down to obtain the parts (gaskets) from Turney. Turney asked him if he was working on the Explorer and Webster said yes. Turney said "Fine." (2:223.) However, only one of the gaskets was there. The parts distributor had to be called. As we know from Stripling, the missing gasket was for the valve cover, and that was the part Stripling ordered that Saturday, February 13, as is reflected on General Counsel's Exhibit 80. (7:1178–1179.)

The second gasket arrived about 10 a.m. Webster then installed the new gaskets, finishing about 4 p.m. After starting the engine to check his work, Webster observed that he had erred in setting the firing order (the sequence in which electricity is delivered to the sparkplugs, 7:1181) thereby causing the engine to run rough. As Turney had already gone for the day, Webster left the Explorer there until the following Monday (February 15). (2:199, 225.) Because Webster's demeanor was superior to that of Turney, and Webster's account given with a more natural delivery, I find that it was Monday, February 15 (not Friday, February 12, as Turney describes in his testimony quoted earlier) that Turney learned from Webster that the Explorer had a problem with its firing order.

On that Monday, Webster saw Turney about 10 a.m. Reporting that he still had the Explorer upstairs, Webster explained that the firing order was wrong. He asked Turney to call the Ford dealer to get the correct firing order. Around lunchtime Turney gave him the firing order reported by the dealer, but after a 10-minute check, Webster saw that it was the same order he had used. (2:199–200, 226–227.) Stumped, Webster let the Explorer sit in the upstairs stall until Wednesday (February 17). On that day (time not specified), after learning that another mechanic at the Charlotte Street garage had an Explorer of the same model year, Webster arranged to inspect that vehicle's firing order. Ascertaining that firing order, Webster, during his lunch period that day, set the sparkplug wires in the correct order on Tad's Explorer. Webster then called TCL driver Todd Price and told him the Explorer was ready. After Price completed his shift he picked up Tad about 4 p.m. and the two came to the garage and picked up the Explorer. They paid Webster $180 in cash. (2:200, 224, Webster.)

(2) Discussion

Recall from Turney's earlier-quoted testimony that he testified that Webster said Dale Stripling had told Webster to go ahead and work on the Explorer. Following that testimony, Turney is asked whether he had given Webster authority to work on the Explorer. Turney answered, "No, personally I did not." Turney then is asked whether, after Webster said Stripling had granted the authority, he had investigated further. Turney asserts that he did not do so because Stripling "had the authority to bring work in [into] the garage and if he thought it wouldn't interfere with our regular work then I let him use that authority." (11:1834–1835.)

In short, no later than the morning of Saturday, February 13, Maintenance Director Turney knew that Webster was poised to begin work on the Explorer. I also credit Stripling's account (7:1182) that Turney told him (on Friday, February 12) to order the parts because Webster "would be working on it on Saturday." I credit Webster's account, as against Stripling's denial, that Stripling asked him to repair the Explorer. Consistent with Stripling's account that Turney knew that Webster would do the work on Saturday, Stripling ordered one of the parts on Friday, February 12. The next morning, Turney and Webster had their conversation when Webster went to pick up the gaskets to start work on the Explorer. I do not credit Turney in his story that he did not investigate further because Stripling had the authority to bring work into the shop. In addition to Turney's poor demeanor in his testimony, such supposed authority is inconsistent with the facts, as I found much earlier, that Turney blocked the passage of any supervisor authority to Stripling.

Note that had this work been within the normal routine for MTSI work, a repair order would have been prepared. President George concedes that preparation of a repair order is something that either Turney or Stripling, not a mechanic such as Webster, would have done. (12:1880.) Stripling's testimony is consistent with that. (7:1176.) As no repair order was prepared, the implication is that Turney recognized that the Explorer job was private work, not a MTSI job. Nothing suggests that Turney would have thought that Webster, although he was salaried, contrary to his past practice, had come in that Saturday to volunteer his services either as free to Explorer owner Tad or as a gift to MTSI of any money paid. If any money was to be paid to MTSI, Turney would have prepared a repair order. As for any gift of services to Tad, nothing suggests that mechanic Webster intended to work for free on a tough job that, even if everything had gone right, required some 5 hours (6 hours if he did not stop for lunch) of manual labor on a Saturday, one of his off days. If anything, the silence about the terms of any payment suggests a practice of "Don't ask, Don't tell."

Indeed, as with the "no policy" described by George (12:1882) concerning tips to the workers, as distinguished from the Charter and Limo drivers who receive tips, the suggestion is that Turney intentionally did not ask. Recall that Turney did not ask mechanic Boza to let him know if he was paid a tip for changing the Jeep's flat tire. It was Boza who came in and

volunteered the information to Turney. There would, of course, be some benefit to MTSI of such a practice of not asking. It would allow the mechanics to earn some extra money. (No one claims that their regular pay is lavish.) MTSI would indirectly benefit by that extra money to the extent it reduces the need of the mechanics to apply pressure on MTSI to increase their pay.

d. McCann's investigation and decision

(1) Description

In my introduction section, above, to Webster's case, I mention that Maintenance Director Turney "came across" the two parts invoices (GC Exhs. 79, 80) for the Ford Explorer. Testifying that he has to reconcile his records at the end of each month, Turney asserts that in early April he found the two invoices, but that he was unable to locate matching repair orders. (No explanation as to why it was not about early March.) Turney first called TCL driver Todd Price. After a couple of conversations, Price told Turney that he was sure that Tad had paid cash to Webster. Turney then went to Webster who said he was waiting for Turney to give him a ticket (bill) for the parts, that he had received money from Tad, and that Dale Stripling had told him to keep the money.

The next day, about mid-April, Turney reported the matter to Human Resources Director McCann, the person who handled matters of employee misconduct. (11:1835–1836.) As McCann apparently began to describe at trial (11:1713), and as her subsequent file memo of April 16 (R. Exh. 27; 11:1716) details, before the first meeting held with Webster that day, Turney reported his account of matters with (in addition to his early April discovery and conversations) dates indicating that the Ford Explorer was brought in and diagnosed on (Thursday) February 11 and that on (Friday) February 12 Webster told Turney that he was working on the Explorer, that Dale Stripling had authorized the work, and that Webster was having a problem with the firing order on the Explorer.

The first meeting in McCann's office, as noted earlier, was held about 2:30 p.m. on Friday, April 16.[33] Attending were McCann, Turney, Todd Price (who did not testify here), and Webster. The meeting elicited the material points as described earlier. (2:197–201, 238–239, Webster; 11:1713–1716, 1742–1744, McCann; 11:1837–1838, Turney; R. Exh. 27.) One item to add here is that McCann acknowledges that at some point (which meeting, or both, not specified) Webster stated that he came in on a Saturday to do the work on the Explorer. (11:1745.) McCann's admission of this important difference with Turney's advance account to McCann, before the first meeting, is not reflected in McCann's written reports (R. Exhs. 27, 28.)

A second meeting was held some 2 hours later. This time Price was absent, but COO Stephens attended along with McCann, Turney, and Webster. Before the meeting McCann conferred with Turney about certain (unspecified) matters that came to light in the first meeting. (11:1717, 1744.) McCann reported to Stephens, as the record indicates and the organizational chart (R. Exh. 13) reflects, so presumably either she or Turney, or both, discussed matters with Stephens before the second meeting. According to her post-meeting April 16 memo covering the meeting (R. Exh. 28), McCann states that a decision was made to terminate Webster because of his actions involving repairs to a non-MTSI vehicle. McCann asserts that this was the first time that Webster mentioned that Dale Stripling had told him to keep the money, and that he would not have done so had Stripling not so told him. Moreover, Webster stated that he had done the work on both MTSI time as well as his lunchtime over a 2-day period. (11:1716–1718, 1744; R. Exh. 28.) At trial McCann conceded almost total ignorance of the workings of the garage, such as that Turney prepared the repair tickets, and that Turney collected for parts, and stated that she did not know whether Turney was aware [of the disputed claim] that mechanics did private work for cash with Turney's knowledge (11:1743–1745.)

As to his keeping the $180, on cross examination Webster initially denies telling McCann that Stripling had said that Webster could keep the cash. Moments later Webster conceded that he "may have" told McCann that, apparently at the second meeting. (2:224–225, 240.) Respecting McCann's statement that Webster said he never would have kept the money except that Stripling told him to, Webster credibly asserts that what he really said was that had he known that working on the Explorer was going to lead to all of this he never would have worked on the vehicle for the money in the first place. (2:240–241.)

COO Stephens testified that although he was present at this (second) meeting, he did not participate in the subsequent discharge decision. (9:1482.) Stephens discloses, however, that McCann told him of her decision to discharge and the basis on which she was going to discharge Webster. (9:1483.) Stephens asserts that Webster's actions, as described at the second meeting (working on a non-MTSI vehicle during Company time; receiving and retaining cash for the work; failing to fill out a "work order" (repair order), and waiting for a parts bill) were in violation of MTSI's "rules" regarding working on non-MTSI vehicles. (9:1487.)

Missing from McCann's account is any mention, as Webster asserts he made (2:202), of any claim by Webster that Turney let the mechanics use the garage all the time for outside work whether it is personal or not. McCann responded to this, Webster states, by saying that such made a difference, and that she would suspend him until making a final decision. (2:202.) Apparently at the second meeting, Webster states, McCann emphasized Webster's admission that, at 10 a.m. on that Monday (February 15), during his MTSI work time, he had asked Turney about the firing order. Thereafter, he told her, most of what he did was on his lunch hour, taking about 10 minutes to recheck the firing order that Turney gave him. But McCann "kept coming back to . . ., 'You did this on the Company's time.'" (2:226–227.)

According to Turney, at the second meeting Webster said he had worked on the Explorer on his lunch hour for a couple of days, and some on Company time, that Stripling had authorized the work, and that he was paid either $184 or $180. (11:1838.) Turney acknowledges that by April 16 he was aware that Webster was one of the mechanics who had walked out on March 3.

[33] Although McCann's file memo (R. Exh. 27) indicates a starting time of 9:30 a.m., I credit Webster who specifically places the starting time at about 2:30 p.m.

(11:1856.) Although Turney attributes the suspension to an unauthorized extended lunch period (11:1857), I have found that the suspension was unlawful.

When Webster returned from his vacation/suspension the following Friday, April 23, to pick up his paycheck, McCann informed him that she had "no choice but to terminate him for theft." (11:1719–1720; R. Exh. 28.) Webster's account is that the conversation contained a good bit more. At that termination conversation, Webster repeated his whole story again. To this McCann said that she would reiterate (what she had said at the second meeting) that if Webster had obtained permission, she would have had no problem with this matter. Webster said (as he had said at the other meetings), "I did have permission." To this McCann assertedly told Webster that if he would sign a statement saying that Dale Stripling, as Webster immediate supervisor, gave him permission, then McCann would take it to "Bill" (President George) and "he might overturn my decision. Because right now my decision is to fire you for stealing Company funds." Saying he would think about it, Webster loaded his too box into his truck, presumably obtained his paycheck, and left. (2:203.)

Although Turney (11:1839) denies that McCann asked for such a statement in his presence at any time, no one claims that Turney was present at the termination conversation. McCann (11:1718) denies that, at the second meeting, she asked for a "statement" (no description given) from Webster. She does not expressly deny asking, at the termination conversation, for the statement as described by Webster. McCann does, however, assert that the termination meeting was "very quick" and that there "wasn't a lot of conversation." (11:1719–1720.) This falls short of an express denial of the specific statement as described by Webster. Webster testified persuasively respecting the termination meeting, and I credit him, especially as to McCann's proposed written statement.

(2) Decision to discharge

McCann testified that she made the decision to discharge Webster. (11:1720.) COO Stephens also suggests that she did. (9:1483) McCann gives three reasons for her decision to discharge Webster (11:1720):

1. He took money for the repair work;
2. He did the repair work on MTSI time; and
3. He used MTSI's facility and materials.

Acknowledging an awareness that most of the mechanics in the garage were "in some way affiliated [with] or trying to get it [the Union] organized, McCann denies that Webster's union activities had anything to do with her discharge decision. She does not recall that Webster wore any union insignia to any of the meetings she had with him. (11:1720–1721.) (Webster did not testify that he did.) Admitting knowledge of a walkout or "some kind of job action" by "some of the mechanics" earlier, she does not know the date, and she denies knowing that Webster was one of the mechanics who participated. (11:1745.)

Turney, who apparently never spoke during the two investigative meetings held by McCann with Webster (2:239; 11:1864), was asked at trial about the discharge decision. Turney asserts that Webster was fired "Because he accepted the cash, kept the cash for the work." (11:1854.) Had a repair order been written, and the normal procedure followed with the parts attached, then Turney "wouldn't have had a problem with it." (11:1854.) Of course, that simply means that the work would have been treated as MTSI work (because of the repair ticket) and (11:1858) the money would have been paid to MTSI. This is so, Turney asserts (11:1189) because Webster "was on hourly wage and that is what he gets paid to do, to work on vehicles." Of course, as Webster was salaried, and as Saturdays were part of his personal time, MTSI was not paying him for any work on a Saturday. In fact, Turney's statement clearly goes back to his earlier testimony (11:1834) that the work was done on Friday, February 12. I have found that the correct date was Saturday, February 13.

Asked about part of the work having been done during lunch (personal time) and part during regular work time, Turney states that, to his knowledge, such has never occurred and that MTSI does not allow such work for cash to be done on the premises—even if all the work is done during the mechanic's personal time. (11:1859.) Clearly at this point Turney was repeating the policy as earlier described by President George. Indeed, as earlier noted, Turney asserts that he has never (knowingly) allowed private work for cash. (11:1861.) Nevertheless, had Webster come to him after Stripling's authorization that he keep the cash, then, Turney suggests (11:1866), possibly Turney would have "okayed" the transaction or otherwise resolved it. Turney asserts that he and McCann did not discuss Webster's union activities. (11:1839.)

Stephens claims that, from what was reported at the second meeting on April 16, Webster actions violated MTSI's rule as to repairing non-MTSI vehicles because, as Webster admitted, (1) Webster worked on a non-MTSI vehicle on MTSI time as authorized by Dale Stripling; (2) Webster received and retained cash for the work; (3) Webster had not filled out a "work order" (repair order); and (4) He was waiting for a parts bill to pay for the parts. (9:1486–1487.) As to item (1) about work on MTSI time, that is 99.9 percent false, and Webster disputed the "authorization" aspect, saying that Stripling asked him to help TCL driver Price's friend who had little money. Number (2) is correct. Respecting number (3), as President George told us, it was the job of Turney or Stripling to prepare the repair order, not the work of a mechanic. (12:1880.) With (4), Turney and Webster share the blame. It was Turney's practice to prepare a monthly "ticket" (a bill) for the parts that the mechanics had ordered through MTSI for the private work of the mechanics. Turney failed to present such a bill to Webster in early March for the February "ticket." Not until early April did Turney come across the two February invoices. (By that time, Webster simply had forgotten about it.) But instead of presenting the bill to Webster, in accordance with his regular practice, Turney went to McCann charging employee misconduct.

e. Conclusions

Human Resources Director McCann testified with an unfavorable demeanor regarding the events in Webster's case, and I generally do not credit her except as her description is consistent with my findings. Thus, respecting McCann's claim of no knowledge that Webster was one of the mechanics involved in

the March 3 walkout (11:1745), I do not credit her. First, I find that, as the Director of Human Resources, and reporting directly to COO Stephens (who himself was involved in the events of the March 3 walkout and subsequent suspension), McCann presumptively would have known that Joe Webster was one of the mechanics who walked out and were suspended. Similarly, I find that, her position, she learned of the Union's March 2 faxed letter (GC Exh. 7) that included Webster's name as one of the new in-plant organizers. Even aside from McCann's actual knowledge, which I find, from the position and function she held, because of that same position and function, MTSI's knowledge is imputed to her through President George and COO Stephens.

McCann also denied knowing that Webster was one of those in the garage who were active for the Union. (11:1720.) In view of McCann's knowledge, as found, concerning Webster's participation in the March 3 walkout, plus his being named as an in-plant organizer, plus his daily wearing of a Teamsters button and, frequently, Teamsters hat, I do not credit her as to this, and I find that she knew that Webster was one of the mechanics active for the Union. Thus, despite her assertion that she does not think Webster was wearing any union insignia during the April 16 and 23 meetings (11:1721), and notwithstanding that Webster was not specifically asked whether he wore his union insignia at those meetings, I find that he did, and that she noticed his union button.

Respecting any specific knowledge that Webster was picketing for the Union on nearly every Friday at noon in the parking lot and on the sidewalk adjoining MTSI's property (2:196, 243), I find it highly unlikely that she did not personally know of such open and obvious activity on or next to MTSI's property. Thus, even though there is no evidence concerning whether management officials, including McCann, drove by or walked by such picketing, or were seen looking as such picketing, I find that MTSI's management, including McCann, was aware of this picketing, and specifically aware that Webster regularly picketed in an open and obvious fashion since early March.

Generally crediting Webster's account of the meetings, I find that McCann distorted Webster's report of a "real quick" (2:226) (probably less than a 1-minute conversation with Turney about 10 a.m. on Monday, February 15) asking him to call Ford and obtain the firing order for the Explorer. This was the only thing he did on MTSI's time. (2:226–227.) Similarly, Webster's report (2:200, 227) that he spent some 10 minutes to check Turney's report against the Explorer's firing order on Webster's lunch hour on Wednesday, February 17, is distorted. And when Webster checked the other mechanic's Explorer to check the firing order on the same model year as Tad's, Webster "popped" the hood on that sister Explorer, found the correct firing order, changed the timing sequence on Tad's Explorer, and called Price to tell him the vehicle was ready, all during Webster's lunch hour that Wednesday, February 17. (2:200, 227.) Webster told all this to McCann at the meetings. (2:200, 202.) Finally, when Todd Price and Tad arrived later (2:200) that Wednesday to pick up Tad's Explorer, the time would have been about 6 p.m., after Webster's shift, the same as it had been on Friday, February 12. (2:224.) Yet, McCann asserts that Webster, at the second meeting, said that he had done the repairs "on Company time, on his lunch time," and "over a two day period." (11:1717.) Turney testified similarly. (11:1838.) That is a reflection of what McCann wrote in her report (R. Exh. 28):

- He worked on the vehicle over a two day period.
- He worked on the vehicle on his lunch period as well as on company time.

I find that these distortions were calculated, not good faith mistakes, and that they were done in order to frame (a coincidentally appropriate word) Webster's actions as if occurring roughly half on MTSI time and half on his own time. I further find that all this distortion was done for the purpose of providing a discharge ground of thievery.

Respecting the matter of permission, McCann, in her memo (R. Exh. 28), simply omits Webster's report (2:201–202) that Turney permitted mechanics to do private work, and instead emphasizes the role of Dale Stripling (already fired as a supervisor who became involved with the Union). In that connection, McCann distorts Webster's lament of ever responding to Stripling's request for help respecting Price's friend and taking the money. Webster said, in effect, that had he known his (good deed) would be so rewarded,[34] he simply would have declined the request. (2:240–241.) Despair not. Better to strive to meet the ideal expressed in 1900 by Eva Rose York:

> And let no chance by me be lost
> To kindness show at any cost.
> I shall not pass this way again; . . .
>
> Then, O, one day
> May someone say—
>
> Remembering a lessened pain—
> "Would she could pass this way again."

From York's poem, "I Shall Not Pass This Way Again."

McCann's distortion of Webster's lament was for the purpose of making it appear that Webster knew he should not have taken the money in the first place (as if he were admitting to doing the work on Friday, February 12), yet did so only because Stripling told him to. All this, I find, was to provide a further basis for discharging Webster for (R. Exh. 28) "theft"—as if Webster were a common crook running a commercial venture on MTSI's paid time.

Moreover, I find that all of this was a MTSI operation, controlled from behind the scenes by COO Stephens, in order to seize on a pretext to rid MTSI of one of the more active and prominent in-plant organizers. Thus, Turney was well aware that Webster had worked on the Explorer. Turney also, I find, was aware that Webster came in that Saturday, February 13, to do it as a private job. In the usual situation, absent any union considerations, I find that Turney, on coming across the two invoices (GC Exhs. 79, 80), simply would have presented Webster with the bill (GC Exh. 18) that he eventually gave him the day Webster was fired. In keeping with his practice, and even

[34] Per the saying of some anonymous cynic, "No good deed goes unpunished."

with this Explorer, Turney never would have asked whether Webster had been paid any cash. Indeed, the rule Turney enunciated to Webster in 1998, [35] having only two conditions, clearly avoids any third condition about not working for cash—just do private work on personal time, and make sure it does not interfere with MTSI's work. (2:183, 220–221.) Webster met both conditions of "TURNEY'S RULE FOR DOING PRIVATE WORK IN THE GARAGE."

I do not credit Turney's after-the-fact assurance (11:1861) that he has never allowed work for cash to the extent he means that he was not aware that such was being done. As I wrote earlier, it may be that Turney preferred to follow something of a "Don't ask, Don't tell" policy about cash work, and that he never expressly authorized private work for cash during personal time. Regardless of that possibility, the fact is that, in practice, he was aware that private work was being done in circumstances, such as this Explorer, that clearly indicated the work was not being donated to MTSI and not being donated to private parties.

Indeed, the whole MTSI system of a 10 percent markup for parts obtained through MTSI for mechanics to do private work, with Turney presenting a bill for the cost of the parts at the end of the month, is nothing other than MTSI's administrative support for that private work. When he presented those bills, including the ones Webster had received in the past, Turney never asked whether any cash had changed hands. That is because, under Turney's rule for the shop, whether the work was for cash (or barter, for that matter) was of no concern to Turney.

Turney knew all this, yet he went to McCann anyway. Whether he previously had gone to COO Stephens, or to President George, I need not address. Clearly Turney would have informed McCann, in their private conversations, of his rule for the garage. At that point McCann, possibly in one of her consultations with COO Stephens, realized that there was a problem. This partially explains the shifting of the date of the work from Saturday, February 13, to Friday, February 12. Additionally, in the meetings, particularly the second one on April 16, McCann slanted her report to make it appear that Webster had done at least half the work during his regular work time—notwithstanding her admission (11:1745) that Webster told her that he had done the repairs on the Explorer that Saturday.

To the extent the 1-minute (as I have found) conversation at 10 a.m. on Monday, February 15, in which Webster asked Turney to obtain the firing order, would constitute private work on MTSI's time, and violated Turney's rule for the shop, I find that such a deviation here not only was microscopic, but Turney condoned it by working to assist Webster in ascertaining the proper firing order for the Explorer—even when Turney knew that the work on the Explorer was private work.

Earlier I credited Webster's account that, in his termination conversation with McCann on Friday, April 23, he demurred on her suggestion that, if he would sign a statement that Dale Stripling, as his "immediate supervisor," gave Webster permission, then McCann would "take it to Bill [George] and he might overturn her decision." (2:203.) Recall George's trial description of MTSI's policy, that even if a supervisor were to approve work for cash on MTSI time, the work for cash still would be considered theft (of MTSI's time and money). (12:1877, George.) Recall also that the dates being pushed by MTSI already had been moved back a day in McCann's first memo (R. Exh. 27) to Thursday, February 11 (diagnosis), and Friday, February (already inquiring about firing order—thereby indicating that the actual work of replacing the gaskets had been done either the day before, or part the day before and the rest on that Friday). Similarly, at trial Turney gave these moved-back dates. (11:1834, 1853.)

The clear purpose of the statement being suggested by McCann in the April 23 termination conversation was twofold. First, it was to seal Webster's doom under PRESIDENT GEORGE'S UNWRITTEN AND PREVIOUSLY UNANNOUNCED RULE FOR PRIVATE WORK IN THE GARAGE. Second, it would serve as evidence in support of MTSI's defense against the March 4 first amended charge (GC Exh. 1c) in Case 17–CA–20061 (which included the March 3 discharge of Stripling as well as the suspension that day of the six mechanics).

Respecting the first purpose, to seal Webster's fate, note that this aspect (supervisor's permission) of the George rule for the shop differs from COO STEPHENS' RULE FOR PERSONAL WORK DONE IN THE GARAGE, for under the latter, private work may be done for cash during off time, and the cash retained, so long as the supervisor has given permission for the work to be done. (9:1480.) Notice also that the Stephens rule for the shop is consistent with the Turney rule (as given to Webster). The only differences in the latter comparison are that the Stephens rule does not clearly give a generic permission as does the Turney rule, and, unlike the Stephens rule, the Turney rule does not explicitly state that (under the generic permission) any cash paid for private work may be retained.

President George's tardy declaration of his rule for the garage was just that—tardy. Notice that George's declaration of the rule, on Day 12 of 13 days of trial, did not come until well after all the other descriptions of the applicable rule had been given. Even then it came with a motion to reopen his direct examination to clarify the record on the matter. (12:1872.) Both the General Counsel and the Union objected to the tardiness and protested as to the prejudice. (12:1872–1873.) As I described earlier in the Statement of the Case, in ruling that MTSI could not recall George as a matter of right on this matter (12:1875),[36] I allowed the testimony on the basis of an offer of proof, in a question and answer format (including cross examination and redirect). Thereafter the General Counsel and the Union withdrew their objections and I received George's offer-of-proof testimony as part of the record evidence. (12:1903–1904.) The point here is that I do not credit George's professed concern about the question of MTSI's insurance coverage.

George had never been concerned enough about the insurance coverage before the trial to see that COO Stephens understood that concern, and Turney never once claimed that he in-

[35] Turney never expressly disputes Webster's account, and only indirectly does by his own "no work for cash" testimony.

[36] Because the result for an orderly procedure in trials would be chaos.

cluded the no-cash rule in any of his orientations with new mechanics. (That is another reason I do not credit Turney respecting his claim (11:1861) that he has never allowed work for cash.) For that matter, Turney makes no claim that he even holds orientations for new mechanics, much less that he cautions them along the lines suggested by George. And if George really thought the no-cash and insurance-coverage concern was such a "very, very serious issue" (12:1877), surely he would have verified that his rule was being announced by Turney at employee orientations even if George did not want to post a copy of the rule for all to see and even if George did not want to announce the rule himself at any employee meetings called for the purpose, in part, to make such an announcement. As discussed earlier, George took none of these steps.

As to why George never took any of these precautions, I need not determine. However, at least two possibilities exist. One, the Jefferson Bus case (no date given; oil pan punctured, bus driven, very expensive diesel engine ruined) that he describes (12:1884) as the occasion of his learning about the insurance coverage did not occur until after Webster was fired, possibly well after, and George simply had not gotten around to alerting everyone. Or two, whether the Jefferson Bus case occurred before or after April 1999, George did not recognize an immediate need to see that all of his staff, including the mechanics, were aware that he now was clarifying whatever the staff and mechanics had been told previously. Of these, the second possibility certainly fits with what happened at trial—the motion to reopen and George's tardy description of his rule for the shop (to try and salvage something from the mess left by the descriptions of the other rules for the shop).

All of these new rules (whether from George, Stephens, Turney, or McCann), I find, are just so much fluff and bullfeathers. Until Webster was hauled before McCann's inquisition, the only rule in existence was that of Maintenance Director Turney—as announced to mechanic Webster in 1998. All the other formulations were created (or garbled versions of a single version that was created) after the fact in order to serve as a basis to get rid of a prominent and active supporter of the Union.

As for any question that McCann reached her decision alone, without "guidance" from COO Stephens and Turney, I find that to be a flight of fancy. McCann admittedly knew practically nothing of the workings of the garage (11:1743–1745), and she had been at her post since only about late August 1998 (11:1711, 1741–1742), or less than 8 months. Her distorted version of what Webster told her was done as a calculated effort to supply a paperwork-appearance of justification for the desired discharge. MTSI's argument (Br. at 51) that its motivation is found by looking at the showing that "McCann acted pursuant to a reasonably held good-faith belief" is unpersuasive for the reasons I have described.

Even if, contrary to what I have found, Human Resources Director McCann were shown to have been independent in her investigation and objectively accurate in her reporting, that would not save MTSI here. This is so because Turney was unlawfully motivated in going to McCann (rather than simply presenting a bill to mechanic Webster) and in supplying (if he actually did) the incorrect dates of February 11 and 12. The corporate animus, generated by the March 3 walkout and the frequent picketing by Webster, flowed through COO Stephens in his guidance of his subordinate, Human Resources Director McCann. Thus, even if McCann's actions were free from any tainted motive, MTSI could not seek to hide behind her. This is so, as the courts have phrased it, to prevent a company from "laundering" a "bad" motive by passing the decision, on planted evidence, to a third manager outside the conspiracy loop. See *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 117 (6th Cir. 1987), citing and quoting from *Boston Mutual Life Ins. Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982); *Jim Walter Resources*, 324 NLRB 1231, 1232–1233 fn. 13 (1997), enf. denied 177 F.3d 961 (11th Cir. 1999) (rule not applicable on the facts); *Springfield Air Center*, 311 NLRB 1151 (1993).

However, I need not rely on the foregoing laundering principle because McCann is shown as an active participant in the distorting of Webster's report of the facts. McCann conferred more than once with Turney and at least once with Stephens. As McCann reported to Stephens, and in light of all the evidence, I infer that McCann conferred with Stephens more than once. In short, McCann coordinated her investigation and decision with the conferences she held with COO Stephens and with Maintenance Director Turney. The significance of that fact, in light of the nature of McCann's approach in her investigation of the facts, is that the investigation and the discharge decision are really the actions of MTSI acting through its agent, Human Resources Director McCann. I so find.

To summarize, I find that the Government established a prima facie case by virtue of the animus flowing from the March 3 walkout, the disparity in what Maintenance Director Turney would have done had there been no Union (he simply would have presented Webster with a bill for the parts) as compared to actively promoting it as a case of employee misconduct), MTSI's distortions of the facts in the investigation (such as shifting the day of work on the Explorer from Saturday, an off day, to Friday, a MTSI work day), plus the padding of the record with fake provisions of a previously nonexistent rule governing private work in the garage. In these circumstances, timing is a factor favoring the Government. *Naomi Knitting Plant*, 328 NLRB 1279, 1283 fn. 18 (1999).

The grounds for the discharge either did not exist, or to the extent they did exist in microscopic percentage (such as "theft" of paid time by a 1-minute conversation at 10 a.m. on Monday, February 15), Maintenance Director Turney condoned the action by willingly participating in it. Accordingly, I find that MTSI failed to carry its burden of persuasion that it would have fired mechanic Joe Webster even had there been no union in the picture.

In light of the foregoing, I therefore find that, as alleged, by suspending Joe Webster on April 16, 1999, and by discharging him on April 23, 1999, MTSI violated Section 8(a)(3) and (1) of the Act. I shall order MTSI to offer Webster reinstatement, and to pay him backpay, with interest.

6. Dale Speelman fired April 27, 1999

a. Background

Complaint paragraph 6(j) alleges that about (Tuesday) April 27, 1999, MTSI discharged Dale Speelman. MTSI admits.

Conclusory paragraphs 6(l) and 8 allege that MTSI discharged Speelman because of his activities on behalf of the Union, and that MTSI thereby violated Section 8(a)(3) and (1) of the Act. MTSI denies.

Hired October 29, 1998, Speelman drove motorcoaches (Charter Division), trolleys, and occasionally a limousine or Town Car for MTSI. (1:101–102.) On Tuesday, April 27, 1999, MTSI, by Human Resources Director McCann and Charter Division Manager Robert "BJ" Garcia, fired Speelman on the basis he was an unsafe driver. (R. Exhs. 32, 33.) Garcia made the decision to discharge Speelman (13:1987), prepared the papers (R. Exhs. 32, 33), and asked (13:1993) McCann to be present. As of the trial, McCann, as earlier noted, had retired, and Garcia (13:1985–1986) had departed MTSI and joined a different company in New Mexico.

During his short 6-month term with MTSI, Speelman had three moving accidents in which, driving at very slow speeds, he hit stationary objects. In his first accident, one night in November 1998, Speelman "touched" his bus against one of the concrete-filled metal pipes guarding the gas pump at MTSI's Conoco gas station. Garcia told Speelman that contact resulted in damage to the bus of $400. Before the ARB, Speelman admitted his miscalculation, said he was sorry, and observed that the particular location could use more light and that a light colored paint on the post would better warn drivers of its location. Speelman received no discipline. (1:102–105, 149–151, 154.)

Speelman's second accident occurred at the TanTara resort, Osage Beach, Missouri, at Lake of the Ozarks. Again it was at night, the lighting was poor, and he was driving one of several MTSI buses that had pulled into the parking area. Checking in his mirror before backing his bus, the way appeared clear to him, but another MTSI bus had pulled up close behind him. Speelman did not ask anyone for assistance in backing, and apparently did not dismount and verify that the way was clear. When he backed up, he hit the bus behind him, thereby causing damages to the two buses exceeding $3000. Before the SRB, and apparently not acknowledging that he was at fault, Speelman explained how the accident happened. Speelman received the penalty for a first "chargeable" accident, a 2-day suspension. (1:108–118, 151–154.)

Speelman's third and final accident occurred on Saturday, April 24, about 9:45 p.m. on Mill Street in Westport, a popular restaurant and entertainment area of Kansas City. The street was congested with heavy traffic, including pedestrians. Cars were parked on both sides of the street. Speelman, taking passengers on a "pub crawl," was driving about 10 miles an hour. To avoid being hit by a car backing from his left, Speelman had to pull to the right. Moments later, thinking that he had clearance, he moved forward. However, the lower right side of his bus brushed against the driver's side of a parked BMW (parked some 20 to 24 inches from the curb), causing damages to both vehicles (mainly to the BMW, apparently) exceeding $5000. Asked whether the damage for his three accidents totaled approximately $10,000, Speelman replied, "I suppose. Yes." (1:128–132, 153–155.)

Respecting the damage amounts, the only source for the $3000 figure on the TanTara accident is a question to Speelman of whether the dollar amount "was over $3000," and Speelman's answer, "That might be. That is the first time that I have heard that amount." (1:154.) Answering a similar question that the damage to the BMW and to the bus exceeded $5000,[37] Speelman said, "That doesn't surprise me, since it is a BMW." (1:155) It appears that any shortcomings in the foregoing are overcome by Speelman's response about the total of all damages approximating $10,000, by his ambiguous "I suppose" followed by the unequivocal, "Yes." Although the individual numbers do not add up to a full $10,000, the figures given were rounded, with the premise that the actual amounts exceeded the rounded numbers. Thus, the actual numbers could well have totaled $9500 or even more, thereby approximating the $10,000 mentioned.

Beginning about March 4, Speelman began wearing union insignia every day to work. (1:120, 155–156.) Other than the discharge, the complaint alleges no other job discrimination against Speelman, although Speelman suggests (1:156–157) that some job discrimination of several days of no work assignments, and failure to transfer him to the Trolley Division, followed his open union activity.

Following the end of his shift on Friday, April 23, Speelman joined other employees picketing (in the presence of two representatives of the Union) at the entrance to the employee parking lot, "right by the MTSI building." Speelman carried a sign bearing the legend, "Respect Is A Teamsters Contract." He so picketed and participated in the accompanying rally from about 4 p.m. to about 6:30 p.m. (1:120–123.) Several MTSI officials walked or drove by, including Claims Director Barry Ziskind and Human Resources Director McCann who (1:122) "drove right past me in her car." Moreover, the offices of the Charter, Trolley, and TCL divisions all face where Speelman was picketing. Speelman previously has stood in the Charter office and looked out at the entrance where he later picketed. (1:123.) From the short distance from that office to the picket spot at the entrance to the employee parking lot, Speelman would be hard not to see for, as he tells us (1:122), he stands 6 feet 7 inches and weighs about 350 pounds.

Crediting Speelman regarding this description of events that day, I do not credit McCann (11:1726–1727) and Garcia (13:1991) that they did not know of Speelman's union activities before his termination. Garcia admits that he observed Speelman picketing, but states that the occasion was about a week after Speelman had been fired. (13:1991.) In disbelieving McCann, I note that she had to drive right past Speelman's imposing figure on April 23 as she (presumably) drove out of the parking lot that day. And strangely, Garcia saw Speelman picketing there only after he had been fired. How convenient that Speelman would delay his picketing until after his discharge. I do not believe either Garcia or McCann either as to plausibility or on the basis of testimonial demeanor. Accordingly, I find that, no later than Friday, April 23, both Garcia and McCann had actual knowledge of Speelman's union activities.

[37] President George cites a damage figure of $5000 just to the BMW. (3:395.)

b. Manager Garcia's asserted reasons

Former Charter Manager Garcia testified that he decided to terminate Speelman because Speelman had three accidents within his first six months as a driver, and each accident resulted in property damage that was progressively more costly—$400, $3000, and $5000. Garcia concluded that Speelman was an unacceptable safety risk. (13:1989–1990, 1997–1998, 2016–2017, 2030–2031.) Although Speelman was operating at a very low speed in each of the three accidents, each time he hit a stationary object. The first time, in November 1998, it was a metal post guarding a gas pump at the Conoco station. (1:102–105, 140, 150–151.) The second time, in February 1999, at the TanTara Resort at Lake of the Ozarks, Speelman backed into a parked bus belonging to MTSI. For this he received a 2-day suspension. (1:108–118, 151–153.) The third time, on Saturday, April 24 (1:124), he sideswiped a parked BMW in a popular restaurant and entertainment area (Westport) of Kansas City. (1:127–132, 153–155.) The third accident led to Speelman's discharge the following Tuesday afternoon, April 27. Garcia assets that the main factors in his discharge decision were that Speelman again hit a stationary object, it was his third time to do so, the frequency rate of his accidents was increasing, and the damage caused was increasingly more costly. (13:1989–1990, 1997–1998, 2016–2017, 2042–2043.)

c. From the ARB to the SRB

Before January 1999 MTSI had an internal safety review body called the Accident Review Board (ARB). (3:399; 8:1401, George.) George advises that the function of the ARB was to determine the cause of accidents involving MTSI vehicles so that claims could be settled or pursued. (3:399; 8:1353.) The ARB had no disciplinary powers. (3:399, 415.) There is some question as to whether it even made recommendations as to discipline, but to the extent it did so, they were only recommendations. The ARB had no "teeth" respecting discipline of employees respecting safety matters. (3:399, 415.) The department (sometimes referred to as division) managers were being pulled in two directions. From one direction the pull would be not to retain a driver who was having accidents. The other, and apparently stronger pull, was that if a manager discharged a driver, he had to get a replacement or perhaps drive himself. Obtaining a replacement was not quick and easy in Kansas City where, during the relevant time, the unemployment rate was a low 2.8 percent. (3:391–392; 8:1401, George.)

In late 1998 George decided that things had to change. After its acquisition by Coach USA, MTSI's growth was rapid, but so was the increase in its rate of accidents. That increase, plus a very expensive accident ($18,000 damage caused when driver Hilton Leonard hit a stationary object), alarmed George who called a meeting with certain managers to solve the problem. (3:390, 414, 418; 8:1378–1379.) Accordingly, effective January 1, 1999, MTSI abolished the ARB and established the Safety Review Board (SRB) with the same function as the ARB but now with "teeth" in the form of authority to impose discipline in matters of safety. The new procedure eliminated the old "Catch-22" facing the managers in that the SRB does not have to wait for a manager to act on his own (and as George states, the managers had a disincentive to discharge drivers), for the SRB can impose discipline. (3:392–393; 8:1353–1854, 1400–1401.) The new policy provisions pertaining to the SRB are in the record here as the last five pages of the January 1999 manual (GC Exh. 12 at 25–29), "Charter Dept., Policies & Procedures for Drivers."

Under the new SRB policy, the penalty for the first "chargeable" accident [driver at fault, in whole or in part, and the accident exposes MTSI to liability for an amount of at least $1000] is a 2-day suspension, and for a second chargeable accident, within one year of the first, the penalty is a 5-day suspension. A third chargeable accident, within one year from the first chargeable accident, and the driver is immediately fired. A proviso permits the SRB to accelerate the penalty all the way to discharge if, for example, the driver is completely at fault and the accident results in serious bodily injuries and significant bodily injuries. (GC Exh. 12 at 28, section III,C,1 through 4.)

President George testified at several points that, on their own supervisory authority, managers have always had the power to discharge drivers who they deemed to be safety risks. (3:391–392, 415, 417; 8:1400.) That inherent authority as the department manager is to be distinguished from a "formal policy" set forth in a safety manual. George testified that, before January 1, 1999 and the SRB, MTSI had no "formal policy" for disciplining drivers found at fault. (3:374, 376–377, 390–391.) Thus, at several points George states that in 1998 drivers were not disciplined for accidents even if they were found at fault. (3:372, 374, 376–377, 387, 389; 8:1388, 1389, 1407.) Although George, I find, ostensibly was referring to the practice with the ARB, I further find that his several descriptions, being all-encompassing, also mean that in 1998 no department or division managers chose to exercise their discretionary managerial authority to discipline any of the drivers for their accidents that year. Indeed, no evidence was offered that, before Speelman's April 27 discharge, any manager had ever exercised such authority to discipline for an at-fault accident. And in any event, as George credibly testified (3:374, 376, 382–383; 8:1353, 1373), MTSI never punishes a driver whom MTSI does not find was at fault in an accident.

Although George testified (3:391) that the new (SRB) policy, effective January 1, did not "wipe the slate clean" of previous accidents, I take that to mean, not that the pre-1999 accidents were available for consideration by the SRB as chargeable accidents, but that such pre-1999 accidents were available for a manager to consider in the exercise of his managerial discretion on whether to punish a driver and without waiting for any action by the SRB.

d. Disparity

All this leads up to the General Counsel's effort to show disparity of treatment. As no independent expression of animus was directed toward Speelman before his termination, a showing of significant disparity is crucial to the Government's prima facie case. On brief (Br. at 38–39) the General Counsel points to eight other drivers with records assertedly as bad as or worse than Speelman's, and observing that these drivers were never disciplined at all, much less fired, for their accidents. The Government's shot here is mostly from a scattergun that misses the mark. Most of the accidents cited are irrelevant because

MTSI did not find its driver at fault, or the damage was so small that no claim was filed. As for no discipline, most of the accidents occurred before 1999 when there was "no formal policy" in place authorizing the ARB to impose discipline, and when the managers had a disincentive to exercise their own authority as managing supervisors to discharge drivers even if they considered them to be safety risks.

An additional problem with the record, and the briefing, is that there is very little focus on the departments or divisions involved. The drivers with these accidents worked in different divisions. For example, Diego Reyes, the first driver cited by the General Counsel (Br. at 38), was (and perhaps still is) a driver in the Trolley Division. (2:302.) The Trolley Division has its own manager. (13:2003.) As some of the accident reports reflect (GC Exh. 27 at 5; GC Exh. 33 at 6; GC Exh. 74 at 13, for example), for at least some of the time that manager was Denny Davis. Indeed, Speelman tells us that, during February to April whenever he would drive trolleys, Denny Davis was his supervisor. (1:102.) During the same period, when Speelman worked temporarily in TCL, the supervisor there was Jeff Brown. (1:102.) George confirms that such interchange occurred, with a trolley driver working a shift for Charter, and vice versa. (8:1388; 13:2003.) Although it is not clear from the record, presumably each manager would be the supervisor with the jurisdiction, and responsibility, to discipline the drivers working for his division, regardless of any temporary assignments a driver might have to a different division, and even if an accident or infraction occurred during his temporary assignment elsewhere. To the extent this is not clear, as the point pertains to the Government's burden to show disparity in order to establish a prima facie case, then the General Counsel had the burden to introduce whatever evidence was necessary to show how disciplinary authority was handled in these interchange situations at MTSI.

The relevant point is that we are concerned here with former Charter Division Manager B. J. Garcia, rather than with the accident history of different divisions, because it was Garcia, exercising his managerial discretion, who decided to bypass the SRB and to discharge Speelman. There therefore is no relevance to accident reports of drivers from the Trolley Division (Diego Reyes, 1:140; 2:302; George Lewis, 8:1360; 13:2033; or Thomas Babysteps, 8:1398; 13:2034), the TCL Division (Ben Merricks, 8:1355–1356; 13:2032), or the KCI Shuttle Division (Billy Gatson, 5:741; 8:1388–1389). That leaves Charter drivers Hilton Leonard (8:1369; 13:2033), Jackson Dennis (13:2033), and, on a part-time basis,[38] Larry Rice (13:2034). (Rice possibly should be classified under another division such as Ben Merricks who also drivers part-time for Charter (13:2032) but whose primary home, as noted earlier, is with the TCL Division.

Turn now to the accident reports received respecting the three Charter drivers, starting with Rice. Respecting Rice, the record reflects that, on October 17, 1998,[39] Rice hit two overhead awnings. (There is some question whether the two reports cover just one accident, but I need not address that. For the purpose here, I treat the matter as two accidents on the same day at different places.) One awning was at the Ritz Carlton (GC Exh. 69; no damage amount shown) and the second was at a Methodist church (GC Exh. 70; awning damage claim of $2396). (7:1280–1281; 8:1384–1388, 1407–1408.) The church's $2396 claim was paid, and the file closed on November 24, 1998. Rice was not disciplined because, as to these accidents, MTSI "didn't do the discipline in 1998. It was [started] in 1/1/99." (8:1388, George.) As no other accident reports were offered as to Rice, particularly none for 1999, we are unable to see whether Charter Operations Manager Garcia would have exercised his managerial discretion to impose any discipline for any later accidents in 1998, or whether he would have done so in 1999 regardless of what the SRB might have done. Accordingly, I find that the evidence as to Rice is irrelevant and of no value here.

Three accident reports pertain to Jackson Dennis. These reports cover accidents occurring on August 6, 1998 (GC Exh. 73, no claim filed), August 31, 1998 (GC Exh. 74, MTSI's claim of $252.64 paid), and September 30, 1998 (GC Exh. 75, claim settled for $200). Again, these dates predate Garcia's arrival by several weeks. The August 6 accident involved no damage and no claim; the August 31 accident involved a vehicle (driver Tate) cutting in front of Dennis on the freeway, thereby causing Dennis to hit the rear of Tate's vehicle. MTSI's claim was paid. To the extent Dennis had any fault at all respecting any of these accidents, no discipline was imposed because MTSI did not impose discipline for 1998 accidents. (8:1396–1397, 1399, 1406–1407, George.) Moreover, whatever damage was involved is minor compared to the damage in the case of Speelman.

At trial I expressed concern that the General Counsel was dumping exhibits into the record without selecting documents on the basis of comparative relevance with Speelman's case. (8:1396) On brief (Br. at 38) the General Counsel merely recites the events reflected in the three exhibits, ignores President George's undisputed testimony that no discipline was imposed on drivers in 1998 because there was no formal disciplinary policy, and made no attempt to link these documents to former Manager Garcia's discretionary authority or how that discretionary authority was exercised as to Speelman. Finding the documents as to Dennis (GC Exhs. 73, 74, 75) to have no relevance here, I attach no weight to them.

Coming now to Charter driver Hilton Leonard, I note, as does MTSI (Reply Br. at 17), that the General Counsel (Br. at 38, 39) inadvertently cites GC Exh. 66—Rejected (accident on March 12, 1999) without acknowledging the rejected status (as she did respecting GC Exh. 34—Rejected) and suggesting a basis for reversing my ruling. Initially I had received General Counsel's Exhibit 66 (8:1335), but later (8:1376) reversed that ruling and rejected the exhibit. (An ambiguous accident report.

[38] Charter Division Manager Garcia had some 30 full-time drivers and 20–25 part-time drivers. (13:2002–2003.) It is unclear whether the part-timers were primarily assigned to another MTSI division, or whether their only work for MTSI was this part-time work in Charter.

[39] B. J. Garcia did not arrive at MTSI, and for his position as Charter Division (or Operations) Manager, until the second week of November 1998, apparently Monday, November 9. (13:1989.)

Interpreting the file, and quoting driver Leonard's description, George testified that, on a freeway ramp, the other vehicle rolled back into Leonard's stopped MTSI van. George testified that MTSI made no payment on the other driver's claim, that MTSI deemed Leonard not at fault, and that MTSI never punished a driver it did not find to be at fault. 8:1370–1371.) I affirm my ruling rejecting General Counsel's Exhibit 66.

The first document to consider now covers a September 16, 1998 accident (GC Exh. 67) in which Leonard, in George's words, "ran a bus under a canopy and did $18,000 damage to the bus by literally opening the roof up like a sardines can, and that is actually the whole impetus to why this whole new [SRB] policy [not "place" as typed at line 5], 1/1/99, that wreck." (3:414.) Recall my description a few paragraphs earlier where I recount that an increase in the rate of accidents plus this $18,000 accident so alarmed George that he called a meeting of managers to turn things around. The result was a decision to abolish the ARB and to replace it with the SRB, and to give the SRB "teeth."

This $18,000 wreck was Leonard's first accident in 20 years of driving (GC Exh. 67 at 5), with most of those years having been as a driver for one or another of the MTSI companies. (8:1379.) Had Leonard been a new employee on the job for 30 days, after this $18,000 accident, "he would not have been there the 31st day." (8:1407, George.) Payment for the damage to the awning ($426.40) was made on October 2, 1998, apparently closing that file. (GC Exh. 67 at 4.) Leonard was not disciplined. (8:1382–1383.) Of course, all this took place before B. J. Garcia arrived to take charge of the Charter operations.

On June 14, 1999 Leonard, barely moving, turned too sharply in front of a parked vehicle, catching the bumper of the other vehicle in the right wheel well of his MTSI vehicle, resulting in damage to the MTSI vehicle of some $814. (GC Exh. 68.) Although Leonard and Garcia were summoned to appear before the SRB on June 24 (GC Exh. 68 at 4), Leonard was not disciplined (8:1380–1381, George)—presumably because the damage was below the threshold amount of $1000 to constitute a "chargeable" accident. Garcia was not called by the General Counsel during the Government's case in chief and asked why he did not exercise his supervisory discretion, and he had done respecting Speelman, and impose discipline of some level, such as a 2-day suspension for a first penalty—similar to Speelman's first penalty of a 2-day suspension in February under the rules of the SRB. (As a former manager of MTSI, and the person who made the decision to discharge Speelman, Garcia very possibly could have been called by the Government under FRE 611(c) as a person "identified with" MTSI. Even as the Government's own witness, if necessary the General Counsel could have impeached any adverse testimony given by him.) When MTSI called Garcia during its case, it did not ask him anything about Leonard. Hence, the General Counsel asked him only a single question, about his job, and that was over objection. (13:2032–2033.)

Although Speelman's damage figures assertedly had an increasingly costly range, Leonard's levels showed a substantial decrease from $18,000 to some $814—a decrease of some 95.48 percent. Still, this was a second at-fault accident by Leonard in a period of 9 months. And if MTSI followed a policy (such as some insurance companies reportedly have of canceling an insured's coverage if he files too many claims) of discharging a driver who takes on an aura of too many accidents, even if not at fault in any of them, then Garcia might well have counted the no-fault (ambiguous facts) accident of March 12, and then that rejected exhibit (GC Exh. 66) would be relevant. However, MTSI currently has no policy of terminating drivers who, while never at fault, somehow get hit by some vehicle or some falling object.[40] (3:394, 397.)

So the General Counsel's disparity evidence is unavailing. However, perhaps the Government demonstrated that Hilton Leonard, after the union activities became public, began wearing pro-MTSI insignia and that such accounts for Garcia's not exercising his managerial discretion to punish Leonard following his $814 at-fault accident on June 14. Not quite. Leonard in fact was among those named in the Union's March 12 letter (GC Exh. 9) as one of the Union's newest in-plant organizers! The Government never offers an explanation of why MTSI, if bent on eliminating open union supporters, would not have jumped at the opportunities presented in 1999, or at least as to the June 14 accident (GC Exh. 68), to start the paperwork rolling (such as a 2-day suspension through Garcia's managerial discretion) toward an eventual discharge of in-plant organizer Leonard.

Then what caused former Charter Manager Garcia not to have that disincentive on Tuesday, April 27, when he fired Speelman? Indeed, Garcia did not even wait until the SRB met on Speelman's April 24 sideswiping incident, but proceeded on his own to get rid of Speelman, thereby preempting the SRB as to whatever discipline it might have imposed. Why would Garcia not wait until the SRB acted, and if the SRB imposed something less than discharge, then intervene and supersede that punishment with his own decision to discharge? As to the latter, if Garcia was determined that Speelman be discharged, could the SRB possibly have accelerated the progressive punishment and itself have fired Speelman over this sideswiping incident?

Recall that Speelman already had received a 2-day suspension for the second (February) accident relied on by Garcia, although Speelman's first accident during 1999—and therefore the first accident covered by the SRB. Under the SRB policy, a third chargeable accident within 12 months of the first results in immediate termination. (Item III,C,3.) Thus, Garcia accelerated the penalty over what the SRB could reach in terms of dates. What about severity? The SRB can accelerate the punishment and impose discharge (section III,C,4), even as to a first chargeable accident, when the accident is "completely the fault of the driver and which results in serious bodily injuries and significant property damages."

As to the latter, there could be a small chance that the SRB might not have determined Speelman "completely" at fault respecting the April 24 sideswiping of the BMW. This is so because Speelman, driving slow in the congested Westport area, had to pull to the right to avoid a car backing out onto the

[40] Referred to variously at trial as a "jinxed-driver" policy, or "Friday the 13th" rule, or "black cat" policy, or the like. (3:360–362, 394, 397; 8:1374, 1416.)

street. This put Speelman's vehicle very close to the BMW parked, on his right, some 20 to 24 inches from the curb. When Speelman later pulled forward [apparently without getting out to check the clearance], the right side of his bus scrapped the driver's side of the BMW. (1:129–130, 153–155; GC Exh. 113.) Even if the SRB still found Speelman completely at fault, would the SRB find the $5000 to constitute "significant property damages"? No evidence addresses whether the SRB has considered a threshold level for "significant" under this section of the policy. One might suppose, however, that $5000 is presumptively "significant." However, as there were no bodily injuries, certainly none that were serious, the SRB would not have had the option of imposing an accelerated penalty of discharge.

Similarly, I credit Speelman (1:107), against Ziskind's denial (10:1677), that, following his February accident at the TanTara resort, but before the SRB issued its 2-day suspension, Claims Manager Ziskind told him that pre-1999 accidents would not count under the SRB's policies effective January 1, 1999. Even had the November 1998 Conoco accident occurred in January 1999, that accident would not have counted as a first "chargeable" accident because the $400 damage does not rise to the $1000 threshold of the SRB policies. (GC Exh. 12 at 28, item I,B.)

e. Dale Speelman fired

(1) Preliminary events

Not long after Speelman hit the BMW in the Westport section of Kansas City the night of Saturday, April 24, then Charter Operations Manager Garcia was paged and informed of the accident. (13:1996–1997, 2031–2032.) The following Monday morning, April 26, Garcia went to the office of Claims Manager Barry Ziskind to read the accident report. (13:1997, 2010, GC Exh. 113.) During Garcia's 5-minute visit with Ziskind that morning, Ziskind informed Garcia that he already had spoken with Speelman, and that Speelman had acknowledged fault and accepted responsibility for the damage in hitting the BMW. (13:2011, 2030, 2041, Garcia.)

Speelman refers to a conversation with Ziskind on that Monday, April 26, but asserts that Ziskind was asking him about an entirely different bus regarding certain other days. Speelman reports no mention of the BMW matter. (1:136–137.) Speelman's demeanor was unfavorable respecting this conversation, his account seemed a bit disjointed, and the details appear to be fuzzy. Garcia's account does not constitute affirmative evidence that Speelman admitted fault to Ziskind on April 26. However, I treat Garcia's account simply as the basis for whatever action he thereafter took, or did not take—such as not waiting for the SRB to address the matters. Even so, as Speelman admits to a conversation with Ziskind on that Monday, April 26, and as I do not accept Speelman's account to the extent it impliedly excludes the possibility of any admission of fault as to the BMW, I find that Speelman could have admitted fault to Ziskind in damaging the BMW the night of Saturday, April 24 in their conversation of Monday, April 26.

During the afternoon on Monday, April 26, Garcia made a second visit to Ziskind's office, this time to alert him that Speelman would not be present when the SRB held its meeting on the BMW accident because Garcia was going to discharge Speelman. (13:1998, 2010, 2013.) Garcia decided to proceed without waiting for the SRB's decision because there was nothing the SRB could say that would change Garcia's view that Speelman's damage to the BMW was preventable. Garcia wanted to end the problem without further delay, and "not incur any more risk with Mr. Speelman." (13:1998.) Garcia alerted his superior, at the time either Director of Operations Byron Fischer (R. Exh. 13) or COO Stephens, of his decision and intended action. He did not discuss the matter with George. (13:2014–2015, Garcia.)

(2) Manager Garcia's decision

As noted, between his first and second visits to Ziskind's office on Monday, April 26, Charter Department Manager Garcia decided that he would terminate Speelman's employment with MTSI. In reaching this decision, Garcia considered the BMW accident report (GC Exh. 113), which he read (13:19997, 2011), the accident reports (not in evidence) from Speelman's November and February accidents, but not the claims files (13:2902–2910), his knowledge of those two prior accidents (13:2016, 2029), the report from Ziskind that Speelman had admitted fault to him and accepted responsibility for the damage to the BMW (13:1997, 2041), and the defensive attitude that Speelman had displayed at, apparently, the February meeting of the SRB where he did not accept responsibility for hitting a stationary object. (13:1990) Thus, at one of the meetings, apparently the SRB meeting in February,[41] Speelman asserted that he would not answer questions based on his right under the Fifth Amendment to remain silent. (13;1990.) Of course, the Fifth Amendment restrains only the government, not private organizations. Garcia concedes that he had not been told of any damage estimate on the BMW as of the time he made his decision. (13:2016, 2038.)

(3) Termination meeting

The discharge meeting was held in Human Resources Director McCann's office. It appears that Garcia and McCann each did some of the speaking on behalf of MTSI at the meeting. In any event, it is undisputed that McCann invited Speelman to be seated, and he declined, saying that he preferred to stand. (1:138, 159, Speelman; 11:1725, McCann.) McCann read a letter of termination—apparently a short memo (R. Exh. 30) prepared by Garcia (basing the termination on Speelman's past accidents). Speelman argued that they were not following their own SRB rules, and McCann said that Garcia could terminate a driver at any time. Eventually McCann told Speelman to leave (11:1726), and apparently she herself started to leave (1:138). Speelman admits (1:138) that he initially said "No" to McCann's direction that he move out of her way, but that he did so when she threatened to call 9-1-1. (1:138.) Speelman concedes that his size intimidates some people even when he is not trying to do so. (1:159.) Apparently later that day Garcia prepared (13:1392) a termination form. (13:1992.) The text states the reason for termination as (R. Exh. 32):

[41] McCann confirms. (11:1723.) Although McCann suggests that this was at the November meeting on the Conoco accident, the record suggest that it could have been at the February meeting.

> Driver Involved in numerous accidents/incidents. Company could no longer employ him [Speelman] due to [a] lack of confidence in his ability to operate vehicles safely.

f. Discussion

Finding that the Government failed to adduce a prima facie case, I shall dismiss the complaint as to Dale Speelman. First, the General Counsel failed to show any relevant disparity. Second, although then Charter Operations Manager Garcia bypassed the SRB's relatively quick process, Garcia was not required to put a driver on the street who, the next time he had an accident, might cause a fatality. This is so even though Garcia embellished his testimony by citing facts (damage increasing in amount) when he admittedly had no damage estimate on the BMW when he made his discharge decision. As Garcia explains, the buses are very heavy and can cause great damage even at low speeds. (13:2031.)

That Speelman offered to pay for the BMW damage (13:2041–2042) would not remove the risk of serious personal injuries and property damage that Garcia was concerned about. [And, President George adds (3:397), MTSI has no insurance coverage for any award of punitive damages.] Furthermore, Speelman already had received one disciplinary action from the SRB for his February accident—a 2-day suspension. Finally, Speelman was a relatively short-term employee of just under 6 months. Had Speelman's tenure been longer, with a lengthy period free of accidents, perhaps a different result would be indicated.

A level of suspicion exists in view of, as found, knowledge by Garcia and McCann of Speelman's union activities, and especially his picketing on April 23, coupled with Garcia's bypassing of the SRB. However, that suspicion is diluted by the fact that Garcia did not seize the opportunity to bypass the SRB and impose some discipline, including discharge, on Charter driver Hilton Leonard for his June 14 accident that resulted in damage of $814 to MTSI's vehicle. After all, Leonard was one of the named in-plant organizers for the Union. Yet Garcia did not penalize in-plant organizer Leonard. Although the June 14 accident occurred after Speelman's April 27 discharge, the June 14 inaction by Garcia respecting any discipline for Leonard is relevant in considering Garcia's motive as to Speelman in April.

Based on all the record evidence, I find that the Government failed to carry its burden of establishing a prima facie case that the discharge of Dale Speelman violated Section 8(a)(3) of the Act. Accordingly, I shall dismiss complaint paragraph 6(j).

7. Russell McIntosh Jr. fired May 17, 1999

a. Facts

Complaint paragraph 6(k) alleges that MTSI suspended Russell McIntosh Jr. on May 10 and discharged him on May 17. MTSI admits. The complaint also alleges that MTSI imposed such discipline on McIntosh because of his activities on behalf of the Union. MTSI denies.

As discussed earlier, in part E.4.b. of this decision, respecting complaint paragraph 5(a)(v) alleging, in part, a March interrogation by Internal Operations Director Christopher Dowd, I found that Dowd unlawfully interrogated McIntosh in mid-March. Although the complaint did not allege an implied threat, that was the nature of the portion of Dowd's warning to McIntosh not to get involved with the Union because "Billy" (President George) "gets upset" when he learns that someone has been talking with Union people. Recall that McIntosh had been talking with Dewey Bird, his cousin, who openly wore Union insignia.

Here, as there, I credit McIntosh over Director Dowd, and also over Supervisor and Senior Dispatcher James Donaldson, because McIntosh's demeanor was more persuasive than theirs. (Additionally as to Donaldson, his version of events was difficult to follow because of his switching of factors and his internal inconsistencies.)

Hired March 27, 1997 (8:1294; 12:1977), McIntosh drove a wheelchair van, Special Services Division, picking up disabled veterans, taking them to the veterans' hospital for their doctor appointments, and then transporting them home. These trips involved picking up veterans in other towns such as Joplin, Missouri and Wichita, Kansas, and required that he work 60 to 65 hours per week with no premium pay for time over 40 hours. McIntosh was one of the senior drivers in the department. (8:1295–1296). Dowd acknowledges that the drivers in Special Services are important to him. (11:1817.)

There is no dispute that on April 23 that Dowd, with Supervisor Donaldson present, warned McIntosh for taking his MTSI wheelchair van home without permission. (GC Exh. 14.) McIntosh admits that Dowd told him that if it happened again (without permission) that he would be suspended or terminated. (8:1313–1314, 1321.) The text on the form (GC Exh. 14) simply states that he would be terminated, but McIntosh was not shown the form. (8:1314.) McIntosh said that he had gotten the approval of Supervisor Donaldson (also known as "JD"). (8:1306, 1308–1309.) Donaldson claimed he did not remember. At that, Dowd instructed Donaldson to put McIntosh's name on a "folder" so that they would know "who's taking the van home." (8:1306, 1322–1323, 1325–1326, McIntosh.) At trial Dowd explained that, among other purposes, he uses folders to keep track of who has permission to take MTSI vans home. (11:1821–1822.)

Although McIntosh did not understand what Dowd meant by his reference to a "folder" (8:1327), he understood Dowd's instruction to Donaldson to mean that he had permission to take the van home when he had to work the next day because they knew that his only transportation was by way of his mother who drove him only when she could do so. Thus, following this warning meeting, McIntosh drove the van home each night, before a work day, between then and his May 10 suspension. (8:1306–1307, 1321, 1323, 1325–1326.)

At least two other drivers (Mark Coleman and Leona Robertson) took their vans home all the time. (8:1310–1312.) However, McIntosh admits that the two use the vans to perform either "on call" duty or to transport other employees to work. (8:1309–1310, 1327–1328.) Accordingly, I find no disparity respecting the Coleman or Robertson situations.

As McIntosh had to work Saturday, May 8, he took his van home that night. The following day he left the van at MTSI when he left work between 12 noon and 1 o'clock p.m. (8:1306–1307.) When McIntosh arrived for work early the

next Monday morning, May 10, Dowd asked him about his use of the van that Friday night. McIntosh said he had understood that he was authorized to take the van home. Dowd responded that it was just for that night (Friday, April 23, apparently) only. McIntosh told Dowd that such was not what he had said. "That's what I meant," Dowd replied. McIntosh credibly testified that nothing was said about a page. (8:1308) Dowd claims to have paged McIntosh twice, unsuccessfully, that Friday evening. (11:1805.) Of course, that was after McIntosh was off duty. (11:1822.) Dowd further claims that the van was missing and not returned to the lot until early Sunday afternoon. I do not believe Dowd. On that Monday morning, May 10, Dowd suspended McIntosh until Dowd could confer with COO Stephens. (8:1308, 1322.)

When McIntosh picked up his paycheck that Friday, May 14, he had a similar conversation with Dowd, in the presence of Donaldson. On this occasion Dowd again said, "That's what I meant" in reference to the folder and the authority granted by his instruction to Donaldson. (8:1308–1309.)

Early Monday morning, May 17, McIntosh telephoned Dowd and asked whether he had talked with Stephens. Dowd replied that McIntosh should turn in his MTSI property. McIntosh concluded that he had been terminated. (8:1309–1310.)

Dowd testified that, "after" [the word appears in a leading question rather than in the answer] Stephens approved the discharge recommendation, Dowd prepared a report of termination. (11:1807–1808.) MTSI did not have the original, asserting that the file had been lost during the subpoena production process. (11:1808.) Even under a magnifying glass, the day of the date on the copy in evidence (R. Exh. 31) is illegible. (No objection was lodged against receipt of the document.) Nevertheless, at trial (11:1809) Dowd read it as being (Wednesday) May 12, 1999. As Dowd said nothing about a discharge approval in his Friday, May 14, conversation with McIntosh, when the latter came to pick up his paycheck, I find that as of that conversation Dowd had not yet been able to meet with COO Stephens. Not until the following Monday, when McIntosh called early that morning, was Dowd able to deliver the bad news.

The actual date on the document is not material to my findings here because my findings would be the same regardless of the date. Even so, I note that in most cases a supervisor or manager drafts a termination document before he or she meets with a superior to present the termination (or warning) recommendation. Thus, it would have been entirely possible that Dowd drafted the document before meeting with Stephens, and placed the drafting date (May 12, here) on the document. In any event, the text that Dowd wrote (11:1809) on the document as the basis for the termination reads (R. Exh. 31):

> On Friday, 5/7/99 took our van home after completing work assignments.
>
> Unauthorize[d] use of equipment.

b. Discussion

The first two issues are (1) knowledge and (2) animus. Recall from the much earlier findings respecting complaint paragraph 5(a)(v), that although McIntosh signed, solicited, and distributed for the Union, he never wore any Union insignia. (8:1301, 1317–1318.) In mid-March, I found earlier, Director Dowd unlawfully interrogated McIntosh respecting his union sentiments. Also, during Dowd's March interrogations of him, when Dowd asked how McIntosh thought the Union would help the employees, McIntosh would reply that the Union could help in various ways. Although not alleged, as noted just above, in mid-March Dowd impliedly threatened (I make no finding of a violation on this unalleged threat) McIntosh with unspecified retaliation should he become a supporter of the Union in telling McIntosh that "Billy" (President George) gets upset when he learns that someone has been talking with Union people.

Thus, I find that, by late March 1999, Director Dowd knew full well that McIntosh supported the Union even though he did not wear Union insignia, and had threatened McIntosh with unspecified retaliation should he get involved with Union supporters. Combined with other findings of unlawful conduct by MTSI during this organizing campaign, general union animus is shown, as is anticipatory animus toward McIntosh.

Arguing pretext, the General Counsel (Br. at 30) does not advance any theory of timing as a factor in the analysis. MTSI argues its own version of a triggering event (that Dowd began an investigation when [surprise, surprise] he found that McIntosh's van was missing the evening of Friday, May 7, but I have not credited that version. The General Counsel's argument of pretext is that MTSI suddenly chose to punish McIntosh for something (taking the van home for transportation to work the next day) that Dowd had given McIntosh permission to do and something that McIntosh, in accordance with that authorization, had been doing ever since Dowd's April 23 authorization. As mentioned, the General Counsel does not suggest just what prompted MTSI to act when it did.

According to Dowd, when he conferred with COO Stephens and recommended that McIntosh be discharged, he and Stephens [who did not address this meeting in his own testimony] did not discuss any union activities by McIntosh. (11:1814.) Contrary to this assurance by Dowd, I infer from the findings that I have made (the earlier unlawful interrogation, the earlier (unalleged) implied threat of retaliation, the reneging on the grant of authority), I find that Director Dowd and COO Stephens did discuss McIntosh's union sentiments and decided to eliminate him and his union sentiments from further infecting the workforce.

It follows from the foregoing findings, including the pretextual basis of McIntosh's discharge, that MTSI failed to carry its burden of showing that it would have discharged McIntosh even absent any union considerations. Moreover, MTSI did not act on any good faith mistake concerning the events.

Based on the foregoing findings, and all the record, I conclude that, as alleged, MTSI violated Section 8(a)(3) of the Act by suspending Russell McIntosh Jr. on May 10, 1999 and by discharging him on May 17, 1999. I shall order MTSI to reinstate him, with interest.

G. Case 17–RC–11776

As summarized much earlier, in my Statement of the Case, resolution of the challenges to the ballots of five of the six dis-

criminatees was consolidated with this unfair labor practice proceeding when I granted (6:910) the General Counsel's motion to consolidate. Based on my findings respecting the five, I recommend that the challenges to the ballots of Dale Stripling, David Lindgren, and Russell McIntosh Jr. be overruled, and that the challenges to the ballots of Rodney Saxton and Dale Speelman be sustained.

CONCLUSIONS OF LAW

1. By coercively interrogating employees, and unlawfully threatening them with economic, supervisory, or disciplinary sanctions for their support of the Union, or should they select the Union as their bargaining representative, Respondent MTSI has violated Section 8(a)(1) of the Act.

2. By suspending and discharging employees because of their union activities, MTSI has violated Section 8(a)(3) and (1) of the Act.

3. The unfair labor practices set forth above 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, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily suspended and discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of suspension or discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]