

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

MASTEC OF NORTH AMERICA, INC.

and

CASES 10-CA-37586
10-CA-37669

COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 3871

Ellen K. Hampton, Esq., for the General
Counsel.

Robert Weaver, Esq., for the Charging Party.

Michael Casey, Esq. and *David Weitzner*
for the Respondent.

DECISION

Statement of the Case

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Kingsport, Tennessee on April 27, 28, and 29, 2009. The charge in Case 10-CA-37586 was filed by Communications Workers of America, Local 3871 (Union) on November 3, 2008¹, and amended on December 15, 2008. The charge in Case 10-CA-37669 was filed by the Union on December 23, 2008, and amended on February 12, 2009. Based upon the allegations contained in Cases 10-CA-37586 and 10-CA-37669, the Regional Director for Region 10 of the National Labor Relations Board (Board) issued an Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing on February 24, 2009. The amended consolidated complaint (complaint) alleges that on or about October 13, 2008, Mastec² of North America, Inc., (Respondent) discharged Christopher Verbal, disciplined Anthony Hodges, and caused the discharge of Nathan Koza in violation of Sections 8(a)(3) and (1) of the National Labor Relations Act (Act.) The complaint also alleges that acting through various supervisors and agents, and during a period of time between July 17, 2008,

¹ All dates are in 2008, unless otherwise indicated.

² Various documents in the record reference Respondent's name as MasTec as well as Mastec. The overall record reflects that both captions refer to Respondent.

and December 2008, Respondent interrogated employees about their union sympathies, threatened employees with regard to their union support and sympathies, and promised employees additional benefits and the resolution of grievances if they abandoned their support for the union in violation of Section 8(a)(1) of the Act. Finally, the complaint alleges that Respondent made changes in its incentive sales program in violation of Sections 8(a)(3), (5), and (1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party, and the Respondent, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a corporation, is engaged in the business of the installation of satellite television services at its facility in Kingsport, Tennessee, where it annually purchases and receives at its Kingsport, Tennessee facility, materials and supplies valued in excess of \$50,000 that were shipped in interstate commerce directly from suppliers outside the State of Tennessee. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

1. Respondent's operation

Respondent sells, installs, and services satellite telecommunication products for DIRECTV. In August and September 2008, there were approximately 3,600 employees in Respondent's advanced technologies division working in 51 to 53 field sites. Respondent's corporate headquarters is in Coral Gables, Florida. Eddie Phillips is the Regional Director of Operations. Kirk Daffler is Respondent's Senior Vice President and Wanzel Jesse is Respondent's Regional Vice President. Respondent acquired the Kingsport, Tennessee facility in January 2006. The Kingsport, Tennessee facility was previously known as Ron's TV or Digital Satellite Services (DSS). In 2008, Respondent employed approximately 26 technicians and warehouse employees, four supervisors, and Site Manager Eddie Russell (Russell) at its Kingsport, Tennessee facility. The supervisors reporting to Russell were Steve Orazi, Tim Riner, Mark White, and Brad Stanley.

On July 17, 2008, the Union filed a petition for an election, seeking to represent all full-time and regular part-time technicians, lead technicians, and apprentice technicians working at Respondent's Kingsport, Tennessee facility. The election was held on August 22, 2008. In the unit of approximately 26 eligible voters, 14 employees voted for the Union and 12 employees voted against the Union. There were no challenged or void ballots. On August

29, 2008, Respondent filed objections to conduct affecting the results of the election. An objections hearing was held on October 1, 2008. On October 22, 2008, the hearing officer issued her report and recommendations. The hearing officer found that none of the Respondent’s objections raised any material or substantial issues affecting the result of the election and recommended that all objections be overruled. The hearing officer further recommended that as the Union received a majority of the valid votes, the Union should be certified as the representative for Respondent’s Kingsport, Tennessee employees in the appropriate collective bargaining unit. As of the date of this decision, this matter remains pending before the Board.

2. Employees’ contact with the Union

Christopher Verbal (Verbal) began working for Respondent as a technician in September 2006. In approximately June 2008, Verbal telephoned union representative Eddie Hicks to inquire about union representation for Respondent’s technicians at the Kingsport, Tennessee facility. In follow-up to Verbal’s telephone call, Hicks met approximately two to three times with technicians prior to any of the employees signing union authorization cards. Verbal signed his union authorization card on June 22, 2008.

Verbal recalled that during the period prior to the election, he spoke with the other employees about the Union and answered their questions if he could do so. He testified that if he didn’t know the answers, he obtained the information for them. During this same period, he was given a union hat and he placed it on the dashboard of his truck. Verbal testified that prior to the election, Field Tech Supervisor Timmy Lee Riner (Riner) spoke with him about the hat in his truck. Verbal recalled that Riner laughingly told him that he wanted Verbal’s hat in order to burn it. When Verbal told Riner that he could not have it, Riner walked away shaking his head and laughing. Verbal recalled that Riner made the same kind of remark about the hat on at least two or three occasions.

B. Allegations of Violations Occurring Before the Election

1. Respondent’s meetings with employees

(a) Complaint allegations

Paragraph 13 of the amended consolidated complaint alleges that during pre-election employee meetings, named supervisors and agents of Respondent threatened employees that it would be futile for employees to select the Union as their bargaining representative. The complaint alleges that they did so by promising to remedy employee grievances only if employees abandoned their support for the Union and by telling employees that if they selected the Union as their bargaining representative, Respondent would withhold benefits and prolong negotiations.

(b) Introduction

During the election campaign period, Respondent conducted a series of meetings with

the technicians. The technicians were split into two groups with the same employees meeting together each session. Each meeting began with the regularly scheduled team meeting conducted by Site Manager Russell and supervisors Orazi, White, and Riner. After the initial discussions about installations and service, the meeting was then conducted by consultant William Jonas. Divided into the two groups, the employees attended one or the other back-to-back sessions held in the tech room on successive days on July 29 and 30, August 5 and 6, August 14 and 15, and August 19 and 20. Jonas was the primary speaker at the first three sessions and Regional Vice President Wanzel Jesse (Jesse) and Senior Vice President Kirk Daffler (Daffler) spoke at the fourth sessions just prior to the August 22, 2008 election.

(c) General Counsel’s evidence

The Board has long held that it will set aside an election where one party engages in conduct which could have the reasonable effect of destroying the “laboratory conditions” necessary to ensure that employees have the opportunity to make an uninhibited choice on the question of representation. *General Shoe Corp.*, 77 NLRB 124, 127 (1948). In its decision in *General Shoe*, the Board pointed out that in election proceedings, it is the Board’s function to “provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.” *Ibid* at 127. As discussed throughout this decision the term “laboratory conditions” was used by Jonas in these scheduled meetings as well as by Site Manager Russell and Supervisor Riner in employee group discussions and in individual conversations with employees.

Counsel for the General Counsel presented eight technicians to testify concerning statements made by Jonas and the two corporate officials during the pre-election meetings. Six of the individuals are current employees of Respondent. During the meetings, Jonas explained the bargaining process for employees; discussing both the process and length of time for negotiations. Verbal recalled that Jonas explained that under “laboratory conditions,” no changes could be made to pay criteria until there was an election and or until there was a negotiated contract. Verbal also recalled that during the second or third meeting, a question was asked about how long negotiations might last. Jonas told the employees that negotiations could take six months or even two years. There was no way to estimate how long the negotiations would require. Although Jonas gave a PowerPoint presentation in each of the meetings, he also allowed employees to ask questions or to comment during the presentation. Verbal, Anthony Koza (Koza), and Michael Stafford confirmed that Jonas responded to questions from employees without using a written text or script.

Almost all of the employees testifying about these meetings recalled that Jonas explained that the election could be delayed, giving the Respondent an opportunity to implement changes at the facility. While the employees did not have identical recall of the words used by Jonas, their testimony was similar. Verbal recalled that Jonas told the employees that if the employees “retracted” the vote for six months, they would be removed from the existing “laboratory conditions.” During that time period, Respondent would have the opportunity to make changes for the better. If employees liked the changes, they would not need to refile for a new union election. Verbal recalled that Jonas assured employees that if they did not like Respondent’s changes, they could refile for a new election and they would

have the right to vote within six months. Anthony Hodges (Hodges) also recalled that Jonas told employees that they had the option of putting off the election for six months. Hodges recalled that Jonas suggested that employees could hold the election over the company's head to see if the company offered the employees anything favorable. If the company did not do so, the employees could again pursue the election in six months. Michael Stafford recalled that Jonas told employees that if the election were postponed for six months, the company would have time to make changes. Under the current circumstances, however, no changes could be made because of the laboratory conditions. Scott Winter also recalled that Jonas stated that the employees had the corporation's attention and suggested they could delay the election for six months and see if anything changed or improved. Winter recalled that Jonas stated that changes had been made in other facilities; however, he could not discuss them because of the laboratory conditions or quarantine that existed at the Kingsport facility. Jonas did, however, indicate that they were "good" changes. Robert Hughes testified that Jonas told employees that Respondent's upper management were "dummies" and they were well aware of the mistakes they had made. He stated that employees at Respondent's other facilities had complained about the same things as the employees at Kingsport and Respondent was looking into making changes. At the Kingsport facility, however, no changes could be made because of the laboratory conditions. Hughes also recalled that when Regional Vice President Wanzel Jesse spoke, he told employees; "I'm the dummy. I'm the one that takes responsibility for the actions that took place." Verbal recalled that Senior Vice President Kirk Daffler told employees that mistakes had been made and that he was trying to correct the mistakes. He told employees that he could not fix the problems all at one time and that it would take time to correct all the problems that had been laid in his lap. Shawn Whippo recalled that Jesse told employees that Respondent had learned its lesson and that changes were being implemented. The employees would be allowed to receive the changes if they were not under laboratory conditions.

A number of employees presented by General Counsel also recalled that Jonas and Daffler told employees what occurred when Respondent's employees voted for union representation at one of Respondent's Florida facilities. Verbal recalled that Daffler told the employees that although the union won the election, negotiations were still continuing after a year. Chris Short testified that Daffler,³ as well as Jonas, spoke about a facility in Florida where negotiations were at a "standstill." Jonas told employees that they could end up the same way because the company did not have to agree to anything.

Verbal recalled that Daffler told the employees that even though the union at the Florida facility offered to use the Employee Handbook as the basis for a contract, Respondent rejected the offer. Michael Stafford further confirmed that one of the other upper level corporate officials commented on the Handbook offer as well. He could not recall whether the official was Daffler or Jesse. He recalled however, that the official told employees that the union at Respondent's other facility offered to use the Handbook as the contract and Respondent rejected the offer. Scott Winter also testified that the company official, whose

³ Although Short could not recall Daffler's specific name, the parties stipulated that Daffler was the man he was referencing in his testimony.

name he could not remember, told the employees about a union election in Tampa, Florida. Winter recalled that the official said that it had been three years since the election and there was still no contract. Although the union was willing to use the Handbook as the contract, Respondent rejected the offer.

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Employees Hughes, Hodges, Short, and Whippo recalled that Jonas spoke about the facility in Florida. Both Hughes and Hodges recalled that Jonas told employees that the company had rejected the union’s offer to simply use the Handbook as the contract. Hodges also recalled that Jonas told employees that even though the union was voted in at the Florida facility, the employees were “stuck at whatever level they were” because of the laboratory conditions. Shawn Whippo recalled that Jonas said that the employees of the Florida facility had been under the same conditions for one or two years because no contract had been reached with the union. Short recalled that Jonas told employees the same thing could happen in Kingsport because the company did not have to agree to anything.

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Whippo testified that Jonas told employees about an Atlanta facility where the employees voted against the union. Jonas explained that for a year’s period, no laboratory conditions would be imposed and the employees were able to “get any conditions that were made during that time” and nothing would be withheld from them. Whippo recalled that Jonas also added that the employees at the Atlanta facility could vote on the union again after the year’s time if they wished to do so. Winter also confirmed that either Daffler or Jesse told employees about the Atlanta facility where the union had not won the election and changes were made in that facility.

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(d) Respondent’s evidence

Respondent presented only one witness to testify concerning the allegations contained in complaint paragraph 13. William Jonas testified that during the 2008, election campaign, he was employed by Respondent as a consultant to provide information to the employees and to management as related to the election. Jonas recalled that he attended meetings at Respondent’s Kingsport facility on 8 occasions between July 29, 2008, and August 20, 2008. He recalled that in the meetings with employees, he presented information about the National Labor Relations Act, National Labor Relations Board election procedures, the negotiation process, as well as a business overview. Jonas confirmed that in speaking with employees, he utilized a “canned package of material” for part of his presentation. On examination by Respondent’s counsel, Jonas was shown four documents purporting to be excerpts from his PowerPoint presentation. He testified that the documents “look like they would have been on the presentation.” Jonas acknowledged that while there was not a question and answer period as such in the meetings, individuals asked questions during his presentations. During the fourth series of scheduled meeting, Senior Vice President Kirk Daffler and Regional Vice President Wanzel Jesse spoke to the employees and managers. Jonas testified that he remained in the room when Daffler and Jesse spoke “for most of these sessions.”

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Jonas confirmed that he told employees that the Union could withdraw the petition if the Union chose to do so. He denied, however, that he made “any statements that the company would provide anything” if the Union withdrew the petition. Jonas denied that he

5 told employees that after negotiations, employees would have nothing better than what they currently had. He asserted that he told employees that they could end up with more, the same, or less after negotiations. He confirmed, however, that he told employees that during an election process; an employer gets a wake-up call and hopefully, if there are issues that “can be fixed,” the employer can fix them. He denied, however, that he was in a position to make any kind of commitments or promises to the employees.

10 Jonas also testified that he did not hear any statements by company representatives that Respondent had refused to accept its own Handbook as a contract. Jonas testified that he did not recall any conversations along the lines of changes being implemented at other facilities and available to Kingsport employees if they were out of laboratory conditions.

(e) Conclusions

15 As described above, the General Counsel presented the testimony of a number of witnesses to describe the meetings with employees and specific comments made by Jonas, Daffler, and Jesse. There is some variation in testimony that leads me to believe that some of the employees may have mistakenly interchanged speakers in attempting to link the remarks to the speakers. Because the employees attended different meetings, it is also possible that the speakers may have inadvertently varied their comments for the different meetings. Despite any slight variations in their recall of the wording, however, the employees’ recollection was overall consistent. Whether it was Jonas, Daffler, or Jesse, the message to employees was unmistakable. Although there was a degree of subtlety, Respondent’s representatives told employees that Respondent was aware that it had made mistakes and wanted to correct them. Respondent could not do so, however, as long as there was the pendency of the election. Respondent suggested to employees that if the petition were withdrawn, Respondent would have the opportunity to rectify those mistakes. Respondent’s representatives talked about the Atlanta facility where employees had voted against union representation. Because of that election result, the Respondent was unencumbered in correcting its mistakes for the next year. This situation was contrasted with the situation in Florida where employees voted for union representation. There, because the parties were mired in lengthy negotiations, the employees were denied any improvements and they were in a state of limbo until there was a collective bargaining agreement. Respondent’s representatives’ discussion about the status of the negotiations in Florida gave employees a view of how Respondent could prolong the negotiations and thwart the union’s success in securing a contract. Although the employees all seemed to have different recall as to how long the Florida negotiations had continued, they all recalled that the period of time was lengthy and that Respondent controlled the process by refusing to accept the Union’s offers. A significant number of employees recalled the specific example of the Respondent’s rejection of its own Handbook as a substitute for a negotiated contract.

45 In response to very specific and detailed testimony by employees, Respondent presented only the testimony of consultant William Jonas. Although a number of the alleged violative statements were attributed to Daffler and Jesse, they were not presented to rebut the employees’ testimony. Although Site Manager Russell attended the meetings, he offered no testimony to rebut the employees’ testimony. Additionally, although other supervisors were

present in the meetings, none were presented to testify about the pre-election meetings or to rebut the employees' testimony. As Counsel for the General Counsel points out in her brief, Jonas could not even identify with certainty some of the excerpts that Respondent offered from the power point presentation. He simply testified that the excerpts 'look like they would
5 have been on the presentation.'

Jonas does not deny that he told employees that the Union could withdraw the petition if they chose to do so. While he did not explain the context of making this statement, he also added that this kind of dialogue "took place or takes place" in explaining that loss of support
10 will cause a union to withdraw an election petition. Jonas denied that he made any specific promises to the employees if the Union withdrew its petition. He asserted that he was not in any position to make those kinds of commitments or promises. He did, however, acknowledge that he told employees that typically a company gets a wakeup call during "this process." He further acknowledged that he told employees that hopefully if there are issues
15 that can be fixed, the company can fix them. On direct examination by Respondent's counsel, Jonas was asked if he mentioned or if he heard others mention that changes have been implemented at other locations and employees would get those changes if they were out of laboratory conditions. He responded that he didn't recall any conversations along those lines. He added that while he had worked on two prior campaigns for Respondent in Atlanta, he was
20 not sure if changes were actually implemented. He provided nothing further to rebut the employees' testimony concerning the alleged comments about Respondent's Atlanta facility. Jonas also admitted that he "probably mentioned" the negotiations taking place at one of Respondent's facilities in Florida as it relates to timetables and the lack of a time limit for negotiations. He also conceded that he talked about the negotiations having lasted for as long
25 as two years and added "I think I may have indicated they were still talking language." He denied hearing anything about Respondent's refusal to accept the Handbook as a collective bargaining agreement.

The Board has long recognized that an adverse inference may be drawn in Board
30 hearings when a party fails to call a potential witness that would reasonably be assumed to be favorably disposed to that party. *Desert Pines Golf Club*, 334 NLRB 265, 268 (2001). Although Respondent presented the testimony of Jonas, Respondent did not present the testimony of Daffler or Jesse, who is alleged to have made some of the violative statements. Additionally, neither Russell nor any other management officials who attended the meetings
35 were presented to rebut the testimony of General Counsel's witnesses. Jonas could not offer an unequivocal rebuttal to alleged statements by Daffler or Jesse as he was only in the meeting for "most" of the sessions when management officials were speaking. In contrast to the specific testimony given by General Counsel's witnesses, Jonas' testimony was less specific, acknowledging that he didn't recall certain comments being made. He admitted that
40 he may have talked about the Florida facility and his rebuttal concerning the Atlanta facility comments were vague. Overall, I do not find Jonas' testimony as credible as that of the individual employees who testified. Additionally, I note that six of these employees testified despite their continued dependence upon the Respondent for employment. One of the factors supporting a finding that Jonas, Daffler, and Jesse made the statements as alleged is the fact
45 that these same kinds of comments were repeated in individual conversations with employees. These conversations are addressed below and reflect Respondent's theme that unspecific

changes could be made if employees abandoned their support for the Union and the Union simply withdrew its petition. I also note that the employees testifying in the underlying unfair labor practice hearing testified similarly to an employee who was called by Respondent to testify in the October 1, 2008, objections hearing. Louis Mays testified in the objections hearing that he changed his mind about the Union after he heard Wanzel Jesse’s presentation to employees. Mays recalled that Jesse told employees that Respondent was looking at things “getting better.” Mays recalled that it had been after Jesse’s presentation that he spoke with another employee about contacting the Union to see if the election could be postponed for six months. Inasmuch as Mays’ testimony was given in a different proceeding, it is hearsay for the purposes of this proceeding. I nevertheless note the similarity in content as it relates to a promise of change and a delay of the election for six months. Mathew Abel also testified in the objections hearing that employees Dennis Shell, Mark Hopkins, and Lou Mays all discussed delaying the election for six months. Abel confirmed that he had not given up his support for the Union until approximately a week before the election and after Wanzel Jesse and another company official spoke in the meeting. Both Mays and Abel were called as witnesses by Respondent during the objections.

Accordingly, I find the total record evidence supports a finding that during the pre-election meetings, Respondent threatened employees that it would be futile to select the Union as their collective bargaining representative by promising to remedy employee grievances if the employees abandoned their support for the Union. Additionally, Respondent further threatened employees with the futility of selecting the Union as their bargaining representative by threatening to withhold benefits and prolong negotiations. In doing so, Respondent violated Section 8(a)(1) of the Act.

2. Allegations involving Riner and Russell preceding the election

(a) General Counsel’s Evidence

Paragraph 11 of the amended consolidated complaint alleges that during the period of time between the filing of the petition and the election, Field Tech Supervisor Timmy Lee Riner (Riner) interrogated employees about their union sympathies on more than one occasion. Paragraph 12 of the amended consolidated complaint alleges that on August 13, 2008, Riner promised employees their grievances would be remedied and benefits would be granted only if they abandoned support for the Union as their collective bargaining representative.

Verbal recalled a time during the period prior to the election when he was standing near the bay door at Respondent’s facility. Riner joined him and began talking about election. Verbal recalled that Riner told him that Respondent was trying to change things at the facility. Riner stated that while there had been some changes made, the employees could not take part in the changes until the employees voted against the Union or until after a contract was reached with the Union if the employees voted for the Union.

Verbal also recalled another conversation with Riner about the Union that occurred approximately 2 to 3 weeks before the election. Riner asked him what he knew about the

Union. Verbal replied: “I know what you know, Tim.” When Riner stated that he had heard that Verbal was a supporter of the Union, Verbal confirmed that he was a supporter. Riner then went on to tell Verbal that Respondent needed time to make some changes. Riner added that if the employees would just give the Respondent time, Respondent could make things better.

Verbal further recalled a third conversation that occurred prior to the election. On the day before the election, he had been standing beside his van outside the bay door. Verbal testified: “Tim had walked up and he said, you know, the vote’s tomorrow. As your friend I’m asking you to vote no and do the right thing and just give us some time. He said we can make things better if you just give us the time to make some changes.” Verbal recalled that Riner asked him how he was going to vote. When Verbal replied that he was going to do the right thing and vote for the Union, Riner walked away.

Chris Short testified that prior to the election; he spoke with Riner two to three times each week about the Union. During the conversations, Riner told him that Respondent needed his vote against the Union. Although Riner did not identify the specific changes, he told Short that Respondent was working on changes “for the better.” Riner told him that he could not identify the changes because of the laboratory conditions. During the conversations, Riner also asked Short how he felt about the Union. Prior to the conversations with Riner, Short had not worn a union hat or made comments that demonstrated his support for the union.⁴

Nathan Koza recalled that approximately a month prior to the election, he was standing outside the shop near the dumpsters. Riner approached him and asked if he had heard anything about the union and how he felt about it. Koza responded that he had not heard anything. Riner told him to ignore what he heard because “unions were bad.” Koza recalled that once or twice a week, Riner continued to ask if he had heard anything and how he felt about the union. Koza testified that he continued to tell Riner that he had not heard anything; however, he assured Riner that he would let Riner know if he learned anything. During this time period, Koza had not worn a union hat or said anything to demonstrate his support for the Union.

(b) Conclusions

Respondent presented no evidence to contradict or rebut the testimony of Verbal, Short, or Koza concerning their conversations with Riner. Although Respondent stipulated that Timothy Riner is still employed with Respondent, he was not called as a witness to testify in this proceeding. As discussed above, it is well settled that when a party fails to call a

⁴ Chris Short also testified that approximately a week prior to the election, he was standing outside the office at the shredder bin. No other employees were with him. Russell spoke with him and asked how he felt about “all the union bull shit” and told Short to come to him if he had any questions. Short confirmed that prior to this question, he had not said or done anything to indicate to supervisors how he felt about the Union. Inasmuch as the complaint does not allege this conversation as a violation of Section 8(a)(1), I have made no finding concerning this alleged comment by Russell.

witness who may be reasonably assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. The inference may be drawn that, if called, the witness would have testified adversely to the party on that issue. *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, fn. 1 (1977) Inasmuch as Riner continues as Respondent’s supervisor and there was no evidence of Riner’s unavailability to testify, an adverse inference is warranted. *Human Development Association*, 348 NLRB 677, 684 (2006); *Reno Hilton Resorts*, 326 NLRB 1421, fn. 1 (1998).

Additionally, I find the testimony of Verbal, Short, and Koza to be credible with respect to their respective conversations with Riner. Koza credibly testified that during the month prior to the election, Riner repeatedly interrogated him concerning not only his personal feelings about the union, but also about what Koza was hearing about the union in the work place. During this same time period, Riner repeatedly interrogated Short about his feelings concerning the union. Both employees confirmed that at the time of Riner’s questions, they had done nothing to demonstrate their support for the union. In addition to his repeated interrogation of Short, Riner also told Short that Respondent was working on changes “for the better,” although he could not tell him the specific changes because of the laboratory conditions. This same message of change was reiterated by Riner in his three conversations with Verbal. In three separate conversations, Riner talked with Verbal about the employees’ giving Respondent time to make changes. In one conversation, Riner indicated that changes had already been made, however, the employees could not benefit from the changes until the employees rejected the union or until a contract was reached. In the following conversations, Riner repeated that Respondent just needed more time to make the necessary changes. Because Verbal openly voiced his support for the union to Riner, it is reasonable that Riner saw Verbal as a key employee who could convince other supporters to withdraw their support for the union and give the Respondent the opportunity to implement the unspecified changes.

As discussed above, Riner did not testify in this proceeding and did not rebut the testimony of Verbal or Short concerning the alleged promises of change. Riner did, however, testify in the objections hearing. During the objections hearing, Riner testified that he told Anthony Hodges that he hoped that Hodges would vote no and “put it in our hands and give us at least the opportunity to make things right” and help to makes employees happy. Thus, Riner’s own sworn testimony in the objections hearing confirms that he impliedly promised employees that their grievances would be remedied and benefits granted only if they abandoned their support for the Union as their collective bargaining representative. Accordingly, crediting the testimony of Verbal and Short, and in view of Riner’s own sworn testimony in the objections hearing, I find Riner’s promise to change to violate Section 8(a)(1).

Additionally, crediting the testimony of Koza and Short, it is apparent that as a supervisor, Riner questioned these employees alone at their place of work and gave no assurances that no reprisals would be taken against if they disclosed support for the union. I find Riner’s interrogations violative of Section 8(a)(1) of the Act. *P.S.K. Supermarkets, Inc.*, 349 NLRB 34, 39 (2007); *Marriott Corp.*, 310 NLRB 1152, 1157 (1993).

C. Other Allegations Involving Alleged Threats, Promises, and Unilateral Changes

1. Statements involving performance criteria

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Paragraphs 14 and 15 of the complaint allege that during a time period spanning from early August to early December, 2008, Russell and Riner threatened employees with respect to their compensation criteria and the opportunity to participate in an incentive sales program, as well as a loss of benefits. The witnesses presented by General Counsel concerning these
10 allegations testified about Russell’s and Riner’s discussions and comments related to the “laboratory conditions” that existed because of the election process.

In June 2008, Respondent implemented changes to its criteria for measuring employees’ performance. Because the performance criteria were integrated with customer
15 telephone service, the technicians viewed the criteria as unfavorable. Verbal testified that concerns about the performance criteria had been the principal reason for the employees contacting the Union. The parties stipulated that Respondent implemented a new metric for telephone responder rates nationwide that was more favorable to employees on October 25, 2008. The more favorable metrics were not implemented at the Kingsport, Tennessee facility
20 until December 20, 2008.

Shawn Whippo testified that a few days before the August 22 election, Russell told a group of technicians standing near the bay door, that the Kingsport employees would not
25 “qualify” for favorable changes being made to the phone criteria until they were no longer under “laboratory conditions.” Robert Hughes recalled that during a technicians’ meeting approximately a month after the election, Russell answered a question about the telephone responder criteria by telling employees that because of laboratory conditions, Respondent wouldn’t or couldn’t change the criteria.

Michael Stafford estimated that approximately 10 times before the election, he
30 overheard Russell state that no changes could be made at the facility because the employees were under “laboratory conditions.” Stafford specifically recalled hearing Russell tell a technician that he would not receive a performance pay increase because Respondent was making no changes because of the laboratory conditions. Stafford confirmed that Russell
35 continued to tell employees that there would be no changes in their performance pay even after the election. Robert Hughes also confirmed that he heard Russell and Riner make similar comments about laboratory conditions. Hughes specifically recalled that following the election, Russell told employees in a technicians’ meeting that changes were being made for the compensation criteria for employees at Respondent’s Asheville, North Carolina facility. Russell went on to add that the employees at the Kingsport facility, however, would
40 not have those changes because of the laboratory conditions.

Prior to the election, Verbal spoke with Riner about the telephone responder rates. Verbal recalled that Riner told him that Respondent was trying to change things and that there
45 had been some changes made, however, the Kingsport employees could not take part in the changes until the employees voted “no” or there was a union contract.

Shawn Whippo testified that Riner discussed the telephone responder rates with employees prior to the election. Whippo recalled that during the team meetings, Riner told employees that they were under laboratory conditions and would be held under the current conditions. Hodges recalled that he attended a supervisor’s meeting with employees in early December 2008. While Russell sometimes accompanies the supervisor in the meeting, Hodges believed that it had been Riner who spoke about the telephone responder rates. He recalled that Riner told the employees that while there was a change in the telephone responder criteria, the Kingsport employees were not eligible because of the laboratory conditions.

Michael Stafford testified that while Russell spoke more often about the laboratory conditions, he had also heard Riner talk about laboratory conditions as many as 5 to 10 times. Stafford recalled that on one occasion, Riner responded to questions about the performance criteria by saying that Respondent could not make changes because of the laboratory conditions and employees “were just going to have to deal with it.”

As discussed above, Riner did not testify and thus did not rebut any of the employees’ testimony concerning the alleged threats by Riner and Russell as alleged in the complaint. Russell was asked by Respondent’s counsel “Did you make any promises to any technicians to the effect that you would confer benefits on them if they voted against the Union.” While Russell denied that he did so, he provided no other information or explanation in relation to his alleged comments about laboratory conditions. Respondent argues that the alleged statements by Russell or Riner, even if credited, suggest no loss in benefits. Respondent argues that such statements were merely truthful statements regarding the effects of changes in compensation and benefits during a union campaign and after an election. Respondent cites the Board’s decision in *Village Thrift Store*, 272 NLRB 572 (1983) for the proposition that an employer may tell its employees that benefits provided in an indefinite manner will be deferred during the pendency of organization efforts, where an employer makes it clear that the purpose in doing so is to avoid the appearance of interference. Despite Respondent’s assertion, however, I find that the evidence in the instant case is distinguishable from *Village Thrift Store*. As the total record reflects, Respondent went beyond simply stating a position of neutrality when talking with employees about benefits and compensation that were unavailable because of the pending election. Beginning with the pre-election meetings with employees conducted by Jonas and Respondent’s corporate management, Respondent emphasized that “laboratory conditions” prevented any favorable changes in benefits or compensation. This explanation was coupled with Respondent’s continued and subtle urging that if the petition were withdrawn for 6 months, Respondent could provide those favorable changes without the restrictions of the laboratory conditions.

Accordingly, I find that through the statements of Russell and Riner, Respondent threatened its employees with loss of benefits and with respect to the compensation criteria as alleged in complaint paragraphs 14 (a) and (b) and 15 (a) and (b).

2. The November 2008 incentive program

Complaint paragraph 18 alleges that in or about October 2008, Respondent made changes in its incentive sales program by announcing that, contrary to past practice, bargaining unit employees would not be allowed to participate in a promotion beginning November 1, 2008, that offered employees extra cash compensation for making a lead sale that was activated during the promotional period.

In November 2008, an affiliate of Respondent offered an incentive program to all of its home service providers, including Respondent. The event was launched as an effort to encourage technicians to secure more lead sales. Respondent's Director of Human Resources Barry Hall explained that a sales lead is a potential customer referral. Hall and Russell both testified that the November incentive allowed technicians to receive a \$150 incentive payment for leads or potential customer referrals during the month of November. The announcement of the incentive program was first published in an October 28, 2008, e-mail to employees from Direct Star TV's HSP (Home Service Provider) Sales Manager. The e-mail explained that the technicians would receive \$150 for every lead sale they made during the month of November.

Hall testified that because the incentive program was not a part of the normal pay practices, Respondent determined that the program constituted a change and thus the Kingsport employees should be excluded from participating in the program. Despite Respondent's determination, however, there was a payroll error and the Kingsport employees were inadvertently included in the program. The employees were given the \$150 if they made the November sales required by the promotion. Hall testified even though it was in error, the employees were allowed to keep the incentive pay they received. Although Hall asserted that the incentive plan payment was not in the normal course of business, Russell acknowledged that similar incentive programs were previously offered to technicians related to lead sales. General Counsel also submitted leaflets to show that prior to November 2008, the Kingsport employees were included in two other similar sales promotion programs.

Employees Stafford, Whippo, Winter, and Hodges all recalled that during a technicians' meeting in late October or early November, Russell told employees that they would not be eligible to participate in the incentive sales program because of the laboratory conditions. Russell testified that when technicians asked him about the November incentive program, he told them that he was not sure if they were eligible. He further testified that when technicians asked him why they were not eligible, he responded that "everything has to stay the same as it was due to laboratory conditions."

By letter dated November 26, 2008, Union Representative Thelma Dunlap informed Russell that the Union had been advised that Respondent was refraining from making favorable changes to company policy regarding criteria for pay because Respondent was "under quarantine" during the pendency of the objections with the Board. In the letter, Representative Dunlap confirmed that the Union had no objection to Respondent's making changes to pay criteria that would favor the Kingsport employees. Representative Dunlap further advised that if Respondent was still concerned about making such changes absent

notice to the Union and an opportunity to bargain, the Union was prepared to meet and confer with Respondent.

5 Counsel for the General Counsel requests a finding that Respondent violated Section 8(a)(5) of the Act because of the unilateral change in its incentive sales program as alleged in paragraphs 18, 20, and 24 of the amended consolidated complaint. As the Board noted in *Flambeau Airmold Corp.*, 334 NLRB 165 (2001), “it is well established that an employer is prohibited from making changes relating to wages, hours, or terms and conditions of employment without first affording the employees’ bargaining representative a reasonable and meaningful opportunity to discuss the proposed modifications.” The Board also pointed out that this restriction on employers also applies in the context where a union won a Board election and the employer made changes while the objections were pending. Russell acknowledged that when technicians asked him about the sales promotion, he told them that he was not sure if they would be eligible for the program because of the existing laboratory conditions. Respondent further asserts that the Union’s written approval giving Respondent permission to grant new and beneficial benefits only serves to legitimize Respondent’s concerns about making any changes.

20 Ironically, although Respondent told employees that they might not be eligible; the employees received the incentive sales payment. Thus, despite Respondent’s initial concern that it could not allow the Kingsport employees to participate in the program, the employees were nevertheless allowed to do so. Because the employees were inadvertently allowed the opportunity to participate in the incentive sales program, there is no unilateral change in violation of Section 8(a)(5) of the Act. Respondent does not dispute, however, that employees were told that because of the laboratory conditions, they would not be eligible for the program. As the Board has noted, under certain circumstances, an employer may relieve himself of liability for unlawful conduct by repudiating the conduct. *Passavant Memorial Hospital*, 237 NLRB 138, 139 (1978). The Board explained that in order to be effective, the repudiation must be timely, unambiguous, specific in nature to the coercive conduct; free from other proscribed illegal conduct, and with adequate publication. Additionally, there must be no additional proscribed conduct after the publication. *Ibid*. While the employees inadvertently received the incentive sales payments, there is no evidence that Respondent repudiated its earlier statements to employees threatening employees that they were not eligible for the program because of the laboratory conditions. Accordingly, the record supports a finding that acting through the statements of Russell and Riner, Respondent threatened employees with respect to their participation in the sales program as alleged in complaint paragraphs 14 (c) and 15 (c).

3. The Retention Bonus

40 Complaint paragraph 16 alleges that on or about December 24, 2008, Riner threatened employees with loss of benefits because of their support for the Union, by threatening to withhold or delay bonuses. Hall testified that prior to 2008; Respondent had never paid a retention bonus to employees. Respondent’s customer, DIRECTV, approached Respondent about giving a \$500 bonus for each employee who was employed in December 2008. Hall clarified that it was a one-time offer that had never previously been given and Respondent

viewed it as a change. Russell recalled that when a number of employees asked him about whether they would receive the bonuses, he also told them that because of laboratory conditions he was not sure if they would or would not receive the bonuses. Hall also testified that as Human Resources was processing the bonuses for Respondent's other facilities, he
5 contacted the Regional Vice President and asked if the Kingsport employees should be given the bonus based upon the Union's November 26 letter. The Regional Vice President agreed that the Kingsport employees should receive the bonus as well. Russell estimated that probably a day or two before he received the bonuses from DIRECTV; he learned that the Kingsport employees would receive the bonuses. Hall testified that the bonus checks were
10 dated December 26, 2008 and were sent by Federal Express to the Kingsport facility at the beginning of the week of December 21 for distribution on Wednesday, December 24, 2008.

General Counsel presented four witnesses who testified about their discussions with management concerning the retention bonus. Shawn Whippo testified that supervisor Riner
15 telephoned him on Christmas Eve. Riner told Whippo that because of laboratory conditions, the employees were not going to receive the Christmas bonus. Riner went on to add, however, that Russell had spoken with his boss and because the bonus came from DIRECTV, the employees were allowed to receive the bonus. Riner then met Whippo that same day and gave him the bonus check. Scott Winter recalled that his supervisor Steve Orazi came out to
20 Winter's last job of the day on Christmas Eve to deliver the bonus check. In doing so, Orazi told Winter that employees had not been scheduled to get the bonus, however, Russell and Regional Director of Operations Eddie Phillips "had gone out of their way to make sure" that the employees got the bonuses they had earned. Michael Stafford testified that he received his bonus check from supervisors Riner and White. Stafford recalled that both Riner and
25 White mentioned that the bonus "almost didn't go through." White said that the decision to issue the bonus did not come down until the eleventh hour. Stafford questioned why the employees would not have received the bonus. While he did not recall the exact words, he recalled that either Riner or White insinuated that the delay had been due to the Union and the laboratory conditions. Stafford further testified that when Riner gave him the check, Riner
30 commented that Respondent wasn't sure if the employees would get the checks. In recalling Riner's explanation, Stafford testified: "The decision came in, like from what I remember him saying, like late last night or the night before, you know, due to the Union situation. They weren't sure if they could give those checks to us." Riner met Robert Hughes on his job site on Christmas Eve and gave him the bonus check. Hughes testified: "He handed me a check
35 and said, 'This is a Christmas bonus,' that we liked to not have got it, that Mr. Russell had went to bat for us on it, that due to the laboratory conditions they were holding it back. But then they decided that - - determined that it was directly from DIRECTV and that they couldn't keep it from us. And that due to the conditions, that the Union had screwed us in a lot of ways."

In her post hearing brief, Counsel for the General Counsel argues "not only did Riner and other supervisors make it clear to employees that their selection of the Union almost cost them the \$500 bonus, but he and other supervisors also drove home the point that by the
45 unilateral [emphasis added] good grace of management and the persuasion of the employees' boss had there been an eleventh hour reversal with respect to withholding the bonus." As noted above, Riner was not presented as a witness and did not rebut the testimony of General

Counsel’s witnesses. The Board has long found that an employer’s statements which blame the loss of benefits on a union’s organizing campaign is violative of Section 8(a)(1) of the Act. *Larid Printing, Inc.*, 264 NLRB 369, 370 (1982). *Jaison’s*, 212 NLRB 1, 7-8 (1974). Accordingly, the un rebutted testimony of the employee witnesses supports a finding that Respondent, acting through Riner, threatened employees with loss of benefits because of their support for the Union as alleged in complaint paragraph 16.

D. Allegations of Discriminatory Discipline

As referenced above, there were 14 votes for the Union and 12 votes against the Union in the August 22, 2008, election. On August 29, 2008, Respondent filed objections to conduct affecting the results of the election. Three of the objections alleged misconduct by Union officials near or in the polling area or the designated “no-electioneering” area. The remaining three objections alleged that the Union and its affiliates, agents, representatives and/or supporters interfered with the election by threatening, coercing and/or intimidating voters before and during the election. In its objections, Respondent submitted that if any of the misconduct was not attributable to the Union, the conduct was nevertheless sufficient to, and did in fact; destroy the minimum laboratory conditions necessary for a free and fair election.

On October 13, 2008, Respondent terminated Christopher Verbal and issued a written warning to Anthony Hodges. On that same day, Nathan Koza submitted his resignation in lieu of being terminated. All three employees were disciplined for allegedly threatening other employees and/or management. Respondent submits that these employees were disciplined because of threats that also served as a basis for its objections to the election.

Verbal’s termination notice identifies the date of his violation of company policy as August 22, 2008. The notice provides: “The Company has determined that you have made the following threats of violence against your co-workers and management team: (1) To threat to slap and to beat co-workers, (2) The threat of physical violence against local management, (3) The threat to ‘kill the traitor’ in reference to a co-worker.” The written warning given to Hodges on October 13, 2008, indicates that on or about August 22, 2008, Respondent received a complaint concerning a threat made by Hodges toward a co-worker. The warning notes that while Respondent had not been able to substantiate the complaints, Hodges was warned to never again engage in any conduct that could be construed as harassment, direct threats, or veiled threats. As Koza resigned in lieu of discharge, his separation notice reflects only that he quit. Thus, there is no dispute that employees’ alleged threats served as a basis for not only the discipline of Verbal, Koza, and Hodges, but also as a partial basis for Respondent’s filing of objections to the August 22, 2008, election. The interrelationship of the objections and the discipline to employees is shown in the chronology of events.

1. Respondent’s evidence

Site Manager Eddie Russell testified that he took a week’s vacation the day after the August 22, 2008, election, leaving supervisor Mark White in charge of the facility. Russell asserts that upon his return, White gave him two typed statements signed by Warehouse Manager Brad Stanley and two typed statements signed by Supervisor Riner. Additionally

attached was a handwritten statement signed by Louis Mays, a technician. Russell testified that at the time of his return, the statements had already been forwarded to Respondent’s legal counsel.

5 One of the statements signed by Stanley and one of the statements signed by Riner concern comments made to them by Glenda Sturgill, a warehouse employee. Stanley recorded that Sturgill approached Riner and Stanley on August 25, 2008, stating that she did not feel safe in the workplace. In his statement, Stanley opines that her comment was based on her conversation with Verbal on the day of the election when Verbal asked her how she
10 Riner’s statement, he confirms that while Sturgill told them that “this was not a safe workplace,” she did not elaborate. In his written statement, Riner documents that the issue was then taken to White.

15 In a second written statement dated August 25, 2008, Stanley documents that he overheard a conversation in which Nathan Koza stated that “If anyone fires me, I’ll kill em.” Stanley notes that he did not know with whom Koza was speaking. In a written statement dated August 25, 2008, Riner notes that a group of technicians asked him questions about whether the company would contract out the work and terminate the current technicians.
20 Riner documents that in a conversation with Michael Stafford, Koza made the comment ‘I don’t care if they fire me I will kill someone that’s why they didn’t fire me at Wal-Mart I scare them.’ Riner asserts that Koza added “I won’t actually kill anyone I will beat them so bad they will wish that they were dead they will almost be dead.” Riner submits in his statement that he simply logged the comments and notified White. He does not document that
25 he said anything to Koza or took any action other than preparing the written statement at White’s direction.

 The fifth statement given to Russell by White was an undated handwritten statement by Louis Mays. In the statement, Mays asserts that on the Friday before the election, he
30 spoke with some of the technicians about giving Respondent a chance. He describes a threatening telephone call that he received that same evening. Based upon the statement, there is no indication as the identity of the technicians with whom he spoke during the day or the identity of the individual who telephoned him. He simply noted that the telephone number of the caller was blocked.
35

 Russell did not identify the specific date that he returned to the facility from vacation; however, Respondent filed the objections to the election on August 29, 2008. Russell testified that prior to the objections hearing, he spoke with employees to determine if they felt threatened. He explained that in “general conversation around the office” he asked if
40 employees would come to him if they had ever felt threatened or if they had been threatened by anyone in relation to the union election,⁵ Russell testified that he did not speak with Verbal, Koza, or Hodges to investigate their involvement in any alleged threats. He

45 ⁵ Russell admits that even though he obtained a written statement from Jason Tanksley, the statement did not relate to threats. As discussed later in this decision, Verbal’s alleged threat to co-workers involved a threat to Jason Tanksley.

contended that he did not do so because of his fear of committing an unfair labor practice by interrogating individuals that may have been union supporters.

5 Russell testified that prior to the objections hearing, a decision was made that the hearing would be used as the investigation for the alleged threats. Russell was present during the entire objections hearing. He testified that after the hearing, he realized that there were a lot of people in his facility that were terrified. He asserted that following the objections hearing, he drafted and posted a letter in the facility informing employees that Respondent would take immediate disciplinary action against anyone who makes a “verifiable” threat of violence and that anyone engaging in violence would be fired immediately. When Russell was asked on direct examination if he considered taking disciplinary action against Koza, Verbal, and Hodges after the objections hearing, he responded: “Absolutely.” He testified that he made the decision to terminate Verbal and Koza and to issue a written warning to Hodges. He explained that he made a distinction with Hodges because “only one person” said that Hodges made a threat and that person may have had “some beef” with Hodges.

20 During the unfair labor practice hearing, Respondent presented no witnesses with any direct knowledge of the alleged threats involving Verbal, Koza, or Hodges. As indicated above, the written statements of supervisors Riner and Stanley were given to Russell upon his return from vacation and submitted to Respondent’s counsel in preparation for filing the objections. Neither Riner nor Stanley, however, testified in this proceeding. Although the statement of Stanley references a statement made to him by Glenda Sturgill, Respondent did not present Sturgill as a witness.

25 The transcript of the October 1, 2008, objections hearing was received into evidence as a joint exhibit. The transcript provides the only information concerning the specific threats upon which Respondent allegedly relied in disciplining Verbal, Koza, and Hodges.

2. Verbal’s alleged threats

(a) The objections’ hearing testimony

30 The objections hearing transcript indicates that Glenda Sturgill was called as a witness by the Respondent. She testified that she was a warehouse employee and had been an eligible voter in the August 22, 2008, election. When initially asked on direct examination if she believed that the pro-Union technicians would be capable of some kind of violent retaliation, vandalism, or harm to her house, Sturgill replied “No.” She testified that she was not aware of any threats by pro-Union technicians to anyone before the election. On redirect examination by Respondent’s counsel, Sturgill was again asked if she feared retaliation by pro-Union technicians and she responded “Yes.”

45 Although Carol Mann was not an eligible voter in the August 22, 2008, election, she was called by Respondent to testify in the October 1, 2008, hearing. Mann testified that she had not wanted to have anything to do with the election and had not supported either the Union or the Respondent in the election. She testified that 2 days before the election; she observed Verbal drive past her house. She stated that the following day she told Verbal that

she had seen him drive by her house. She told him that her boyfriend had suggested that the next time he drove by her house; he should stop for a beer.

5 Mann also testified that she overheard a conversation on the day of the election involving Verbal, Hodges, Koza, Michael Stafford, and Scott Winter. She also recalled that employees Jerry Roberts, Chris Bush, Chris Short, and Robert Hughes were also present. Mann testified that she heard Verbal say that Jason Tanksley had turned their back on “them.” She testified: “He was basically kind of going off about Jason Tanksley was a traitor and kill the traitor.” She added that Chris Short and others mimicked the statement in such a way that
10 there was a chant of “kill the traitor.” She further added that this sentiment was the “general consensus” of the group of employees.

15 Technician Louis Mays also testified during the objections hearing on October 1, 2008. Mays testified that the only comment that he ever heard anyone make about Jason Tanksley prior to the election was to refer to him as a pansy. He never heard anything similar to a threat. Mays estimated that approximately 2 weeks before the election, he heard employees including Nathan Koza and Chris Hall joking about Tanksley. He recalled that they were talking about Tanksley being against the Union because his wife or fiancé didn’t want him to support the Union. Mays compared these employee comments about Tanksley to
20 comments that high school students make to annoy each other.

25 During the objections hearing, technician Mathew Abel testified that a couple of weeks before the election, a group of three or four technicians, including Verbal, were in a conversation outside the office. In describing Verbal’s comments Abel testified:” I think he was talking about Dennis and Shawn Whippo. I think basically he just said, you know, I’ll bitch slap them; you know, I’ll whip their fuckin’ ass, you know, just, you know, blowin’ off steam saying things like that.” Prompted by a leading question, Abel added that Verbal made the statement in relation to whether Dennis Shell and Shawn Whippo would cause the Union to lose the election.
30

Abel also testified that he had heard Verbal make the statement that if the Union didn’t win, he would “whip Eddie’s [Russell] ass.” Abel added “But of course, I would say that a lot of technicians have probably said that once or twice; maybe not in regards to the Union, but--” Abel also confirmed that he too had said that he was going to whip someone’s ass more
35 than once. He acknowledged that he had not really been worried about Verbal actually attacking anyone that he was talking about.

40 Verbal was subpoenaed by both the Respondent and the Union to testify at the objections hearing. In his testimony, Verbal confirmed that he had been on the Union organizing committee and had a leadership role in the Union’s organizing efforts at Respondent’s facility. Verbal was asked: “About a week before the election, did you tell anybody, referring to Shawn Whippo and Dennis Shell that if they -- “If they cost us ...,” words to this effect, “If they cost us the election, I will whip their ass?” Verbal denied that he made such a comment or that he said anything about whipping anybody’s ass for voting
45 against the Union. Additionally, Verbal was asked: “On the day of the election, about 7:30 a.m., did you say to anyone words to this effect, that Jason Tanksley is a traitor; he turned his

back on us and that he is a traitor and you all should kill the traitor?” Verbal denied having made such a statement. He also denied that he made any comment or threat to Tanksley about Tanksley being a mama’s boy or doing what his girlfriend wanted him to do. On cross-examination by the Union’s attorney, Verbal testified that he had been outspoken for the
 5 Union and Tanksley had also made his feelings known. Verbal explained that he had known from the first time that he spoke with Tanksley that he was not going to vote for the Union. He testified that even though he had known from the beginning of the campaign that Tanksley was a “No” vote, they had not had a falling out because of it.

10 **(b) Verbal’s trial testimony**

Verbal testified that on the morning of the election, he arrived at the facility at approximately 6:25. As he walked into the facility, he met the Union’s local president leaving. After he voted, he remained at the facility until the vote count. The election period
 15 ran from 6:30 a.m. until 8:30 a.m. Verbal recalled that he waited for the election results with the remainder of the technicians outside the bay door; an area that is a common meeting ground for employees to gather. Jason Tanksley and Lou Mays were not present as they were serving as company and union election observers.

Verbal testified that prior to his discharge; he had been good friends with Tanksley. He and Tanksley occasionally went out to dinner and socialized during the weekends. He denied that he made any comment about Tanksley being a traitor or any comment about “kill the traitor” while he waited with the other technicians. Verbal testified that he had talked about Tanksley to the other technicians while they waited for the vote count. He told the
 20 other technicians that Tanksley was the most honest one of them because they all knew where he stood about the Union. During the campaign, Tanksley told Verbal and the other employees that he could not vote for the Union because the Union supported Barack Obama in the presidential election. Verbal explained that even though Tanksley took this position, his relationship with Tanksley had not changed. During his testimony, Verbal also denied
 25 that he made any threatening comments about Dennis Shell, Shawn Whippo, or Eddie Russell.

Chris Short arrived at the facility between 7:30 a.m. and 8:00 a.m. on the morning of the election. After voting, he waited with the other technicians for the election results. Short⁶
 35 denied hearing Verbal say anything about Tanksley being a traitor or anything to the effect of “kill the traitor.” Short also denied ever hearing Verbal make any threats to Russell or any other employees. Anthony Hodges arrived at work on the morning of the election at approximately 6:15 a.m. After voting, he waited with the other technicians for the conclusion of the election. Hodges testified that he did not hear Verbal say anything about Tanksley
 40 being a traitor or hear Verbal threaten to “kill the traitor.” Anthony Hodges recalled only that Verbal made the statement that Tanksley was the only honest man there because the

45 ⁶ Michael Stafford also denied hearing Verbal make any threat with respect to Tanksley. Stafford arrived at the facility at approximately 8:00 a.m. and smoked a cigarette before going in to vote. Shawn Whippo additionally denied hearing Verbal make any comment or threat about Tanksley. He was with the other technicians around the 8:00 a.m. time period.

employees knew how he stood from the beginning.

5 Scott Winter arrived at the facility on the day of the election at approximately 6:30 a.m. After voting, he waited with the remainder of the technicians for the conclusion of the election period. He estimated that he was approximately 3 or 4 feet away from Verbal during this time. He heard no discussion about Tanksley and no comment about “kill the traitor.”

10 Robert Hughes arrived at the facility on the day of election between 7:00 and 7:15 a.m. After voting, he waited outside with the other technicians. Hughes testified that he never heard Verbal say anything about Tanksley being a traitor or heard him say “kill the traitor.”

(c) October 13, 2008

15 When Verbal arrived for work on October 13, 2008, at approximately 6:30 a.m., he found that he had difficulty accessing his route from the computer. He asked for supervisor Steve Orazi’s assistance. When Orazi was unable to find Verbal’s assigned route, he suggested that Verbal wait while he found Verbal’s assignment. Even though Verbal waited until approximately 9:00 a.m., Orazi had still not determined Verbal’s assigned route for the day. Verbal left the facility to return home. When he reached his home, he found that he had a telephone message from Orazi. When Verbal telephoned the facility, Orazi told him that there was something that he needed to discuss with Verbal and it was important that he talk with Verbal at the facility. When Verbal returned to the facility, he met with Orazi and Russell in Russell’s office. Orazi then read the contents of a Disciplinary Action Form to Verbal, informing him of his immediate termination. The form indicated that Verbal was terminated because on or about August 22, 2008, he made threats of violence against co-workers and management. Specifically, the threats were listed as (1) a threat to slap and to beat co-workers, (2) the threat of physical violence against local management, and (3) the threat to “kill the traitor” in reference to a co-worker. Verbal testified, without contradiction, that between October 1, 2008, and his discharge, nothing was said to him about his having made serious threats or to notify him that his job was in jeopardy. He was unaware of any investigation of his having engaged in misconduct.

35 On the same day of his termination, Verbal visited the home of Michael Stafford. While in Stafford’s home, Verbal telephoned Tanksley. Because Verbal used a speakerphone, Stafford could overhear both Verbal and Tanksley. Stafford overheard Verbal tell Tanksley that he had been fired because of a threat to Tanksley. Tanksley replied “Oh, I can’t believe that.”

3. Koza’s alleged threats

45 Nathan Koza worked for Respondent from April 20, 2007, until his employment ended on October 13, 2008. Although he testified in the October 1, 2008, objections hearing, no supervisor ever questioned him about any alleged threats before or after the objections hearing.

During the objections hearing on October 1, 2008, supervisor Tim Riner testified that on August 25, 2008 at approximately 7:40 a.m., he had been in the vicinity of several technicians (techs) who had gathered near the dumpster. Michael Stafford and Anthony Koza were among the techs in the group. Riner said that he knew the date and time of the conversation because he recorded it in his “book.” Some of the techs asked a questions relating to whether the company could get rid of its workforce and use only contract employees. Riner testified that Koza made the statement “Well if they fire me, they better be prepared because I’ll kill somebody.” Riner continued to testify that Koza added “Well, I wouldn’t kill them; I’d just beat them so badly they’d wish they were dead. That is why they fired me at Wal-Mart because I made house calls.” Riner also asserted in the hearing that he had previously heard Koza talk about having addresses and making house calls. Respondent’s counsel did not, however, ask Riner to clarify the date or circumstances of the earlier comment concerning house calls. On cross-examination, Riner volunteered that Koza had made similar statements several times before, claiming that he had “scared them at Wal-Mart.” He also acknowledged that he had previously heard Koza talk about “making house calls” in connection with the union campaign. He also acknowledged that other than Koza’s comment, he had heard the expression “house calls” used “a lot” during the union campaign and that it referred to visiting someone. He denied, however, that he knew what the term “house call” means in the context of a union organizing campaign. Riner was not asked, and did not provide any additional information about Koza’s alleged comment concerning his employment with Wal-Mart.

(a) Koza’s testimony in the objections hearing

Respondent called Koza as a witness during the objections hearing. Respondent’s counsel asked Koza “Before the election, did you make any threats or statements to the effect you were going to kill anyone.” Koza denied that he had ever said that he was going to kill anyone. He asserted “That word never came out of my mouth.” Counsel followed by asking “Did you ever say anything like you were going to fuck somebody up, the pro-company people or the people who voted for the company.” Again, Koza denied that he had done so and asserted that such words had never come from his mouth. When asked, Koza also denied that he had ever threatened to kill anyone who fired him. Respondent did not ask Koza for any information or clarification involving Koza’s alleged conversation with Riner and Stafford and Respondent did not call Stafford as a witness during the objections hearing.

(b) Koza’s testimony at trial

Koza testified that as early as a month before the election, he asked Riner about whether Respondent could contract out the technicians’ work. No one else had been present other than Riner. During the conversation, Riner had assured him that he would not let the work be contracted out. Approximately 2 weeks before the election, Koza had a second conversation with Riner about the question of contract work. Michael Stafford had been present during the conversation. Stafford asked Riner if the Respondent had to maintain a ratio of 40-60 for contractors to employees. Stafford also asked if the ratio applied for each facility or company-wide. Koza testified that Riner’s response that the ratio applied company-wide prompted his realization that Respondent could possibly get rid of the

technicians based upon the ratio. Koza denied, however, that he said anything during the conversation about killing anyone, beating up anyone, house calls, or Wal-Mart. He denied that he made any such statements in any other conversations with Riner.

5 Michael Stafford recalled the conversation about contractors with Riner and Koza. He recalled that the conversation occurred not long after the election. Stafford had been standing with Koza beside the bay door and the dumpsters. When Riner walked out of the office, Stafford called to Riner: “So are you going to be contracting or giving all our work to contractors now that we’ve got the Union in?” When Riner did not respond, Stafford added:
 10 “Well, supposedly DIRECTV, their contract with Mastec is that you have to have more employees than contractors.” While smiling, Riner responded: “Well, that’s company-wide.” Stafford testified that Koza was in the process of leaving and his only response was: “Yeah, that’s why Suburban is here.” In explaining what Koza meant by “Suburban,” Stafford testified that Respondent was allegedly meeting that day with a contract company. Stafford
 15 testified that other than the reference to the contract company, Koza said nothing else. Stafford testified that Koza said nothing about killing anyone or beating anyone up if he were fired. He said nothing about house calls or Wal-Mart.

In a telephone conversation on October 13, 2008, Russell told Koza that he was
 20 terminated for making threatening statements. Russell told him to return his company van. When Koza later spoke with Russell at the facility, Koza told Russell that he would rather quit than have such an allegation on his record. While Koza was unloading his van, Riner presented him with a resignation letter for his signature. Koza told Riner that he didn’t want to sign the letter. Riner explained however, that if he signed the letter, he would make sure
 25 that his final paycheck would not be delayed. Koza testified that because he needed the money, he signed the letter as requested.

4. Hodges’ alleged threats

30 Prior to his discipline on October 13, 2008, Anthony Hodges had been employed at the Kingsport facility for 3 years and had been an employee with Ron’s TV before Respondent acquired the business. During the campaign, Hodges was a member of the Union’s campaign committee. He also kept a union hat in plain view in his van that was inspected monthly by management. Shortly after the Union filed the petition, Hodges told
 35 Russell that he had attended union meetings.

During Riner’s testimony at the objections hearing, he described a conversation with Hodges the day before the election. Riner asserted that Hodges made the statement that he hoped that Respondent would “belly up if the Union did not come in” and he hoped it would
 40 “belly up trying to fight it.” Riner also testified that a day or two before the election, Hodges called him to ask if he had been making telephone calls to employees about the election. Riner testified that he told Hodges that he had been calling employees and had added that he hoped that Hodges would vote no and “put it in our hands and give us at least the opportunity to make things right and help, you know, and make you guys happy.” Hodges responded that
 45 he had been making telephone calls as well; asking employees to vote for the Union.

Technician Matthew Abel testified during the objections hearing that approximately a week before the election, Hodges telephoned him. Abel alleged that Hodges told him that he had learned that Dennis Shell had changed his mind about supporting the Union. Abel asserted that Hodges then commented that he “could go up to Grundy and whip Dennis’ ass or find out jobs that he had done fuck them up to where they wouldn’t pass the QC.” Abel also acknowledged that he too had been agitated with Shell. Following the conversation with Hodges, Abel did not contact Shell to tell him what Hodges had said. Abel also confirmed that he had not discussed this information with anyone until approximately a month later when he spoke with Riner.

(a) Hodges’ testimony in the objections hearing

Hodges was subpoenaed to testify in the objections hearing. Prior to the hearing, no supervisor or manager questioned him about any alleged misconduct on his part or by Verbal and Koza. During his testimony at the objections hearing, Hodges confirmed that he had been a member of the Union’s organizing committee. He denied that he had told anyone that he would kick Shell’s ass or that he would do anything to interfere with Shell’s work. He denied that he ever threatened to harm anyone if they voted for Respondent in the election. Following the objections hearing, he returned to work. Prior to October 13, 2008, nothing was said to him by any supervisor or manager about possible discipline for any alleged threats.

(b) Hodges’ trial testimony

As discussed above, Hodges testified that Jonas suggested to employees in the pre-election meetings that they had the option of delaying the election for 6 months to see if Respondent offered something favorable in the meantime. He explained that as a result of these comments, employees discussed this possibility. Hodges said that he told other employees that he would go with the majority and if they decided to delay the election, he would go along with it. In conjunction with this discussion, Hodges received a telephone call from Mark Hopkins and Hodges also made 2 telephone calls. One of the calls he made was to Matthew Abel. He told Abel that Mark Hopkins and Dennis Shell wanted to find out if everyone would go along with putting off the vote for 6 months. Abel responded that he would check around. Hodges testified that this interchange was “pretty much the end of the conversation.” Hodges denied that he ever told Abel that he would whip anyone’s ass or do anything to interfere with anyone’s work. He denied that he ever said anything about taking an action against a co-worker because of the Union. He denied that he made any threats about Mark Hopkins or Dennis Shell during this conversation.

On October 13, 2008, Russell and Riner presented Hodges with an employee counseling form for threatening a co-worker. Although Hodges asked for the identity of the person that he was supposed to have threatened, Russell did not tell him. Russell only told him that the person had testified against him.

5. Conclusions concerning the discipline of Verbal, Koza, and Hodges

(a) Whether General Counsel has established a prima facie case

5 The question of whether Respondent terminated Verbal and Koza and issued a written
warning to Hodges depends upon Respondent’s motivation. The Board established an
analytical framework for deciding cases turning on employer motivation in *Wright Line*, 251
NLRB 1083, 1089 (1980), enf.d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989
10 (1982). To establish that an employee was disciplined or discharge in violation of Section
8(a)(3) of the Act, the General Counsel is required to show, by a preponderance of the
evidence, that an employee’s protected conduct was, in fact, a motivating factor in the
employer’s decision to discipline or discharge the employee. *Webco Industries*, 334 NLRB
608, fn. 3 (2001); *Manno Electric*, 321 NLRB 278, 280, fn. 12 (1996). To establish a prima
facie case, the General Counsel must show that the employee(s) engaged in protected activity,
15 the employer was aware of the activity, and the activity was a substantial or motivating reason
for the employer’s action. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). If the
General Counsel is able to make such a showing, the burden shifts to the respondent employer
to demonstrate that the same action would have taken place in the absence of the employee’s
protected conduct. *Wright Line*, supra at 1089. The Board has also found, however, that if a
20 respondent’s asserted reasons for its discharge or discipline of an employee either did not
exist, or were not relied upon by the respondent, the burden shifting analysis of *Wright Line*
need not apply. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991), *Arthur Young & Co.*, 291
NLRB 39 (1988).

25 The total record evidence reflects that General Counsel has met its burden of
demonstrating that these employees’ protected activity was a motivating factor in their
discipline. The elements of discriminatory motivation are union activity, employer
knowledge, and employer animus. In the instant case, Respondent disciplined Verbal, Koza,
and Hodges all on the same day and for similar conduct. There is no dispute that Verbal and
30 Hodges were known union supporters. Both Verbal and Hodges admitted during the
objections hearing that they were on the Union’s organizing committee and that they assumed
a leadership role in the organizing effort. They both displayed their union hats in their vans
during the campaign. In contrast, Koza did not hold himself out as a leader or even a union
supporter during the organizing campaign. During the objections hearing, he denied that he
35 was on the organizing committee or that he had a leadership role in the organizing effort.
Additionally, Koza testified that despite Riner’s efforts to interrogate him prior to the election,
he did not disclose his support for the Union. Thus, on the surface it would appear that both
protected activity and employer knowledge might be lacking in a *Wright Line* analysis for
Koza’s forced resignation. The Board and courts have long recognized, however, that
40 employer may discriminatorily discharge non-union employees in order to terminate
employees who support the Union. In those cases, the mere fact that the non-union
employees were given similar discipline did not lessen the discriminatory motivation.
Wonder State Mfg. Co. v. NLRB, 331 F.2d 737, 738 (6th Cir. 1964); *Majestic Molded
Products, Inc. v. NLRB*, 330 F.2d 603, 606 (2nd Cir. 1964); *Seeburg Corp.*, 192 NLRB 290,
45 298 (1971). The overall record demonstrates that despite the fact that Koza was not a known
union supporter; his discharge was intertwined with Respondent’s attempt to justify the

discipline imposed on Verbal and Hodges, as well as a means to bolster its assertions of election interference. I also note, however, that the Board has found that a reasonable inference of knowledge can be drawn on the employer’s general knowledge of union activity among its employees and its demonstrated hostility toward such activities preceding the employee’s discharge. See *Pan-Osten Co.*, 336 NLRB 305, 308 (2001). In this instance, evidence of such demonstrated hostility is seen in the independent 8(a)(1) violations as described above, as well as the discipline of known union adherents Verbal and Hodges.

Additionally, the overall record demonstrates Respondent’s discriminatory motive in these three discharges. Prior to the objections hearing, no supervisor or company official told these employees that they were suspected or accused of any misconduct. Following the objections hearing, there was no additional investigation. Although Russell asserts that he made the decision to discipline these employees after he attended the objections hearing, the discipline was not imposed for these allegedly egregious acts for another 12 days after the objections hearing. Russell further admitted that prior to these employees’ discipline on October 13, Respondent never contacted law enforcement concerning these alleged threats. Respondent’s Director of Human Resources; Barry Hall, confirmed that even though he spoke with Russell after the objections hearing, he did not advise Russell to contact law enforcement or even to segregate these three employees from their co-workers.

There is no dispute that the Union’s attorney filed his post-hearing brief in the representation case on October 9, 2008. The certificate of service indicates that the brief was filed electronically and by first class mail. On page 9 of the brief, counsel points out:

Indeed, given the contemporary level of sensitivity to threats of violence in or around the workplace, the fact that none of the incidents on which the Employer bases its objections were reported to law enforcement nor resulted in discipline demonstrates clearly that everybody involved understood that no such statements were serious threats.

Thus, only after the Union’s attorney pointed out that no discipline or contact with the police had resulted from the alleged conduct, Respondent initiated action against these employees. On October 1, 2008, Respondent not only disciplined these three employees, Respondent also contacted local law enforcement and requested additional after-hours patrol for the facility.

(b) Respondent’s Inconsistencies in Discipline

I note that inconsistencies in an employer’s explanation for an employee’s discipline may support a finding of a discriminatory motive. *W. F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995); *NLRB v. Radcliff*, 211 F.2d 309, 314 (9th Cr. 1954). The record as a whole reflects a number of inconsistencies that contradict Respondent’s asserted reason for disciplining these employees. The inconsistencies are seen with respect to the individual disciplines as well as with the Respondent’s collective discipline of these employees.

Respondent produced four statements that provided the framework for filing its objections to the election based upon allegations of threats, intimidation, and coercion. Three

of the statements were prepared by management and only one statement was provided by a non-supervisory employee. The non-supervisory employee's statement did not identify the source of the alleged threat as it was based upon an anonymous telephone call. None of the statements contain any allegation that Verbal threatened any other employee or any manager.

5 The only allegation involving Verbal was supervisor Stanley's opinion that employee Sturgill did not feel safe in the workplace because Verbal asked her how she had voted and if she had turned her back on the techs who voted for the Union. When Sturgill testified at the objections hearing, she testified that she was not aware of any threats by pro-Union technicians to anyone before the election. She did not identify Verbal as the source of any

10 threat to her or any other employee.

During the objections hearing, employee Carol Mann described a conversation among 9 employees. She alleged that during the conversation, Verbal mentioned employee Jason Tanksley and asserted that he was a traitor and used the words "kill the traitor." She added,

15 however, that employee Chris Short mimicked the statement in such a way that initiated a chant of "kill the traitor." She opined that this was the consensus of the group. Despite her testimony, however, there was no apparent investigation by Respondent to determine the involvement of any of these other 8 employees or to discipline Short, Stafford, Winter, Roberts, Bush, or Hughes. Although Hodges and Koza were among this group of employees and were disciplined for other alleged threats, there is no evidence that the conversation

20 allegedly overheard by Sturgill was used against anyone other than Verbal.

Matthew Abel testified during the objections hearing that he heard Verbal make a threat about Dennis Shell and Shawn Whippo before the election. Although he identified that

25 there were two or three other technicians participating in the conversation with Verbal, Respondent did not inquire as to the identity of these other technicians at the objections hearing. Additionally, there is nothing in the record to indicate that Respondent attempted to identify or interview these other technicians at any time prior to Verbal's termination.

As discussed above, two of the statements that were collected during the week after

30 the election were written by supervisors Stanley and Riner about an alleged threat by Koza. Although Riner was called as a witness in the objections hearing, he was not presented to testify in this underlying unfair labor practice hearing. Stanley was not called to testify in either hearing. Riner's written statement that was dated August 25, 2008, alleges that he

35 overheard Koza threaten that if "they" fired him, he would kill them or beat them up." Riner gave similar testimony at the objections hearing. On cross-examination during the objections hearing, Riner was asked who Koza meant by "they." Riner responded: "Does it matter? I took it as a threat. I took it as a threat against me and Eddie [Russell] and Steve [Orazi]?"

40 Although the wording of Riner's response indicated that he was quite adamant about his having being threatened, Riner's written statement contradicts his indignation. His written statement indicates that his only response to hearing this alleged threat was to simply log it in his book and report it to White who was covering in Russell's absence. Respondent's Handbook provides that Respondent will promptly respond to any incident or suggestion of violence. Following the objections hearing, Russell drafted and posted a notice for employees

45 confirming "we will take immediate disciplinary action against anyone who makes a verifiable threat of violence concerning any other person who works here." Thus, despite the

wording in Respondent’s Handbook, the wording of the notice posted after the objections hearing, and Riner’s assertion that he felt personally threatened, no action was taken against Koza from August 25, 2008 until October 13, 2008 and he was allowed to continue to work each day alongside coworkers and managers.

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Additionally, Riner’s statement of August 25, 2008 confirmed that Michael Stafford was present during the conversation with Koza. Despite the fact that Respondent asserts that it used the objections hearing as an investigation of the alleged threats, Stafford was not called to testify in that proceeding. Moreover, Stanford was never contacted by a supervisor or member of management concerning this alleged threat either before or after the objections hearing.

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Russell testified that he had chosen to give Hodges a written warning rather than a termination because the alleged threat was reported by only one person and it was only Abel’s word against Hodges. On the face of it, this rationale would appear to be a reasonable approach; but for the fact that this was the same situation with Carol Mann’s allegations against Verbal regarding Tanksley and Abel’s allegations against Verbal regarding the alleged ‘bitch slap’ and “whip their ass” comment. In both instances, there was only one witness’ word against Verbal. The same is true of Riner’s testimony about Koza. Respondent only had Riner’s word against Koza because Respondent chose not to talk with Stafford who was also present during the conversation.

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Russell acknowledged that he had known Hodges for 15 years and he considered Hodges to be a friend. He did not deny that he and Hodges went to drag races together and that he (Russell) had essentially built Hodges car. It is interesting that Respondent included in Hodges’ written warning that it had not been able to substantiate the alleged threat and thus he was given only the warning. As discussed above, Respondent had the opportunity to substantiate both Koza and Verbal’s alleged threats and yet there was no attempt to substantiate these threats upon which Respondent relied in terminating these employees.

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(c) Respondent’s failure to investigate the alleged misconduct

The Board has long found that an employer’s failure to adequately investigate an employee’s alleged misconduct has been found to be an indication of discriminatory intent. *Washington Nursing Home*, 321 NLRB 366, 375 (1996); *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988). As discussed above, Respondent did not engage in any meaningful investigation of these threats. Respondent asserts that it chose to use the objections hearing to conduct its investigation of the threats, because “in doing so, Mastec would be able to conduct a full and fair investigation of the threats, while avoiding additional ULP charges.” Despite its assertion that it conducted a full and fair investigation, Respondent chose to present only limited witnesses for the objections hearing and ignored essential witnesses such as Michael Stafford, whose testimony was essential to a legitimate investigation. In its brief, Respondent argues that if witnesses were not called in the objections hearing to dispute the testimony of supervisor Riner and other witnesses, the Union’s attorney should have done so. While it is true that an opposing counsel has the burden of rebuttal in an adversarial proceeding, Respondent’s argument is specious in this regard. Either Respondent legitimately used the

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objections hearing as a means of fairly and fully investigating the alleged threats or it assumed an adversarial role and presented only witnesses that would support its assertions. It could not do both. Thus, contrary to its assertions, I do not find that Respondent engaged in any kind of meaningful or legitimate investigation of the alleged threats.

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One of the best examples of Respondent’s failure to investigate is Respondent’s reaction to Koza’s alleged threat about his past employment with Wal-Mart. While Riner included this volatile allegation in his original written statement and again in his testimony during the objections hearing, there is absolutely no evidence that Respondent attempted to contact Wal-Mart, probe into Koza’s past employment history, or even to clarify the meaning of such an alleged statement. Had there been a legitimate concern about Koza’s alleged threat, Respondent would certainly have investigated such allegation involving Wal-Mart during this almost 2-month period prior to Koza’s discharge. Accordingly, on the basis of the entire record, I find that General Counsel has met the initial burden of persuasion and has demonstrated that these employees’ protected and union activity was a motivating factor in their discipline.

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As discussed above, once the General Counsel has demonstrated a prima facie case of discriminatory intent, the burden shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of protected activity. *Willamette Industries*, 341 NLRB No. 75, slip op. at 3 (2004); *American Gardens Management Co.*, 338 NLRB 644 (2002). In its post-hearing brief, Respondent cites the Board’s decision in *Nepco, Inc.*, 346 NLRB 18, 20 (2005), wherein the Board stated that “Absent a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or no reason at all without running afoul of the labor laws.” Respondent goes on to argue that Russell made the decision to discipline these employees because he “believed” the witnesses who testified at the objections hearing.

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(d) Respondent’s failure to meet its burden under Wright Line

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The overall record, however, does not reflect that Respondent would have disciplined these employees in the absence of either their individual protected activity or the protected activity of its employees in selecting the Union as their collective bargaining representative. Respondent does not dispute that it waited almost 2 months before it disciplined these employees for the alleged threats. Respondent argues, however, that the fact that it did not take immediate action against these employees does not show that it did not take these threats seriously. In support of this argument, Respondent asserts that “the nature of the threats was such that there was no requirement for Mastec to take immediate action.” Respondent explains this by contending that the prerequisites had not been met for the threats to take effect. As an example, Respondent points to Abel’s testimony at the objections hearing concerning what Verbal allegedly threatened if the Union did not win the election or if employees caused the Union to lose the election. Respondent also submits that Koza’s alleged threat involved what he would do if he were fired. Respondent asserts “The Union did win the election, and Koza was not terminated at that time.” Taking this rather skewed analysis to a logical conclusion, the alleged threats would never have posed a valid risk if Koza had never been terminated and because the Union won the election.

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(e) Respondent’s tolerance of similar conduct

5 Verbal testified that it was a common occurrence for supervisor Riner to tell Verbal that he would kick his ass. Verbal estimated that between June 2008 and October 2008, Riner made a comment to Verbal that he would kick his ass and Verbal responded in kind at least once or twice. Christopher Verbal, Chris Short, Anthony Hodges, Scott Winter, and Nathan Koza all testified that Riner had a practice of mimicking a YouTube (Internet) puppet character identified as “Achmed, the terrorist.” The employees confirmed that Riner mimicked the puppet’s often-used line “I’ll kill you, I’ll kill you.” Koza testified that even though Riner made the statement “I’ll kill you,” employees understood that it was taken from the video and it was not taken seriously. Verbal testified that it was standard shop talk for employees to use phrases like “kicking ass” or “kicking butt” and they did so in front of supervisors. He estimated that at least once or twice a week, he heard employees make similar statements in Riner’s presence. Verbal recalled that on the day following the objections hearing, Riner told Verbal that he was going to kick his ass. Verbal explained that as with other occasions, the comment was made in a joking manner.

20 Chris Short testified that more than once during the election campaign, Riner told him that he would “kick my ass.” Short recalled that on one occasion, Riner told him that he wanted to talk with him about his responder rates not being at the desire level. Riner told him that he would kick his ass if he didn’t increase the rates. Short explained that he did not take the comments seriously.

25 Nathan Koza described the atmosphere of the shop as relaxed. He estimated that once or twice a week during the campaign period, Riner made comments to him about threatening to whip his ass. Koza did not take the comments seriously. Anthony Hodges also testified that he and Riner had a relationship in which he joked with Riner and regularly did things to aggravate Riner. Hodges explained that he had a habit of slapping Riner on his “belly” as he walked by. Riner’s practice was to respond “Don’t make me kill you” or “Don’t make me whup [sic] you” or even “I’ll kick your ass.” Hodges estimated that these exchanges occurred weekly during the period between June and September of 2008.

35 Michael Stafford recalled a specific statement made by Riner a couple of weeks after Koza and Verbal were terminated. Stafford had been in the office with Anthony Hodges, Steve Orazi, and Riner. Stafford recalled that Hodges was complaining to Orazi about his numbers. Sitting at his computer, Riner turned around and repeated “I’ll kill you, I’ll kill you, I’ll kill you.” When Stafford told Riner that he should not make threats, Riner laughed it off. Stafford reminded him that two people had been fired for such “ridiculous stuff.”

40 Scott Winter testified that talk about “whip ass” or kill somebody” is so rampant that it happened all the time among the technicians. Winter explained that they were a “bunch of guys that work in the field” and that comments like “I’ll kick your ass” is used all the time. Robert Hughes also testified that weekly or biweekly, he heard Riner and even Orazi use phrases such as “whipping ass,” “killing,” or “kicking ass.” He specifically recalled a conversation in October or early November involving Riner and Orazi. Hughes testified that

Riner pointed to employee Chris Short and told Orazi “My man will kick your butt.” Hughes recalled that Orazi did not appear to take the comment seriously.

5 During the objections hearing, Abel testified that while he had heard Verbal threaten to kick Russell’s ass if the Union did not win, a lot of technicians had said that once or twice and not even in regard to the Union. Abel further admitted that he too had said more than once that he was going to whip someone’s ass and he had not been worried about Verbal actually doing so.

10 **(f) Summary of conclusions**

To reinforce the assertion that it acted properly in disciplining Verbal, Koza, and Hodges, Respondent presented the testimony of Dr. James Madero, a clinical psychologist and consultant to employers and law firms. Respondent submits that Madero is “an expert in
15 the field of workplace violence and threat assessment.” Madero testified that Respondent acted reasonably in terminating Koza and Verbal, and in issuing a warning to Hodges. Madero acknowledged, however, that he was first retained by Respondent in 2009, and only after the discipline was issued to these employees. Further, the record reflects that in providing this opinion, Madero only reviewed the hearing officer’s report and
20 recommendations on objections, the Respondent’s brief in support of its exceptions to the hearing officer’s report, the Respondent’s exceptions to the report, and a letter from Respondent’s counsel to the Regional Director in January 2009 opposing the Union’s request for injunctive relief. Madero admitted that he did not review the transcript and testimony of the objections hearing. Additionally, there is no evidence that Madero interviewed any
25 witnesses or performed any other post-discharge investigation.

Certainly, in our present day society, the potential for workplace violence is a realistic concern for any employer. In the instant case, however, the overall record fails to show that Respondent’s treatment of these employees resulted from such a realistic concern.
30 Respondent’s own “expert witness” testified that even if an alleged threat is not imminent, the “employer has the obligation to engage in “due diligence” and conduct an investigation.” As discussed above, the Respondent’s alleged investigation was superficial and incomplete. Although Respondent asserts that it conducted its investigation through the objections hearing, significant witnesses were not called to testify in order to fully investigate the
35 veracity of the alleged threats. Additionally, Russell testified that after attending the objections hearing, he concluded that several individuals at the facility were “terrified.” Despite this assertion, however, Russell’s only immediate action following the hearing was to post a notice to employees advising them that Respondent would take immediate disciplinary action against anyone who makes a verifiable threat of violence. The employees who had
40 allegedly “terrified” their fellow employees remained on the job, working alongside their fellow employees. It was not until after the Union pointed out in its brief to the hearing officer that there had been no discipline in response to the alleged threats, that discipline was finally administered.

45 Accordingly, Respondent has not met its burden under *Wright Line*. An employer cannot carry its *Wright Line* burden by simply showing that it had a legitimate reason for its

5 action. The employer must “persuade” that the same action would have taken place even absent an employee’s protected conduct. *Centre Property Management*, 277 NLRB 1376 (1985). Accordingly, the record supports a finding that the discipline imposed upon Verbal, Koza, and Hodges violated Section 8(a)(3) and (1).

Conclusions of Law

10 1. Mastec of North America, Inc., Respondent, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By interrogating employees about their Union sympathies, Respondent violated Section 8(a)(1) of the Act.

15 3. By promising employees that their grievances would be remedied and benefits granted only if they abandoned support for the Union as their collective bargaining representative, Respondent violated Section 8(a)(1) of the Act.

20 4. By threatening employees that it would be futile to select the Union as their collective bargaining representative by promising to remedy employee grievances only if employees abandoned their support for the Union, and threatening to withhold benefits and prolong negotiations if they select the Union as their collective bargaining representative, Respondent violated Section 8(a)(1) of the Act.

25 5. By threatening employees with loss of benefits, loss of participation in a sales promotion, and a loss with respect to compensation criteria because of their support for the Union, Respondent violated Sections 8(a)(1) of the Act.

30 6. By discharging Christopher Verbal, causing the discharge of Nathan Koza, and disciplining Anthony Hodges, Respondent violated Section 8(a)(3) and (1) of the Act.

7. By threatening employees with loss of benefits by threatening to withhold or delay bonuses because of their support for the Union, Respondent violated Section 8(a)(1) of the Act.

35 8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

40 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.

45 The Respondent, having discriminatorily discharged Christopher Verbal and caused the discharge of Nathan Koza, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to

date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:⁷

ORDER

10 The Respondent, Mastec of North America, Inc., Kingsport, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

15 (a) Interrogating employees about their Union sympathies.

 (b) Promising employees that their grievances will be remedied and benefits granted only if they abandon their support for the Union as their collective bargaining representative.

20 (c) Threatening employees that it would be futile to select the Union as their collective bargaining representative by promising to remedy employee grievances only if employees abandoned their support for the Union, and threatening to withhold benefits and prolong negotiations if they select the Union as their collective bargaining representative.

25 (d) Threatening employees with loss of benefits, loss of participation in a sales promotion, and a loss with respect to compensation criteria because of their support for the Union.

30 (e) Threatening employees to withhold or delay bonuses because of their support for the Union.

 (f) Discharging and disciplining employees because of their support for the Union and in order to discourage membership in a labor organization.

35 (g) 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.

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

 (a) Within 14 days from the date of the Board’s Order, remove from its

45 ⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

files any reference to the unlawful discharge of Christopher Verbal and Nathan Koza and the unlawful discipline of Anthony Hodges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges and discipline will not be used against them in any way.

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(b) Within 14 days from the date of the Board’s Order, offer Christopher Verbal and Nathan Koza full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed.

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(c) Make Christopher Verbal and Nathan Koza whole for any loss of earnings and other benefits suffered as a result of the Respondent’s unlawful conduct, with interest, in the manner set forth in the Remedy section of this decision.

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(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.

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(e) Within 14 days after service by the Region, post at its Kingsport, Tennessee, facility copies of the attached notice marked “Appendix.”⁸ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 17, 2008.

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(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.

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⁸ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading “POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD” shall read “POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.”

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Dated, Washington, D.C., August 25, 2009.

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Margaret G. Brakebusch
Administrative Law Judge

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**APPENDIX
NOTICE TO EMPLOYEES**

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain 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 interrogate our employees about their Union sympathies.

WE WILL NOT promise our employees that their grievances will be remedied and benefits granted, only if they abandon their support for the Union as their collective bargaining representative.

WE WILL NOT threaten our employees that it would be futile to select the Union as their collective bargaining representative by promising to remedy employee grievances only if they abandon their support for the Union or threaten to withhold benefits and prolong negotiations if they select the Union as their collective bargaining representative.

WE WILL NOT threaten our employees with loss of benefits, loss of participation in a sales promotion, or with respect to compensation criteria because of their support for the Union.

WE WILL NOT threaten our employees to withhold or delay bonuses because of their support for the Union.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Communications Workers of America Local 3871 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 guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Christopher Verbal and Nathan Koza, and **WE WILL**, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

**JD(ATL)-22-09
Kingsport, TN**

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

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

WE WILL, within 14 days from the date of the Board's Order, make whole Christopher Verbal and Nathan Koza for any loss of earnings and other benefits suffered as a result of Respondent's unlawful conduct, with interest.

MASTEC OF NORTH AMERICA, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

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

233 Peachtree Street N. E. Harris Tower, Suite 1000, Atlanta, GA 30303-1531
(404) 331-2896, Hours: 8:00 a.m. to 4:30 p.m.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTION CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER. (404) 331-2877.