Mid-States Express, Inc. *and* International Brotherhood of Teamsters, Local Union No. 20 *and* Freight Drivers, Dockworkers and Helpers Local Union No. 24, a/w International Brotherhood of Teamsters. Cases 8–CA–37168 and 8–CA–37302

February 12, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On September 19, 2008, Administrative Law Judge George Alemán issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Mid-States Express, Inc., Cleveland and Toledo, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Karen Neilsen, Esq., for the General Counsel.
Tim Marszalkowski, Regional Manager, for the Respondent.
Norm Lewallen, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMÁN, Administrative Law Judge. This case was tried in Cleveland and Toledo, Ohio, respectively, on March 26–27 and April 21–23, 2008, following issuance of a consolidated complaint by the Regional Director for Region 8 of the National Labor Relations Board (the Board), alleging that Mid-States Express, Inc. (the Respondent), had violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).[1]

Specifically, the complaint alleges that the Respondent, through various managers and supervisors at its Toledo and Cleveland (the Richfield facility), Ohio facilities engaged in certain unlawful conduct that violated Section 8(a)(1), including threatening to close its facilities and put employees out of work if they voted for union representation, threatening to discharge employees for their union activities, interrogating employees about their union activities, creating an impression of surveillance of its employees' union activities, soliciting and promising to remedy their grievances, and promising improved benefits, in order to dissuade them from engaging in union activity; and calling the police on employees engaged in lawful handbilling activity. The Respondent is also alleged to have violated Section 8(a)(3) and (1) by unlawfully discharging at its Richfield facility employees Shawn Confere, Justin Rea, and David Goodsell, and at its Toledo facility employees Jason Ulch (J. Ulch), Merle Ulch (M. Ulch), and Steven Wilson.[2]

All parties at the hearing were afforded a full and fair opportunity to be heard, to present oral and written evidence, to examine and cross-examine witnesses, and to argue orally on the record.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel and the Respondent, I make the following[3]

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[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

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

Further, the Respondent argues that, during the hearing, the judge improperly questioned the Respondent's witnesses. We find that the judge's questioning was proper under Sec. 102.35(a)(11) of the Board's Rules and Regulations.

In view of the findings that the Respondent interrogated and imparted an impression of surveillance to employee Jason Ulch in violation of Sec. 8(a)(1), we find it unnecessary to pass on the judge's findings that the Respondent also unlawfully interrogated and imparted an impression of surveillance to employee Steven Wilson, as such findings are cumulative and would not affect the remedy.

In adopting the judge's finding that the Respondent unlawfully discharged employee David Goodsell, we do not rely on his discussion of United States Department of Transportation regulations. We also observe with regard to each of the employee discharges at issue that there are no exceptions to the judge's finding that the General Counsel satisfied his initial burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st 1981), cert. denied 455 U.S. 989 (1982).

[1] All dates herein are in 2007, unless otherwise indicated. The charge in Case 8–CA–37168 was filed by International Brotherhood of Teamsters, Local No. 20 (Local 20) on May 7, and amended on June 28. The charge in Case 8–CA–37302 was filed by Freight Drivers, Dockworkers and Helpers Local Union No. 24, a/w International Brotherhood of Teamsters (Local 24) on July 13, and amended September 28, and October 31.

[2] M. Ulch is J. Ulch's father, and Wilson is M. Ulch's brother-in-law.

[3] In her posttrial brief, counsel for the General Counsel, inter alia, moves to correct the record in certain respects. Thus, she seeks to have Respondent, Exhibits ((R. Exhs.) 8, 11, and 15 placed in a separate "rejected" exhibit file to reflect that they were not accepted into evidence. While a separate file containing proposed exhibits that have been rejected is the more suitable approach to take when the record in a particular case is completed, the absence of such a "rejected exhibit"

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Illinois corporation, is engaged in the receipt, distribution, and delivery of freight at facilities located in various States,[4] including facilities in Toledo and Richfield, Ohio.[5] In the course and conduct of its business operations, the Respondent annually derives gross revenues in excess of $50,000 from the transportation of freight from its Ohio facilities to points and places located out the State of Ohio. The 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 Locals 20 and 24 are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Factual Background

The Respondent is a family-owned business. Terry Hartmann serves as its president and chairman, and his son, Brad Hartmann (B. Hartmann), as its chief operating officer.[6] Tim Marszalkowski has, since April 23, 2007, served as Respondent's regional manager, with responsibility over six facilities, including the Toledo and Richfield facilities, as well as facilities in Columbus, and Cincinnati, Ohio, Fort Wayne, Indiana, and Bay City, Michigan. Prior to assuming his regional manager position, Marszalkowski served as district manager at the Richfield facility since 2005. Terry Hartman, Brad Hartmann, and Marszalkowi are admitted supervisors and agents of the Respondent within the meaning of Section 2(11) and (13) of Act. Bryan Adkins was, at all times material herein, the night or "outbound" supervisor at the Richfield facility, and also an admitted statutory supervisor and agent of the Respondent. At the Toledo facility, Mark Dotson served as account executive; Chris Bateson, Chris Benson, Greg Gruic, and Nate Stamp as dispatchers; Jerry Lach as service center or "district" manager; and William Lee as third-shift re-ship manager,[7] all admitted supervisors and agents of the Respondent as defined by the Act.

The record reflects that in early 2007, several of Respondent's facilities experienced organizational drives by various local unions seeking to represent employees at those facilities. At Respondent's Lasalle, Illinois facility, for example, Teamsters Local 722 filed a petition for a representation election on January 18, which led to an election being held on February 21, and to its certification on March 1, as exclusive bargaining representative for employees in that facility.[8] Local 24 engaged in similar efforts at the Richfield facility and, to this end, filed a representation petition on March 1, 2007, seeking to represent "all line haul drivers, P&D drivers, and dockworkers" at that facility. (See GC Exh.-2.) The day before filing its petition, Local 24, by letter dated February 27, notified Marszalkowski that a majority of employees at the Richfield facility had asked it to represent them, and requested he contact the Union to negotiate a bargaining agreement. (GC Exh.-3.) An election among unit employees at the Richfield facility was thereafter held on April 12, which the Union lost. Alleged discriminatee, J. Ulch, formerly employed at the Toledo facility, testified, without contradiction, that he, and presumably others, at the Toledo facility became aware of the organizing activities at the Respondent's various facilities from former employees, and from truckdrivers who came in and out of the Toledo facility to and from the locations.

The complaint alleges that during the course of these ongoing organizing campaigns, the Respondent, through Marszalkowski and other supervisory or managerial personnel, directed certain coercive and unlawful conduct towards employees at the Richfield and Toledo facilities in order to dissuade them from supporting the Unions' organizational efforts. A discussion of these allegations follows.

1. The Richfield facility

a. The alleged 8(a)(1) conduct

(1) Statements attributed to Marszalkowski

Paragraphs 6, 7, 9, and 10 of the complaint allege that sometime in February, Marszalkowski threatened employees at the Richfield facility with plant closure and discharge if they selected Local 24 to represent them; promised them benefits to discourage support for Local 24, and unlawfully interrogated an employee about his union activities.

Shawn Confere was employed as a dockworker at the Richfield facility from September 11, 2006, until discharged, allegedly for unlawful reasons, on March 2. At the time of his termination, Confere worked from 6 a.m.–3:30 p.m., and was being supervised by Stamp and Marszalkowski. Confere identified himself as a Local 24 supporter, explaining that he signed a union authorization card after discussing the matter with his grandfather, and also spoke with other employees about the

will not necessarily cause confusion here, which I suspect is the basis for this aspect of counsel for the General Counsel's corrective motion, since the rejection of each of these three exhibits at the hearing is clearly identified as such in the appropriate transcript volume where reference to the exhibit is made. See, e.g., Tr. vol. 2, p. 282; vol. 3, p. 437. Counsel for the General Counsel also moves to correct certain spelling and other minor inaccuracies in the record. See General Counsel's brief (GC Br.) at p. 4–5 for proposed corrections. In the absence of any opposition thereto, her motion to correct the record in this regard is granted. Finally, at the conclusion of her case-in-chief, counsel for the General Counsel moved to conform the pleadings to the proof to allow, based on the record evidence, the finding of additional violations not specifically alleged in the complaint. Tr. 863, 866. I granted counsel for the General Counsel's motion by advising that she reference in her brief the additional misconduct not alleged in the complaint for which she contends there is supporting record evidence.

[4] Indiana, Illinois, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, North Dakota, South Dakota, and Wisconsin.

[5] Richfield is a suburb of Cleveland.

[6] Other members of the Hartmann family involved in the business include Bruce Hartmann as vice president, and Barbara Hartmann as secretary.

[7] Lach was terminated by the Respondent on March 21, and Lee quit on November 2. Dotson replaced Lach as district or terminal manager at the Toledo facility.

[8] Similar organizing drives were taking place at Respondent's facilities in Decatur, Illinois, Grand Rapids, Michigan, and facilities in Columbus and Cincinnati, Ohio.

Union. He testified that as a general rule, Marszalkowski, along with Stamp, held weekly meetings with city drivers around 8–8:30 a.m. every Tuesday or Wednesday in the Richfield facility breakroom. Items discussed at these meetings included operational matters, e.g., how the equipment was working, whether the trucks were running properly, how late the drivers' runs had been. Discussion also centered on the Respondent's failure to pay employee medical bill. Confere recalls some employees being more outspoken than others on the medical bill issue, and being quite upset over it.

Confere also recalled Marszalkowski, at some of these meetings, discussing the organizing efforts at the Lasalle facility, and telling employees at these meetings that employees at that facility would receive a dollar raise if the Union did not get voted in. Confere further testified that during their meetings in February, Marszalkowski told them that if the Union got voted in at the Richfield facility, "the Hartmanns" would close down the facility. Marszalkowski went on to say that he did not know if employees wanted to remain employed, but that he didn't want "the place to get shut down by some damn union." Confere recalled Marszalkowski commenting that the "grass isn't always greener on the other side," and again telling employees at two other meetings he recalled attending in early to mid-February, that "they would shut this facility down if the Union come [sic] in here." (Tr. 93.)

City driver Justin Rea worked at the Richfield facility from July 2006 until terminated on March 14, allegedly for unlawful reasons. He testified to being aware of Local 24's organizing drive in and around January, and to helping the Union in its efforts by signing an authorization card and to soliciting some 6–7 other employees to do the same. He recalled having one conversation with Marszalkowski in mid- to late February, in the latter's office during which he asked Marszalkowski how the Union vote at the LaSalle facility was going. Marszalkowski, he contends, denied knowing what was going on.

Like Confere, Rea testified that, occasionally, when not on the road, he attended weekly meetings conducted by Marszalkowski and, sometimes, Stamp, among drivers and dockworkers. The meetings generally involved job-related issues, such as problems drivers may be having with customers, or anything that might be going that employees should know about, which included health insurance problems employees might be having. Rea, however, recalled these meetings being held on Thursdays. Unlike Confere, Rea denied hearing Marszalkowski make the union-related comments attributed to him by Confere. He admitted, however, that there were times he did not attend the meetings because he would already be out on the road. Thus, it may very well be that the comments attributed by Confere to Marszalkowski about the facility closing down if the Union came in, or promising employees certain benefits, may very well have been made by Marszalkowski during the meetings Rea failed to attend. Rea did recall hearing rumors around the facility just prior to the election that if the Union came in, the facility would be closed and employees would be out of jobs. He did not, however, identify the source of these rumors. (Tr. 218.)

Employee Curtis Harmon, a Richfield driver, was called as a witness for the Respondent and testified that he attended "some of" the weekly drivers meetings, but never heard "anyone in management talk about the union, or not have a union at the Richfield facility." He only recalled hearing employees being told that "you're not allowed to say anything to sway one way or the other." (Tr. 869.) William Greenleaf, a 13-year driver, also testified on the Respondent's behalf about attending the weekly employee meetings which he claims were generally held on Thursdays, but sometimes on Tuesdays. He testified that he was never absent during the period from January through April, and that, at no time during these meetings, did he hear management ever "talk about the Union at the Richfield facility," and that if anyone asked a union-related question, he (Marszalkowski) would tell them he "couldn't talk about it." (Tr. 887.)

I credit Confere's testimony and find that at some weekly meetings in mid-February held by Marszalkowski at the Richfield facility, Marszalkowski told employees about Local 20's organizing efforts at the LaSalle facility, and mentioned that employees at that facility would be given raises if the Union was not voted in, and added that the Richfield facility would be closed if Local 24 were voted in. Marszalkowski, as noted, never took the stand to deny Confere's remarks. The only evidence produced by the Respondent to counter Confere's account were the purported assertions by Harmon and Greenleaf that they never heard Marszalkowski make such comments during meetings they attended. Harmon, however, apparently did not attend all such meetings, for he testified that he attended *some* meetings. Thus, it is quite likely that Harmon, like Rea, may not have been present at the meetings during which Marszalkowski made the remarks attributed to him by Confere.

Harmon's testimony was, in any event, too general and vague to be reliable. Thus, unlike Confere, who described the purpose of, and what may have been discussed at, these meetings, including the showing of antiunion videos, Harmon's testimony regarding these meetings was his apparent recollection that "the only thing that was said . . . was that you're not allowed to say anything to sway one way or the other." He offered no explanation as to who may have said this, or what, if any other matters, may have been discussed. I doubt seriously the Respondent would have convened employee meetings simply to make the statement Harmon claims was made at the meetings he attended. Harmon's testimony in this regard is, therefore, rejected as not credible.

Greenleaf's testimony is similarly unreliable. Although he claims not to have been absent from work during the period in question, and to have been present at drivers meetings that were held at the facility, it is unclear if he attended each and every weekly meeting conducted during that period. I note in this regard that Rea and Harmon, both of whom, like Greenleaf, were drivers at the Richfield facility, often missed these weekly meetings, Rea attributing it to his being on the road when the meetings were held. I am inclined to believe that Greenleaf, also a driver, may arguably have had occasion to be on the road and possibly missed some of the weekly meetings. Overall, Greenleaf's testimony was not very convincing and, from a demeanor standpoint, was not particularly credible.

Confere also testified that sometime in mid-February, Marszalkowski questioned him about his union sympathies. Ac-

cording to Confere's undisputed account, on that occasion, he and Marszalkowski were talking in the latter's office, the subject of which meeting was not made clear by Confere in his recitation of these facts, when, "out of the blue," Marszalkowski asked him what he thought about the Union. Confere replied that he had never really given it much thought. Marszalkowski then asked Confere if he would vote for the Union, but Confere replied he simply did not know. A few minutes later, Marszalkowski again turned his attention to the Union by asking Confere what employees thought was wrong with the facility that would make them want to bring in a union. Confere answered that he did not know. Towards the end of this conversation, Confere asked if Marszalkowski was still planning to attend Confere's upcoming trial as a character witness on February 28, to which Marszalkowski replied, "[M]ost certainly."[9] Confere apparently viewed Marszalkowski as somewhat of a friend, describing how he had made plans to go over to Marszalkowski's house on February 24, to help him install a new countertop. He contends, however, that following this latter conversation with Marszalkowski, their relationship turned cold, and that they never held any further conversations in Marszalkowski's office after that. Although present throughout the hearing as the Respondent's principal spokesperson and representative, Marszalkowski did not take the witness stand to refute or deny the statements and comments attributed to him by Confere.[10] Accordingly, I credit Confere's above unchallenged testimony regarding his conversations with Marszalkowski.

Discussion

The credited and undisputed evidence of record, as found above, reveals that, on various occasions during employee meetings at the Richfield facility, Marszalkowski informed employees that the Respondent's owners would close the facility if they voted to bring in a union, and that the closure could result in a loss of jobs. The Board has long found that an employer's threats of plant closure and loss of jobs in response to employee efforts to unionize, like those made here by Marszalkowski, naturally tend to have a coercive effect on employees' exercise of their statutorily protected right to decide freely whether to become represented. *Valerie Manor, Inc.,* 351 NLRB 1306, 1321 (2007); *Evergreen America Corp.,* 348 NLRB 178 (2006); *Mid-South Drywall Co.,* 339 NLRB 480, 481 (2003); *Mohawk Industries,* 334 NLRB 1170, 1176 (2001); *Massachusetts Coastal Seafoods,* 293 NLRB 496, 498 (1989). Accordingly, I find, as alleged in the complaint, that the Respondent, through Marszalkowski, violated Section 8(a)(1) of the Act by threatening employees with plant closure and loss of their jobs during the February employee meetings held at the Richfield facility.

In addition to unlawfully threatening employees with plant closure and loss of jobs, Marszalkowski also told employees at the Richfield facility that LaSalle facility employees would receive raises if they voted against union representation. Marszalkowski's remark in this regard, I am convinced, was intended to persuade employees at the Richfield facility that an alternative to the plant closure and loss of jobs, to wit, employee raises, might also be available to them if they too voted against being represented by Local 24. Such a promise of benefits aimed at discouraging employee support for a union is unlawful and, as alleged in the complaint and found herein, a violation of Section 8(a)(1) of the Act. *Superior Emerald Park Landfill, LLC*, 340 NLRB 449, 459 (2003); *Burlington Times, Inc.*, 328 NLRB 750, 756 (1999).

As found above, in mid-February, Marszalkowski questioned Confere on how he felt about the Union, and whether Confere would vote for it in the upcoming Board election, conduct alleged in the complaint to be unlawful. The applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation is the totality-of-the-circumstances test adopted by the Board in *Rossmore House,* 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board has identified a number of factors that are "useful indicia" in determining whether the questioning of an employee constitutes an unlawful interrogation.[11] There are, however, no particular factors "to be mechanically applied in each case." *Westwood Health Care Center,* 330 NLRB 935 (2000); See also *Benjamin Franklin Plumbing,* 352 NLRB 525, 532 (2008), and *River Ranch Fresh Foods,* 351 NLRB 115, 327–328 (2007), citing too *Westwood,* supra. Here, Marszalkowski's questioning of Confere on how he felt about the Union, and how he intended to vote in the Board election, as noted, occurred against a backdrop of unlawful threats of plant closure, job loss, and promise of benefits that had been directed by Marsalkowski at Confere and other employees during this same time period, and took place in Marszalkowski's office, which, given the above threats, could hardly be viewed as a neutral or friendly environment.[12] As noted, it is unclear from Confere's account, which is the only version available as Marszalkowski chose not to testify, just why Confere was meeting with Marszalkowski when the questioning took place. Thus, while Confere may have viewed Marszalkowski as a friend, Confere was also a union supporter, and his ambivalent response to Marszalkowski, when asked how he intended to vote in the election, suggests that Confere, despite his feeling of friendship towards Marszalkowski, may not have felt comfortable making his true prounion intentions known to him. In these circumstances, I find that Mar-

[9] Confere's court appearance related to an alleged violation of a protective order involving his girlfriend.

[10] Marszalkowski was called by counsel for the General Counsel as an adverse witness at the start of the hearing and gave testimony on the Respondent's operational structure and other related matters. He did not, however, take the stand at any time thereafter to refute Confere's account, or any other statements attributed to him by other witnesses.

[11] These include the background in which the questioning occurred, e.g., any prior history of employer hostility and discrimination; the nature of the information sought; the identity of the questioner; place and method of interrogation; truthfulness of the reply. See, e.g., *Westwood Health Care Center*, 330 NLRB 935, 939 (2000), citing too *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964).

[12] Indeed, as more fully discussed below, it was in Marszalkowski's office that employees were directed to watch antiunion videos, and where employees were subjected to other coercive and unlawful conduct by B. Hartmann.

szalkowski's questioning of Confere was indeed coercive, and constituted, as alleged in the complaint, an unlawful interrogation in violation of Section 8(a)(1) of the Act.

(2) Statements by Adkins

Paragraph 8 of the complaint alleges that sometime in mid-February, Adkins unlawfully created an impression among employees that their union activities were being kept under surveillance, and threatened them with unspecified reprisals because of their union activities, and, in paragraph 11, that, on or around March 1, he threatened employees that the facility would be shut down if the union were voted in.

David Goodsell was a city driver at the Richfield facility from 2005 until discharged on March 21. Goodsell testified, credibly and without contradiction, to being a Local 24 supporter and assisting Local 24 in its organizational efforts. He explained, for example, that in late January or early February, he went to Local 24's union hall to obtain authorization cards, signed a card himself, and gave one to employee Donald Thorsky to sign. He then handed some blank authorization cards to Thorsky to distribute to other employees, and took some himself and solicited other employees to sign cards.

Goodsell testified that in mid-February, as he was taking a break inside a trailer in the dock area of the facility, Adkins entered the trailer and asked to speak with him. When Goodsell asked what he wanted to discuss, Adkins mentioned that he had overheard or been part of a conversation involving Marszalkowski where mention was made of rumors going around the facility that he (Goodsell), Thorsky, Confere, and Rea were trying to get the Union in. Goodsell claims he simply looked at Adkins and replied, "Well, you know how rumors float around this place." Adkins responded, "Okay," and then cautioned Goodsell to watch himself and to be careful. (Tr. 350.)

Goodsell also recalled having another conversation with Adkins, this one towards the end of February, in the main office, as he was looking over the outbound bills for the night loads. According to Goodsell, Adkins appeared to be in a "foul mood" at the time, so he went over and asked Adkins why he seemed upset. Adkins, he contends, answered, "You know why I'm upset." When Goodsell asked if it had anything to do with the letter Respondent had just received from the Union requesting recognition, Adkins replied, "Yes." Goodsell then remarked, "Well, we had to do something because Mid-States wasn't doing anything for us," to which Adkins replied, "Well, they're probably gonna close this place down if you guys keep this up." Adkins did not testify. Accordingly, Goodsell's testimony as to the comments Adkins made to him in mid- and late February is credited and accepted as true.

Rea also testified to some union-related comments made to him by Adkins. He recalls being in the main office one day and using the computer to look up his route for deliveries he would be making the following day. Adkins, he contends, came over to him and asked what he was doing. When Rea explained and asked why Adkins wanted to know, Adkins answered that someone had purportedly been using the computer to look up union activity, and that when "they" find out who it was, that individual was "going to be in big trouble."

Discussion

Regarding Adkins' comment to Goodsell about hearing rumors that Goodsell, along with Thorsky, Confere, and Rea were trying to bring in the Union, such conduct is alleged to have created an unlawful impression that Goodsell's union activities, and that of the other named individuals, were being kept under surveillance. The test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement that their union activities had been placed under surveillance. *Flexsteel Industries,* 311 NLRB 257 (1993). As explained by the Board in *Flexsteel,* the idea behind finding "an impression of surveillance" as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without fearing that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways.

Although admitting to being a union supporter and to distributing authorization cards to other employees, nothing in Goodsell's testimony, or elsewhere in the record, suggests that he was open and notorious about his support for and activities on behalf of Local 24. Thus, when told by Adkins about rumors that he and others were trying to bring the Union in to the Richfield facility, Goodsell could reasonably have believed that Adkins may have learned of his involvement with Local 24, and that his activities on Local 24's behalf were being monitored. Adkins' remark could further have reasonably caused Goodsell to refrain from engaging in such protected activity for fear of retaliation. In these circumstances, I find that Adkins' remark to Goodsell, about hearing "rumors" of his attempt to bring the union in, unlawfully created the impression that Goodsell's activities, and that of other Local 24 supporters, were being kept under surveillance, and violated Section 8(a)(1) of the Act, as alleged.

Adkins, as noted, also told Goodsell in late February that if employees persisted in their efforts to bring the Union in, the Respondent would probably close down the facility. Adkins, as credibly explained by Goodsell, was angry that employees were seeking Local 24's representation, and made his comment to Goodsell when the latter remarked that employees had to do something because the Respondent was not doing anything for them. As discussed above in connection with similar statements made by Marszalkowski to Confere, a threat to close a plant in response to employee union activity is coercive and unlawful. Adkins' threat of plant closure directed at Goodsell in late February was therefore unlawful and a violation of Section 8(a)(1) of the Act.

(3) Statements by B. Hartmann

Paragraph 12 of the complaint alleges that in or around late March, B. Hartmann implicitly threatened employees with discharge if the Union were voted in, solicited employee complaints and grievances, and promised them increased benefits and better terms and conditions of employment in order to induce them into not supporting the Union.

The specifics of this allegation center on comments purportedly made by B. Hartmann during an antiunion video employees were directed to watch about 1 month before the scheduled April 12 election.[13] Rial Finney, a line haul driver at the Richfield facility, testified that at around 9 a.m. on the day he was shown the video, he had just returned from delivering a load when he was instructed to go to Marszalkowski's office, where he found B. Hartmann, but not Marszalkowski, present. He had never before met B. Hartmann, nor, for that matter, any of the other Hartmanns. After introducing himself, B. Hartmann slid a video cassette into a small television set and both sat and watched the 15–20 minute video. The video, according to Finney, discussed how a union at an auto plant had gone on strike to obtain a contract, and how employees had lost their jobs as a result of the strike. B. Hartmann, he contends, remained quiet during the showing, but spoke to him for about 5 minutes following the video.

B. Hartmann, he recalled, told him that what had happened in the video at the auto plant would happen at the Richfield facility if a union was voted in. B. Hartmann further remarked that he did not know why anybody at the Richfield facility would want a union, that unions are not all cracked up to what they used to be. He then asked Finney why he or the other employees wanted a union, to which Finney replied that employees needed new trailers as the ones they were using were all worn out, and the Company was not making the repairs needed to make them safe to operate. He further told B. Hartman that employees also needed the Union because their medical payments weren't being paid by the Respondent. B. Hartmann informed Finney that some 48-feet trailers had been ordered, that these would have to be used first and that the Company would thereafter order 53-feet trailers. Regarding the medical payments, B. Hartmann purportedly told him that the Company was taking out a loan with which to cover the employees' medical benefits. (Tr. 151–152.)

Finney also recalled being directed, on two subsequent occasions, to view antiunion propaganda films, again in Marszalkowski's office. Unlike the first time, however, when B. Hartmann remained in the room with him, Finney watched the films with other employees present. Finney testified that the next time he saw B. Hartmann was on the day before the election when, he claims, Marsalkowski and B. Hartmann were at the facility walking around and talking to different employees. Finney was in the process of loading his trailer when B. Hartmann approached, shook his hand, and said he would appreciate it if Finney did not vote for the Union. Finney simply answered, "Okay," and continued loading his trailer. (Tr. 155.)

Goodsell, and another line haul driver, Gerry Joseph also testified to viewing videos similar to that shown to Finney. Goodsell recalled viewing two videos, the first in mid-February in the drivers' room. He could not recall if another employee watched it with him at the time, but recalls no one from management being present. The second video, he recalled, was shown to him 1 week later in Marszalkowski's office, with B. Hartmann and other employees present. He testified that B. Hartmann did not speak while the video containing an antiunion message played, but that B. Hartmann did address him and the other employees once the video was over. B. Hartmann, he recalled, mentioned that the Company was trying to get the employees medical bills paid. (Tr. 347.)

Joseph similarly testified that, prior to the election, he and a few other employees were directed to watch a 20-minute video, which was more or less antiunion, in Marszalkowski's office at the Richfield facility while B. Hartmann was present. He recalled that during the showing of the video, B. Hartmann did not speak, but following the video, he recalled the latter telling employees "he didn't want a third party involved with the Company." Joseph had never before met B. Hartmann, nor did he recall ever seeing him during his more then 10 years he had been working at the Richfield facility. (Tr. 289–290.) B. Hartmann did not testify. Accordingly, the testimony provided by Finney, Goodsell, and Joseph regarding B. Hartmann's presence during their viewing of the videos, and as to what he may have said to them is credited and accepted as true.

Discussion

As found above, after requiring Finney to view an antiunion video in Marszalkowski's office about the loss of a jobs following a strike at an auto plant, B. Hartmann told Finney that the same thing would happen at the Richfield facility if Local 24 were brought in. Despite being present in the courtroom during Finney's testimony, B. Hartmann, as noted, never took the witness stand to refute Finney's account, or to offer some legitimate explanation or reason for his plant closing and job loss remark to Finney.[14]

Nothing in Finney's description of B. Hartmann's comment about a strike at the Richfield facility leading to a loss of jobs, similar, apparently, to what was depicted in the video he was required to watch, reflects that there was any ambiguity in B. Hartmann's statement. Thus, B. Hartmann's remark, as credibly described by Finney, was presented to the latter not as a prediction based on objective fact as to what might occur if Local 24 were brought in, but rather as an inevitable event that will occur if employees voted for union representation. The Board has found similar comments regarding the inevitability of a strike should a union prevail to be coercive and unlawful. *Smithfield Packing Co*., 344 NLRB 1, 8 (2004); *Gold Kist, Inc*., 341 NLRB 1040, 1041 (2004); *Vasaturo Bros., Inc.,* 321 NLRB 328 (1996); *Heartland of Lansing Nursing Home,* 307 NLRB 152, 158 (1992). Here, B. Hartmann's comment to Finney was

[13] Antiunion videos were apparently shown to employees at Respondent's other facilities. Called as a witness by counsel for the General Counsel, Lach testified, credibly and without contradiction, to being instructed by B. Hartmann sometime in February to show employees at the Toledo facility a video regarding unionism, and to send it back to him, possibly for circulation to other facilities, because the Respondent "was having problems with the Union throughout the Company." Tr. 630–631.

[14] Finney displayed overt hostility to Marszalkowski during the latter's cross-examination of Finney, leading me to admonish him for his behavior on the witness stand. Nevertheless, I am crediting Finney's account notwithstanding his display of hostility because of the Respondent's deliberate failure to call B. Hartmann, who was present during Finney's testimony, to deny or refute Finney's assertions.

similarly coercive and unlawful, and a violation of Section 8(a)(1) of the Act.

B. Hartmann, as noted, also questioned Finney during this particular incident on why he and other employees wanted a union. When Finney complained about the faulty trailers employees had been using, and how the employees medical benefits were not being paid, B. Hartmann told Finney that new trailers had been ordered and more were on the way, and that the issue of the nonpayment of medical benefits would soon be resolved because the Respondent was taking out a loan to cover such expenses. B. Hartmann, on another occasion also told Goodsell, following the latter's mandated viewing of an antiunion video, that the Respondent was trying to get the medical expenses paid. The promises by B. Hartmann to Finney and Goodsell, which I have found were made since B. Hartmann was not called to refute them, are alleged to have been unlawful attempts by B. Hartmann to dissuade Finney and Goodsell from supporting Local 24. The allegation has merit.

B. Hartmann's inquiry of Finney as to why he and other employees wanted a union was, in my view, an attempt by B. Hartmann to ascertain what problems employees might be having with the Respondent that would prompt them to turn to a union for help in resolving them. There is no evidence to indicate that the Respondent, or B. Hartmann specifically, had ever before solicited employee grievances or complaints. "When an employer, who has not previously had a practice of soliciting employee grievances or complaints, suddenly embarks on such a course during an organizational campaign, the Board may find that the employer is implicitly promising to correct those inequities discovered as a result of the inquiries, thereby leading employees to believe that the combined program of inquiry and correction will make collective action unnecessary." See *Enjo Architectural Millwork,* 340 NLRB 1340, 1353 (2003), quoting from *Valley Community Services,* 314 NLRB 903, 904 (1994); also *D&F Industries,* 339 NLRB 618, 644 (2003).

Finney, as noted, told B. Hartmann, in response to the latter's inquiry into why employees needed a union, of the problems he and others were having with trailers, and with getting their medical benefits paid, at which point B. Hartmann immediately assured him that both problems were in the process of being resolved. Clearly, B. Hartmann's answer was intended to convince Finney that the problems which were driving him and others to the Union were being taken care of the Respondent, thus rendering the union unnecessary. This same message, as noted, was conveyed to Goodsell and other employees, following their viewing of the antiunion video, when B. Hartmann mentioned that the Respondent was trying to get their medical bills paid. In these circumstances, B. Hartmann's solicitation of grievances from Finney, and his subsequent statements to Finney, Goodsell, and other employees as to how the Respondent was remedying, and intended to remedy, their grievances, was coercive, and violated Section 8(a)(1) of the Act, as alleged.

(4) Rea's handbilling incident

Rea, as more fully discussed and found below, was terminated on March 14, for his involvement with, and activities on behalf of, Local 24. Following his unlawful termination, Rea continued with his union activities and, on April 3, went to the Richfield facility to hand out union literature to Respondent's drivers returning from their routes. It is unclear from his testimony if this was the only instance of handbilling engaged in by him after his firing. Rea testified that in conducting his handbilling activity that day, he positioned himself on the paved road, off the Respondent's property, between a fire hydrant and the driveway entrance to the Richfield facility.[15] At around 5 p.m., Supervisor Adkins approached Rea and asked what he was doing. Rea told Adkins what he was doing, and Adkins asked to see the flyers. Rea handed Adkins copies of three union flyers he was distributing, after which Adkins told Rea that Marszalkowski was not going to be happy with what Rea was doing.

Soon thereafter, Marszalkowski appeared and, after he and Rea exchanged greetings, Adkins handed Marszalkowski the flyers. Marszalkowski and Adkins then walked away from Rea without saying anything else. At one point, Rea noticed Marszalkowski using his cell phone to make a call. Some 5 minutes later, the Richfield police arrived, asked Rea what he was doing, and then asked to see the flyers Rea was distributing. The police, according to Rea, told him they simply wanted to make sure the material he was handing out was not "slanderous to Mid-States Electric." Adkins did not testify, and no mention was made by Marszalkowski in his testimony regarding this incident. On brief, however, the Respondent admits that Marszalkowski called the police on Rea, but gave no explanation for why he did so.[16] (R. Br. 29.) Although not charged or ar-

[15] GC Exh.-14 is a photo depicting the road where Rea claims he was standing. The photo shows the Richfield facility on the left side, a fire hydrant on the grassy area off the road, and the entrance to the Richfield facility a little further up in the photo. According to Rea, he stood on the paved area between the fire hydrant and facility's entrance.

[16] The Respondent did elicit some testimony from employees Harmon and Greenleaf which seemingly contradicts Rea's claim that he conducted his handbilling activity on public property. Thus, Harmon testified he saw Rea "standing on the apron and on the grass of the terminal where the drivers were coming in" handing out leaflets. Greenleaf claimed to have seen Rea doing so "right at the driveway where we pull into the yard." Tr. 883, 892. Their testimony, which was rather vague and lacked specificity, was, however, elicited through some very leading questions posed to them by Respondent's representative, rendering said testimony, like the testimony provided by them on other matters, highly suspect and unreliable. Neither Harmon nor Greenleaf, it should be noted, testified as to when their observations purportedly occurred. Thus, assuming, arguendo, that Harmon and Greenleaf in fact saw Rea handing out leaflets in the locations described by them, it is unclear from their testimony if what they observed occurred on April 3, when the police were called on Rea, or on some other day. As noted, nothing in Rea's testimony suggests that his handbilling activity was limited to the April 3 date. Nor, in any event, was any evidence produced by the Respondent to confirm that the areas where Harmon and Greenleaf contend Rea was standing during his handbilling activity was company property. In sum, I credit Rea over Harmon and Greenleaf and find that he was indeed standing on public property during his April 3, handbilling activity. In any event, the Respondent, as previously noted, has not claimed that it called the police on Rea for allegedly trespassing on its property.

rested for his handbilling activity, Rea was nevertheless detained by the police on some other unrelated matter.[17]

The Respondent's sole defense to this allegation, as argued in its brief, is that it could not have committed any unfair labor practice when it called the police on Rea on April 3, because the latter was no longer an employee at the time. (Tr. 29.) I disagree.

It is well established that an employer may seek to have police take action against pickets, or, as in this case, handbillers, where the employer is motivated by some reasonable concern, such as public safety or interference with legally protected interests. *Nations Rent, Inc.,* 342 NLRB 179, 181 (2004). However, an employer violates Section 8(a)(1) when it calls police to have nonemployee union organizers removed from public property. *Walgreen Co.,* 352 NLRB 1188, 1193 (2008); *Corporate Interiors, Inc.*, 340 NLRB 732, 746 (2003). Here, the Respondent has not shown, nor for that matter contended, that the police were called on Rea because the latter was trespassing on its property during his handbilling activity. In these circumstances, the Respondent's decision to call the police on Rea amounted to an unlawful interference with Rea's Section 7 right to handbill on public property, and violated Section 8(a)(1) of the Act, as alleged.

b. The 8(a)(3) conduct

(1) Confere's termination

Confere, as noted, was terminated on March 2, allegedly for having "two consecutive unexcused absences" in violation of company policy.[18] The events leading up to the termination involved Confere's previously mentioned court appearance which was scheduled for February 28. Marsalkowski, as found above, had, several days earlier, assured Confere that he would appear as a character witness for Confere. On February 27, the day before Confere's trial date, Confere claims he went to Marszalkowski's office and asked if he was still showing up in court the following day. He contends, however, that Marsalkowski did not respond and simply kept looking down at his desk and never looked up at him. Confere then walked out of Marszalkowski's office. Confere testified that he had previously received permission from Marsalkowski to take the day off to attend the court hearing, explaining that Marsalkowski had, in his office, a chalkboard which he observed contained a notation showing Confere's scheduled February 28 hearing.

Despite promising to do so, Marsalkowski did not appear at Confere's court hearing. Confere contends that at some point in the afternoon on February 28, he called the facility and spoke with Stamp, as Marsalkowski apparently was not in the office. According to Confere, he informed Stamp that he was still in court and, while he was almost done, he had no idea how much longer he would be there. Stamp purportedly told him that Marsalkowski was not in the office but he would let him know about Confere's call. Confere, it appears, spent the whole day in court.

Confere did not report for work on March 1, having been directed the day before, presumably by the court, to report to the probation office that day. Confere claims he called the facility on three different occasions on March 1, to report his whereabouts. His first call purportedly occurred at 5:45 a.m. Confere recalls speaking with Stamp, telling him he had to go to the probation office, and did not know how long he might be there or what he had to do.

Called as a witness by the Respondent, Stamp denied ever receiving phone calls from Confere, including on February 28 or March 1. (Tr. 931.) Certain inconsistencies and ambiguities in Stamp's testimony, however, render it unreliable and not particularly trustworthy. Stamp, for example, claimed he began working for Respondent in April 2001, and purportedly left in early March 2007, although he was somewhat vague and unsure as to his departure. Testimony by Curtis Harmon, one of Respondent's witnesses, that Stamp was supervising him in April 2007, seemed to undermine Stamp's claim of having left the Respondent's employ in March. Stamp also testified that no member of management "ever gave OS&D (over, short & damaged department) items to employees. This rather broad, sweeping assertion by Stamp is somewhat hard to accept, since Stamp never explained how he would have known what other supervisors may or may not have done vis-à-vis employees and OS&D products, in his absence, and testimony from other witnesses makes clear that the distribution of OS&D products to employees by supervisor was a common occurrence.

Stamp's blanket denial of having spoken by phone to Confere on either February 28 or March 1, also lacked the ring of truth. Thus, the question put to Stamp by Respondent, to which he answered, "No" without hesitation or equivocation, was whether Confere had called him on either of the above dates. Stamp's ability, more than a year later, to aver with the degree of certainty exhibited by him on the witness stand and without giving it any thought, that he had never received any phone calls from Confere, including on February 28 or March 1, was not convincing, particularly given his inability to recall with any degree of certainty when he terminated his employment with the Respondent. Stamp's testimony of not having received any phone calls from Confere on February 28, and March 1, is rejected as not credible. I find instead, as credibly testified to by Confere, that the latter indeed called and spoke with Stamp on February 1, to update him on the status of his court appearance, and again on the morning of March 1, to advise of his required meeting with the probation office.

[17] According to Rea, he was detained by the police based on a mistaken identity involving his cousin who lives next door to him and whose social security number is somewhat similar to Rea's social security number. The matter was eventually cleared up.

[18] Sec. 704 of the Respondent's personnel policy manual, entitled "ATTENDANCE AND PUNCTUALITY," provides, inter alia, that "Two (2) unexcused absences will result in termination. (The first requires a Final Warning Letter.)" The policy defines an "unexcused" absence as when "the employee fails to properly notify his supervisor two hours in advance of his/her start time," "when the supervisor does not approve the absence and the employee nevertheless is absent," or "when an employee says that they will be late and fails to report to work at any time that day." (See GC Exh.-4.) Par. 3 of the policy, however, assures employees that "[i]t is not [Respondent's] intent to unduly discipline employees for a reasonable "excused" absence.

His second phone call on March 1, Confere explained, took place at around 8 a.m. and was with Marsalkowski. He told Marsalkowski during this phone call that he was still at the probation office waiting to hear what was going on, and that he had not yet met with his probation officer or been told what he had to do. Marsalkowski, he contends, made no mention of why he did not appear at his February 28 court date. The third phone call, Confere contends, was made at 12:30 p.m. and he again spoke with Marsalkowski. He informed the latter that he was being required to watch a video with some other 30 individuals at the probation office, and had no idea how long it would be. Marsalkowski purportedly replied, "[Y]ou do whatever you've got to do," and slammed the phone down on Confere. Confere described Marsalkowski as being "a little angry, a little upset" during that brief conversation. He denied being told by Marszalkowski during this latter phone conversation that the facility was swamped with freight. He never told Marsalkowski whether or not he would make it in to work that day because he had no idea how long he would have to remain at the probation office. Confere contends that he eventually got out of the probation office at around 2:45 p.m. His testimony as to the substance of his two phone conversations he had with Marszalkowski on March 1, was not denied or otherwise disputed by Marszalkowski, leading me to credit Confere's version of the conversations.

Confere reported to work the following day, March 2, at 5:45 a.m. His starting time was 6 a.m. He testified he arrived a few minutes early in order to give Stamp copies of his court and probation papers, presumably to confirm his February 28 court appearance and his March 1, attendance at the probation office. Stamp, however, had not yet arrived, so Confere went to Marszalkowski's office, who was there, to hand him his documents. Marsalkowski, however, simply walked out of his office without saying a word, but returned a short while later accompanied by driver, Bill Greenleaf. Confere recalled that on his return, Marszalkowski put some papers on the desk and told him, in any angry tone, that he was being terminated for "unexcused absence." (Tr. 108.) Marszalkowski asked Confere to sign a termination notice, which was to be witnessed by Greenleaf, and Confere did so without reading it, explaining that he was too upset at the time about being fired for no reason to read anything.[19]

Other than identifying the termination notice he issued to Confere for two unexcused absences, Marsalkowski did not testify as to the circumstances surrounding the discharge. His failure and refusal to do so, despite being present at the hearing and being advised by me of his right to take the stand to refute such testimony, supports an inference that Marszalkowski chose not do so for fear that any such sworn testimony would be detrimental to Respondent's case. Confere's undisputed testimony regarding his discussions with Marsalkowski before and during the discharge is, as noted, accepted as true and credited.

[19] The termination letter, received into evidence as GC Exh.-5, appears to have been signed by Marsalkowski, and contains Greenleaf's signature as a witness. It gives the following explanation for the termination:

> You had a court appointment on Wed. 2/28/07. After your court date you did not call the terminal to see if you were needed. It was end of the month and we were swamped. That constitutes an unexcused absence. On Thursday 3/1/07 you called me and said you were at your parole officers office. You needed to watch a movie with 30 others. I told you we were swamped with freight. You said you would call. I never received a call and you did not show up for work again. You are terminated for 2 consecutive unexcused absences.

Discussion

The complaint, as noted, alleges, and counsel for the General Counsel contends, that Confere was discharged for his activities on behalf of, or for supporting, Local 24 in its organizing campaign at the Richfield facility. The Respondent insists Confere was lawfully discharged for having two unexcused absences in violation of company policy. When, as here, the motivation for an employer's actions, here Confere's discharge, is at issue, the Board utilizes the test set out in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 395 (1983), to determine if the action taken was lawful or unlawful under the Act. *Hahner, Foreman & Harness, Inc.,* 343 NLRB 1423, 1426 at fn. 8 (2004). Thus, to establish that Confere's discharge was unlawfully motivated, counsel for the General Counsel, under *Wright Line*, must first show that Confere was engaged in protected or union activity, that the Respondent was aware of his activity, and that the activity was a substantial or motivating reason for the Respondent's action. See *Manno Electric,* 321 NLRB 278, 283 at fn. 8 (1996).

Once the General Counsel makes this initial showing, the burden of persuasion shifts to the Respondent to prove that it would have taken the same action even if Confere had not engaged in protected or union activity. But where it is shown that the employer's proffered reasons "are pretextual—that is, either false or not, in fact, relied upon—the employer fails by definition to show that it would have taken the same action for those reason, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Metropolitan Transportation Services,* 351 NLRB 657, 660 (2007), and cases cited therein.

Confere's support for and involvement with Local 24 is not disputed. Thus, he testified, credibly and without contradiction, to being a Local 24 supporter, and to having signed an authorization card on its behalf and discussing the Union with other Richfield facility employees. Credible evidence of record also makes clear that the Respondent knew, or strongly suspected, that Confere was assisting Local 24 in its organizing efforts, for Goodsell, as noted, testified, without contradiction, to being told by Adkins sometime in mid-February that Marszalkowski suspected him, Confere, and others of trying to bring in the Union. Adkins was not called to refute Goodsell's testimony, and Marszalkowski, who was present at the hearing, simply chose not to take the stand to deny Goodsell's assertion. Goodsell's testimony, which I have credited, thus establishes that the Respondent was aware of Confere's union activity before it fired him on March 2.

The record is replete with credible and undisputed evidence of Respondent's, and in particular Marszalkowski's, strong

animosity towards unions and their supporters.[20] There are, for example, the numerous 8(a)(1) violations committed by the Respondent, through its various supervisors and/or managers at its Richfield and, as shown below, at the Toledo facilities, that included coercive interrogation of employees regarding their activities, creating an impression of surveillance of their activities, promising to improve their benefits, including paying their medical bills and giving them raises, to induce them into not supporting the Union, and threatening employees with the closure of facilities and loss of jobs if they were to vote the Union in.

Marszalkowski's own personal animosity towards unions and their supporters was further revealed through uncontradicted testimony provided by Lach regarding statements made by Marszalkowski in conversations between the two. One such conversation, Lach recalled, occurred in Lach's office when Marszalkowski entered smoking a cigarette. Lach asked him not to smoke in his office and, after some exchange, the conversation turned to some prior attempts that had been made by unions to organize the Respondent's facilities. At one point, Marszalkowski stated that he had been brought in to clean up the union problem. When Lach asked how Marszalkowski had managed to do that, the latter replied that he had solved the problem by taking employees out to a "topless" bar, and buying them drinks, boasting that it had only cost him about $1000. During another conversation, Lach recalled Marszalkowski mentioning how the Respondent had moved one of its terminals from Ann Arbor, Michigan, to Toledo, Ohio, because of a union problem it allegedly was having at Ann Arbor, and, during another conversation, Marszalkowski described how he had fired a driver at the Richfield facility because the driver had been to the union hall. This latter conversation occurred sometime in 2005 or early 2006. As noted, Marszalkowski chose not to take the witness stand to deny Lach's assertions, leading me to accept Lach's testimony in this regard as true.

The above undisputed facts thus show that the Respondent harbored strong antiunion animus, and that it had no qualms about doing whatever it took to ensure that its facilities remained nonunion, including using such coercive tactics as threats, interrogations, promise of benefits, and, in the final analysis and as shown below, the termination of union adherents. Accordingly, I find that counsel for the General Counsel has satisfied her initial *Wright Line* burden of proof, and that the burden now rests with the Respondent to demonstrate that it would have discharged Confere even if he had not taken part in union activity.

The Respondent, as noted, contends, and Marszalkowski testified, that Confere was discharged allegedly for his two unexcused absences on the days he had to appear in court on a family matter. The record does show that the Respondent maintains a written policy that two unexcused absences by an employee results in a termination, although it is not known to what extent, if any, this policy has been adhered to in the past as no evidence was produced to show that other employees have previously been discharged pursuant to this policy. Whether or not the Respondent, in fact, adheres to its policy is, in any event, of no real consequence here, for the evidence of record convinces me that Confere did not violate the policy.

Thus, Confere testified, credibly and without contradiction, that Marszalkowski was fully aware, as early as mid-February, that he was scheduled to be absent on February 28, due to a court appearance. Marszalkowski, in fact, recorded Confere's anticipated absence from work on February 28, on a chalkboard in his office, a fact that again was neither denied or contradicted by Marszalkowski. Indeed, Marszalkowski had assured Confere that he would appear as a character witness on latter's behalf on the day in question. In sum, there is no question, and I so find, that Confere's absence from work on February 28, was well-known to, and authorized in advance by, Marszalkowski. His absence from work that day, therefore, was not unexcused, as claimed in his letter of termination but rather, I find, authorized.

Confere's termination letter, as noted, states that he was told by Marszalkowski during his last phone call on March 1, that the facility had "a large amount of freight," suggesting implicitly that Confere knew or should have known he was needed at the facility that day. As found above, Confere credibly denied being told any such thing by Marszalkowski. Marszalkowski's failure and/or refusal to take the stand to corroborate the statement contained in the discharge letter purportedly made by him to Confere renders the statement nothing more than hearsay and, therefore, unreliable. I credit instead Confere's denial that Marszalkowski told him about the amount of work at the facility that day.

In sum, I find that Confere was authorized by Marszalkowski to be absent from work on February 28, to attend his court hearing, and that, early the following morning, March 1, Confere called in and left word with Stamp that he had to visit his probation office that day. Consequently, the stated reason for his discharge, having two consecutive unexcused absences, is patently false, as Confere, as found above, was authorized to be out on the first of the 2 days in question, February 28.

Nor does his absence from work on March 1, fit the definition of "unexcused" as set forth in Respondent's absenteeism policy. Thus, as credibly testified by Confere, he did notify Stamp early in the morning on March 1, about his required attendance at the probation office that day, and also notified Marszalkowski in two separate phone conversations later that morning as to his whereabouts. In neither of his conversations with Marszalkowski did the latter ever inform Confere that he was required to report for work that day, or that he expected Confere to come to work on leaving the probation office. Rather, during the second phone conversation, Marszalkowski simply instructed him to do what he had to do. Nothing in Confere's credited description of this conversation indicates that Confere assured Marszalkowski he would report for work once he was finished at the probation office. Confere credibly explained that he could not have done so as he had no clue when he would be finished and allowed to leave the probation office.

In these circumstances, I am convinced that Confere had good reason to believe that his absence from work on March 1, was excused. Notably, Marszalkowski never testified that Con-

[20] The Respondent, on brief, concedes that anti-union sentiment was prevalent among managers at the Richfield facility (R. Br. 2).

fere did not have permission to be at the probation office on March 1. Accordingly, I find that Confere was indeed authorized to be absent from work on March 1. As Confere's absence from work on February 28 and March 1, was authorized, the stated reason for his discharge, having two consecutive unexcused absences, is clearly false and pretextual.[21] The Respondent has, consequently, failed to rebut Counsel for the General Counsel's prima facie case. I therefore find, as alleged in the complaint, that Confere's discharge was unlawful and a violation of Section 8(a)(3) and (1) of the Act.

(2) Rea's termination

Rea, as noted, was terminated on March 14, allegedly for theft, to wit, stealing two bags of pretzels off the dock (GC Exh.-6; Tr. 47). He testified to arriving for work that day at around 5:45 a.m. to begin his 6 a.m. shift. As he got to the timeclock, he noticed his timecard was not in its usual slot and went over to Marszalkowski, who was in his office, to tell him about his missing timecard. Marszalkowski, he contends, told him he was aware of it and that he had to speak with Rea. Marszalkowski then left the office and returned a few minutes later with drivers Mike Mills and Curtis Harmon as witnesses.[22] On re-entering his office, Marszalkowski showed Rea his "vehicle inspection" book, and told Rea that, when the latter returned to the facility from making deliveries the day before, his truck was missing a mud flap and that Rea had not written it up in his book. Marszalkowski told Rea that, when he went out to the truck to get his "vehicle inspection" book, he found an opened bag of pretzels in Rea's vehicle, and then showed Rea a damaged box of pretzels Marszalkowski said were found on his dock, along with a can of cake frosting also found in the truck. Rea contends Marszalkowski next sat down at his desk and informed him he was being terminated for theft. Marszalkowski then typed up a termination letter and gave it to Rea to sign, which he did.

Mills, as noted, did not testify. Harmon, on other hand, did, and testified that Marszalkowski asked Rea if had taken "the stuff" off the OS&D without permission, and Rea admitted he had. Marszalkowski, Harmon contends, then read the contents of the termination letter aloud to Rea. Rea, according to Harmon, then asked to meet in private with Marszalkowski but the latter refused, and simply told Rea he was terminated. (Tr. 875.) Notably, Greenleaf also claimed to have been present when Rea was terminated, and testified to hearing Marszalkowski confront Rea about "finding the stolen merchandise from OS & D in the truck," and hearing Rea admit having done so. He contends Marszalkowski asked Rea if he had gotten permission to take the merchandise, and Rea responded he had not. (Tr. 894.)

Rea denied telling Marszalkowski that he had taken "the stuff," as testified to by Harmon and Greenleaf, and also disputed Harmon's claim that Marszalkowski refused his request for a private meeting. Rather, according to Rea, he did meet with Marszalkowski in private after Harmon and Mills left the office. During this private meeting with Marszalkowski, which occurred after he had been told he was terminated, Rea denied stealing the pretzels and insisted he had gotten them from the office, explaining that his supervisor, Stamp, had given him permission about a week earlier to take the pretzels. Rea testified in this regard that a week before his termination, he retuned to the facility early in the morning after making a delivery, noticed the pretzels on counter, and saw other employees, including secretary Karen Larkman, eating pretzels. He asked Stamp at the time if he could take some pretzels with him before leaving on his next run, and Stamp said it was OK.

According to Rea, when goods or food products are damaged at the facility, they are turned over to the OS&D department. He contends that, from time to time, supervisors and others in the OS&D department would hand out or authorize employees to take these goods for their own personal use. He recalled, for example, seeing such items as small soup packages, e.g., Healthy Choice or Progresso brand, "Slim Jims," "Tabasco" sauce, given out. On other occasions, he claims to have been authorized by various members of management to use certain products from a customer's damaged cartons, such as garbage bags and paint. He recalls on one occasion being given a "grease gun" for his personal use by Adkins.

As to the can of cake frosting, Rea explained to Marszalkowski it was given to him by a customer during one of his deliveries. The customer, he contends, was discarding the item and Rea simply asked if he could have it. Marszalkowski told Rea it didn't matter, that he was still being terminated for theft. (Tr. 226.) Rea was then escorted to his truck to retrieve his personal belongings, turned in his fuel card, and left. Rea denied ever admitting to stealing the bag of pretzels or the cake frosting to Marszalkowski. Rea never received a copy of his termination letter. Goodsell corroborated Rea's testimony regarding the practice at the facility of allowing employees to take damaged goods or food products for their own use. (Tr. 375–376.)

I credit Rea over Harmon and Greenleaf as to what occurred and was said at his March 14 termination meeting. Harmon and Greenleaf, as previously discussed, were not particularly credible witnesses, and struck me as having embellished, if not outright fabricated, their testimony to comport to the Respondent's version of events. Greenleaf's claim of being present during Rea's termination is particularly difficult to accept, for Rea's termination letter shows, consistent with Rea's testimony, that Mills and Harmon, in addition of course, to Marszalkowski, were the only witnesses present at this meeting. Neither Mills nor Marszalkowski, as noted, testified, and Harmon, the only witness who could have corroborated Greenleaf's purported presence at the discharge meeting, was not asked to do so. I am convinced that Greenleaf was not present during Rea's termination meeting and that he simply

[21] Even if Confere's absence from work on March 1, was deemed to be "unexcused," the discharge would not have been justified since his absence from work on February 28, was excused. As set forth in his discharge letter, Confere purportedly was terminated for having "2 *consecutive* unexcused absences." As his February 28, absence from work was undisputedly approved he could not have been terminated for having two *consecutive* unexcused absences.

[22] GC Exh.-6, Rea's termination letter, contains the signatures of Harmon and Mills, confirming Rea's account that they served as witnesses to his discharge. Mills did not testify.

lied about being there to curry favor with the Respondent. In short, I find that Marszalkowski never asked Rea where or how he obtained the bag of pretzels, and that, as credibly testified to by Rea, he simply accused the latter of theft and informed him he was being discharged for stealing the bag of pretzels.

Counsel for the General Counsel contends, and I agree, that Rea was unlawfully discharged for his union activities, and that the Respondent used the alleged theft as a pretext to mask its unlawful conduct. Rea, as noted, was an active Local 24 supporter, having signed an authorization card on its behalf, and solicited other employees to do the same. Further, Adkins' statement to Goodsell about having overheard, of been part of, a conversation involving Marszalkowski, during which Rea's name was mentioned as one of several employees trying to bring in the Union, makes clear that the Respondent either knew or strongly suspected that Rea was a Local 24 supporter. That the Respondent harbored strong animosity towards Local 24 and its supporters was, as discussed above in connection with Confere's discharge, clearly demonstrated by the coercive conduct it directed at employees in order to dissuade them from supporting Local 24, conduct which, as noted, included threats of plant closure, job loss, interrogations, impression of surveillance, and promise of benefits, along with the unlawful discharge of Confere, another union supporter, for engaging in activities on behalf of Local 24. On these facts, I find that counsel for the General Counsel has made a prima facie showing under *Wright Line* that Rea's discharge was, like Confere's discharge, motivated by antiunion considerations.

The Respondent's claim that Rea was lawfully discharged for stealing a bag of pretzels does not withstand scrutiny. According to Rea's credited and uncontradicted testimony, Marszalkowski never bothered to ascertain the truth of Rea's assertion that he had been given permission by Stamp to take the pretzels. Stamp, it should be noted, did testify that no "management employee" had ever given OS&D items to employees. He did not, however, explain how he knew what other managers may or may not have given to employees in the past from the OS&D department. As to the incident with Rea and the pretzels, Stamp was never specifically asked what he knew about this incident, or whether he, himself, had authorized Rea to take the pretzels. Nor was Larkman, who could have refuted or denied Rea's claim that she too was eating pretzels when Rea received permission from Stamp to take some, called to testify, warranting an adverse inference that, had she been called, her testimony would not have supported Respondent's claim. Accordingly, in the absence of any specific denial from Stamp, I credit Rea and find that he had, in fact, been allowed by Stamp to take the bag of pretzels Marszalkowski found in his truck on March 14.

But even if Stamp had not authorized Rea to take the bags of pretzels, and I believe Rea's undisputed account that he did, nothing in Marszalkowski's sparse testimony suggests he knew this when he fired Rea, for Rea's credited account makes patently clear that Marszalkowski fired him practically on the spot without bothering to ask Rea how, where, or when he had gotten the pretzels. Without questioning Rea, Marszalkowski could not have known if Rea purchased the pretzels himself, or, if Rea had gotten it from the OS&D department, as it turns out was the case here, or who, if anyone, authorized him to do so. An employer's failure to fully and fairly investigate an employee's alleged misconduct before disciplining or terminating him, or to provide the employee an opportunity to rebut the accusation, suggests the presence of discriminatory motivation. *Aljoma Lumber, Inc.,* 345 NLRB 261, 285 (2005); *Pratt Towers, Inc.,* 338 NLRB 61, 97 (2002); *Traction Wholesale Center*, 328 NLRB 1058, 1072 (1999). Here, the Respondent's discharge of Rea, purportedly for "theft of a customer's property" (R. Br. 8), to wit, a bag of pretzels, was clearly pretextual as Rea's credited and undisputed testimony unmistakably establishes that Rea was given the pretzels by Supervisor Stamp. Marszalkowski's accusation and discharge of Rea for "stealing" the pretzels is, therefore, patently false. The Respondent having failed to provide a legitimate, nondiscriminatory reason for terminating Rea, I find that counsel for the General Counsel's prima facie case remains intact, and that Rea's discharge on March 14, was due solely to his activities on behalf of Local 24. Accordingly, I find, as alleged in the complaint, that Rea's discharge violated Section 8(a)(3) and (1) of the Act.

(3) Goodsell's termination

Goodsell, as testified to by Marszalkowski, was terminated on March 21, allegedly for "falsifying reports" and "damaging company property." (Tr. 47.) His termination notice, received into evidence as General Counsel's Exhibit-7, states his discharge was for "Falsification of reports, misrepresentation of reports, failure to follow DOT [Department of Transportation] requirements, destruction of company property."

Regarding his discharge, Goodsell testified that he reported for work on March 21, and went to the drivers' room, presumably where drivers congregate, and, while there, noticed on the board used to record problems with tractors and trailers, that the truck he regularly drove had been written up as containing some damage. According to Goodsell, the truck in question was also regularly used by another employee, Steven King. While unsure who had written the damage report on the board, Goodsell believes King may have done so. Goodsell drove the truck on March 20, and, prior to that, last used the truck on March 14, at which time, he contends, the truck had no damage.

Goodsell recalled that after leaving the drivers' room, he went out and began hooking up a trailer to his truck to prepare it for loading, when Marszalkowski approached him and asked to see the damage on the truck, which consisted of a broken splash guard or quarter fender over the left rear tire. Marszalkowski then reviewed the truck's vehicle inspection book and, on not finding an entry of the damage in the book, asked Goodsell about it. Goodsell replied that he kept a duplicate book inside the terminal with his own belongings, at which point Marszalkowski walked away. Goodsell, as it turned out, had not entered the damage in his own duplicate book either, explaining that he had run out of entry pages in the duplicate book and, consequently, had also failed to record the damage in his duplicate book. (Tr. 355.)

Goodsell then pulled the trailer into the dock and began loading it. Marszalkowski returned a few minutes later and told Goodsell he wanted to speak with him in the office, and also

asked to see Goodsell's own inspection book containing the write-up on the truck. Once inside the office, Goodsell noticed employees Eric Poe and Mark DeBaer were also present. Marszalkowski then told Goodsell he was being terminated for "not filling out an inspection report." The entire meeting, Goodsell contends, lasted less than a minute after which he turned and left to retrieve his personal belongings. Marszalkowski never questioned him about the damage to the truck, nor did he read, or give Goodsell a copy of, the termination letter at that time. After retrieving his personal belongings, Goodsell returned to Marszalkowski's office, shook the latter's hand, and told him there were "no hard feelings," explaining that he didn't harbor any resentment towards Marszalkowski for discharging him, and admitting that he had made a mistake in not filling out the truck's vehicle inspection report. Goodsell, however, denied damaging the truck. (Tr. 357–358, 364.)

Marszalkowski testified he first learned of the damaged quarter fender on the truck from King. According to Marszalkowski, King, who did not testify, noticed the damage on the truck while doing a pretrip inspection of the vehicle on March 20, reviewed the vehicle inspection report to see if the damage had been entered and, on not finding any such entry, reported the matter to him. Marszalkowski's understanding as to sequence of events leading to the discovery of the damage is that, on March 20, King was apparently waiting for Goodsell to return from his road trip, and that, on Goodsell's arrival at the facility, and after the latter had backed the truck into the dock, King went out to do his pretrip inspection and discovered the damage. There was, according to Marszalkowski, only about a 15-minute gap between Goodsell's arrival and King's discovery of the damage on the truck and subsequent report to Marszalkowski. Marsalkowski was unsure when the damage to the truck occurred, but was of the view it occurred sometime during the 10–12 hours Goodsell was in possession of the truck, admitting, however, that he simply did not know.

Later that same day, Adkins called Goodsell and informed him he could appeal his termination by writing a letter to upper management. When Goodsell asked what he should put in the letter, Adkins suggested that the only way he could get his job back was for Goodsell to "kiss their ass and tell them what they want to hear." After speaking with Adkins, Goodsell prepared an appeal letter, returned to the facility, and handed it to Adkins, who, in turn, called Marszalkowski. Marszalkowski informed Adkins that Goodsell would first have to sign his termination letter before his appeal could be considered. Goodsell was then given his termination letter for the first time which he signed. Goodsell then left the facility and, later that evening, received a call from Adkins who told him his appeal had been denied.

Goodsell, as noted, denied damaging the truck. Goodsell recalled that sometime after his termination, he had a conversation Joseph in which the latter told him that, the night before Goodsell was fired, he, Joseph, had driven the truck in question and had seen the damage on truck. In other words, Joseph, according to Goodsell, had noticed the damage on the truck on the evening before Goodsell drove it, and the night before King first noticed it.

Joseph corroborated Goodsell's above testimony. Joseph testified that he drove the truck on March 19, and, at the time, saw that a piece of the quarter fender was broken off. He explained that the damage was obvious because the truck was fairly new making the damage more obvious. Joseph, however, contends that on examining the damage, he concluded it had not occurred recently because the break did not appear clean as would be noticeable from a recent break, but rather was dirty and did not seem fresh. Joseph chose not to write it up in the vehicle inspection report because, given his conclusion that the breakage occurred some time ago, he assumed some other driver must have already written it up. He further explained that writing up this particular type of damage in the vehicle inspection report is not a requirement but more of an option, noting that many of the Respondent's other trucks have also had quarter fenders break off or become damaged without being written up. (Tr. 295.)

Joseph confirmed having a conversation with Goodsell the day after the latter's termination. He testified he did not feel Goodsell's termination was justified because he had noticed the damage on the truck's quarter fender before Goodsell drove it on March 20. As to Goodsell's failure to record the damage in the vehicle inspection report, Joseph pointed out that failing to fill out such reports was not uncommon among drivers, a claim corroborated by Rea who testified, without contradiction, to not having filled out his vehicle inspection report during a 4-month period from September 2006 to mid-January 2007, and to knowing of others who likewise did not do so, without consequence.[23] He explained that, oftentimes, inspection books would be missing from the trucks, notably when the book was all filled in and new books were not readily available.[24] In Joseph's opinion, the Respondent did not strictly enforce the requirement that vehicle inspection reports be filled out, and, to his knowledge, no one has ever been discharged for not doing so. He testified that, following Goodsell's termination, the practice regarding vehicle inspection reports was changed, so that, instead of just maintaining one book in the vehicle to be used for night- and day-shift drivers to write their reports, now night-shift drivers would maintain their own separate book, and day-shift drivers would have their own. Joseph also pointed out that, in addition to the vehicle inspection reports, drivers used a log book to record their hours, and that, while a log book is generally kept with the vehicle, a separate log was also maintained in the drivers' room. Oftentimes, he contended, he, as well as other drivers, would make their vehicle inspection report entries in the drivers' room log book. He was never disci-

[23] He explained that he began filling out the vehicle inspection reports after mid-January on becoming involved with the Union because he did not want to give the Respondent an excuse to take action against him for his union activity by claiming he was not filling out the report. (Tr. 257.) Rea further claimed that another employee, Kevin Jewel, told him in December 2006 that he too was not filling out his vehicle inspection reports.

[24] The vehicle inspection books apparently contain about a 30-day supply of receipts. Thus, once an entry is made in the book, a copy of the entry slip is torn out and turned in at the end of the workday, while the book presumably remains with the vehicle.

plined for doing so, nor, to his knowledge, was any other driver.

The complaint alleges that Goodsell's termination was motivated by antiunion considerations and, thus, unlawful. Goodsell, as noted, was a Local 24 supporter. Thus, he signed an authorization card for Local 24, and distributed cards to other employees to sign. Goodsell's credited and undisputed account of how Adkins told him the Respondent believed he, along with Rea and Confere were responsible for bringing in the Union, supports a finding that the Respondent knew Goodsell supported, and was active on behalf of, Local 24. Evidence of Respondent's antiunion animus was fully discussed in connection with the analysis of Confere's and Rea's termination and will not be repeated here. On these facts, I find that counsel for the General Counsel has met her initial *Wright Line* burden of showing that Goodsell's termination was discriminatorily motivated by antiunion reasons.

The Respondent's claim, that Goodsell was lawfully terminated for damaging the quarter fender on one of its trucks, and for falsifying a report, lacks credible evidentiary support and amounts to nothing more than a pretext. Thus, it produced no evidence to show that Goodsell was responsible for causing the damage in question. Marszalkowski, who made the decision, did not have personal knowledge of how the truck was damaged or who might have done so. His hearsay testimony reflects only that employee King, who did not testify, reported the damage to him. Marszalkowski, however, never claimed to have been told by King that the latter actually witnessed Goodsell damage the truck. Rather, Marszalkowski simply assumed that Goodsell had done so because Goodsell had driven the truck just prior to King's alleged discovery of the damage. Indeed, Marszalkowski's description of what King told him, to wit, that because Goodsell had driven the truck earlier that day, he "must have been the person that damaged the truck," makes clear that King did not know for certain, and also simply assumed, that Goodsell was responsible for the damage. (Tr. 51.)

Goodsell, as noted, denied damaging the truck, and Joseph's testimony, which went unchallenged, that he noticed the damaged quarter fender on the vehicle in question a day before Goodsell last drove it on March 20, supports Goodsell's denial, and suggests that someone other than Goodsell may very well have caused the damage. Marszalkowski made no attempt to question other employees who may have driven the truck before March 20, or anyone else for that matter, before abruptly terminating Goodsell, without explanation or affording him an opportunity to defend against the charge. Such an inquiry, which presumably would have included questioning Joseph since the latter was also employed as a driver, would, at a minimum, have raised a doubt in Marszalkowski's mind as to Goodsell's culpability for the damaged quarter fender. Marszalkowski's rush to judgment regarding Goodsell's alleged responsibility for the truck's damage, without so much as a cursory inquiry into how the damage occurred or who might have caused it, and based on nothing more than an unsupported assumption, convinces me that the damage to the truck had nothing to do with Goodsell's discharge, and that Marszalkowski, as he did with Confere and Rea, simply used this as one of various excuses to rid himself of another Local 24 adherent.

Goodsell's alleged falsification of the vehicle inspection report is another of the pretextual reasons used by Marszalkowski to justify Goodsell's discharge. No evidence, however, was produced by the Respondent to show that any such falsification of a report by Goodsell occurred. While Goodsell, as noted, admittedly failed to record the damaged quarter fender in the vehicle inspection report and in his duplicate book, his conduct in this regard was more one of omission or neglect, and not of intentionally falsifying the vehicle inspection report by including something therein that he knew or had reason to believe not to be true. Goodsell's failure to record the damage in the vehicle's inspection book or report, however, does not appear to be dischargeable offense for, as Joseph credibly pointed out, this was not uncommon among employees and, to his knowledge, no one has ever disciplined or discharged for failing to do so. No evidence, documentary or otherwise, was produced by the Respondent to contradict Joseph's claim, or to show that it has, in the past, discharged other employees for failing, like Goodsell, to record an entry in the vehicle inspection report. Nor did it explain why, having ignored or implicitly condoned similar infractions by other employees in the past, it now chose to terminate Goodsell, in part, for this alleged infraction. This unexplained disparity in treatment supports a finding that Goodsell's failure to record the damage in the vehicle inspection report, as well as the Respondent's unsubstantiated claim that he falsified a report, are nothing more than pretexts designed to mask the true reason for his discharge, Goodsell's union activity.

Finally, Goodsell's termination letter cites "failing to follow DOT requirements," presumably stemming from his failure to record the damage in the vehicle inspection report, as an additional reason for his discharge. Notably, Marszalkowski, in his testimony, mentioned only that Goodsell "was terminated for falsifying reports and damaged Company property," but did not mention his alleged failure to follow DOT requirements, as a reason. This too, however, is nothing more than a pretext.

According to Marszalkowski, DOT Regulation 396.11 requires that "any damage to a vehicle "must be reported" and, under company policy, the failure to do so is a "termination" offense.[25] Review of the regulation in question, however, does not fully support Marszalkowski's assertion, for the regulation does not appear to require the reporting of *any* damage found on a vehicle, but rather that which would "affect the safety of

[25] A copy of the Federal regulation in question, 49 CFR § 396.11, was not produced at the hearing. I take judicial notice of 49 CFR § 396.11, which requires a driver of a motor vehicle subject to this regulation to "prepare a report in writing at the completion of each day's work" which should cover at least the following parts and accessories of the vehicle: Service brakes including trailer brake connections; parking (hand) brake; steering mechanism; lighting devices and reflectors; tires; horn; windshield wipers; rear vision mirrors; coupling devices; wheels and rims; emergency equipment. The regulation further provides that the report "shall identify the vehicle and list any defect or deficiency discovered by or reported to the driver which would affect the safety of operation of the vehicle or result in its mechanical breakdown. If no defect or deficiency is discovered by or reported to the driver, the report shall so indicate."

operation of the vehicle or result in its mechanical breakdown." The regulation does not list a "quarter fender," often referred to also as a "splash guard," as one of the items that must be reported on a daily basis, nor is it clear that a cracked or broken quarter fender is the type of damage referred to in the regulation that would affect the safety operation of the vehicle itself or lead to a mechanical breakdown. Respondent's own director of safety and security/risk management, Harold Ferenczi, called presumably, in part, to bolster Marszalkowski's assertion, did not do so. Rather, he testified, contrary to Marszalkowski, that a broken quarter fender is not covered under Federal DOT regulations, but did proffer that this is something that might be covered under a State DOT regulation.[26] Marszalkowski's claim, therefore, that Goodsell's failure to record the broken quarter fender in his vehicle inspection report violated DOT regulation 396.11 is simply not supported by a plain reading of the rule in question, and, moreover, is contradicted by Respondent's own safety director, Ferenczi.

Thus, like the other reasons cited for his discharge, Goodsell's failure to record the damaged quarter fender in the vehicle inspection report amounts to nothing more than a pretext designed to cover up the true reason for his Goodsell's termination, to wit, his union activity. Accordingly, I find that the Respondent has failed to rebut counsel for the General Counsel's prima facie showing that Goodsell was terminated for his union activity, and that Goodsell's discharge was, consequently, unlawful and a violation of Section 8(a)(3) and (1) of the Act. .

2. The Toledo facility

a. The alleged 8(a)(1) conduct

Paragraphs 13(a) and (b) of the complaint alleges that on or about March 20, admitted Toledo Facility Supervisor Lee unlawfully interrogated employees about their union sympathies or activities, and created the impression that employee union activity was being kept under surveillance. Alleged discriminatees J. Ulch and Wilson provided testimony regarding these allegations, and other conduct that, while not specifically alleged in the complaint, were raised and addressed at the hearing.

J. Ulch worked as a second shift dockworker at the Toledo facility from January 2005 until terminated on March 21, allegedly for "unsafe forklift operation." (Tr. 61; GC Exh.-8.) He first began discussing the need for a union with other employees in September 2006, explaining that the discussion was prompted by employee complaints that their medical bills were not being paid, and that they were being asked to drive faulty trucks and trailers. He claims that on one occasion in September 2006, as he and employee Jason Peck were openly discussing the union near the dispatch office, Supervisor Gruic cautioned them that if Dotson were to hear them discussing the union, they would be fired like some other employees who were terminated a few years earlier by Marszalkowski for similar conduct. (Tr. 448.) J. Ulch also testified to another incident that occurred around Labor Day 2006, in former Toledo District Manager Lach's office. He recalled being in Lach's office to turn in a doctor's note justifying his 2-day absence from work.

J. Ulch contends that once in Lach's office, Lach phoned Joe Baker, head of operations at the LaSalle facility to clarify the matter. Baker apparently had received an e-mail from Gruic stating that J. Ulch had been seen at a football game on the 2 days he was off work. During that phone conversation, J. Ulch informed Baker that he had not been at a football game, and had turned in a doctor's note to Lach justifying his absences. Baker seemed to accept the explanation, but then began questioning J. Ulch about ongoing union activities, including what he knew about the "Vote Union 20" comment that had been found written on freight. J. Ulch denied responsibility for the writings, but did admit he and other employees were discussing the union. Baker told J. Ulch that he did not want to hear any more talk about union activities or about the Union. J. Ulch contends he then stopped talking about the Union, but resumed his union discussions with employees in early 2007 when Local 20 began its organizing drive at the Toledo facility. (Tr. 452–453.)

On Saturday, March 17, J. Ulch attended a Local 20 meeting and signed a Local 20 authorization card that day. J. Ulch testified, without contradiction, that when he reported for work around 1:30 p.m., Monday, March 19, OS&D supervisor, Tim Ulrich,[27] approached him at the timeclock and asked how the Union was going. J. Ulch replied it was going fine. Ulrich then asked J. Ulch to help him find some freight in a trailer and the latter agreed. Once inside the trailer, Ulrich again asked how the Union was going, and when J. Ulch repeated things were fine, Ulrich asked how many people had shown up, presumably referring to the Saturday union meeting. J. Ulch replied that some 5–10 persons had attended. Ulrich then asked how many dockworkers had attended, and J. Ulch identified himself, his father M. Ulch, and Wilson. Ulrich further asked J. Ulch if he was going to try and get the other dockworkers to support the Union, and J. Ulch answered yes. J. Ulch named some of the employees he was going to talk to about the Union, including one Paul Whitman, to which Ulrich replied, "[G]ood luck with Paul Whitman." Ulrich also asked if any of the truckdrivers had joined the Union. It is unclear from his testimony if J. Ulch responded to this latter question. (Tr. 462–463.) Ulrich did not testify. Accordingly, J. Ulch's uncontested account of his conversation with Ulrich is credited.

J. Ulch also testified that, at the end of his shift on Monday, March 19, as he was about to clock out, Supervisor Lee came up and asked him how the union drive was going, and whether he had enough people to vote the Union in. J. Ulch replied that he believed he had. Lee then told J. Ulch that Dotson and Gruic appeared to have overheard him (J. Ulch) talking to

[26] Ferenczi testified that such a provision can be found in Ohio's DOT regulations, but not in the Indiana's DOT regulations. No documentary evidence, such as a copy of the Ohio DOT regulation, or a citation to where the State regulation can be found, was produced.

[27] J Ulch's description and characterization of Ulrich as OS&D supervisor was not challenged or denied by the Respondent. Accordingly, I find Ulrich was, at all times relevant herein, a statutory supervisor as defined by Sec. 2(11) of the Act.

truckdrivers, dockworkers, and other former employees about the Union, and cautioned J. Ulch to be careful. (Tr. 467.)

The following day, March 20, J. Ulch was also questioned about his union activities by Supervisor Bateson. He testified, without contradiction, that as he was clocking in to begin work that day, Bateson, like Lee and Ulrich the day before, asked him how the union campaign was going, and how many people were involved. J. Ulch replied he was not sure, but that it numbered somewhere between 5–15. Bateson then asked if the Union was promising them anything, to which J. Ulch replied that no promises were being made. Bateson continued probing, asking if the Union was promising raises, and J. Ulch again replied it was not, and that the Union only agreed to try and help employees with their medical bills. Bateson then told J. Ulch to let him know if the Union offers them more money because he really did not want to be a supervisor and preferred being back on the dock. (Tr. 468.)

Wilson also worked as a dockworker at the Toledo facility from July 2005 until discharged on March 21, allegedly for being a "substandard employee." (See GC Exh.-10.) He testified that around August 2006, he took part in discussions with other employees about getting a union to represent them to help employees address issues relating to their medical bills and their hourly wage rate. Wilson claims that some 2 months later, around Thanksgiving time 2006, he spoke with Lee in the dispatch office about the unpaid medical bills he was receiving, told him that other employees were having similar problems with their bills, and commented to Lee that something had to be done, explaining to Lee that he wanted the facility to become unionized. Lee, according to Wilson, complained that he too was having problems with his medical bills, and that others had already complained about their bills not being paid. Wilson claims that he then personally spoke to fellow employees about getting Local 20 to represent them. (Tr. 542.) The record reflects that Wilson signed an authorization card on Local 20's behalf on March 17, just days before being discharged. (GC Exh.-19.)

Wilson testified to having a conversation with Lee in the Toledo facility lunchroom, but could not recall if it occurred on March 18, 19, or 20, but was sure it was on 1 of those days. Lee, he recalled, asked him how the March 17, union meeting had gone. When Wilson answered it had gone fine, Lee asked if many people had attended. Lee told him not too many had attended, but that, hopefully, there will be many more at the next meeting. (Tr. 553.)

Lee, who, as noted, voluntarily left the Respondent's employ in November, was called to testify by counsel for the General Counsel. Lee's testimony, for the most part, corroborated J. Ulch's above account and, moreover, provided some insight into the nature, as well as Respondent's awareness, of the union activity at the facility. Lee testified that, prior to March 21, there was much talk going on among employees at the Toledo facility and at other facilities about the Union, and about the organizational activity going on at the LaSalle facility. He recalled first hearing about the organizing activity at the LaSalle facility from Richfield facility driver, Rial Finney. Finney, he recalled, told him when the organizing activity at LaSalle was just commencing, that employees at that facility had petitioned for a Board election because they were fed up with the situation involving the nonpayment of medical bills and other matters occurring at the Company. Lee testified, without contradiction, that the next day, he told Dotson about his conversation with Finney.

Lee recalled having three more brief conversations with Finney. The second such conversation occurred the following evening. Finney purportedly told him that, on his return to the Richfield facility, he was stopped by Marszalkowski at the front gate and taken to the office. During the third conversation with Finney, Lee contends he told the latter how he was told by Gruic and others that the Respondent had promised to, within 90 days, give employees up to $4 raises, and pay all their medical bills. Gruic, Lee recalled, told him he had been told of this by Marszalkowski at a meeting in the breakroom. The fourth and last discussion he purportedly had with Finney occurred several weeks later during which he recalled telling Finney that the promise of wage increases and payment of medical bills within 90 days had also been made to employees at the Respondent's Columbus and Cincinnati, Ohio facilities. Lee claims that on learning about the promises being made to employees, he spoke with one Ward, the Cincinnati facility manager, who confirmed that such a meeting took place with Marszalkowski during which the latter promised that all medical bills would be paid, and up to $4 raises for employees within 90 days. (Tr. 766–768.)

As to the Toledo facility, Lee claimed that, in late February, he saw the words "Local 20" and "Union Yes" scrawled in the breakroom bathroom wall, and was fully aware, as of February, that J. Ulch, M. Ulch, and Wilson were personally involved in union activities. (Tr. 751.) In this regard, Lee testified that, at one point, an unidentified driver came to him and said these three individuals needed to stop discussing the Union. Lee did not say whether this individual was simply another employee or a member of management, or whether the union conversations purportedly engaged in by J. Ulch, M. Ulch, and Wilson, and presumably overheard by this unidentified individual, occurred away from or at the Toledo facility. Lee explained that employees in the past had been terminated for discussing union matters, and that, consequently, employees should avoid engaging any such discussions. (Tr. 751–752.)

Lee testified that he spoke with J. Ulch soon after receiving this message from the unidentified driver. He recalled telling J. Ulch how drivers had alerted him to the fact that the dock employees were talking more than any of the other drivers about the Union, and then cautioned him to watch what he said because "people have been known to be terminated . . . for being involved with the union if they are talking too much about it." (Tr. 754.) J. Ulch, he contends, mentioned to him that employees had contacted a union business agent and they were in the process of arranging a meeting for employees. Lee recalled having two additional conversations with J. Ulch, the first, consistent with the latter's testimony, took place right after the union meeting referenced by J. Ulch. Lee testified that as J. Ulch was about to clock out for the day, he asked J. Ulch how the meeting had gone, and if they had been able to convince other employees to attend the meeting. The next conversation, Lee contends, occurred right before J. Ulch was termi-

nated, around March 10 or so. He recalls telling J. Ulch, and also Wilson who approached them as they were chatting, that the union at the LaSalle facility had won the Board election. (Tr. 760.) As to Wilson's claim that Lee also questioned him on how the March 17, union meeting had gone, Lee was never asked to confirm or deny this particular allegation. I credit Wilson and find that Lee, as he did with J. Ulch, questioned Wilson about the union meeting, and whether it was well-attended by employees.

Discussion

Complaint paragraph 13 is directed at Lee's questioning of J. Ulch and Wilson on how the union meeting had gone and how much employee support the Union had. The evidence, as discussed above, makes clear that the questioning indeed occurred as testified to by J. Ulch and Wilson. Thus, there is no evidence that the relationship between Lee on the one hand, and J. Ulch and Wilson on the other, was anything other than a working one. Neither J. Ulch or Wilson, for example, described Lee as a friend, and nothing in Lee's testimony suggests otherwise. The questioning of J. Ulch and Wilson, as noted, occurred in the workplace, Lee's having taken place by the timeclock as he was leaving work, and Wilson's in the lunchroom. In neither case did Lee explain to J. Ulch or Wilson how he knew they had attended the union meeting, and why he needed to know how the meeting had gone or how much support the Union already enjoyed. Nor is there any indication in their respective testimony regarding these incidents to suggest that Lee assured J. Ulch or Wilson that he was questioning them in his personal capacity and not as a supervisor acting on Respondent's behalf and with its approval. There is likewise no evidence to indicate that J. Ulch and Wilson were, at that point in time, open and overt in their support of Local 20.[28] In these circumstances, I find Lee's questioning of J. Ulch and Wilson, without explanation or justification, about their attendance at the union meeting and as to the amount of support Local 20 enjoyed, constituted an unlawful interrogation, and, moreover, unlawfully created the impression that the Respondent was keeping its employees activities under surveillance. By engaging in such conduct, the Respondent, through Lee, violated Section 8(a)(1) of the Act, as alleged.[29]

Counsel for the General Counsel also contends that similar questioning of J. Ulch by Ulrich as he was about to begin his shift on March 19, and by Bateson on March 20, on how the union organizing was going, and how many employees had shown up at the union meeting a few days earlier, was also unlawful. While not specifically alleged as independent violations in the complaint, this conduct was raised and litigated at the hearing. The Respondent offered no evidence to contradict J. Ulch's claim that they occurred, nor did it bother to question J. Ulch regarding these matters. Counsel for the General Counsel, as noted, moved, without objection, to conform her pleadings to proof, which motion was granted. I find the allegations are properly before me for consideration, and, moreover, that they are not time barred under Section 10(b) of the Act,[30] for the alleged misconduct by Ulrich and Bateson are, in my view, closely related to the allegations set forth in complaint paragraphs 13(a) and (b). Thus, both Ulrich's and Bateson's interrogations and related comments were directed at J. Ulch, who was the recipient of the virtually identical coercive comment directed at him by Lee. Ulrich's questioning of J. Ulch, as noted, occurred on the same day as Lee's unlawful interrogation of J. Ulch, while Bateson's questioning of J. Ulch occurred the following day. Both sets of allegations, to wit, that set forth in complaint paragraphs 13(a) and (b) and those raised at the hearing involving Ulrich and Bateson, involve the same legal theory, e.g., unlawful use of coercive interrogations and creating an impression of surveillance in order to undermine em-

[28] Although J. Ulch had been open about his support for the Union in September 2006, he ceased his prounion activity after being directed by Baker back then to do so.

[29] The Respondent, on brief, contends that it should not be found liable for Lee's misconduct given the latter's admission at the hearing that he talked to employees about their union activity on his own and that management had not instructed him to do so. Tr. 822. Lee did, in fact, further testify, in response to questioning by me, to being told "several times" not to ask employees about their union activities, although he never identified who gave him such instructions. Tr. 852. Lee's above admissions, however, the reliability of which I find highly suspect, do not absolve the Respondent of liability for his coercive comments. Lee, as noted, was not the only supervisor to engage in coercive conduct towards employees. As found above, at the Richfield facility, two of Respondent's highest management officials, Marszalkowski and B. Hartmann, as well as supervisor Adkins, engaged in conduct as, if not more, coercive than that engaged in by Lee at the Toledo facility that included, inter alia, threatening employees with plant closure, loss of jobs, and discharge for engaging in union activity. Indeed, like Lee, Marszalkowski, as noted, unlawfully questioned Confere about his views on the Union and as to how he intended to vote. Clearly, if Lee was instructed not to talk to employees about their union activities, said instructions either were not conveyed, or intended to apply, to other managers or supervisors like Marszalkowski, B. Hartmann, and Adkins, or they were simply ignored with the Respondent's tacit approval. While I doubt, given the similar unlawful conduct engaged in by Lee's superiors Marszalkowski and B. Hartmann, and by supervisor Adkins, that Lee was instructed not to talk to employees about their union activity, I am convinced that, even if he did receive any such instruction, it came with the proverbial "wink and a nod," for Lee apparently ignored the instruction without repercussion. In these circumstances, I find the Respondent is indeed liable for Lee's coercive comments to J. Ulch and Wilson.

[30] Sec. 10(b) of the Act provides in pertinent part that "no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." The Board, however, permits unfair labor practice allegations that are otherwise time barred by the 6-month limitations period in Sec. 10(b) of the Act to be litigated if they are legally and factually closely related" to allegations of a prior timely filed charge. *Carney Hospital*, 350 NLRB 627 (2007), citing *Redd-I, Inc.*, 290 NLRB 1115 (1998). Under *Redd-I*, as clarified in *Carney Hospital,* supra*,* the Board considers the following three criteria to determine if an otherwise untimely allegation is sufficiently related to a timely allegation so as to allow it to be added to the complaint: (1) whether the timely and the untimely allegations involve the same legal theory; (2) whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge; and (3) "may look" at whether a respondent would raise the same or similar defenses to both the timely and untimely allegations. *Earthgrains Co.*, 351 NLRB 733 (2007).

ployee support for the Union. Further, the Respondent's defense to these additional allegations would be no different than what would be required of it to defend against the 8(a)(1) allegation involving Lee. Accordingly, I find the allegations involving Ulrich and Bateson are not "time barred," and conclude, based on J. Ulch's undisputed and credited testimony, that Ulrich and Bateson, like Lee, unlawfully interrogated J. Ulch about his attendance at the union meeting, and created the impression his union activities were being kept under surveillance. In so doing, the Respondent, through Ulrich and Bateson, further violated Section 8(a)(1) of the Act.

b. The 8(a)(3) conduct

(1) Jason Ulch's termination

J. Ulch, as noted, was terminated on March 21, either for his union activities, as claimed by counsel for the General Counsel, or justifiably for operating a forklift in an unsafe manner, as argued by the Respondent. The facts surrounding his discharge are as follows.

J. Ulch arrived for work at 1:30 p.m. on March 21, a rainy day, he recalled, and was approached by Ulrich who told him Marszalkowski was coming to the facility later that day to "probably" get rid of Lach. A few hours later, around 5 p.m., Ulrich notified him that Lach had indeed been fired, and that, if anything else happens at the dock, to call him (Ulrich) at home and let him know. Ulrich's work shift ended around 5 p.m. J. Ulch continued the work he was doing of "breaking down" two trailers, which essentially involved removing freight from the trailers using a forklift to sort and store it in various areas of the terminal for shipment to other terminals. J. Ulch testified that during the loading process, he was having some difficulty getting his forklift to function properly due to some problem with the dock plate which the forklift had to travel over. He recalled that on two separate occasions, this particular problem caused his forklift to spin its tires, but that he was able to maneuver the forklift adequately and continue with the loading. As he was doing so, J. Ulch recalled seeing Marszalkowski and Dotson in the dock area hiding behind freight and observing what was going on, conduct which he found somewhat unusual as he had not seen either of them engaging in such behavior in the past.

Soon thereafter, he responded to a call from Gruic over the intercom asking for a dockworker to come to the front office. Once at the office, Gruic handed him a bill and told him that a pickup truck sitting out by the ramp needed to have a skid loaded onto it. With bill in hand, J. Ulch left the office, went to his forklift and proceeded to load the skid on the truck. As he was doing so, he noticed Marszalkowski standing alongside another dockworker, Jeff Whitaker, watching him. After loading the truck, J. Ulch had difficulty making it up the ramp to the dock on the forklift because the rain had made the ramp wet and slippery. J. Ulch then asked Whitaker to get him a skid to add additional weight to the forklift and give him the traction needed to go up the ramp. After getting up the ramp, J. Ulch returned to the trailer he had been breaking down before being called by Gruic.

Soon after returning to the trailer, Marszalkowski approached and asked what he was doing. J. Ulch explained what he was doing, and continued working. J. Ulch claims that at one point in his unloading process, as he was exiting the trailer to come down the ramp, his forklift got hung up on a damaged portion of the dock plate which bridges the path between the dock and the trailers. According to J. Ulch, most of the dock plates at the facility are damaged and unsafe, and curled up at their sides. J. Ulch simply backed the forklift back into the trailer and drove the forklift out using the center portion of the dock plate. At one point, J. Ulch contends, Marszalkowski came to him and asked what was taking so long with a particular trailer. J. Ulch jokingly replied that Marszalkowski could help him by preparing the bills for him. Marszalkowski simply looked at him and told J. Ulch to get off the forklift and come to the office, that he was being terminated immediately for "spinning your tires."

Once inside the office, and with Dotson also present, Marszalkowski asked J. Ulch how his name was spelled. The latter replied that he had been working at the facility long enough and that Marszalkowski already had his file before him and should know how to spell his name. Marszalkowski replied by calling J. Ulch an "asshole." Marsalkowski then asked Dotson to go out and make copies of the termination papers. When Dotson left to make copies, J. Ulch asked Marszalkowski why "you guys got to be backstabbers and two-faced" since he, J. Ulch, had done so much for the Company. Marszalkowski, at that point, jumped out of his seat and yelled to J. Ulch, "Get the fuck out of here now. Get the fuck out of my office." (Tr. 484.) J. Ulch recalls at one point asking Marszalkowski for a copy of his termination paper, and the latter telling J. Ulch that he "wasn't fucking getting one."[31] Dotson had apparently returned by then, at which time Marszalkowski instructed Dotson to escort J. Ulch off the premises. J. Ulch asked Dotson if he could make a quick phone call before he left, but he was told no. On his way out, Wilson came up to him and asked what had happened, that he had heard yelling, and J. Ulch told him he had just been fired and that Wilson would be next. J. Ulch then asked Wilson to phone his brother, Kenny Ulch, and have him come and pick him up. As he waited outside for his brother to arrive, J. Ulch asked Dotson why he was being fired, and Dotson replied that he had no control over it, that it had come from "someone higher above."

Marszalkowski provided some testimony regarding J. Ulch's discharge. He admits being present at the Toledo facility that day to terminate Lach and to observe the operation. At the time of his arrival around 6 p.m., there were four dockworkers present—J. Ulch, M. Ulch, Wilson, and another individual not identified by Marszalkowski, but presumably Whitaker. Marszalkowski testified that he decided to discharge J. Ulch after purportedly witnessing J. Ulch operating the forklift in an unsafe manner. As described by Marszalkowski, J. Ulch "drove the tow motor" of the forklift "over the top, actually almost airborne as fast as it could go, flipped the lever in reverse" causing the tires "to spin completely backwards." As he did so, J. Ulch, Marszalkowski contends, "smiled and thought it was awfully funny." According to Marszalkowski, J. Ulch was

[31] J. Ulch's termination notice was, as noted, received into evidence as GC Exh.-8.

putting on a show for him. Asked if J. Ulch was discharged for reasons other than his "unsafe forklift operation," Marszalkowski answered, somewhat ambiguously, that J. Ulch's termination letter should also have included "damaging the equipment," e.g., the forklift, as a reason for the termination. Asked if J. Ulch was then also terminated for damaging equipment, Marszalkowski evasively answered, "He should have been, but that wasn't put in there at the time." (Tr. 62.)

Discussion

Regarding J. Ulch's discharge, counsel for the General Counsel has, I find, made a strong prima facie showing that J. Ulch's termination was motivated by antiunion considerations. J. Ulch, as previously discussed, was an active Local 20 supporter prior to his discharge, having attended union meetings, signed an authorization card, and solicited signed cards from other employees on Local 20's behalf. The record also makes clear that the Respondent was fully aware of his union sympathies when it fired him on March 21. Thus, Supervisors Ulrich, Lee, and Bateson all questioned J. Ulch about his attendance at the union meeting on March 17, making clear that they either knew or had reason to suspect, that J. Ulch was involved with the Union. To the extent they may have doubts about his attendance at the union meeting before questioning him, those doubts clearly dissipated when J. Ulch, on further questioning by these supervisors, disclosed how many individuals had attended the meeting or the level of support enjoyed by the Union. Further, J. Ulch credibly testified to being told by Lee that Dotson and Gruic had overheard him, J. Ulch, talking to employees about the Union. Although present in the courtroom, Dotson was not called to refute or deny the claim made by Lee to J. Ulch that he, Dotson, had overheard J. Ulch discussing the Union with other employees, and thus must have known of J. Ulch's union involvement and sympathies. As already discussed above in connection with the discharges of Confere, Rea, and Goodson, there is substantial record evidence of the Respondent's strong antiunion animus. On these facts, I find that counsel for the General Counsel has met her initial *Wright Line* burden of proving that J. Ulch's discharge was motivated by antiunion reasons.

The Respondent contends that J. Ulch was lawfully terminated for operating a forklift in an unsafe manner, notably for causing the tires to spin which, it points out, J. Ulch readily admitted doing.[32] While J. Ulch did admit that the tires on his forklift spun on the day in question as he was loading freight, he credibly explained that the spinning of the tires was inadvertently caused by the wet and slippery ramp and the damaged dock plates. No evidence was produced to dispute J. Ulch's description of the weather conditions that day or the poor condition of the dock plates.

The question that needs answering is whether this inadvertent spinning of the tires constitutes an unsafe operation of the forklift, such as to render J. Ulch's conduct a "safety violation" under Respondent's rules. The Respondent, on brief, readily admits no evidence was produced by either party on the definition of, or what constitutes, a "safe/unsafe forklift operation." (R. Br. 11.) It contends, however, that the burden of proof on this question rests with counsel for the General Counsel. The Respondent is clearly mistaken in this regard, for under *Wright Line*, supra, the burden of proof, once a prima facie case has been established by counsel for the General Counsel, as I have found has occurred here, shifts to the Respondent to demonstrate by a preponderance of credible evidence, that its discharge of J. Ulch was done for reasons unrelated to his union activity. Thus, it was incumbent on the Respondent, not counsel for the General Counsel, to show that the spinning of the forklift tires constitutes a safety violation for which discipline, including discharge, would be warranted.

The Respondent readily concedes, on brief, that it "failed to establish [J. Ulch's] operation as unsafe via expert testimony." (R. Br. 10.) The Respondent, however, did not need an expert witness to makes its case, for it could simply have produced other witnesses to testify, or documentary evidence (warnings, discharges, etc.) to show, that it has, in the past, disciplined or discharged employees for similar conduct. Such evidence might have gone a long way towards rebutting counsel for General Counsel's prima face case. No such evidence, or for that matter any evidence, other than Marszalkowski's dubious claim of what he observed J. Ulch doing with the forklift, was produced to establish any misconduct by J. Ulch. The most than can be said is that, as credibly testified to by J. Ulch, the tires on his forklift spun inadvertently while traveling over a wet, slippery, damaged dock plate. No evidence, as admitted by the Respondent, was produced to show that his conduct in this regard amounted to a violation of its safety rules. Accordingly, I find that the Respondent has not rebutted counsel for the General Counsel's prima facie case, and that J. Ulch's termination was unlawful and a violation of Section 8(a)(3) and (1) of the Act.[33]

[32] The Respondent, on brief, cites to its "Employee Conduct and Work Rules" which define "Safety Violations" as including, inter alia, "Failure or refusal to follow safety policies, standard safety practices, or safety instructions from management," and "actions that might endanger yourself, another person, or company property or equipment." See R. Exh.-19. R. Exh.-19 provides that engaging in such behavior may subject an employee to "disciplinary action within our work environment, up to and including suspension/termination."

[33] Other factors point to the alleged "safety violation" defense as nothing more than a pretext. Thus, while not mentioned in the termination letter as a reason for the discharge, Marszalkowski in his testimony, as noted, suggested, somewhat ambiguously, that J. Ulch was also terminated for causing damage to the forklift. No evidence was produced to show what, if any, damage may have been caused by J. Ulch to the forklift. This strikes me as nothing more than a posthoc attempt by Marszalkowski to beef up his rather weak explanation for terminating J. Ulch, rendering it pretextual. *Aljoma Lumber, Inc.*, 345 NLRB 261 (2005). Further, J. Ulch, as noted, testified, credibly and without contradiction, to being told by Dotson, as the latter was escorting him out of Marszalkowski's office immediately following the termination, that the decision to fire him had come from higher up, suggesting implicitly that the decision to terminate may have been arrived at even before the alleged "tire spinning" incident had occurred. Finally, it is worth noting that, in addition to firing J. Ulch, Marszalkowski also fired M. Ulch and Wilson the same day for, as discussed and found below, their union activities, thereby decimating practically its entire evening shift of dockworkers which was comprised of only four employees. The termination of these three union support-

(2) Steven Wilson's termination

Wilson began work at 1:30 p.m. on March 21, the day he was fired. Like J. Ulch, Wilson was operating a forklift that afternoon, moving tires from the dock area to a trailer scheduled for Cincinnati. He too noticed Marszalkowski and Dotson hiding behind some freight and spying on him and other dock employees. At one point, Marszalkowski and Dotson approached and asked him how much longer he would be with the work he was doing. Wilson replied that he had just gotten started, and that it was going to take a while longer. Both Marszalkowski and Dotson then left his area and walked over and stopped J. Ulch who was on the forklift. He next saw J. Ulch going into the office. Wilson claims he entered the office a short while later to ask for some help with the tires, and saw J. Ulch walking down the forklift ramp followed by Marszalkowski and Dotson. As J. Ulch went by him, the latter asked him to call his brother, at which point Marszalkowski angrily ordered Wilson back to work. Wilson did return to work, and after finishing with the tires, went to lunchroom where he encountered Gruic. Wilson asked Gruic if he could take his lunch break before he got fired. Wilson explained that he believed he was about to be fired because of his union activity. On leaving the lunchroom, Wilson went to the timeclock to punch in, and, soon thereafter, was approached by Marszalkowski and Dotson who told him they needed to see him in the office.

Wilson then met with Marszalkowski and Dotson in Lach's office. Once inside, Wilson was asked to sit down and, on doing so, was met with silence from Marszalkowski and Dotson who simply stared at him for a minute or so. After this staring event, Dotson stood up and Marszalkowski informed Wilson that he was being terminated. When Wilson asked why, Marszalkowski stated he could not give Wilson a reason at that time, at which point Wilson and Marsalkowski shook hands. Marszalkowski and Dotson then escorted Wilson out of the facility and watched as he entered his automobile and drove away. Wilson was not given a termination letter when fired, although, as noted, a termination letter was, in fact, prepared and received into evidence as General Counsel's Exhibit-10, listing "substandard" performance as the reason for the discharge.[34] Although dated March 21, it is unclear when the termination letter was prepared.

Marszalkowski's testimony regarding Wilson's discharge was limited only to confirming that the discharge occurred on March 21, and that it was for the reason stated in the termination letter. He did not deny any of the assertions made by Wilson regarding the events preceding the discharge, or the statements attributed to him by Wilson, including the latter's claim that Marszalkowski declined, without explanation, to give him a reason for the termination at that time. Wilson's undisputed testimony regarding his discharge and the events preceding it is credited.

Discussion

Wilson is alleged in the complaint to have been discharged for his union activities. Undisputed evidence makes clear that Wilson was a Local 20, supporter, having signed a union authorization card just 2 days before being discharged. He credible, and without contradiction, testified to being questioned by Lee about his attendance at the union meeting a few days before his termination, and to telling Lee how the meeting had gone. Clearly, from this conversation, and from Wilson's admission to Lee several months earlier around August 2006, that he favored having a union, Lee would have known of Wilson's prounion sympathies. Wilson also revealed his union sympathies to Lach when, in early March, he complained about being asked to watch an antiunion video which he viewed as slanderous to the Union. Evidence of Respondent's animus towards the Union and its supporters has previously been described in connection with the unlawful, union-related terminations of Confere, Rea, Goodsell, and J. Ulch and will not be repeated here. On these facts, I find that counsel for the General Counsel has satisfied her initial *Wright Line* burden and shown that Wilson's discharge was motivated by antiunion considerations.

The Respondent, as briefly testified to by Marszalkowski, claims it lawfully discharged Wilson for being "a substandard employee" with performance and absenteeism problems. (Tr. 68.) In support of the discharge, the Respondent produced an "Employee Discussion Form" which is used to record the various infractions or violations of company rules committed by an employee. (R. Exh.-17.) This particular form lists all infractions or violations purportedly committed by Wilson during a 20-month period beginning "7/19/05" to "3/21/07." Among the infractions listed in Respondent's Exhibit-17 are "improper loading," "damaging freight," "taking extended lunchbreak," "sexual harassment" and related allegation, "failure to count freight," "accidents/crashes," and excessive absenteeism. Shown Respondent's Exhibit-17, Wilson was able to recognize the document but had difficulty recalling the specific incidents set forth therein.

Marszalkowski testified that the Respondent maintains a progressive disciplinary policy which calls for issuance of an initial letter of instruction, followed by a warning letter, then a final warning letter, and finally a letter of termination. Managers have some latitude in determining how many letters of instructions to issue before proceeding to a warning letter, but may, depending on the nature of the infraction, issue a warning letter without first issuing a letter of instruction. According to Marszalkowski, the Respondent maintains different tracks for different offenses. For example, attendance infractions are kept on one track, infractions involving production-related work, such as damaging freight or improper loading of freight, would be on different tracks. Thus, the nature of the violation will determine which track will be used in applying the progressive disciplinary policy. Marszalkowski also testified that while the Respondent does not have a set period of time after which an infraction will be removed from an employee's file or no longer

ers on the same day, shortly after their attendance at a union meeting and after being subjected to coercive interrogations by their supervisors, was, I am convinced, no mere coincidence, but rather part of the Respondent's plan to defeat any attempt to unionize the facility.

[34] GC Exh.-10 goes on to describe Wilson's substandard performance as consisting of "multiple occasions of improper loading, damaging company property, unexcused absences, and excessive absenteeism," which "offenses," the letter further avers, "are documented in Mr. Wilson's personnel file."

considered under the progressive disciplinary policy, he did admit that, informally, infractions more than a year old are generally not considered. (Tr. 32, 35.)

The Respondent's claim that it fired Wilson for being a "substandard" employee simply does not withstand scrutiny. The discharge was not the result of anything Wilson had done that day, or recently, but rather for what the Respondent would have me believe was his overall poor performance as an employee. It points to three separate warnings purportedly issued to Wilson wherein he is cautioned that further similar infractions could lead to his suspension and/or termination.[35] It is true that, as shown in Respondenet's Exhibit-17, Wilson had a history dating from July 19, 2005, to March 8, 2007,[36] of committing a variety of different work-related infractions. It is equally true, however, that the Respondent, at no point prior to March 21, viewed his overall performance/attendance problems to be sufficiently serious as to merit his termination, for it obviously allowed him to continue working following the warning issued to him 2 weeks earlier for mishandling freight containing hazardous material. The fact that he was not terminated on March 8, for the "mishandling freight" warning suggests that the Respondent was not overly troubled by this infraction, at least not to the point of discharging him. The Respondent has offered no explanation as to why, having allowed Wilson to continue working despite these past infractions, it chose to abruptly terminate Wilson on March 21, without providing a reason or explanation for doing so. The record reveals that the only intervening events of any significance between the warning issued to him on March 8, and his discharge on March 21, was Wilson's attendance at the March 17, union meeting, his signing of a union card for Local 20, and his coercive interrogation by Lee about his the union meeting just days before the discharge.

As to Respondent's claim that Wilson was fired pursuant to its progressive disciplinary policy, there are sound reasons for doubting its assertion. Thus, the record, as noted, shows that the last discipline imposed on Wilson before his March 21, termination was the warning letter issued to him on March 8, allegedly for mishandling some hazardous material. In that letter, the Respondent cautioned Wilson that "[a]ny further instances of this nature will result in further disciplinary action leading up to and including suspension and/or termination." Clearly, the Respondent chose not to terminate him for this infraction but instead simply warned him that a future infraction of this kind might very well result in his termination. As stated, however, there is no evidence to indicate that Wilson engaged in any kind of misconduct or committed any other type of infraction between March 8 and 21. Similarly, in the two warnings referenced by the Respondent in its brief, Respondent's Exhibit-16 issued December 29, 2006, and Respondent's Exhibit-18 issued January 20, 2007, the Respondent again warned that future "improper loading" infractions might result in a suspension and/or termination. There is no evidence that, during the 3-month period between the January 20, 2007 warning issued to him and his termination, Wilson committed any other "improper loading" infraction.

As to his absenteeism infractions (R. Exh.-17), the employee discussion form, shows only that Wilson was issued a warning letter on March 1, 2007, for excessive absenteeism. It also contains a notation showing that, on February 27, 2007, Wilson had an unexcused absence for calling in 1 hour before the start of his shift, but does not reflect if he was issued a letter of instruction or a warning for this incident. In essence, therefore, all Respondent's Exhibit-17 shows regarding Wilson's alleged absenteeism problem is that, from July 19, 2005, to March 21, 2007, a period of some 20 months, Wilson only received one warning on March 1, 2007, for excessive absenteeism. The March 1, 2007 warning letter was not produced by the Respondent. Thus, it is not known if, under Respondent's progressive disciplinary system, the March 1, 2007 warning was intended as a first, or final, warning letter. It is nevertheless patently clear from Respondent's own documentary evidence, to wit (R. Exh.-17), that Wilson's, at most 2 days of absences, on February 27 and again on March 21, during a 20-month period hardly fits the description of an "excessive absenteeism" problem. No evidence was produced by the Respondent to show how it defined "excessive absenteeism," or to show that other employees with a similar absentee record as Wilson's were treated in like manner, e.g., suspended or discharged for missing work twice in an almost a 2-year period. I am convinced no such evidence was produced because none exists.

As the only evidence produced by the Respondent shows that Wilson's absenteeism from work amounted to, at most, 2 missed days of work, it is highly unlikely that the Respondent was following its progressive disciplinary policy when it discharged him, in part, for this reason. Thus, under that policy, Wilson would have had to receive an initial letter of instruction, an initial warning letter, a final warning letter, and finally a termination letter for his alleged excessive absenteeism which, by implication, suggests he would have had to have at least three absences before being subject to termination. Clearly, he did not, as the Respondent's records show, at most, only two absences for Wilson during a 20-month period, and no evidence was produced to show he received anything other than the one written warning issued to him on March 21. In light of the above, I am convinced, and so find, based on the near total lack of evidence showing Wilson had an "absenteeism" problem, that the Respondent's claim of having discharged Wilson, in part, for his alleged "excessive absenteeism" and "unexcused absence" problem is nothing more than a pretext intended to hide its true reason for the discharge, his union activities.

In sum, neither Wilson's alleged "excessive absenteeism" nor his "improper loading" infractions could have been factors

[35] See, R. Exhs.-16, -18 and GC Exh.-34. R. Exh.-16 is a warning issued to Wilson on December 29, 2006, more than 3 months before his discharge for "misloaded freight." R. Exh.-18 is a warning issued to him on January 20, 2007, again for "misloading freight." GC Exh.-34, however, cited by the Respondent on brief (p. 17) as another warning presumably issued to Wilson, is, in fact, a warning issued to Bill Lee, and not to Wilson. GC Exh.-34, therefore, has no relevance to Wilson's discharge.

[36] The next-to-last entry on R. Exh.-17 shows a notation of a "warning letter" purportedly having been issued to Wilson on "3/8/07," Wilson recalls receiving this warning but refusing to sign it. The warning allegedly was issued for mishandling freight labeled hazardous material and containing sulfuric acid. See GC Exh.-22.

in his termination. As to the former, the Respondent's own documentary evidence fails to show that Wilson had an "absenteeism" problem, or that he ever received the requisite cautions and/or warnings called for by Respondent's progressive disciplinary prior to being terminated. As to the "improper loading" infractions, the most recent one issued to him prior to his discharge, as stated, occurred on March 8, for mishandling some hazardous material freight. However, this infraction led only to him being cautioned against "further instances of this nature." The Respondent produced no evidence to show that from March 8, when he was issued this warning, to March 21, when he was discharged, Wilson committed any such infraction, or any other infraction for that matter. Clearly, something other than some workplace infraction by Wilson, or his nonexistent absenteeism problem must have triggered Respondent's rather rash decision to terminate him on March 21. As stated, the only intervening events that occurred during this period were Wilson's decision to attend the union meeting and sign a union card on March 17, and his unlawful questioning by Lee regarding his attendance at that meeting a day or so before the termination. In these circumstances, and given the pretextual and/or false reasons proffered by Respondent for terminating Wilson, I find that Wilson's discharge was motivated solely by his activities on behalf of Local 20, and thus violated Section 8(a)(3) and (1) of the Act.

(3) Merle Ulch's termination

M. Ulch worked as a dockworker from 5 p.m.–5 a.m. at the Toledo facility from sometime in 2006 until fired on March 21, for, according to the Respondent, "insubordination," or, as more explicitly spelled out in his termination letter, "violence in the workplace." (GC Exh.-9; Tr. 67.)[37]

M. Ulch appeared to have been one of the employees most responsible for trying to bring in the Union. Thus, he testified, without contradiction, that on March 14, 1 week before being discharged, he contacted Local 20 on his own and spoke with Local 20 organizer, Norm Lewallen, about obtaining representation at the Toledo facility. After discussing the matter with Lewallen, M. Ulch signed a Local 20 authorization card and took other blank cards to hand out to other employees. M. Ulch explained that he and other employees sought out the Union because they were having problems at work, including unsafe working conditions, and their inability to get their hospital and other medical bills paid because Respondent was not paying its share of the premiums.

M. Ulch recalled that sometime after his March 14, union meeting and before his March 21, discharge, he and Supervisor Lee were talking in the dispatch office when Lee asked him how the Union had gotten started at the Toledo facility, and how it was proceeding. At one point during that conversation, Lee mentioned that employees at the Cleveland facility were about ready to vote in a union. (Tr. 724.) Lee, as noted, claims he learned of M. Ulch's involvement with Local 20 sometime in February.

M. Ulch testified to an incident that occurred on March 8, several days before he contacted the Union, and which the Respondent claims was the basis for his eventual termination on March 21. Thus, on March 8, there was spill of sulfuric acid at the facility resulting in the fire department being called, which, in turn, summoned a HAZMAT team. At the time of the spill, M. Ulch was assigned to load a truck situated right next to the spill site. M. Ulch proceeded to load the truck despite experiencing a burning in his eyes, a sore throat, an upset stomach, and drowsiness presumably due to the acid fumes and his proximity to the spill as he performed his work. On completing his assignment, M. Ulch approached Gruic in the dispatch office and complained about his symptoms. Gruic, he contends, was reluctant to let him leave to obtain treatment for his symptoms, at which point M. Ulch told Gruic, and others who were there at the time, that he was not quitting, but was going to punch out because he was sick and was going to the hospital.

M. Ulch did in fact go straight to the hospital. The following day, M. Ulch returned to work with a hospital slip showing he had been treated at the Toledo Hospital Medical Center, which he handed to Lach. (GC Exh.-32.) Lach, M. Ulch claims, told him that Gruic had written him up presumably for leaving work early the night before, but that, since M. Ulch had gone straight to the hospital and had a hospital slip to prove it, the writeup would be rescinded. According to M. Ulch, he was never disciplined for this particular incident.

Gruic testified that on the day of the acid spill, he was out on the dock talking with J. Ulch somewhere between 5–7 p.m., when Wilson, who was in the process of unloading a straight truck, dropped a box as he was backing out of the truck. Wilson, he contends, simply picked up the box and set it aside near a pole. A few minutes later, the box began leaking some liquid which began to smoke as it touched the concrete floor. On

[37] Marszalkowski identified GC Exh.-9 as M. Ulch's termination letter. The letter is somewhat ambiguous and confusing as to the precise reason for M. Ulch's termination. The letter, for example, cites "3) insubordination" as a grounds for the discharge, but then contains the following brief narrative under the subsection "9) OTHER" purporting to explain the reason(s) for the discharge: "Express violence in the workplace, gross insubordination and leaving the workplace without permission. On 3/8/07 Merle Ulch threatened Outbound Supervisor Greg Gruic while using aggressive and profane language in response to a question that was asked by Greg Gruic. Merle Ulch then said he was ill and punched out and left the terminal. This is in direct violation of company policy and Merle Ulch was terminated. He was told his services were no longer needed because of the Violence in the work place." Thus, while the letter states, on the one hand, that M. Ulch's "leaving the work place without permission" was a factor in his termination, the last sentence in the narrative, on the other hand, suggests that his early departure from work on March 8, may not have been a factor since it reflects that M. Ulch was told only that his "services were no longer needed because of the Violence in the workplace." This apparent ambiguity was not explained by Marszalkowski during his limited testimony. Nor is it clear who may have prepared GC Exh.-9, for Marszalkowski never claimed to have done so. The document does contain what appears to be the signature of a supervisor. Marszalkowski, however, was unable to identify who the signature belonged to, admitting that it was not his. Further, while the letter is dated "03/21/07," no evidence was produced as to when it was prepared. Marszalkowski, it should be noted, never claimed to have given, shown, or read the contents of the termination letter to M. Ulch when discharging him on March 21. (Tr. 66.)

noticing a puddle forming on the floor, Gruic instructed Wilson to clean up the spill. Wilson, he contends, declined to do so because it was "hazardous" material, at which point J. Ulch agreed to do it.

Some 10 minutes later, the fire department arrived, explaining they had received a call about a hazardous material spill. Gruic escorted the firemen to the location of the spill and, on reviewing the site, purportedly told Gruic that "it looks like you guys are doing the right job, but let's go ahead and call somebody." Gruic proceeded to call Respondent's safety director, John Ferenczi, who instructed Gruic to call in a cleanup crew. Gruic did so, and about a half hour later, a member of the cleanup crew showed up and finished cleaning the spill. (Tr. 1002.)

According to Gruic, later that evening, around 9 p.m., he called out over the PA system, as he did nightly, for employees to bring him their bills. M. Ulch, he contends, showed up about one half hour later with his bill, and Gruic asked what took him so long. M. Ulch purportedly threw his bills on the counter and walked away as if nothing had happened. Gruic then asked M. Ulch what was wrong, and the latter replied that he was sick and was going home. When Gruic asked what he (M. Ulch) was so "pissed off about," M. Ulch purportedly replied, "This Company's messed up, this is bullshit. If you're going to get on my case, why don't you get on everybody's case because everybody else is working just as slow as I am." Gruic asked M. Ulch what he was talking about, and M. Ulch allegedly answered, "If you keep pushing me, you're going to regret it," pointing his finger at Gruic as he did so. M. Ulch, he recalled, looked at everyone in the break room and said, "I'm sick, I'm going to go home. I'm sick. You guys all hear this, right? I'm sick." M. Ulch then punched out and left. Gruic claims that M. Ulch did not seem sick to him, and did not receive permission to leave work early. Gruic made no mention in his testimony of having issued M. Ulch a warning or taking any other disciplinary measure against him for leaving early, or for his conduct and "you're going to regret it" comment to Gruic. Nor was any documentary evidence produced to show that M. Ulch was cautioned, warned, reprimanded, or otherwise disciplined for his alleged misconduct on March 8.

Lach worked for Respondent from August 2005, through March 21, when, as noted, he was fired from his district manager position at the Toledo facility. He testified he first heard that the Toledo employees had contacted a union on March 19, from an employee, Rick Estes, who informed him of a union meeting which had been held the previous Sunday. The following day, March 20, before leaving the facility, Lach sent B. Hartmann a voicemail telling him that "the Union problems were progressing at Toledo, and we needed someone higher up to come out and talk to them," presumably referring to employees. Lach was terminated the following day by Marszalkowski who, according to Lach's undisputed and credited account, simply approached Lach as he sat in his office and told him, without explanation, "Clean out your desk, you're fired."

Regarding M. Ulch's March 8, incident when the latter left work complaining of fumes-related medical problems, Lach was not at work that day and, consequently, had little to say as to what may have occurred. He did, however, testify that he did not discipline M. Ulch for leaving work early that day. He explained that he had been trained, presumably by the Respondent, that if an employee already at the facility reports being sick either before beginning a work assignment or after completing one, it was his practice to let the sick employee go home. Lach claims that, based on what he had been told, M. Ulch had completed his assignment when he asked to leave the facility and, for this reason, did not feel discipline was justified. He further expressed the view that M. Ulch's subsequent termination was not warranted. Lach made no mention in his testimony of having told M. Ulch about a writeup prepared by Gruic, nor, for that matter, was Griec asked if he had prepared any such writeup on M. Ulch, as M. Ulch claims he was told by Lach.

Unlike Lach, Lee did witness the exchange between Gruic and M. Ulch on March 8. Lee testified that on arriving to work March 8, he observed chaos on the dock, and that the rear part of the dock had been quarantined and cordoned off by HAZMAT personnel due to the acid spill. The spill was apparently in the process of being cleaned up when he arrived. Later that evening, Lee saw M. Ulch enter the breakroom with some bills in his hand reflecting that he had just finished unloading a trailer. As M. Ulch entered the room, Gruic asked the latter if he had the bills from another trailer that had been loaded, and M. Ulch replied he had, and that he was in the process of writing up the bill for the other trailer. Gruic, Lee contends, told M. Ulch that he would have to unload the other trailer to find out what had been loaded and to ensure that the correct freight was put on, even though M. Ulch told him he had the bills reflecting what had been loaded. M. Ulch, according to Lee, became upset and told Gruic he was going home, that he was feeling sick from having to help clean up the acid spill, and was going to the hospital. Gruic insisted that M. Ulch remain and get the work done so that the drivers could get out. M. Ulch replied that he was leaving for the hospital and would bring back a hospital slip in the morning to confirm his visit. Although he admits that M. Ulch was angry at being asked by Gruic to unload a trailer truck, in his version of the exchange between Gruic and M. Ulch, Lee makes no mention of seeing M. Ulch point his finger at Gruic or say to him, "If you keep pushing me, you're going to regret it," as testified to by Gruic. M. Ulch, as noted, likewise made no mention of it in his testimony. Rather, Lee's testimony appears to be more in line with M. Ulch's version of the incident, than with Gruic's. I credit M. Ulch's account and find that he never implicitly or otherwise threatened Gruic by pointing his finger at Gruic and telling him he would regret it if he, Gruic, kept pushing him.

On the day he was fired, M. Ulch, like J. Ulch and Wilson, recalled seeing Marszalkowski and Dotson hiding behind some freight observing him and others working. At the time, he did not know who Marszalkowski was, but apparently learned later that day who he was from J. Ulch. He recalls at one point seeing some police officers in the main office. Wilson approached him a bit later and told him J. Ulch had just been terminated and that he, M. Ulch, was next. M. Ulch then returned to work and, some 20 minutes later, Marszalkowski approached him, told him to shut down his equipment, and to follow him to Marszalkowski's office. Once there, Marsazlkowski remarked,

"You probably know what this is," referring to M. Ulch's termination, to which the latter replied, "yeah," and then asked for a reason for his termination. Marszalkowski told M. Ulch that his position was no longer needed, and then angrily instructed him to "just punch out and get the fuck off the property." M. Ulch left the premises at that point. M. Ulch claims he never received or was shown a copy of his termination notice. As Marszalkowski did not refute M. Ulch's version of his discharge meeting, I credit M. Ulch's account and find Marszalkowski simply told him, in response to his query on why he was being fired, that M. Ulch's position was no longer needed. Marszalkowski, I find, made no mention of the March 8, events between M. Ulch and Gruic at the former's discharge meeting.[38] I also credit M. Ulch and find he was never given or shown a copy of his termination notice.

Discussion

Applying a *Wright Line* analysis to M. Ulch's discharge, I find that counsel for the General Counsel has made a prima facie showing that M. Ulch's discharge was unlawfully motivated by antiunion considerations. M. Ulch, as noted, was one of Local 20's initial proponents and supporters. He credibly explained that he visited Local 20's office on his own to obtain information on how to obtain representation, signed an authorization card on its behalf, solicited others to do so, and attended union meetings. The record, in particular, Lee's undisputed testimony, makes clear that the Respondent was fully aware of M. Ulch's involvement with Local 20 as early as February, one month before terminating him. It is equally clear, as already pointed out above in connection with the unlawful, union-motivated terminations of Confere, Rea, Goodsell, J. Ulch, and Wilson that the Respondent harbored animosity towards the Union and its supporters, and was determined to eliminate the union threat by ridding itself of its more ardent supporters.

The Respondent has proffered mixed reasons for terminating M. Ulch. Thus, at the hearing, Marszalkowski stated that M. Ulch was terminated for expressing violence in the workplace by telling Gruic on March 8, that he was "going to knock him on his ass." Asked if this was the sole reason for M. Ulch's termination, Marszalkowski answered that it was.[39]

Several factors point to Marszalkowski's explanation as being nothing more than a pretext. First, Marszalkowski himself never witnessed the incident, so that his claim as to what M. Ulch may have said to Gruic on March 8, is obviously based on second-hand information. Marszalkowski, however, never identified who may have reported this incident to him, or when. Gruic, for his part, never claimed to have informed Marszalkowski of what occurred on March 8, between him and M. Ulch. Second, according to Gruic's account, what M. Ulch said to him was that "[i]f you keep pushing me you're going to regret it." Gruic never claimed that M. Ulch threatened to "knock him [Gruic] on his ass," as testified to by Marszalkowski. Third and foremost, M. Ulch, as found above, credibly denied threatening Gruic, either as described by the latter, and much less as testified to by Marszalkowski, whose testimony in this regard, I find, to be a pure fabrication given the inconsistency between his and Gruic's account, and his failure to identify who reported the incident to him, or when he first learned of it.

Further, notwithstanding Marszalkowski's claim that M. Ulch was terminated only for threatening Gruic on March 8, the Respondent, on brief, avers that M. Ulch was also discharged for "leaving the workplace without permission," referencing in support thereof General Counsel's Exhibit-9, the termination letter. (R. Br. 11.) Again, there are several problems with this particular explanation. First, it is inconsistent with Marszalkowski's admission at the hearing that M. Ulch was discharged solely for his alleged threat to Gruic on March 8, and not for leaving work early that day. These inconsistent explanations proffered by the Respondent and by Marszalkowski for M. Ulch's termination strongly support an inference that they are pretextual in nature and not the true reason for his discharge. *Roosevelt Memorial Medical Center,* 348 NLRB 1016 1030 (2006); *GATX Logistics, Inc.,* 323 NLRB 328, 335 (1997). Second, and as previously discussed (see fn. 37, supra), the termination letter itself is ambiguous as to the reasons for the termination, as it implicitly suggests, contrary to the Respondent's proffer on brief, that M. Ulch's early departure from work on March 8, was not a factor in his termination. Third, any reliance by the Respondent on the termination letter to explain M. Ulch's discharge is misplaced, as there is strong reason to question, if not doubt, its authenticity and reliability. Thus, no evidence was produced to show who authored or prepared it, or when it was prepared. Incredulously, Marszarlkowski, who terminated M. Ulch, never identified who prepared the document, when it was prepared, or whose signature appears as supervisor on the letter. As noted, M. Ulch credibly testified that General Counsel's Exhibit-9 was never read, shown, or given to him before his discharge, an assertion that was not disputed by Marszalkowski. M. Ulch's further claim that he was only told he was no longer needed without being given an explanation credibly contradicts the unsubstantiated statement in the discharge letter that he was told he was being

[38] It is unclear how or when Marszalkowski first learned of the March 8 incident, for he never provided any such explanation during his limited testimony on M. Ulch's discharge. Nor did Gruic claim to have informed Marszalkowski of the incident. Indeed, when asked on cross-examination if an assertion made by Lach, that he, Gruic preferred discussing the operations of the Toledo facility with Marszalkowski rather than with Lach, Gruic answered that he did not think Lach would have said such a thing because, Gruic readily explained, "I don't talk to Tim [Marszalkowski]." Gruic's admission, that he did not speak with Marszalkowski during his employment at the Toledo facility, and Marszalkowski's statement to M. Ulch that he was being let go because he was no longer needed, leads me to question whether Marszalkowski was even aware of the March 8 incident when he discharged M. Ulch on March 21.

[39] A review of his answer to counsel for the General Counsel's question on whether this was the only reason for the termination shows Marszalkowski responding, "Correct. That's why Mr. Lach was terminated." Tr. 67. It is clear from the record that Marszalkowski misspoke when he mentioned Lach, for he was at the time being questioned as to the reasons for M. Ulch's, not Lach's, termination, and that the question which preceded his above-described answer related directly to M. Ulch's discharge. There is nothing in the record to suggest that Lach was fired for the same reason.

let go because of his alleged "[v]iolence in the workplace." The various inconsistencies and discrepancies surrounding General Counsel's Exhibit-9, along with its rather dubious and unexplained origin, render it of little or no value on the question of M. Ulch's termination, and thus offers no support for the Respondent's stated explanation for the discharge.

As to the Respondent's claim on brief that M. Ulch was also terminated for leaving work early without approval on March 8, this too does not withstand scrutiny, for, according to Lach's credited and undisputed testimony, employees who became ill at the workplace either before or after completing an assignment were generally not penalized for leaving work early. Lach opined, based on his knowledge of what occurred, including the fact that M. Ulch had completed his assignment before leaving work on March 8, that disciplining M. Ulch for doing so that day would not have been justified. In fact, M. Ulch, who came in the following day with a document confirming his visit to the hospital the night before, was never disciplined for leaving work early. The Respondent's decision, therefore, some 2 weeks after the fact, to terminate M. Ulch purportedly for leaving work early without authorization on March 8, after declining to do so on the day in question, strikes me as purely pretextual. See *Traction Wholesale Center, Inc.,* 328 NLRB 1058, 1073 (1999). I find, instead, that neither M. Ulch's leaving work early on March 8, nor his alleged insubordinate behavior towards Gruic that day, which I have already found did not occur, were factors in M. Ulch's termination. As the Respondent has failed to provide a legitimate reason for M. Ulch's termination, it follows that it has not overcome counsel for the General Counsel's prima facie case. Accordingly, I find that M. Ulch's termination was, as alleged in the complaint, discriminatorily motivated by his union activities and, consequently, a violation of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Mid-States Express, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Teamsters, Local No. 20 and Freight Drivers, Dockworkers and Helpers Local Union No. 24, a/w International Brotherhood of Teamsters are labor organizations within the meaning of Section 2(5) of the Act.

3. By threatening to close its facilities and with job losses if employees chose the Unions to represent them, threatening to discharge employees because they supported the Unions, coercively interrogating employees, creating the impression that it was keeping their union activities under surveillance, soliciting employee grievances, and promising to resolve them, promising to improve the employees' benefits to dissuade them from supporting the Unions, and interfering with the right of individuals to distribute union literature on public property by calling the police, the Respondent violated Section 8(a)(1) of the Act.

4. By terminating Richfield facility employees Shawn Confere, Justin Rea, and David Goodsell for their activities on behalf of Local 24, and Toledo facility employees Jason Ulch, Merle Ulch, and Steven Wilson for their activities on behalf of Local 20, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, 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.

To remedy its unlawful discharge of employees Shawn Confere, Justin Rea, David Goodsell, Jason Ulch, Steven Wilson, and Merle Ulch Jr., the Respondent shall be required to offer them, within 14 days from the date of the Order, reinstatement to their former positions or, if their positions no longer exist, to substantially equivalent positions, without prejudice to the rights and privileges they previously enjoyed.

The Respondent will also be required to make the above-named employees whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of a 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).

The Respondent shall further be required to, within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges and, within 3 days thereafter, to notify the above employees, in writing, that this has been done and that the discharges will not be used against them in any way.

Finally, the Respondent shall be required to post an appropriate notice to employees.[40]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[41]

ORDER

The Respondent, Mid-States Express, Inc., Toledo and Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering, restraining, or coercing employees in the exercise of the rights afforded them under Section 7 of the Act by threatening to close its facilities and put employees out of work if they selected the Union to represent them, threatening to discharge employees for supporting the Union, interrogating employees about their union activities, creating the impression it is keeping their union activities under surveillance, soliciting

[40] I find it unnecessary to require the Respondent, as requested by counsel for the General Counsel on brief, to post the notice at all of the Respondent's facilities, not just at its Richfield and Toledo, Ohio facilities. Nor do I find it necessary to require the Respondent to mail copies of the notice to former employees who were employed at the Richfield and Toledo facilities during the relevant time period herein, or to have the contents of the posted "Notice to Employees" read aloud to employees at those facilities, as I find the standard posting requirements are sufficient satisfy the Board's remedial purposes.

[41] 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.

and promising to resolve employee grievances to dissuade them from supporting the Union, promising to improve their benefits if they withdrew their support for the Union, and by interfering with their right to handbill on public property by calling the police.

(b) Discharging or otherwise discriminating against any employee at its Toledo, Ohio facility for supporting International Brotherhood of Teamsters, Local No. 20, or at its Richfield facility in Cleveland, Ohio, for supporting Freight Drivers, Dockworkers and Helpers Local Union No. 24, a/w International Brotherhood of Teamsters, or for supporting any other union.

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

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

(a) Within 14 days from the date of the Board's Order, offer Shawn Confere, Justin Rea, David Goodsell, Jason Ulch, Merle Ulch, and Steven Wilson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Shawn Confere, Justin Rea, David Goodsell, Jason Ulch, Merle Ulch, and Steven Wilson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

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

(e) Within 14 days after service by the Region, post at its facilities in Cleveland (Richfield) and Toledo, Ohio, copies of the attached notice marked "Appendix."[42] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 15, 2007.

(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.

[42] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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 interfere, restrain, or coerce you in the exercise of your above-described rights by threatening to close our facilities and put employees out of work if they choose to have a union represent them, threaten to discharge you for supporting a union, interrogate you about your union activities, create the impression that your union activities are being kept under surveillance, solicit your grievances and promise to remedy them, or promise you increased benefits, to dissuade you from supporting a union, or interfere with your right to distribute union literature on public property by calling the police.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting International Brotherhood of Teamsters, Local No. 20, or Freight Drivers, Dockworkers and Helpers Local Union No. 24, a/w International Brotherhood of Teamsters, 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 this Order, offer Shawn Confere, Justin Rea, David Goodsell, Jason Ulch, Merle Ulch, and Steven Wilson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Shawn Confere, Justin Rea, David Goodsell, Jason Ulch, Merle Ulch, and Steven Wilson whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Shawn Confere, Justin Rea, David Goodsell, Jason Ulch, Merle Ulch, and Steven Wilson, 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.

MID-STATES EXPRESS, INC.