

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

ECOLOGY SERVICES, INC.; ECOLOGY  
SERVICES CURBSIDE COLLECTION  
SERVICES, LLC; ECOLOGY SERVICES  
ANNE ARUNDEL COUNTY CARTAGE, LLC;  
A Single Employer

and

PAULA WARREN

and

RICHARD HUNTER

Cases 5-CA-35334,  
5-CA-35381, and  
5-CA-35538

*Johnda D. Bentley, Esq. and Shannon Rogers,  
Esq.*, for the General Counsel.  
*Gary L. Lieber, Esq. (Ford and Harrison, LLP),*  
of Washington, D.C., for the Respondent.  
*Paula Warren*, Charging Party.  
*Richard Hunter*, Charging Party.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. These cases were heard by me on July 28-30 and September 1, 2010, in Baltimore, Maryland, pursuant to a charge filed on October 14, 2009, by Charging Party Paula Warren (Warren) against Ecology Services, Inc. (the Respondent) in Case 5-CA-35334. Warren also filed another charge against the Respondent on January 22, 2010, in Case 5-CA-35538. On November 5, 2009, Charging Party Richard Hunter (Hunter) filed a charge against Ecology Services, Inc., in Case 5-CA-35381.

On March 31, 2010, the Regional Director for Region 5 of the National Labor Relations Board (the Board) issued a consolidated complaint against Ecology Services, Inc.; Ecology Services Curbside Collection Services, LLC; Ecology Services Anne Arundel County Cartage, LLC, a single employer (the Respondent), alleging that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). On April 14, 2010, the Respondent timely filed its answer to the complaint, essentially denying the commission of any unfair labor practices and asserting certain affirmative defenses.

At the hearing, the parties were represented by counsel and were afforded a full opportunity to be heard, examine and cross-examine witnesses, and introduce evidence. On

the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs<sup>1</sup> filed by the General Counsel and the Respondent, I make the following.

## Findings of Fact

5

### I. Jurisdiction

10 The Respondent admits that collectively Ecology Services, Inc., a Maryland corporation; Ecology Services Curbside Collection Services, LLC, a New Jersey limited liability company; and Ecology Services Anne Arundel County Cartage, LLC, a New Jersey limited liability company) have been at all material times affiliated business enterprises with common offices, ownership, directors, management, and supervision; have formulated and administered a common labor policy, and have held themselves out to the public as a single-integrated business enterprise.<sup>2</sup>

15

20 The Respondent also admits that at all material times, collectively through its affiliated businesses, it has maintained an office and place of business in Pasadena, Maryland; and that it has been engaged in the collection and disposal of refuse and recycling materials. The Respondent further admits that during the 12 preceding months it, by and through its affiliated business entities and their respective business operations, performed services in excess of \$50,000 from its Pasadena, Maryland facility for Howard County (Maryland) and other customers directly involved in interstate commerce. The Respondent also admits that during the same 12 preceding months, in conducting its business operations by and through its affiliated businesses, it purchased and received at its Pasadena, Maryland facility goods and services valued in excess of \$50,000 from locations outside the State of Maryland.

25

The Respondent admits, and I would find and conclude, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

30

---

35 <sup>1</sup> Charging Parties Warren and Hunter appeared at the hearing but were not represented by counsel, and they did not file briefs. Warren and Hunter were given full opportunity to testify and otherwise participate in the proceedings but elected to defer to the General Counsel's prosecution of the case.

35

40 <sup>2</sup> The General Counsel and the Respondent's counsel at the hearing entered into a joint stipulation which, inter alia, requested that no finding be made that the Respondent and its business affiliates constitute a "single employer" as alleged in par. 2(b) of the complaint. Respondent has stipulated and agreed to the following:

40

45 For purposes of obtaining a remedy, Respondents agree that should the Board and or the Courts upon appeal or to obtain enforcement of an Order that Richard Hunter was terminated unlawfully and/or that Paula Warren was disciplined unlawfully, that, in such case both Ecology Services Anne Arundel County LLC and Ecology Services., shall legally serve as a guarantor of such Order, including with respect to any provisions regarding backpay and/or reinstatement should Ecology Services Curbside Collection Services be legally unable to comply with such Order. [See G.C. Exh. 1(z)].

45

50 In agreement with the General Counsel and the Respondent's counsel, I would conclude that a finding of single employer status is not necessary to resolve this litigation and if liability is determined, the Respondent's guarantee obviates the need for such a finding.

50

## II. The Labor Organization

5 The Respondent admits, and I would find and conclude, that Teamsters Local Union No. 311, affiliated with International Brotherhood of Teamsters (the Union), has been a labor organization within the meaning of Section 2(5) of the Act.

### III. Background Matters Not in Dispute

#### A. *The Respondent's Pasadena Operations*

10

The Respondent operates a refuse and recycling collection and disposal business out of several facilities, including one located in Pasadena, Maryland; the instant litigation primarily concerns matters arising at the Pasadena yard. The Respondent's headquarters is located in Columbia, Maryland, out of which Chief Executive Officer and Owner Peter Forbes Osborne during all material times managed the business.

15

20

The Pasadena yard is utilized by the Respondent to park the vehicles used in its refuse collection business, mainly pickup trucks and larger packer-type trash trucks, and to repair and maintain them. At the Pasadena yard, the employees—both management and rank and file—are allowed to park their personal vehicles in a designated area. The Respondent also at the Pasadena yard maintains a trailer which is used as an office and place where employees punch in and out at the beginning and end of their shifts.

25

The Respondent's Pasadena operations are conducted by and through a system of routes which are subdivided into discrete service areas, each of which is assigned to an individual supervisor. The Respondent's supervisors are administratively responsible to an operations manager who is responsible for coordinating the service locations, overseeing supervisor performance, and generally ensuring employee compliance with work rules; operations managers may also reassign employees. As part of their management duties, operations managers are also authorized to discipline employees, including termination.

30

35

Supervisors are essentially charged with ensuring that all collection services are performed by the employees and, using assigned pickup trucks, monitor the service routes by following the trucks and dealing with customer issues such as delayed or missed pickups or other complaints.

40

Each trash truck is manned by a driver and usually two helpers or "throwers"; a recycling truck is manned by one driver and a single helper. The Respondent's usual practice is to have each driver and the helper crew permanently assigned to the same truck and route, although on occasion drivers and helpers fill in for other drivers and helpers. In such instances, the drivers and helpers are designated floaters.

45

Drivers and helpers are required to clock in at the office trailer at the beginning of their shifts about 5:30 a.m. and in turn clock out there at the end at about 2:30 p.m. The gates to the yard however, are opened by supervisors around 5 a.m. Employees who arrive early often mill about and discuss topics of interest before punching in. Drivers are issued Nextel cell phones so as to be in constant communication with their respective supervisors and are required to call in at the end of their tour of duty. At the beginning of their shifts, drivers are required to perform an inspection of their vehicles and another after completing their routes at the end of the day.

50

The inspections take around 5 minutes if there are no problems discovered. Notably, checking the vehicles' tire pressure is a requisite for each pre-trip inspection. However, the Respondent

does not issue a tire pressure gauge for this test so drivers either kick the tires or use an implement of their choosing to check pressure.

*B. Union Activity and Collective Bargaining at Ecology Services*

5

The Union began its initial organizing effort at the Pasadena yard sometime in 2008; a Board election was held on July 30, 2008, but the Union was unsuccessful. However, the Union filed objections to the results of that election complaining of the Respondent's conduct therein. On December 12, 2008, the Board ordered a second election which took place on April 17, 10 2009. Notably, the Union's second organizing efforts began around January 2009, and continued through March up to the time of the second election. The Union won the second election and was certified by the Board in May 2009.

15

Around mid to late June into July 2009, the Union and the Respondent began negotiations for a collective-bargaining agreement and designated certain persons for their respective sides.

20

The Union designated James Shannon Myles, Paula Warren, Richard Hunter, and Darlene Hall; Business Agents Neil Dixon and Ken Helm completed the Union's negotiating team. The Respondent was represented by Peter Osborne; his brother and co-owner, Tim Osborne; and retained counsel Gary Lieber Esq. Around May 2010, the parties reached agreement and negotiated a contract whose terms were May 1, 2010, through April 30, 2014.<sup>3</sup>

IV. The Unfair Labor Practice Allegations

25

The Respondent is charged in the consolidated complaint with the following unlawful conduct:

30

1. On or about October 13, 2009, the Respondent threatened and coerced employees at the Pasadena facility regarding their union activity by promulgating a rule that prohibited employees from discussing union activity, their wages, hours, and working conditions; and by threatening the employees with discipline or discharge if they engaged in union or other protected activity, in violation of Section 8(a)(1) of the Act;

35

2. On or about sometime in September 2009, the Respondent unlawfully issued an order to alleged employee Paula Warren requiring her to go directly to her truck in the morning;

40

3. On or about October 13, 2009, the Respondent unlawfully ordered employee Paula Warren to leave work immediately at the end of each shift;

4. On or about August 21, 2009, the Respondent unlawfully denied employee Richard Hunter his quarterly bonus; and

45

5. On or about August 25, 2009, the Respondent unlawfully terminated employee Richard Hunter, all in violation of Section 8(a)(1) and (3) of the Act.

50

---

<sup>3</sup> See GC Exh. 2, a copy of the parties' collective-bargaining agreement.

*A. The General Counsel's Witnesses*

The General Counsel called a number of witnesses to establish the Respondent's unlawful conduct and its unlawful treatment of its employees, Warren and Hunter.

5

Paula Warren testified that she has been employed by Ecology Services since August 2007 as a driver operating a rear loading Mack dump/trash truck; she has always worked out of the Pasadena yard. Warren said that her direct supervisor at the time of the April 2009 election was Deon Manns; Warren noted that Shanta Turner was the operations manager at the time and that Manns reported to her.

10

Warren stated that she is a current member of the Union, first becoming involved with it around April 2008 when she was introduced to the Union's president, Neil Dixon, by a coworker; at the time the Union was then attempting its first organizational effort.

15

Warren recalled an incident involving one of the Ecology Services operations managers, Mel Morales, prior to the first election scheduled for July 30, 2008. Warren said that one day she and a coworker had gone to a local restaurant where the employees ate and cashed their checks—Jimmy G's—to try to get signatures for the union authorization cards. According to Warren, Morales was there at the time and told her and the coworker that the Company did not need a union; and said "F" the Union, and walked away.

20

Warren said that the Union lost the first election, but she maintained contact with Dixon periodically and in the run-up to the second election, she engaged in various activities supportive of the Union, including speaking to employees not employed at the time of the first election and informing them that this was a "revote" (her term) of the first election and advising them that she would pass on to the Union any questions they might have. Warren said at the time essentially she served as a "go-between" for the employees with the Union.

25

Warren also related an encounter she had with then-driver Deon Manns on April 15,<sup>4</sup> 2009. According to Warren, Manns called her that Monday in the morning and asked her if she was worried about being terminated. Warren said that she asked Manns why he was asking her about that, and Manns (to her, matter of factly) said to her, "well, you are a representative for the Union" and that was the word around the yard, that she was talking about the Union. Warren said that she responded to Manns, telling him that she was encouraging everyone to vote but not to vote yes necessarily and that they should be aware that this was a revote. Warren said that she then ended the conversation with Manns as she felt uncomfortable about a fellow driver's worrying about the possibility of her being fired. Warren said that she did not ask Manns from whom he had heard that she was a union representative.

30

35

40

Warren also recalled that on the same day of her encounter with Manns, she asked Shanta Turner, operations manager,<sup>5</sup> if she had heard anything about her being a union representative. According to Warren, Turner said that she indeed had heard this, that a couple of guys (presumably employees) had called her and told her that Warren had called them and encouraged them to get out and vote. Warren said that she then asked Turner whether the

45

---

<sup>4</sup> Warren noted that during the summer of 2009 after the second election, Manns was promoted from driver to supervisor of Area 2; he was later returned to driver status. Manns is an admitted supervisor. Warren also noted that Manns served as an observer for the Company during the morning election balloting.

50

<sup>5</sup> Turner is an admitted supervisor.

employees had told her that she had said to them to vote “yes” or to just get out and vote. According to Warren, Turner shook her head, indicating that the two employees had not said she said to vote yes, and the conversation ended. Warren testified that at that time she resigned herself to being labeled a union representative.

5

Directing herself to the Friday before the second election—April 10, 2009—Warren stated that she spoke to the Company’s president, Ruth Rilee,<sup>6</sup> inside the office trailer for about 20–30 minutes. During the course of the conversation, Warren said that she broached the subject of the need for an employee committee to address the employees’ concerns about working conditions at the Company, to include working in inclement weather and their entitlement to sick leave. Warren also recalled reminding Rilee that Pete Osborne, the owner prior to the first election, while living in New Jersey, had promised the employees that he would be more “hands on” in terms of running the business and that the employees could direct their concerns to him. Warren said that she told Rilee that the employees considered Osborne to be a liar because he had not lived up to his promise. According to Warren, Rilee said that Osborne was busy trying to straighten out the corporate office. Rilee also said that because of the imminent election she could not promise anything, either sick time or the employee committee, and the conversation ended on that note.

10

15

20

Warren recalled also that a driver, Andre Harris,<sup>7</sup> was nearby at the time and evidently overheard her conversation with Rilee and joined the discussion, saying that the truck companies do not provide sick days. Warren stated that she felt that she was defending the Union and told Harris that she (Warren) did not work for other companies, and that this (getting sick days) was what the Union could do for us at Ecology.

25

Warren testified that about a week later, by chance, she had a similar conversation with Osborne. She related that one day while fueling her truck, she noticed Osborne standing on the steps of the office trailer. After finishing the fueling, Warren said that she parked her truck and proceeded to walk up to the trailer stairs to punch out. Osborne, who was at first standing with another manager<sup>8</sup> but who by then had departed, greeted her. Warren said that she returned his greeting but proceeded to punch out. As she was leaving the trailer, Warren said that Osborne asked to speak with her and as they walked along, Osborne said, “I hear there are lots of problems, what are they?” Warren stated that she essentially repeated her conversation with Rilee, reminding him that he promised to be around more, but that the employees had not seen him. According to Warren, Osborne said that he had taken up residence locally, and that it took time to straighten out the business.

30

35

40

Warren stated that on this occasion she broached with Osborne the employee committee and sick days, the two basic issues the employees complained of. According to Warren, Osborne said that he could promise nothing because of the union vote, but that things would work out; he then shook her hand and walked away.

45

Warren also related another incident stemming from the second election and her perceived involvement with and support of the “revote.”

---

<sup>6</sup> Rilee is an admitted supervisor.

<sup>7</sup> Warren noted that Andre Harris was a company observer during the afternoon balloting for the second election. She also noted that he was promoted to supervisor after the second election.

50

<sup>8</sup> Warren identified the other manager as Harold Lane, an Area 1 supervisor. Warren recalled that Lane was promoted to operations manager after the first election.

5 According to Warren, after the second election, some of the employees were really upset about a rumor of having to work 10-hour days and believed the Union was the reason for the new hours; in fact, it was in this context that some employees had approached her, asking why she had brought the Union back. Warren said she tried to explain to them that the second election was a revote because of problems with the 2008 election, and asked who had told them that she was responsible. The employees told her that the source was Earl Johnson, a supervisor for Area 7.

10 Warren stated that she, irritated at being blamed for all of the problems in the yard, went to the office trailer to confront Johnson. When she arrived at the trailer, Johnson was not there. However, Shanta Turner and Area 1 supervisor Howard Lane were there and she asked them to convene a supervisor meeting and explain the reason for the second election, and to request that supervisors stop telling the employees that she had brought the Union back; Warren said she mentioned Johnson's alleged part in the matter to them. According to Warren, Lane said that he would speak with Johnson and told her that he sympathized with her because he had been in a union before. According to Warren, Lane also volunteered that the problem was that every time someone (employees) would speak to him about the Union, either her name, Richard Hunter's, Donald Christian's, or James Myles' names would come up.

20 Warren said that around August 19, 2009, she was able to speak to Johnson directly about the matter and specified her concerns that she was being blamed for bringing the Union back. According to Warren, Johnson said that was what he was being told.. Warren said she explained the circumstances surrounding the "revote" and Johnson thanked her for explaining things to him. Warren said they never again spoke of the matter after this conversation.

30 Directing herself to the post-election period, Warren said that she was a member of the union negotiating committee which was also composed of employees James Shannon Myles, Darlene Hall, and Richard Hunter. According to Warren, each of the employees represented the employees of the Respondent's three corporate entities. Warren and Hunter worked for Ecology Services; Myles for ESAACC, and Hall worked under the Howard County (Maryland) contract. During the period covering around May or June 2009 through April 2010, Warren said the Union and the Respondent engaged in negotiations for a contract which was ultimately executed in April 2010.

35 Turning to the complaint allegations, Warren related certain policies that were changed by the Respondent around September 2009, but seemingly applied only to her. Warren said that her usual practice or procedure at work was to go to the office trailer and clock in, and then clock out at the end of her shift. However, one day in September 2009 according to Warren, former driver Andre Harris, now promoted to be her Area 1 supervisor, informed her that once the employees clocked in, the Company wanted them to go straight to their respective trucks, that there was to be none of the usual hanging out and talking in front of the office trailer, a practice followed by the drivers who, after clocking in, would gather in front of the trailer and talk while waiting for their respective helpers to arrive.<sup>9</sup>

45 Warren stated that initially she complied with the new edict but others did not; so she resumed her practice of talking with the drivers after clocking in. Warren said that she noticed,

---

50 <sup>9</sup> Warren noted that the instruction to go directly to her truck was verbally given to her by Harris, that no notice was posted so instructing the other drivers or other employees. Accordingly, she is not sure whether other supervisors gave a similar instruction to their drivers.

however, Shanta Turner or another manager occasionally seemingly watching her, at which time Warren said she decided to move along.

5 Directing herself to October 13, 2009, Warren said that after her shift that day, Turner asked her to meet with then-operations manager Pat Dean and herself in the back of the office trailer.

10 Warren stated that at this meeting, Dean, who did most of the talking, informed her that Peter Osborne had sent an email which he was required to read to her; Dean stated that he was not allowed to answer any questions Warren might have regarding the contents of the email nor could he offer any comments; and finally, while she could not have a copy of the email, she could read it for herself. According to Warren, Turner told her she was not allowed to speak but was there only in the role of an observer.

15 Warren identified at the hearing the email read to her by Dean on October 13, 2009, which set out in six enumerated points how she was to conduct herself while employed at the Company, and that any violation of the six points would subject her to disciplinary action to include termination.<sup>10</sup> Warren said that after the email was read to her by Dean, she was not allowed to respond. Warren stated that the email really upset her and later she was told by the Union (through Dixon) that Osborne had sent him a copy of the email. According to Warren, 20 Dixon told her that the Union would file an unfair labor practice charge against Ecology Services.

25 Addressing the points set out in the mail, Warren (visibly upset at the hearing) testified that regarding union activity at the job (point #1), she told the employees to call her after work—they had her telephone number—regarding matters of concern.

30 Warren testified that because she was an active union supporter, it was her belief that management perceived her as being the one who was most responsible for the Union's ultimate success. However, she noted that she is still employed by the Company and never received a formal discipline from the Company and, in fact, has received all of the quarterly bonuses the Company awards high performing employees during her time with the Company.

35 Warren said that she was never disruptive in employee meetings (point #2), and she never gave directions to employees regarding company policy (point #3). On this later count, Warren recalled telling an employee his refusal to work at another area could result in his being written up for insubordination.

40 As to the point informing her that she did not have more rights than the other employees (point #4), Warren stated that she never harbored such feelings or possessed this attitude. Warren said that, in point of fact, she believed she had less in the way of employee rights

---

45 <sup>10</sup> A copy of the email is contained in GC Exh. 3. The email was sent by Ruth L. Rilee, president of Ecology Services, who instructed Dean to advise Warren as follows:

1. She is not to conduct union activity on the property or during work hours.
2. She is not to be disruptive in meetings.
3. She has no authority to give direction to other employees regarding our policies.
4. She has no more rights than any other employee.
5. She is to do her job, clock out and go home.
- 50 6. She is not to attempt to correct or second guess the office manager's decisions and/or instructions in front of employees.

because Osborne had told Dixon that she was not allowed to address management at employee safety meetings because she had reportedly caused a near riot at one such meeting.

5 Regarding the email's instruction that she was to do her job, clock out, and go home (point #5), Warren said that she confronted Turner on the spot, asking her when she had not done her job—pre- and post-inspections—and doing her route, and otherwise doing what she was asked of her job-wise. At this time, Warren said she complained about the policy prohibiting the employees from standing around and talking, putting an end to their camaraderie and friendship; now they could not converse with one another after work. According to Warren, 10 Dean and Turner merely nodded but said nothing in response to her.

As to the email's instruction that she was not to “second guess” the office manager's instructions to employees (point #6), Warren recalled that around this time, prior to the October 13 meeting, a driver (Chanteese Griffin) told her that her truck had been struck by another 15 vehicle. In the discussion about the matter, Warren and her then supervisor, Andre Harris, and Griffin discussed whether Griffin had to undergo a drug test because of the accident, which was not Griffin's fault. At the time, Office Manager Linda Gerber came out of the office trailer and, since Harris did not know the answer, Warren said that she asked Gerber who responded with exasperation, throwing up her hands and in a loud voice saying everyone had to be drug tested. 20 Warren stated that it was her belief that drivers were only tested when they were deemed to be at fault in accidents. Warren stated that there was no attempt to second-guess Gerber.

Richard Hunter testified that he is not currently employed, having been terminated from his last job as a driver for Ecology Services on August 24, 2009; he was first employed with the 25 Company on August 24, 2007.

Hunter stated that he was a member of the Union and served as an employee-member of the contract negotiating committee around April 2009 (after the Union's successful bid to represent the Pasadena yard employees). Hunter said that the other members of the 30 committee were fellow employees Paula Warren, Shannon Myles, and Darlene Hall; and Kenny Helm and Neil Dixon, union representatives; the Employer representatives were the owner of the business, Peter Osborne, and his brother, Tim, and their retained counsel.

Hunter said that he attended all of the regularly scheduled Wednesday negotiation 35 meetings up to the time of his discharge.<sup>11</sup> As a committee member, Hunter said that he provided information to the employees regarding the status of the negotiations and presented their questions and concerns to the committee members. According to Hunter, he spoke up at the negotiation sessions but being mindful of the requests of the union representatives and company legal counsel, he kept his participation “professional” as the parties discussed matters 40 of concern across the table; Hunter noted that on occasion the participants, while not really arguing as such, talked all at once and all were asked by legal counsel to calm down to move the negotiations along.

45

---

50 <sup>11</sup> Hunter recalled the Union's earlier election but said that he merely spoke to employees at a park gathering of employees seeking information after that election. As to the second election and its aftermath, Hunter said his activities were limited to participation in the negotiation committee.

Hunter could not recall all of the points and matters discussed in the sessions but did remember that at one of the sessions the parties agreed to the policy governing discipline at the Company and he received a copy of the policy.<sup>12</sup>

5           Turning to the complaint allegations involving him, Hunter said that the Company provided performance bonuses to eligible employees on a quarterly basis. Hunter acknowledged that in April 2008, he did not receive a bonus and was told by his then-supervisor, Mel Morales, that the reason was that he did not help out on the other routes when asked. Hunter also acknowledged that at the time he was angry over not receiving the bonus  
10 but after meeting with Morales, he believed there was nothing he could do about it.

          Hunter also conceded that he may have been holding the baseball bat he used to check his pressure on the tires of his truck during the meeting with Morales. Hunter explained that the reason he had the bat in his hands was because he probably was clearing or had cleared out  
15 his truck and when Morales walked over to speak to him about the bonus, he simply stopped what he was doing, turned around—bat in hand—and began conversing with Morales. Hunter volunteered that at the time neither he nor Morales mentioned the bat and, moreover, he never received any discipline (of any kind) over the matter.

20           Hunter stated that he also did not receive his quarterly bonus due him in April 2009; he was told that he was not going to receive one by his then-supervisor, Deon Manns. According to Hunter, Manns said that he had put him in for the bonus but that it had been denied; that Hunter would have to speak to then-operations manager Shanta Turner. Hunter said that later, he confronted Turner about the bonus and she told him that she could not disclose the reason  
25 at the time and walked away.

          Hunter stated these conversations took place on August 23, 2009. He admitted that he was unhappy about not receiving the bonus.

30           Hunter said that he reported for work the next day at his usual time—5 a.m. Hunter volunteered that while he is not permitted to clock in at that time, he is usually the first employee or one of the first to arrive when the supervisors open the gate to the yard. Hunter stated that he parks his vehicle in front of his truck to put his personal belongings in the truck, among which is a baseball bat he uses to check his tire pressure, after which he completes his pre-trip  
35 inspection of the vehicle.<sup>13</sup>

          Hunter stated that on August 24—a Monday—after inspecting his vehicle, he struck up a sports-related conversation with an employee named Donald, whose last name he did not know but, like him, was an early arrival at the yard. Hunter admitted during this conversation with  
40 Donald that he had the bat in his possession, actually resting it on his shoulder the whole of the

---

<sup>12</sup> Hunter identified GC Exh. 4, a copy of the new disciplinary policy that issued after a negotiation session on August 19, 2009.

45           <sup>13</sup> Hunter described the bat as a beat up wooden Little League bat that he had picked up on the route. Hunter went on to describe how DOT regulations instruct drivers to strike the tires of a truck with a stick or mallet to get a “bounce” off the hard rubber tires which will indicate proper pressure. It should be noted that the Company does not issue the drivers tire pressure gauges. Hunter stated that he has also seen supervisors use a shovel or broom to check their tires.  
50           Notably, Hunter said that some drivers kick the tires to test tire pressure. Hunter also stated that drivers and helpers use a stick to ward off dogs.

15–20 minute conversation.<sup>14</sup> Hunter said that while he was talking, he saw Pat Dean walk by headed toward the trailer office. Then, according to Hunter, Ray Bethune, his helper,<sup>15</sup> arrived and also proceeded to the trailer to punch in. According to Hunter, Bethune asked if he were ready to go out on the route and they left the yard. Hunter said that no one from management  
5 spoke to him about the bat that day.

Hunter said he arrived at work the next day—August 25—at his usual time and again put his belongings in his truck and proceeded to the trailer to get the truck keys. Hunter said he was refused the keys and told to meet with Turner and Area Manager Earl Johnson. Around 10  
10 minutes later, Hunter stated that he met with Turner and Johnson in the rear of the trailer, whereupon Turner informed him that he was being terminated because he had a weapon—the baseball bat—(on company property). Hunter said that he tried to explain to Turner that the bat was not a weapon and could only be used as such if one attempted to use it on or against  
15 someone; however, Turner made no response and neither did Johnson. Hunter said that he bid them a good day and left the yard, leaving the bat in the truck. Hunter said that he went home and later called the Union to inform the representatives of what had happened.

Hunter stated that he read a report of his termination authored by Osborne and discovered that he was denied his August 2009 bonus because he did not help out with the  
20 other routes. Hunter agreed that there were times that the Company needed his assistance but he did not help out. Hunter acknowledged that he had received a quarterly bonus for the first part of 2009.

Shanta Turner testified that she has been employed at Ecology Services since June  
25 2006 when she was hired as a driver, then promoted to supervisor and later to operations manager, the position she held in August through October 2009, and then back to her current position as supervisor. All of her time with the Company has been spent at the Pasadena yard.<sup>16</sup>

Turner stated that her duties and responsibilities as an operations manager at the  
30 Pasadena yard required her basically to ensure that all trucks were properly manned with drivers and helpers, all route supervisors were in place, and that all operations were carried out safely. Turner stated that she also had the authority to terminate employees and to award/deny them the Company's quarterly bonuses awarded to employees who perform their duties well  
35

---

<sup>14</sup> On cross-examination, Hunter agreed he had the bat but did not swing it from side to side, but moved it from shoulder to shoulder while conversing with Donald; he said he never placed  
40 the bat behind his neck but only rested it on his shoulders, switching it at one time from one shoulder to the other.

<sup>15</sup> According to Hunter, Bethune had worked with him as a thrower/helper for about a year or more, but had never complained to him about anything. Hunter testified that he was not aware that Bethune had complained to management about him but later found out that he had, based  
45 on a statement authored by Bethune that was provided him by Dixon of the Union. Hunter insisted (on cross-examination) that Bethune was his assigned helper on August 24, and rode with him the entire day and after completing the route, Hunter dropped him off at the train station.

<sup>16</sup> Turner was called by the General Counsel and testified as a 611(c) adverse witness.  
50 Turner is an admitted supervisor. Turner admitted that on July 7, 2010, she was demoted by the Company from operations manager to supervisor.

based on criteria that included safety, property damage, fines incurred, attendance, and willingness to help out when requested.<sup>17</sup>

5 Turner said that she consults with the employees' supervisors in determining whether they will receive the quarterly bonus because they work closely with them and are in the best position to evaluate them.

10 With respect to Hunter, Turner first stated that she knew him and made the decision not to award him his bonus in August 2009, mainly because his supervisor, Deon Manns, advised that Hunter did not help out when needed on the other routes and also had problems with his helpers who had complained about him.<sup>18</sup>

15 Turner said that Manns was a new supervisor at the time and actually was still in training, and did not discipline Hunter for not helping out. However, according to Turner, she relied on Mann's report to her that Hunter was not helping out when requested and used the cell phone excessively in determining that he did not deserve a bonus that August. Turner said that ultimately, both she and Manns concluded that Hunter did not deserve a bonus.

20 Turner said that she made the decision to terminate Hunter on August 24, 2009, for having a weapon on company property and creating a hostile environment on that day, but only after consulting with Peter Osborne who told her over the phone to conduct an investigation and he would conduct one also. As a result of the investigation, Osborne instructed her to terminate Hunter. Turner explained what her investigation disclosed.

25 Turner stated that on August 24, she arrived at the yard around 5 a.m. and began doing her usual job of seeing to the manning of the trucks when another supervisor, Linda Pope, approached her in the office, asking what was up with Hunter, that she saw him standing in the middle of the yard with a baseball bat, swinging it, resting it on his shoulders, hitting his feet with it, and just having it in his hand. According to Turner, Pope said that she had to blow her horn for him to get out of her way as she was driving in. Turner said that Pope's son and an Ecology employee, DeAndre, now deceased, was in her car at the time.

35 Then, according to Turner, operations manager Pat Dean arrived and said that several employees had approached him also, asking what was up with Hunter, why did he have a bat. Turner said that Dean did not identify the employees who queried him about Hunter, but told her the employees did not want to get involved. Turner stated that DeAndre also came in the office asking why Hunter had the bat. Turner said that again that same morning Ray Bethune came to

---

40 <sup>17</sup> See R. Exh. 16, a copy of a criteria for the quarterly bonuses. According to Linda Gerber, office manager for Ecology, at least as late as February 2009, when she was hired, the Respondent used this performance-based criteria for awarding quarterly bonuses. Gerber testified that this criteria was supplanted by another more definitive criteria sometime after February 2009. She identified R. Exhs. 14(a) and (b) as copies of the employees who were  
45 considered for quarterly bonuses for the third quarter of 2009 based on the updated or revised performance criteria.

50 <sup>18</sup> Turner said that Manns also spoke to her about other employees who were problematic; e.g., had attendance issues. According to Turner, these employees did not receive bonuses. Turner was shown a company document (GC Exh. 15) that listed the employees who received bonuses for the months covering January through September 2009. Contrary to her testimony, an employee, Lamar Parrish, received a bonus on August 21, 2009, even though Turner testified that he had attendance problems.

her office and, like the others, asked about Hunter and the bat but speculated that the bat was meant for him because of his written complaints against Hunter. Turner said that she told Bethune that as far as she knew, Hunter did not know about the statements that he had provided previously. Turner acknowledged that none of the persons who saw Hunter with the bat said that he swung the bat at them.

Turner recalled that Hunter went out on his route that day but that Bethune did not go with him. Turner believed that she had previously reassigned him to another truck or made him a floater because of his complaint against Hunter, probably some time earlier that month. Turner also did not recall anyone from management speaking to Hunter about the bat incident either before or after he completed his route.

Turner conceded that she did not personally see Hunter with the bat on August 24, but did view a security video tape<sup>19</sup> of him in the middle of the yard, walking around the yard, swinging a baseball bat that day. Turner said that she also asked Pope and Bethune to draft a statement of the Hunter incident and both complied.<sup>20</sup>

Turner stated that having viewed the tape and consulted with Dean, Pope, Bethune, and DeAndre, she decided to terminate Hunter for having a weapon—a bat—on company grounds, and that because his behavior created a hostile work environment for not only those who witnessed the incident but also the 50–60 employees who were in the yard at the time. Turner said that on August 25, she notified Hunter in person of her decision and reassigned his truck. Turner recalled that Hunter, to her, acted like he did not care about his firing and did not offer to give his version of what had happened.<sup>21</sup>

Turner said that she considered the bat a weapon and Dean advised her that the company rules prohibited employees' having weapons on company property and in such a case termination was automatic. (Tr. 332.) Turner noted that in viewing the tape, she concluded there was no reason for Hunter to have the bat on company grounds and that more controlling to her, his behavior with the bat was menacing. Turner stated that Hunter in her view was not terminated for any union activities and, in fact, she did not know about his union involvement or whether he was for or against the Union.

Ray Bethune, currently employed at Ecology Services, testified that he has been so employed for about 3 years as a helper/thrower and, for about 18 months of that period, worked with Hunter who was the driver of his assigned trash truck.

<sup>19</sup> The video tape was not produced at the hearing because it had been reused and the previous images were erased.

<sup>20</sup> See GC Exh. 9, a statement of Linda Pope regarding her observation of Hunter with a bat on August 24. Notably, Pope's statement did not say Hunter was swinging the bat when she observed him with it. See also GC Exh. 8, Bethune's statement regarding the August 24 incident. Notably, Bethune's statement mentioned that Hunter was swinging the bat.

<sup>21</sup> Turner was shown a copy of a signed statement (undated) she provided wherein she stated that Hunter on August 25 said that he had the bat because he uses it to check the tires on his truck. See GC Exh. 10. Turner also said in this statement that she had ever seen Hunter with the bat in the past. However, she admitted that she provided to the Board an affidavit in which she said that she had seen the bat in his car in 2006 but had not seen him checking his tires. (Tr. 266.)

Bethune said that from the first day he drove with Hunter, he had complaints about him and made his views known to management on a number of occasions. Bethune said that his complaints centered on Hunter's excessive use of his cell phone, his slowness in covering the routes (because of his excessive use of the phone), Hunter's driving down the middle of the street which necessitated Bethune's carrying heavy trash receptacles a longer distance which caused him back pain, and not sharing his water on hot days. Bethune noted, however, that he did not view Hunter as a "loose cannon" or a person prone to violence or temper and, in fact, on a personal level, got along with him.

Bethune volunteered that during the summer of 2009, Hunter confronted a helper, Tim Lewis, about his complaints.<sup>22</sup> Bethune could not recall the date but that one day in the yard Hunter asked Lewis if he had complained about his excessive use of the cell phone. Lewis told Hunter that he had not made any such complaints. According to Bethune, Hunter did not threaten Lewis, who later transferred to the Company's Howard County operations. Bethune also recalled that Hunter told him that another employee, DeAndre (supervisor Linda Pope's deceased son), complained to management, namely, Pope, about his being slow (in covering the route), that he could not drive, and was on the phone all day. Bethune said that DeAndre complained to him also. Bethune recalled that Hunter said that he spoke to DeAndre but did not threaten him in any way. Irrespective of these encounters, Bethune said that he never saw Hunter do anything (one could consider) violent at work.

Bethune stated that, nonetheless, he remained dissatisfied with working on Hunter's truck and later, when supervised by Deon Manns, he complained to him about Hunter and asked for a transfer, which he ultimately received.<sup>23</sup> Bethune believed that by August 20, 2009, he had been transferred to another driver/helper crew, Vonnell and Wayne.

Directing himself to August 24, Bethune said that he reported for work at the Pasadena yard at about 5:30 a.m. and, upon driving in the yard, observed Hunter with a bat in his hand. Bethune said he parked his car and proceeded to the trailer to punch in, passing Hunter to whom he did not speak as he entered the trailer. Bethune said that he tried to avoid Hunter as he did not want to be hit by him with the bat. Once inside the trailer and punching in, Bethune said that he did not overhear anyone there discussing Hunter and the bat. Once he arrived at his truck, Bethune discussed the matter with fellow employee Wayne (last name unknown) who asked why Hunter had the bat. Along these lines, Bethune stated that while he could not recall who was assigned as helper on Hunter's truck, it was not he, as he believed he had been working with Wayne for about a week and a half by August 24.

Bethune also recalled speaking with Turner later that day around 10:30 a.m. after finishing his route and asking her why Hunter had the bat. According to Bethune, Turner gave him the impression that she did not know why. However, Bethune said that he thought the bat was meant for him because of the prior statements he had given management complaining about Hunter, and felt intimidated.

Bethune said that on about September 3, 2009, Manns approached him and two other helpers, Gabe and Wayne, and asked if they had witnessed Hunter with the bat and each said

---

<sup>22</sup> A witness identifying himself as Tim Lewis testified at the hearing and stated that he was a supervisor. Assuming he is the same person, Bethune may have been mistaken about Lewis' status. Lewis' testimony will be set out later herein.

<sup>23</sup> Bethune identified a memorandum he prepared on August 20, 2009, at the suggestion of Manns to buttress his request for a transfer.

he had. According to Bethune, Manns instructed each worker to prepare a statement and give it to him. Bethune said he did as instructed; he prepared a statement of the incident in longhand, but it was retyped by Linda Gerber and he later signed the typed version.<sup>24</sup> Bethune said that he believed Wayne and Gabe prepared statements also, as he saw them writing something and handing it to Manns, but he did not read what they may have written.

Bethune volunteered that he knew that drivers were required to check their truck's tires before going on the route, but not necessarily after finishing for the day. Bethune stated that over the 18 months he worked with Hunter, he saw him check his tires every day, but that he kicked the tires and never used a bat. Bethune said, however, that there was a bat regularly on Hunter's truck in the back, and in his view the supervisors could have seen it over the 18-month period. According to Bethune, he has seen bats on other trucks; they were used to ward off dogs encountered along the routes. Bethune could not recall the supervisors ever saying anything about the bats being on the trucks.

Deon Manns testified that he currently works at Ecology Services and has been so employed there since August 28, 2008. Although he currently is a driver, Manns stated that he had been promoted to a supervisor position and briefly, perhaps for 2 months, supervised Hunter during the summer of 2009.<sup>25</sup> Manns said that he also knew Ray Bethune who was assigned to Hunter's truck and often complained about Hunter, especially his claimed excessive use of his cell phone and not sharing of water. Manns said that Bethune complained so much about Hunter that he transferred him to another truck, but retained his supervisory duties with respect to both Hunter and Bethune.<sup>26</sup> Manns noted that he asked Bethune to put his complaint in writing because he (Manns) was in training and had to report to Turner, as did Bethune.<sup>27</sup> Manns also noted that Bethune had been complaining about Hunter for a long time before he decided to grant his request for a transfer.

Regarding company bonuses, Manns stated that they are issued quarterly. In August 2009, because he was a supervisor in training, he consulted with Turner as to those who would or should receive the August 2009 bonus, but Turner did not tell him who actually received the bonuses then. Manns recalled advising Turner that Hunter did not possess a good attitude, that while Hunter sometimes helped with the other routes, he gave him a hard time about helping out and, on balance, he was not consistently willing to help out.<sup>28</sup> According to Manns, Turner was the one responsible for awarding the bonuses and he had no great say in the matter because he was inexperienced. Manns said that he simply provided some input for bonuses for all the

<sup>24</sup> Bethune identified GC Exh. 8 as a copy of the typed version of the statement he provided to Manns. At the hearing Bethune testified that the typed statement accurately reflected his observations and feelings in reaction to Hunter and the bat incident. Bethune stated that he did not know what happened to his longhand version, which Linda told him was hard to read.

<sup>25</sup> Manns is an admitted supervisor. He supervised Hunter during the relevant period herein.

<sup>26</sup> Manns said that he could not recall the date of the transfer but by reference to Ecology's scheduling documents for August 2009, Ray Bethune was assigned to the truck of driver Vonnell Taylor (truck no. A-06) beginning August 3, 2009. According to company records from August 3-24, Bethune was not assigned to Hunter's truck. (See GC Exh. 17.)

<sup>27</sup> Manns identified GC Exh. 18 as a copy of the statement he asked Bethune to prepare. Manns said that Bethune wrote the statement by hand and it was later transcribed and retyped.

<sup>28</sup> Manns originally testified that Hunter did not help out. Shown his affidavit to the Board, he clarified his testimony in that regard, as set out above.

employees he supervised at the time but made no recommendations; and he pointed out problems with some employees other than Hunter.

Manns recalled observing Hunter with a bat but could not recall the exact date.

5 According to Manns, he saw Hunter holding a bat, actually with it resting on his shoulders and the back of his neck.<sup>29</sup> Manns stated that he went into the trailer but did not speak to Hunter about the bat and actually said nothing to him before Hunter left for his route because he (Manns) was extremely busy that morning. Manns also said that he could not recall who was assigned as a helper on Hunter's truck on August 24 and, likewise, could not recall speaking to  
10 Hunter during the workday.

15 However, Manns said that when he first saw Hunter with the bat and was inside the trailer, he commented to Turner that Hunter was outside with a bat. According to Manns, Turner said that she had already heard about it from other throwers but did not elaborate because it was extremely busy that morning. Manns stated that it was his intention to speak to Hunter about the matter that day but he was too busy to do so. Manns said that he went on vacation the next day without further discussing the matter with anyone in management.<sup>30</sup>

20 According to Manns, he did not know whether Hunter was a union supporter. However, Manns stated that he served as an observer for the Company at the second election, but merely performed his assigned tasks without taking sides.

25 Peter Osborne, one of the principals of Ecology Services, testified that he has owned this business for about 2 years and is responsible for the day-to-day operations, including handling financial accounts and personnel matters.<sup>31</sup>

30 Osborne stated that after the Union was certified by the Board as the representative of the Pasadena employees, the drivers and helpers, he served on the negotiating committee and attended all of the bargaining sessions. Osborne said he was familiar with Warren and Hunter, both served as employee representatives on the committee, along with fellow employees James Myles and Darlene Hall.

35 Osborne said that he was aware of Hunter's termination on August 25, 2009, for an incident occurring on August 24, but before his termination he really did not know him well aside from his participation on the negotiating committee.

40 Osborne recalled his Company and the Union negotiated a disciplinary policy on about August 19 for the Pasadena yard employees, which was to take effect on August 24 with the understanding that all employees would start on a "clean slate."<sup>32</sup> Osborne said that the newly negotiated disciplinary policy created two classes of disciplinary infractions—Class 1 offenses

---

<sup>29</sup> Manns further stated that he walked within about 10 feet of where Hunter was standing with the bat, and at this location he opined that all employees clocking in at the trailer would have had to pass by Hunter.

45 <sup>30</sup> Manns said that Dean was in the office when he spoke to Turner about Hunter. According to Manns, Dean seemed to be listening to his conversation but said nothing in his presence.

<sup>31</sup> Osborne is an admitted agent/supervisor within the meaning of the Act. Osborne was called by the General Counsel and was examined as a 611(c) adverse party.

50 <sup>32</sup> See G C Exh. 4, a copy of the disciplinary policy negotiated by the parties on August 19, 2009.

which could result in immediate termination and Class II offenses for which progressive warnings were warranted. Osborne said that possessing, using, or storing of a weapon of any kind, such as firearms, knives, or explosives, constituted a Class I offense under the negotiated policy. However, Osborne noted that under the Company's prior disciplinary policy, possessing  
5 a weapon on company property also was an offense deemed serious enough to warrant termination.<sup>33</sup>

With respect to Hunter, Osborne testified that he was discharged for brandishing a baseball bat, which under the circumstances was considered by the managers to be a  
10 prohibited weapon, on company property. According to Osborne, the decision to discharge Hunter was based solely on this ground. Osborne volunteered that it was his personal belief that the termination of an employee is a big decision not only because of the immediate effect on the subject employee but also on the rest of the work force, this decision should only be reached if the decision-maker is confident that termination is warranted.

15 According to Osborne, it was out of these concerns that after August 28, 2009, he investigated Hunter's discharge. Osborne agreed that Hunter had never shown any violent behavior or tendencies during the negotiations sessions and, in fact, to him he was quiet, well mannered, and polite. Moreover, Osborne stated that he never saw Hunter engaging in violent or untoward behavior in any other context.  
20

Osborne said that he was in fact alerted to the incident involving Hunter by Turner and Dean who called to tell him about what had transpired, namely, that early in the morning of August 24, Hunter was observed walking back and forth in the yard with the bat; Turner and  
25 Dean were very upset over his behavior. Osborne stated that after mulling over this incident, he instructed Turner or Dean to terminate Hunter on August 25.

However, after the termination, Osborne interviewed a number of persons, including Hunter himself, to be sure in his own mind that discharge was warranted. Osborne identified  
30 the statements of Ray Bethune, Linda Pope, Shanta Turner, and Mel Morales (GC Exh. 11) that he secured pursuant to his investigation of the Hunter incident in September 2009. Osborne also stated that he reviewed the security tape which showed someone walking back and forth in the yard. Osborne acknowledged that he could not actually make out the identity of the person or that he was carrying a bat, such was the poor quality of the tape. Osborne also  
35 revealed that a copy of the tape was not available, that Dean had told him that he could not retrieve it, and that it was probably overwritten. Osborne said that he also interviewed Hunter on or about September 17 but did not ask him to put his version of the incident in writing. Osborne noted that Hunter said that he was merely checking his tires with the bat.

40 As an aside, Osborne testified that after the second election, the Union was his employees' designated representative, and so he embarked on a plan to make the Union an ally and asset in the conduct of Ecology's business. Osborne said that since so many matters associated with running the business could either lead to arbitration or result in unfair labor practices, he decided it was best to try to work with the Union regarding any job related  
45 problems, and specifically where issues with union representatives arose, he gave them the benefit of the doubt and to call the Union when issues cropped up.

Osborne stated that these considerations governed his approach to the Hunter incident.

---

50 <sup>33</sup> See R. Exh. 3, a copy of Ecology's employee handbook which included the disciplinary policy (at pp. 23 and 25) that was in effect before August 19, 2009.

Regarding the Hunter discharge, Osborne related that in point of fact the Union requested that he personally investigate the matter and to reinstate him to his former job, Osborne stated that since he had developed and retained a cordial relationship with the Union,  
 5 something he wanted to preserve, he prepared a memorandum of his investigation of Hunter and shared it with the Union.<sup>34</sup>

In the end, Osborne concluded that in spite of his belief that Hunter had never before caused problems suggestive of possible violent behavior or any such tendencies, as exemplified  
 10 by his dignified and polite demeanor at the bargaining table, he, nonetheless, concluded that based on the comments from those who supervised him that Hunter was a “loose cannon” whose behavior caused the other employees to be afraid of him. The reports of his pacing menacingly back and forth in the yard with the bat for 10–15 minutes indicated to him that  
 15 Hunter’s behavior was seriously wrong, deviant, and irresponsible; and that he would no longer be employed at Ecology as he posed a possible danger to the work force. Moreover, Hunter’s behavior to him (Osborne) seemed to be related to his not receiving his quarterly bonus.<sup>35</sup> Osborne noted further that he did not believe that Hunter was merely checking his tires with the bat as he had maintained in the personal interview with him.

Osborne stated that he concluded from the investigation that Hunter was not just innocently walking around the yard with the bat because he had just checked his tires. Osborne testified that he came to the belief that Hunter was menacingly brandishing the bat in rage over  
 20 not receiving his bonus. Osborne went on to say that irrespective of Hunter’s possible motive, the controlling fact of the matter to him was Hunter’s walking around the yard with the bat with possibly 100 or more employees about to go on their routes observing his behavior. Osborne  
 25 stated that he concluded that this could not be tolerated because in the end management was responsible for the welfare of the workers, some of whom, as far as he knew, were afraid of Hunter.

Osborne stated that in point of fact regarding disciplinary matters, he accorded the union representatives special treatment out of his concerns for preserving his relationship with the  
 30 Union. Osborne recounted his lenient treatment of three of the employee members of the negotiating committee—Darlene Hall, James Shannon Myles, and Paul Warren.

As to Hall, Osborne said she was involved in a couple of incidents—marijuana  
 35 possession in June 2009, an accident with property damage with the truck, and possible drug use in November 2009—but Hall did not receive a discipline. Osborne stated that he thought she had some problems that could be remedied, that she did not in his view pose a danger to others in the same way he viewed Hunter’s behavior.<sup>36</sup>

---

<sup>34</sup> Osborne identified GC Exh. 7 as a copy of the memorandum. The memorandum is undated, but I presume it was prepared sometime in September 2009.

<sup>35</sup> Osborne stated that the awarding of the quarterly bonus is not a matter with which he is  
 45 directly involved. The decision is basically made by the operations manager and the employee’s immediate supervisor. Osborne stated that he may have spoken to Hunter’s supervisor, Deon Manns, about Hunter’s not receiving a bonus in August 2009 supposedly because Hunter drove down the middle of the street requiring the thrower to walk further with the heavy trash cans.

<sup>36</sup> See R. Exh. 9, a summary of various incidents involving Hall covering this period June 12,  
 50 2009 through, June 7, 2010, when she was fired.

Regarding Myles, Osborne said that he reportedly refused to drive a truck that he felt was unsafe, but the vehicle was deemed by management not to be in an unsafe condition. Osborne said he told the Union that he would waive any disciplinary action against Myles as a courtesy to the Union.<sup>37</sup>

5

Osborne also related his handling of the discharge on October 27, 2009, of two helpers for insubordination and disobedience. In this matter, Osborne stated that as a courtesy to the Union, and at its request, he prepared a memorandum of facts surrounding Ecology's decision to terminate the men just as he had done with regard to Hunter. Osborne stated that this review was undertaken to preserve relationships with the Union. Osborne believed that the efforts to work amicably with the Union have paid off in that in the new contract, the Union agreed to allow him the tiebreaking vote in cases where the Company and the Union cannot agree on accident and work assignment issues.

10

15

Turning to Warren, Osborne acknowledged sending to the Union an October 8, 2009 email from Rilee (GC Exh. 12) regarding the five and later six-point email containing advice to be given Warren. Osborne initially could not recall whether he or Rilee composed the email but later recalled that he drafted them and sent them to Rilee.

20

Osborne stated it was his view that since Warren became involved with the Union, she continually overstepped her authority and that the October 8 and 13 emails may have been the third or fourth time she had been instructed as to how she should conduct herself as a union representative. Osborne candidly testified that he had certain ideas about how Warren should have conducted herself; for example, she should not challenge management or voice such challenges on behalf of others.<sup>38</sup> Osborne stated that he personally contacted the Union (Nixon or Kelm) a number of times about Warren's overstepping her authority. However, Osborne could not recall whether the Union responded to the emails before they were read to Warren by Dean.

25

30

Osborne stated that he did not believe Warren understood what was required of her, what her rights were, basically what her role as a union representative entailed.

35

Osborne noted that the emails, especially the October 13, 2009 email, were by his directive to Rilee to be read to Warren by Pat Dean and Turner was to act solely as a witness. Osborne conceded that the possible infractions, should Warren have violated any of the items in the email, were not Class I offenses under the disciplinary policy agreed to by his Company and the Union in August 2009. Osborne also conceded that in spite of this, his email stated that Warren faced disciplinary action to include termination for any violation of the points contained in the email.

40

Osborne noted that the instructions were provided to Warren to give her clear rules or guidelines that would remedy the problems of her overstepping her bounds and, in point of fact, he believed she was doing a great job as a result of the emails.

45

Osborne admitted that the email instructions did not apply to other employees, only Warren because she was a union representative. (Tr. 166.)

---

<sup>37</sup> See R. Exh. 5, a copy of an October 27, 2009 email from Osborne to the Union regarding the waiver of discipline of Myles.

50

<sup>38</sup> Osborne answered the General Counsel by saying "That's right" to his question regarding an example of what Warren should not do as a union representative. (Tr. 160.)

Osborne stated that he objected to Warren's confrontational style and her open and vehement disagreements with management regarding instructions given by them. Osborne recalled the incident involving James Myles and his refusal to drive the truck he believed was unsafe and that Warren advised drivers not to operate a vehicle with a missing gas pedal. While Warren was ordered to clock out and go home immediately that day, Osborne said that she was not otherwise disciplined.

Osborne recalled a meeting convened by the Company's consultant safety officer, Charles Mays, whereat it was reported to him by Dean and possibly Turner that Warren caused a near riot by her questions about the issue of the possible implementation of a 10-hour day, which caused much upset among the employees.<sup>39</sup> Osborne said that he had also received reports from persons whose names he could not recall that Warren was consistently conducting union business on company property during worktime.

Osborne said he wrote the emails because not only was Warren not properly conducting herself as a union representative, but she was also not conducting herself properly as a rank-and-file employee. Rather, by her conduct, she was acting more like a manager, and in such a role she was disrupting the operations by doing and saying things that she should not, such as giving instructions or orders or contradicting instructions given by managers.

Osborne said that when Warren was out of line, he would contact the Union directly and ask them to speak to her; however, the Union did not provide any specific response or feedback to his concerns.<sup>40</sup> Osborne stated that he did not believe he violated any of her rights in his effort to guide her, although he later came to the realization (through retained counsel) that he should not have told her not to engage in union activity during working hours; he should have said work time.

Osborne said that since the October emails and especially since December 2009, there have been no real issues with Warren and she is in fact a model employee and does her job very well. Osborne stated that Warren never received any discipline when Warren and Myles were inappropriately using the company cell phones on working time. Osborne said that he informed the Union (Dixon and Kelm) about this and that he told the Union that Warren and Myles could not conduct union business during working time and asked the Union to advise them to cease this activity.<sup>41</sup>

<sup>39</sup> Osborne stated that he believed that Warren confronted and pushed the consultant, Mays, into making unintended statements. Osborne believed she baited Mays into saying that employees would have to work a 10-hour day when he meant to say they *could* have to do this. According to Osborne, this statement caused a near riot in the yard. Osborne believed this was also a clear instance of Warren's overstepping her authority.

<sup>40</sup> Osborne said he spoke to the Union several times and had a conversation (with Dixon and Kelm) about Warren's disruptive conduct in the yard. Osborne said the Union agreed with him that Warren had overstepped her authority and said they would talk to her; Osborne stated that he thought that they indeed had spoken to her. (Tr. 175.)

<sup>41</sup> See R Exh. 6, an email from Osborne dated October 13, 2009, with phone records attached, in which he informs the Union that Warren is conducting union business with James Myles, using the company cell phones. The email states that the Company routinely monitors telephone records of drivers and supervisors, and the calls in question were between the two drivers who do not share the same routes. Notably, only three of the calls listed in the exhibit's attachments were made by Warren to Myles. Osborne conceded that he did not express his

Continued

Kenneth Kelm testified that he is employed by the Union and occupies the offices of secretary treasurer and principal officer, and also serves as the business manager for the local in which capacity he deals with organizing campaigns, contract negotiations, and grievances. Kelm stated that the Union first unsuccessfully attempted to organize Ecology Services in 2008; and then in April 2009, the Union succeeded in its second organization effort and was certified by the Board in 2009. Kelm said that he and Neil Dixon were members of the negotiating committee with Dixon acting as the chief negotiator; the employee members were James Myles, Darlene Hall, Richard Hunter, and Paula Warren.

Kelm recalled that Hunter called the hall in August 2009 and told him that he had been discharged by Ecology for allegedly swinging a baseball bat on company property. Kelm said that Hunter admitted to him to having the bat but that he used it to check his tires.

Kelm said that he contacted Peter Osborne that same day and queried him as to what had happened. According to Kelm, Osborne said that he had been informed (by the supervisors) that Hunter was observed in the Pasadena yard swinging a baseball bat around in a threatening and violent manner. Kelm recalled that Osborne also faxed him a copy of supervisor Linda Pope's statement (GC Exh. 9) and one from an employee, Bethune. (GC Exh. 19.) The former statement covered what had happened on August 24 with the bat. Kelm noted that in the initial conversation, Osborne did not mention Hunter's use of a cell phone or not sharing his water. Kelm also noted these matters were never stated by the Company as grounds for terminating Hunter.

Kelm said that he later read the statements to Hunter over the phone and Hunter admitted that he did have the bat in his possession that day, but again said he used it to check his tires.

Kelm said that about 2 days later, Osborne called him to say that there was a surveillance tape of Hunter in the yard and invited him to view it. Kelm stated that about 2-3 days after the incident, he viewed the tape at the yard in the office trailer with employees Warren and Myles and Managers Turner and Dean. According to Kelm, the tape, only 5 minutes in duration, was dark, blurry, and grainy so that he could only make out a person and his movements, but the identification of the person was not possible. According to Kelm, he also could not make out the outline of a bat but the person's hand could be seen to be moving, and he could see him put something on his shoulders and rest something on the nape of his neck with his two hands. Kelm noted that he also saw another person in the video, but Dean stated that it was Hunter.

In his discussion with Dean at the time of the viewing, Kelm said that Dean said that he had not said anything to Hunter that day and could not see anything out of line at the time because it was really too dark that early in the morning.

Kelm said that he called Osborne the next day and informed him that to him, the tape did not prove anything and he (Kelm) did not believe that Hunter did anything threatening, a position Kelm says the Union holds to this day. Moreover, Kelm said that he told Osborne that if Dean

---

disapproval of Myles' behavior in the email but testified that he should have as both were engaging in impermissible use of the company phones. (Tr. 192.)

did not think that whatever Hunter was doing (with the bat) did not merit even a conversation, there was no reason to discharge him.<sup>42</sup>

5 According to Kelm, Osborne responded by saying that he would look into the matters. Kelm stated that the Union really pressed him on the issue, sincerely and strongly believing that Hunter did not deserve to be terminated.

10 In any event, Kelm said that Osborne, who he believed was usually good for his word, conducted an investigation of the incident and, acting on his promise to get back to the Union with the results, in a letter (Kelm believed) informed Dixon that he was not going to do anything (reinstate) for Hunter.

15 Kelm stated that he only recently read Osborne's statement of facts memorandum (GC Exh. 7) regarding his investigation of the Hunter bat incident and noted that most employers do not go to that length to explain their handling of job-related issues. Commenting on the Union's recently executed collective-bargaining agreement with Ecology, Kelm said that the Union did in fact trust Osborne and allowed him to be the tie-breaking vote relative to on-the-job accident situations.

20 Kelm said that he was aware of Myles being involved in an accident and did not want to pay the fine the Company imposed and quit. Kelm said that he was aware that Hall also had an accident with her truck and got into an argument with a customer in Howard County; he did not know anything about her involvement with a drug test issue. Kelm acknowledged that the Union never claimed that any of these matters were associated with the employees' union  
25 involvement. Kelm volunteered that while the Union believed that Hunter's discharge was "unjust," they never told Osborne that Hunter's union activities were involved in the decision.

30 Kelm stated that he has a respectful regard for Osborne and gets along with him. Kelm said that he was familiar with Osborne's investigation of the Hunter incident and he thought that Hunter was fired because of the bat but that the other complaints against him—not working well with his helpers and possibly getting violent about not getting a bonus—were added to build a case against him.

35 Kelm stated that he believed some of the managers were making more of the matter than it merited and did not tell Osborne the whole truth regarding the incident. Kelm said he had no problem with Osborne's role in the investigation; that is, relying on what he was being told by the persons involved and then doing what he had to do. Kelm believed that the communications between lower management (in the yard) and upper management (Osborne) seemed to him to entail a "lot of drama." In any case, Kelm said that the Union has been told consistently that  
40 Hunter was terminated for swinging the bat and in a sense that behavior was catalytic in the decision to discharge him. Kelm believed some of the other complaints against Hunter, especially his supposed anger over not receiving the August bonus, merely buttressed Osborne's view that Hunter's behavior was not to be tolerated. Kelm noted that those other complaints were developed during Osborne's investigation, but were not mentioned on August  
45 24.

James Shannon Myles testified that he worked for Ecology from February 13, 2007, until October 30, 2009, as a driver.<sup>43</sup> Myles stated that he was a member of the Union and

50 <sup>42</sup> Dean did not testify at the hearing. It appears that he is no longer employed at Ecology.

<sup>43</sup> Myles said that he quit his employment at Ecology because on October 26, 2009, he was

participated in the first organizing campaign at Ecology in 2008 by obtaining employee signatures on the authorization cards. Myles stated that the Union won the second election and he was a member of the negotiating committee established to reach a contract; Myles said that Warren, Hunter, and Darlene, whose last name he did not know, also were on the committee.

5 Myles said that he attended all of the negotiating sessions during the time he was with the Company.

10 Myles recalled that on October 13, 2009, he spoke with Warren who told him that she was called to the office and advised that if she or anyone else in the yard talked about the Union, he would be fired. Myles said that he spoke to Dean later in his office and Dean (basically) told him if he talked about “union stuff” on company property, he would be written up and terminated.

15 Myles identified a notice<sup>44</sup> that he observed posted at the timeclock on a Monday morning after the second election around the time the negotiating committee first met with Osborne and retained counsel, Gary Lieber; according to Myles, the notice was only up for a day.

20 Turning to Hunter, Myles said that he was unfamiliar with the circumstances leading to his termination. Myles recalled that he viewed a video, a security tape, which showed Hunter standing alone in the yard with a bat on his shoulder for about 3–4 minutes; Myles said that Warren, Neil Dixon, Pat Dean, and Shanta Turner were also there. According to Myles, Turner remarked “look at the video, he’s swinging a bat.” Myles said that he disagreed with her assessment, in that to him Hunter was not swinging the bat as it was resting on his shoulders. 25 Myles noted that it was dark at the time and if he had not been told the person on the video was Hunter, he would not have known it was he.<sup>45</sup> However, Myles stated that he spoke to Hunter about the matter and Hunter admitted that it was he in the video with the bat; furthermore “everyone” knew that it was Hunter. (Tr. 558.)

30 Donald Christian testified that he is currently employed by Ecology Services as driver, the position for which he was hired in October 2007; Christian said that he was a member of the Union and recalled both the earlier union election (in 2008) as well as the 2009 election. Christian stated that after the Union won the election he was “volunteered” to be the shop steward, a position he currently holds.

35 Christian related that after completing their pre-trip inspections and clocking in, the drivers usually conversed with one another while awaiting the arrival of the helpers. However,

40 assigned a route different from his usual assigned route and the route was one he had never driven before and was the largest area of the Company’s operations. Myles stated that he questioned his supervisor, Charles (last name unknown), about the assignment and Charles wrote him up, claiming that he (Myles) had cursed him. Pat Dean, the operations manager at the time, questioned him about his refusal to drive that route and brought up his prior refusal to drive a truck with a broken accelerator pedal on his regular assigned route. Myles said he quit 45 on October 3. Myles acknowledged that while he was not disciplined for the broken pedal matter, he was disciplined for speeding in the (trash) pickup area. (See GC Exh. 23.) Myles admitted, however, that he was not terminated for the speeding incident.

<sup>44</sup> See GC Exh. 22, a copy of the notice identified by Myles.

50 <sup>45</sup> It should be noted that Myles never expressed at the hearing that the person on the tape was not Hunter. It is also noteworthy that Myles stated that he also had a baseball bat on his truck and that he used the bat to check the inflation of his tires. (Tr. 545.)

around September 2009, his supervisor, Linda Pope, advised him that there was a change in policy, that from that point on, drivers were to clock in and then directly go to their trucks. Christian said that around that time he spoke to Warren, a close friend of his, who told him she was not permitted to hang out in the yard and talk with us (drivers), that she had to go directly to her truck. Christian noted that in spite of Pope's directive he only complied with the new policy "now and then," but certainly not on a regular basis. However, Christian said he noticed that the employees were no longer standing by their trailers talking as much after Pope's announcement.

Christian recalled that on the morning of August 24, 2009, he conversed with Hunter in the yard while awaiting the arrival of the supervisors. Christian explained that he is usually the first employee to arrive every morning around 4 a.m. and Hunter also arrives early, normally at around 4:15–4:30 a.m. On the morning of August 24, Christian said that he did not observe Hunter performing his pre-trip inspection because Hunter had parked his truck near the front of the yard near the trailer office and Christian parked his truck at the end of the other lot near the gate. Christian stated that he did not know exactly how Hunter performed his pre-trip inspection because usually, after completing their respective inspections, they would get together and engage in conversations, mainly about sports.

According to Christian, early on August 24, he and Hunter were engaging in their customary sports banter and Hunter kept tapping his shoulders with something that he (Christian) could not at the time (4:30 a.m. and pitch-black dark) make out what it was. Christian also said that he did not ask Hunter what the object was during the entire 10- to 15-minute conversation, but that whatever it was did not seem to him out of the ordinary. Christian noted that aside from Hunter's enthusiasm over football, he did not seem to him to be otherwise excited or agitated, nor did he raise his voice in anger. Christian noted that the matter of the bonus was not mentioned by Hunter in this conversation.<sup>46</sup> Christian vaguely recalled that Warren walked by him and Hunter and merely said good morning as she proceeded to her truck.

Christian stated that the next day he was informed by Turner that Hunter had been terminated. Christian insisted at the hearing that he did not know (to this day) what object Hunter was moving from shoulder to shoulder that morning, saying that he was just playing with something, and whatever it was did not arouse his curiosity. Christian acknowledged that all drivers had bats on their trucks, usually to ward off dogs, and that he himself had two bats on his truck, one on his side and one with the thrower in the truck.<sup>47</sup>

However, Christian said that Turner's announcement of Hunter's discharge was surprising to him, prompting him to ask her the reason. According to Christian, Turner said that Hunter was terminated for having a bat in his hand. Christian stated that after Hunter's

---

<sup>46</sup> Christian said that he was aware of the company bonus program and only missed receiving his quarterly bonus one time since he was employed by Ecology. Christian stated he later became aware that Hunter did not get a bonus in August in a subsequent conversation with him.

<sup>47</sup> Christian conceded that he provided an affidavit to the Board on or about December 2, 2009, and in it said that Hunter "had a stick or a bat on his shoulders and was playfully tapping his shoulders with it." (See R. Exh. 10, p. 3, ll. 9 and 10.) In my view, Christian's credibility suffered somewhat in this respect because of this clear contradiction on the one hand, but also it seems highly likely that even in the dark he should have been able to identify an object—the bat—that was commonly used by him and other drivers in the performance of their daily jobs.

5 termination, Turner asked him to provide a statement. Christian said he told Turner that he could not provide a statement because he did not know precisely what Hunter had in his hand, only that he had something. According to Christian, Turner said that his statement in that regard would not do and dropped the matter. Christian volunteered that Turner did not ask him whether Hunter had threatened him or others with the bat and, in fact, no one else from management spoke to him about the Hunter incident.

10 Timothy Lewis testified that he has been employed by Ecology Services for the past 4 years; first as a driver, then as a supervisor, and currently as an operations manager for the Company's Howard County business. Lewis said that for the 2 years he was employed as a supervisor, he was assigned to the Pasadena yard.

15 Lewis stated that he knew Hunter, having supervised him in 2008 for about 3 months. Lewis said that during the time he supervised Hunter, he did not behave aggressively with other drivers or helpers. Lewis also knew that a helper, Ray Bethune, complained about Hunter about twice a week, usually about his excessive talking on the cell, his driving down the middle of the street, and so forth. Lewis said that while he never wrote Hunter up for any of Bethune's complaints, he did speak to him about them, and Hunter to his credit improved a little.

20 Lewis acknowledged that he denied Hunter a quarterly bonus in 2008 and explained to him that he did not help out on the other routes. According to Lewis, on the occasions he asked Hunter to help out, he would always tell him something about his dog as the reason for not being able to help.<sup>48</sup> Lewis stated that as to Hunter's alleged excessive use of the company cell phone, he could never catch him in the act and he never bothered to pull Hunter's phone records.

25 Lewis volunteered that he has observed drivers kicking their tires for a pressure reading and has heard of, but not seen, them using a stick, bat, or pole. Lewis stated that he thought kicking the tires gives a better "read" on tire inflation because one can sense the "bounce" of a properly inflated tire through one's foot.

### *B. The Respondent's Witnesses*

35 Linda Pope testified that she has been employed by Ecology for about 4 years and has been a supervisor of drivers and helpers for little over 1 year.<sup>49</sup>

Pope said that she knows Hunter and actually supervised him for a short time,<sup>50</sup> about 1 week in 2009.

40 Pope recalled the August 24 incident involving Hunter and his possession of a baseball bat on company property. Pope stated that she arrived at work that day at around 4:55 a.m. and as she was pulling up to the office trailer to park her vehicle, she observed Hunter standing where the supervisors normally park their trucks, actually blocking her way. Pope said that she

45 <sup>48</sup> Lewis said that the bonus criteria included attendance, performance, safety, and conduct to include willingness to help other drivers on their routes when requested. According to Lewis, during the time he supervised him, Hunter never helped out and, accordingly, did not receive a bonus.

<sup>49</sup> Pope is an admitted supervisor.

50 <sup>50</sup> Pope said that she has never made any input regarding any decision whether to give Hunter a bonus.

had to wait for him to move in order to pull into her parking space; Pope said that as she was parking, she noticed he had a baseball bat on his shoulders.

5 According to Pope, when she went into the trailer she did not comment on Hunter's behavior but other supervisors—Turner, Manns, and Dean—were inside and talking about the situation, asking why Hunter had the bat and commenting that he was swinging it.

10 Pope said she only stayed in the trailer a few minutes and did not supervise Hunter that day. However, she was later asked to provide a statement regarding the incident, which she did.<sup>51</sup> Pope also recalled that about a day or so after the incident, she overheard a supervisor, perhaps Turner—she was not sure—say that an employee, Ray Bethune, felt intimidated by Hunter's behavior with the bat.<sup>52</sup>

15 Queried about the use of a bat to check a truck's tire pressure, Pope stated that she used to be a driver but never used a bat to check tire pressure; she stated she usually just kicked the tires, something many drivers do. Pope noted that while she personally has never used a bat and had not seen any other driver use one, she acknowledged that DOT regulations permit use of a mallet or a stick to check tires and in that sense a bat could be used for that purpose. Pope noted that at the time she observed him, Hunter was about 15–20 feet from the area where the trash trucks are parked in the yard.

25 Earl Johnson testified at the hearing and stated as Ecology's chief of operations for the past 2 years at the Pasadena yard, his duties include general oversight of the activities there, and especially the servicing and maintenance of the company trucks. Johnson noted that in August 2009, Turner's job title was the same as his, but she handled yard paperwork and computer work while he handled what he described as the manual stuff.

30 Johnson said that he had no responsibility or input regarding the awarding of bonuses because his job did not entail any connection to personnel issues.

35 Johnson said that he was familiar with the circumstances surrounding Hunter's termination, having sat in on the meeting at which Hunter was notified of his discharge. Johnson recalled that Turner had called Hunter in for the meeting and told him that because of his having the bat, mainly because of concerns about safety, he had to be discharged. According to Johnson, Hunter made no response to the accusation.

40 Johnson noted that he had not personally observed Hunter with the bat on August 24, but had on other occasions seen Hunter check his tires by kicking them the way he (Johnson) normally performs his pressure checks. According to Johnson, he had not heard of his drivers using bats or sticks to check for tire inflation, although he had observed over-the-road truckdrivers use sticks or a mallet to check pressure.

45 Johnson volunteered that the Company has held meetings (since 2006) in which the subject of weapons was raised, and employees were told that no weapons were allowed on the trucks or company property because of safety concerns.

---

50 <sup>51</sup> Pope identified GC Exh. 9 as a copy of her statement and said that it reflected her view of the incident. She believed that she provided the statement on August 24, the day of the incident. Pope said that she did not see Hunter swinging the bat, and for her part did not hear of any other employees complaining about him that day.

<sup>52</sup> Pope said that she was not put in fear of Hunter when she saw him with the bat.

Johnson stated that he also discussed Hunter's termination with Osborne, telling him that in his view the bat should not have been on the job. Johnson said that he gave Osborne the bat he removed from Hunter's truck, the last one to which he was assigned, after meeting with him at a supervisor's meeting held the Wednesday after Hunter was discharged.<sup>53</sup>

In spite of his feelings that bats should not be on the job, Johnson admitted that he knew that Hunter kept a bat in his truck before the incident but was not aware that he used it for checking tires. Johnson acknowledged the men keep bats on the trucks to ward off dogs and rats.

Johnson admitted that he did not have a high regard for Hunter and described him as a "high school bully." According to Johnson, he and Hunter both arrive early at the yard and on occasion they would converse and while Johnson was inspecting the trucks, Hunter would ask questions in a pointed (and as I discerned) accusatory way that irritated him. Johnson said that he simply could not relate to Hunter because Hunter always wanted to be right and tried to push his opinions on Johnson, arguing with him over various issues when, in fact, Johnson had more experience.

As to the effect of Hunter's bat incident, Johnson stated that no employees claimed to know anything about the incident when asked to provide statements, at least according to what he had heard from the yard employees.

Johnson went on to say that he did not know whether Hunter was a union supporter, and likewise for Warren. Johnson volunteered that even if Hunter or Warren were union supporters, he "paid [or would have paid] that no mind." Johnson specifically denied ever speaking to Warren or Hunter about the Union. However, Johnson admitted that the supervisors talked about the Union, but he personally did not know "who was who, and didn't know nothing about the Union." (Tr. 710.)

Mel Morales testified that he is currently chief of operations of the Company's Howard County operations and is responsible for truck servicing and maintenance, supervising employees, and interfacing with the county authorities. Morales stated that he has worked continuously for Ecology for about 4 years except for a 3-month period covering November 2008 though February 2009, when he worked for Montgomery County (Maryland) in its solid waste division. During the period before working with Montgomery County, Morales said that he was the manager of the Pasadena yard. However, in September 2009, he was no longer working at that yard, having been reassigned to Ecology's recycling operations in Frederick, Maryland.

Morales stated that he knew Hunter and recalled that Osborne informed him that Hunter had been fired for swinging a bat or something to that effect. Morales said that he told Osborne that Hunter had done something similar in April 2008 when he supervised him. According to

---

<sup>53</sup> Johnson identified the bat at the hearing. The bat that I observed was metal (aluminum) and appeared to be what I would describe as a Little League bat, possibly 28 inches long. Johnson could not recall the date he gave Osborne the bat but said it was right after his first conversation with him. I note that Johnson averred in his affidavit (GC Exh. 23, p. 3, l. 5) that an employee discovered the bat and brought it to him in the trailer. Nevertheless, Johnson insisted that he observed the bat he identified at the hearing in the cab of Hunter's truck prior to meeting with Osborne.

Morales, Osborne asked him to provide a statement of the incident, which he did on September 7, 2009.<sup>54</sup>

5 Morales noted that Hunter was not disciplined by him for the 2008 bat swinging incident because on the day in question Hunter left the premises before he could speak to him and due to the press of business on the succeeding days, the matter essentially fell between the cracks.

10 Morales further noted that he actually saw Hunter with the bat on a Wednesday (in April 2008) and that Hunter had queried his supervisor, Oscar Henriquez, about not receiving his bonus the previous Friday. Morales said he assumed that Hunter was angry about not getting the bonus.

15 Morales recalled an incident that took place at the Jimmy G Restaurant in April 2008, at around 11 a.m., perhaps at noon that day. According to Morales, a lady (unidentified) was speaking to two Spanish (his term) persons about making more money; the persons were Ecology employees whom he supervised. Morales stated that he believed that the woman was trying to recruit (steal) his workers so he was there to check things out.<sup>55</sup>

20 Morales said that there were actually three ladies sitting there and one of the women was Rhonda, a former Ecology employee working at the Pasadena yard. According to Morales, Rhonda was trying to explain something to one of the Spanish guys, something involving a paper. Morales said that he asked what was going on and one of the other women told him he had no business there and got really upset. Morales said he asked why he should not be there, but the woman started yelling at him.

25 Morales said that he called Ruth Rilee at Ecology and explained the situation to her from his truck. Morales noted that Rhonda said nothing during the encounter but that Warren, whom he knew definitely, was not present at Jimmy G's at the time, at least as far as he remembered.

30 Morales said that he left the restaurant that day without actually knowing what the real issue was. Morales denied hearing anything said about the Union and for his part said nothing about it, including saying to anyone, "F##k the Union." Morales conceded that he knew that there was an election in 2008, but not at the time of the Jimmy G encounter.<sup>56</sup>

35

40 <sup>54</sup> Morales identified a copy of the statement he provided at the behest of Osborne. (See GC Exh. 11.) Morales also identified R. Exh. 15, a statement he initially provided to Osborne who told him he needed more specificity from him regarding dates, and so he provided GC Exh. 11 in response to Osborne's request. Both statements, I note, are practically identical in substance, differing mainly only in that GC Exh. 11 includes a date of the incident—April 11, 2008. Morales stated he was not sure of the date when he drafted the first statement but then recalled the date because the incident was coincident with the award of the bonus that year and Hunter's behavior was to him in protest of his not receiving a bonus at the time.

45 <sup>55</sup> Morales explained that when a refuse company gets a new contract to work an area, it wants experienced workers to reduce training costs. Under such circumstances, companies vie for already trained employees who may be working with a competitor.

50 <sup>56</sup> Somewhat incredibly, Morales testified that he was not really familiar with the term "election," but in any case could not recall there being one ongoing at the time of the Jimmy G incident. (Tr. 685.)

## V. Contentions of the Parties

A. *The General Counsel's Position*

5           The General Counsel essentially argues that the Respondent's denial to Hunter of his  
quarterly bonus in August 2009, and his subsequent discharge in that same month, was due to  
his having engaged in union activity; the reasons offered by the Respondent for both actions,  
she argues, simply are pretextual. The General Counsel asserts that, specifically, the  
10           Company's claim that Hunter did not help out, excessively used his cell phone, and was  
somewhat aggressive (a loose cannon) and uncooperative in his dealings with his coworkers  
were mere pretexts for the unlawful actions against him. She notes that as proof the  
Respondent never even counseled, let alone disciplined, Hunter for his deficiencies in  
performance over the time he worked at Ecology. She notes further that, in point of fact, no one  
15           from management even spoke to Hunter contemporaneous with observing him with the bat on  
August 24, 2009.

          The General Counsel avers that it is undisputed on this record that Hunter engaged in  
union and other protected activity and that the Respondent was fully aware of this at the time it  
denied him his quarterly bonus, and subsequently discharged him. She notes that Osborne  
20           himself participated in the negotiating committee meetings with Hunter and admitted that he  
knew Hunter was an employee representative. The General Counsel further notes that it was  
Osborne who directed Turner to discharge Hunter on August 24. In likewise, the General  
Counsel submits that in spite of her denial of knowledge of Hunter's union involvement Turner  
was clearly aware because Warren credibly testified that Howard Lane, a supervisor, made  
25           mention of Hunter's reputed association with union matters. She notes that it was Turner who  
principally made the decision to deny Hunter his quarterly bonus and was instrumental in the  
decision to discharge him.

          The General Counsel also asserts that the Respondent generally harbored animus  
30           toward the Union and toward the protected activities of employees, especially those involved  
actively with the Union. The General Counsel notes that in 2008, Morales went to the Jimmy G  
Restaurant to intimidate employees who were signing authorization cards. The General  
Counsel notes further that shortly after the Union was certified, between the first negotiation  
session and Hunter's denial of a bonus in August, the Respondent posted a notice by the  
35           timeclock prohibiting employees from engaging in any union activity of any kind.

          The General Counsel further asserts that Osborne's giving special consideration to the  
employees on the negotiation committee actually was a subtle threat to impose unwarranted  
discipline on them in order to stifle their engaging in protected conduct and reduce the  
40           effectiveness of the committee.

          In terms of motive, the General Counsel argues that an inference of unlawful motive on  
the Company's part is supported by Turner's inconsistent testimony about the grounds she used  
to deny Hunter his bonus. The General Counsel submits that Turner at one point said that  
45           Hunter was denied a bonus solely for not helping out and excessive use of the company-issued  
cell phone; then at other times, Turner said he was denied for driving down the middle of the  
road. The General Counsel contends that these shifting and inconsistent reasons suggest that  
the reasons given by the Respondent to deny Hunter a bonus were pretextual and, therefore, a  
mere subterfuge for its unlawful motivations in its treatment of Hunter.

50           The General Counsel further submits that while Hunter was by all accounts a good  
employee who arrived early for work, had good attendance, and seemingly operated his truck

accident and injury-free, other employees who did not have as good a record, nonetheless, received bonuses. The General Counsel submits that the Respondent applied its bonus criteria discriminatorily to Hunter and held him to a much higher standard than other employees.

5           The General Counsel also submits that even the new disciplinary policy negotiated on August 19 provided a convenient justification for terminating Hunter and evinces the Respondent's plan to discharge him one way or the other. She notes that it is beyond coincidence that Bethune was asked to submit a statement to justify his request for transfer from Hunter's truck when he had already been transferred earlier in the month.

10           The General Counsel also notes that other employees who were terminated by the Respondent for serious misbehavior on the job were discharged the same day of their misconduct. Hunter was not terminated until the day after his alleged possession of a "weapon," a baseball bat that was on Hunter's truck for some time and known to be used by  
15 drivers and throwers to ward off dogs and rats. The General Counsel asserts that the Respondent's disparate treatment of Hunter underscores the pretextual nature of the acts it took against him in August 2009.

20           Regarding the Respondent's possible utilization of Bethune's complaints about Hunter, the General Counsel asserts that his complaints were baseless and the Company knew that he merely wanted to be transferred to a truck that finished earlier in the day; essentially, Bethune fabricated one complaint after the other to be removed from Hunter's trucks. The General Counsel thus submits that since Bethune's fabrications would not hold water, the Respondent decided to use Hunter's anger over not receiving his bonus as a reason for welding the bat in  
25 the yard.

          On balance, the General Counsel asserts that the evidence adduced by the Respondent going to Hunter's supposed bad attitude, his being a loose cannon, and generally not being a team player was only indicative of its animus against his prounion involvement. Moreover, other  
30 employees with supposedly bad attitudes were excused—the trucks were extremely hot and the work is arduous—but Hunter's evidently was not. The General Counsel concludes that all in all, the Respondent terminated Hunter because of his union activities and any other reasons asserted by the Company as mere pretexts.

35           Turning to the allegations involving the Respondent's treatment of Warren, the General Counsel first contends that the Respondent violated Section 8(a)(1) of the Act by promulgating a rule prohibiting its employees from discussing union activity on its property during working hours, and specifically threatening Warren with termination if she violated these rules. The General Counsel notes that the Respondent never denied that management—Rilee and  
40 Osborne—directed an email to Warren on October 13, 2009, and had it read to her by her supervisors in the Pasadena yard, and that the email contained a presumptively invalid and overbroad no-solicitation rule prohibiting all discussion about union activity on company property. Notable also, the General Counsel asserts, is the lack of denial by the Respondent that Warren was threatened with discharge if she violated the unlawful rules.

45           The General Counsel also submits that the Respondent's warning to Warren, that she should not second-guess management's—the office manager's—decisions in front of employees, was also violative of Section 8(a)(1) of the Act in that this directive impeded most directly Warren's ability to engage in protected activity.

50           The General Counsel contends that the Respondent violated Section 8(a)(1) and (3) of the Act by requiring Warren to leave work immediately after her shift ended, again on

October 13, 2009, and even earlier, by ordering her to go straight to her truck after clocking in sometime in September 2009.

5 The General Counsel asserts that while the Respondent did not impose what ordinarily would be described as “a formal discipline” such as a write-up or suspension, Warren, the subject of the Respondent’s directives, could reasonably believe she was being disciplined. The General Counsel submits that Warren clearly was a model employee, and the Company even admits that she generally complied with all work rules daily and went to her truck promptly as a matter of course, stopping only like the other drivers to engage in shop banter before  
10 attending to her work duties at the beginning of her shift.

The General Counsel asserts that the October 13 meeting was tantamount to a disciplinary meeting inasmuch as Warren was given a warning to cease and desist from specific conduct or face discipline, to include termination. Moreover, the rules to be applied and  
15 complied with pertained solely to her. The General Counsel submits that any reasonable employee but Warren surely could rightly believe she was being disciplined, and by any standard the October 13 meeting was not only inherently coercive and discriminatory, but also was called specifically by management to deal with Warren’s purported improper behavior as a union representative. All in all, the General Counsel contends that the Respondent violated  
20 Section 8(a)(1) and (3) of the Act by dint of its treatment of Warren during the early fall of 2009.

#### *B. The Respondent’s Position*

Regarding Hunter, the Respondent first essentially contends that Hunter had received  
25 quarterly bonuses during his time with the Company and for the three-quarters preceding the third quarter of 2009, he did receive the bonus. Also, the Respondent notes Hunter did not receive a bonus around April 2008 for basically the same reason he did not receive one for the second quarter of 2009, simply and solely because he did not earn it; he did not help out on the routes. The Respondent points out that Hunter received his bonuses during the period before  
30 and during the time the Union engaged in its organizing efforts. The Respondent also noted that Hunter admitted that he did not always help out, and this negative information in 2009 was provided by his then supervisor, Manns, to Turner who decided that Hunter did not merit the bonus.

35 The Respondent submits that Hunter’s failure to receive a bonus had nothing to do with any union activity that could be realistically attributed to him. The Respondent points out that each of the other negotiating committee employees, including discriminatee Warren, received all of their bonuses during the material time; Myles received a bonus for the same quarter as Hunter, and Hall received bonuses for the first two quarters of 2009.

40 The Respondent notes that in contradistinction to Warren, who was a very known and active union supporter, there was essentially no evidence adduced of Hunter’s union activity save his membership on the negotiating committee whereon he did not take a particularly activist role. The Respondent submits that Hunter, while familiar with the two elections,  
45 admitted that he only attended a gathering in the park on one occasion and spoke to employees generally about the Union during the first election and did not even do that much for the second election campaign.

50 The Respondent submits that Hunter simply was not denied the quarterly bonus because of his limited union activity here, simply and solely his participation on the negotiating committee.

Turning to Hunter's discharge, the Respondent first asserts that Hunter, by his own testimony, learned that he was not going to receive his bonus on August 23, 2009. On August 24, Hunter comes to work at his usual 5 a.m. early arrival time but by around 5:30 a.m., when the employees are arriving at the yard to punch in, he was observed by management standing close to the office trailer with a baseball bat in hand. Among those who observed Hunter with the bat was thrower Bethune who had earlier complained against Hunter and who testified that he was intimidated by Hunter and thought the bat could be meant for him in reprisal. Hunter was also observed by supervisors Pope and Manns with the bat and, in the case of Pope, Hunter was even blocking her way to the supervisors' parking area. Turner was in the office trailer at the time and there received word of Hunter's conduct.

In the end Turner, having conducted her own investigation of the incident, including speaking to Hunter as she was instructed by Osborne on August 25, decided on her own, but with Osborne's concurrence, to terminate him for violation of the Company's policies prohibiting a weapon—the bat—on company property and harassment.

The Respondent contends that the matter could have ended there and then but the Union believed that Hunter's discharge was unjust and requested that Osborne personally investigate the matter, to which request Osborne acceded. Osborne conducted his own investigation and concluded that Hunter's termination was proper and justified and reported his findings to the Union.

The Respondent asserts that on the first count, again and from his limited participation on the negotiating committee, Hunter was not really an activist union supporter. Moreover, the Respondent had done nothing that could be described as adverse action against the Union since it was certified almost 4 months earlier.

On the second count, as of the certification of the Union by the Board, the Respondent contends that it had accepted the "reality" of the Union and, through Osborne, set out to make the Union an "asset" towards the goal of productivity and order in the pursuit of its business. In that regard, the Respondent points out that management commenced bargaining for a contract in good faith and to preserve good relations with the Union, extended special considerations to negotiating committee members Myles and Hall who had run afoul of company rules during the negotiations. The Respondent admits that with respect to Warren, there was a misconduct issue, but she was the exception. However, even as to her, as well as Myles and Hall, the Company consulted with the Union as opposed to imposing discipline on committee members. On this point, the Respondent points out that the Union and it have a good and respectful relationship, and in fact the Union has placed a great deal of trust in Osborne's management of the Company and his fairness in dealing with the employees. The Respondent contends these factors militate against any inference that it harbored any animus against the Union, union supporters, and specifically Hunter in his role as a negotiating committee member.

The Respondent asserts that in addition to the illogic under the circumstances of trying to undermine a certified union by terminating employee committee members, the timing of Hunter's discharge—4 months after union certification—is too remote in time to support a charge of ongoing animus against the Union or Hunter, or even that the Respondent had engaged or was engaging in a systematic campaign to undermine the Union.

On bottom, the Respondent contends that Hunter was discharged by management solely because he brandished the bat—a weapon in context—on the job in full view of other employees in a way deemed menacing and threatening to the employees, as well as

supervisors and other managers; that the discharge had nothing to do with Hunter's union activities or support.

5 As to the allegations involving Warren, the Respondent contends first that as to Warren's testimony that a supervisor, Andre Harris, told her that employees had to go directly to their trucks (sometime in 2009), the General Counsel adduced no evidence that this directive had any connection to the Union although bargaining was then ongoing.

10 The Respondent also points out that even if the no longer employed Harris said this to Warren, there was a good business reason for its implementation as Warren testified that the morning employee muster was customarily particularly hectic and management wanted the employees to get to their trucks as soon as possible and not spend time talking. The Respondent submits also that simply because Warren felt that she was being watched by management while talking to the drivers does not rise to the level of "discipline," nor would such  
15 conduct if true constitute or support a charge of unlawful coercion or surveillance. The Respondent submits that the charge is groundless and should be dismissed as frivolous.

20 Turning to the events of October 13, the Respondent asserts that Warren became involved in a heated debate with Safety Supervisor Charles Mays in an employee meeting. It was reported to Osborne that their "debate" caused a near riot in the yard. It was because of this event that Osborne instructed his managers to read the five and later six point email to Warren.

25 The Respondent contends that the Union agreed that Warren had "crossed the line" of proper conduct of a union steward, and had engaged in unprotected activity during the meeting. The Respondent also contends that Osborne's notice to her was nothing more than a simple didactic lesson from an employer who wanted to promote cooperative labor relations and was not meant to intimidate or thwart Warren in the exercise of her Section 7 rights. Instead, the Respondent submits that the email reading was not a discipline nor was it intended to be such.  
30 The Respondent argues that given this point, essentially the charge of Section 8(a)(3) and (1) fails on grounds of insufficiency of proof of unlawful conduct and should be dismissed.

## VI. The Legal Principles Applicable to the Unfair Labor Practices

### 35 A. *The Unfair Labor Practice Principles*

#### 1. 8(a)(1) and 8(a)(3) Allegations

40 Employer interference, restraint, or coercion of employees who exercise their statutory right to form, join, or assist labor organizations are unlawful under Section 8(a)(1) of the Act.<sup>57</sup> The test under Section 8(a)(1) does not turn on the employer's motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which it may be reasonably said tends to interfere with the free exercise of employee rights under the Act.  
45 *Gissel Packing Co.*, 395 U.S. 575 (1969); *United Rentals*, 350 NLRB 951 (2007); *Almet, Inc.*, 305 NLRB 626 (1991); *American Freightways Co.*, 124 NLRB 146, 147 (1959). Thus, it is violative of the Act for the employer or its supervisor to engage in conduct, including speech, which is specifically intended to impede or discourage union involvement. *Johnson Technology, Inc.*, 345 NLRB 762 (2005); *F. W. Woolworth Co.*, 310 NLRB 1197 (1993); *Williamhouse of California, Inc.*, 317 NLRB 699 (1995). The test of whether a statement or conduct would  
50

<sup>57</sup> As codified, see 29 U.S.C. §158(a)(1).

reasonably tend to coerce is an objective one, requiring an assessment of all the circumstances in which the statement is made as the conduct occurs. *Electrical Workers Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109 (1995). *Rossmore House*, 269 NLRB 1166 (1984), *enfd. sub nom. Hotel & Restaurant Employees Local 11 v. NLRB*, 706 F.2d 1006 (9th Cir. 1985). *Medicare Associates, Inc.*, 330 NLRB 935 (2000). *Greenfield Die & Mfg. Corp.*, 327 NLRB 237 (1998).

The Board has found that threats of job loss may violate Section 8(a)(1) because of the reasonable tendency of such statements to coerce employees in the exercise of their Section 7 rights. *Clinton Electronics Corp.*, 332 NLRB 479 (2000). *S & M Grocers, Inc.*, 236 NLRB 1594 (1978); *Hinky Dinky Super Markets*, 247 NLRB 1176 (1980), *affd.* 636 F.2d 231 (8th Cir. 1980).

Regarding the issue of employee discussions about and solicitations on behalf of unions, the Board recently held and reaffirmed that:

It is well established that employees are entitled to discuss unions and solicit for unions on nonworking time, unless the employer can show that it needs to limit the exercise of that right in order to maintain production or discipline. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945), *MBI Acquisition Corp.*, 326 NLRB 1246 (1997); and *Peyton Packing Co.*, 49 NLRB 828, 843-844 (1943), *enfd.* 142 1009 (5th Cir.), *cert. denied* 323 U.S. 730 (1944). It is also well settled that an employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to other subjects not associated or connected with the employees' work tasks. However, an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work . . . . *Jensen Enterprises*, 339 NLRB 877, 878 (2003).

While Section 8(a)(1) prohibits certain speech and conduct deemed coercive, employers are free under Section 8(c) of the Act to express their views, arguments, or opinions about and regarding unions as long as such expressions are unaccompanied by threats of reprisals, force, or promise of benefits. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).<sup>58</sup>

In fact, the Board has determined that even "intemperate" remarks that are merely expressions of personal opinion are protected by the free speech provisions of Section 8(c). *International Baking Co. & Earthgrains*, 348 NLRB 1133 (2006); *Sears, Roebuck & Co.*, 305 NLRB 193 (1991). In accord, an employer is entitled to explain the advantages and disadvantages of collective bargaining to its employees in an effort to convince them that they would be better off without a union, as long as there are no threats or promises of benefits. *Amersino Marketing Group, LLC*, 351 1055 (2007); and *Langdale Forest Products Co.*, 335 NLRB 602 (2001).

Consistent with an employer's right to express its opinion, the Board permits the employer to distribute antiunion materials on notices, as long as there is no coercion. *Allegheny Ludlum Corp.*, 333 NLRB 734 (2001).

---

<sup>58</sup> In *International Baking Co. & Earthgrains*, a supervisor told an employee, among other things, that the union was not a good thing and that the union would harm him as he was making decent money and advised the employees not to sign a union card. The Board found no violation, holding that the supervisor was merely expressing his lawful opinion concerning the effects of unionization on the employees.

Notably, an employer may violate the Act by imposing on its employees any rule or policy that prohibits them from engaging in union activity on company property or during “working hours” without explaining the limits on when such activity is permitted. *Ichikoh Mfg., Inc.*, 312 NLRB 1022 (1993).

5

The Board has also held that a rule, policy, or directive from an employer that requires employees not to second-guess (question) management’s decisions and policies may violate the Act because such a rule in effect may thwart or discourage employees in the exercise of their Section 7 rights. *Webasta Sunroofs, Inc.*, 342 NLRB 1222 (2004).

10

#### B. Section 8(a)(3)

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3).<sup>59</sup> First, the General Counsel must make a prima facie showing sufficient to support the interference that protected conduct was a motivating factor in the employer decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board’s *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1993).

15

20

Under the *Wright Line* framework, the General Counsel must establish four elements by the preponderance evidentiary standard. Accordingly, the General Counsel must first show the existence of activity protected by the Act, generally an exercise of an employee’s Section 7 rights.<sup>60</sup> Second, the General Counsel must show that the employer was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a line or nexus between the employee’s protected activity and the adverse employment action. If the General Counsel establishes these elements, she is said to have made out a prima facie case of unlawful discrimination, or a presumption that the adverse employment violated the Act.<sup>61</sup>

25

30

The Respondent, in order to rebut this presumption, is required to show that the same action—the adverse action—would have taken place even in the absence of protected activity on the employee’s part. *Mano Electric*, 321 NLRB 278 (1966); *Farmer Bros.*, 303 NLRB 638 (1991).

35

While the *Wright Line* test entails the burden shifting to the employer, its defense need only be established by a preponderance of evidence. The employer’s defense does not fail simply because not all of the evidence supports, or even because some evidence tends to negate it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992).

40

45

---

<sup>59</sup> Sec. 8(a)(3) of the Act (§158(a)(3)) makes it an unfair labor p[practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

50

<sup>60</sup> The protected activity includes not only union activities but also invocation and assertion of rights guaranteed employees under Sec. 7 of the Act. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Interboro Contractors*, 157 NLRB 1295 (1966).

<sup>61</sup> *Yellow Transportation, Inc.*, 343 NLRB 43 (2004); *Tracker Marine*, 337 NLRB 644 (2002).

The Board has held, however, that where the General Counsel has made out a strong showing of discriminatory motivation, the employer's rebuttal burden is substantial. *Bally's Atlantic City*, 355 NLRB No. 218 (2010). Accordingly, the strength of the General Counsel's case should be considered by the judge in finding that an employer has met its *Wright Line* rebuttal burden.

It is worth noting that proving discriminatory motive and animus is often elusive. Accordingly, the Board has held that an animus or hostility toward an employee's protected and concerted activity or union activity may be inferred from all the circumstances even without direct evidence. Therefore, inferences of animus and discriminatory motive may derive from evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct,<sup>62</sup> departures from past practices, tolerance of behavior for which the employee was fired, and disparate treatment of the discharged employees. *Adco Electric*, 307 NLRB 1113, 1123 (1992), enfg. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); and *In-Terminal Services Corp.*, 309 NLRB 23 (1992).

The judge may also consider prior unfair labor practices in resolving this issue, as well as violations that have occurred before and after an election.<sup>63</sup>

It is worth a reminder that the Board admonishes judges considering an employer's defense(s) of the actions taken against employees not to substitute their business judgment for that of the employer, because the action taken may have been exercised on the basis of the employer's particularized business judgment. *Lamar Advertising of Hartford*, 343 NLRB 261 (2004). *Yellow Ambulance Services*, 342 NLRB 804 (2004). The Board, moreover, has emphasized that the crucial factor is not whether the business reason was good or bad, but whether it was honestly invoked and in fact was the cause of the action taken. *Framan Mechanical, Inc.*, 343 NLRB 408 (2004).<sup>64</sup>

---

<sup>62</sup> On this point, see *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004), holding that union animus was evident through the respondent's many violations of Sec. 8(a)(1), (3) and (4) found to have occurred before and after the second election campaign. See, also, *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418 (2004), where the Board noted that the knowledge element of the General Counsel's initial burden also may be satisfied by evidence of the surrounding circumstances, including contemporaneous 8(a)(1) violations.

<sup>63</sup> While the Board has not, based on my research, enunciated what standards would apply to an employer's investigation of employee misconduct that it determined was worthy of some degree of adverse action, it would be my view that a full and fair investigation would at a minimum be promptly undertaken, thorough, and impartial.

<sup>64</sup> Along these lines, employees who breach company policies in the course of engaging in protected activity by verbal (or nonverbal) conduct may lose the protection of the Act. In that regard, the Board employs a four-factor test as set out in *Atlantic Steel Co.*, 245 NLRB 814 (1979). The four factors are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employees' outburst; and (4) whether the outburst was provoked by the employer's unfair labor practice.

See *Kiewit Power Constructors Co.*, 355 NLRB No. 150 (2010), and *Kentucky River Medical Center*, 355 NLRB No. 129 (2010). Both cases treat with behavior of an employee which the employer deemed worthy of discipline because of or related to its policies governing their behavior on the job.

## Discussion and Conclusions

5 As I have reviewed the credible evidence regarding the alleged discrimination against Warren and Hunter by the Respondent, certain aspects of the parties' conduct, interface and roles, to me, are clearly beyond dispute. Viewed as such, these matters form the underpinnings of my ultimate decision in this case.

10 First, as to Warren, the Respondent's treatment of her on October 13 at the closed door meeting with her supervisors, Turner and Dean, was orchestrated by the Company's owner, Osborne, and president, Rilee, who instructed Dean to meet with Warren and read her the contents of the emails; Turner's role was only to be a witness. The sum and substance of the meeting centered on Warren's behavior/conduct, not as an employee but as a unionist. Thus, the gravamen of the Respondent's complaint was the way she performed her duties as a union representative. The Respondent, mainly Osborne, believed that she was overstepping her  
15 bounds and, in so many words, usurping the prerogatives of management. Hence, the Respondent determined that her behavior as a union representative had to be addressed at the October 13 closed door meeting with only her supervisors present. The Respondent may have complained earlier to the Union about Warren, but it did not invite the Union to the meeting, which clearly took on a disciplinary atmosphere.

20 Applying the *Wright Line* analysis to the October 13 meeting, it is abundantly clear that the General Counsel has met her burden. It is uncontrovertibly established that the Respondent at the highest level knew of her union activities. It is also crystal clear that the meeting in the office that day was convened solely to deal with what the Respondent believed was Warren's  
25 not abiding by its notions of how she would properly comport herself as an employee representative. In this regard, in agreement with the General, I would conclude that she was discriminatorily singled out for discipline because of her union activities. Contrary to the Respondent, I would find and conclude that on October 13, Warren was indeed disciplined. First, the entire scenario was essentially tantamount to a "wood shedding" of Warren and was  
30 highly coercive and threatening.

35 Moreover, the October 13 email—the five and six point versions—was verbatim read to Warren and, most notably, she was warned that if she were to violate any of the items covered by the email, she faced disciplinary action to include termination.

40 Notably, some of the listed infractions were not dischargeable offenses under the extant disciplinary scheme. By any reasonable standard, in my eyes, the warning and the chosen method of administering it constituted a discipline or adverse action within the meaning of the Act. Furthermore, to the extent the Respondent sought to change Warren's behavior in her representation of the employees at the Pasadena yard, its coercive approach, while unlawful, seemingly worked as the Company now believes she is a model employee. This approach and action by the Company in my view is the precise type of behavior condemned by the Act and the Board.

45 While the Respondent certainly has a right to take measures that ensure order and discipline in the workplace, as to Warren it took a legally incorrect approach in my view. So to the extent the Respondent defends its actions against Warren on grounds of its need to have order and discipline in the workplace, and that Warren's conduct was disruptive or  
50

insubordinate—an overstepping of her authority—I would reject that defense and conclude that irrespective of its stated motive, its action is not defensible under the Act.<sup>65</sup>

5 Therefore, I would find and conclude that by singling out Warren on October 13, 2009, for discipline because of and on account of her having engaged in union and other protected activities, the Respondent violated Section 8(a)(1) and (3) of the Act.

10 Regarding the Respondent's allegedly having discriminatorily told Warren sometime in September 2009 that she was to go immediately to her truck in the morning, I note that Warren and the other General Counsel driver witness Christian who testified on the point stated that she (and he) customarily gathered and informally conversed with each other in the mornings prior to beginning their runs and while waiting for the helpers to arrive. In my view, Warren credibly testified that she was told to go immediately to her truck by her supervisor sometime in September. However, she did not always comply with this instruction. Notably, driver Christian recalled that his supervisor told him sometime in September that there was a policy change and that he was to go directly to his truck and presumably not engage in the small talk he customarily engaged in prior to starting his workday. Christian said that he, too, only complied with this directive now and then.

20 I would find and conclude that with respect to the September 2009 charge, the Respondent did not violate the Act with regard to Warren. It seems that irrespective of her union activities at the time, the Respondent's directive to her was also applicable to the other drivers as well, and seemingly was not always complied with by her and at least one other driver—and surely others—with no disciplinary consequences.

25 It certainly may be argued that the September 2009 instruction to Warren was a precursor to the Respondent's more dramatic treatment of her in October but, be that as it may, I cannot conclude that she was discriminatorily told by the Respondent to go directly to her truck in the mornings or that she suffered any adverse employment action by dint of the instruction. I would recommend that this charge be dismissed.

30 Turning to Hunter, in my mind it is beyond dispute that early in the morning on August 24, Hunter was observed standing in the Pasadena yard near the office trailer, where all employees have to go to clock in, with a baseball bat in his possession. It is also in my view that Hunter had been observed about year earlier by management officials again standing in the Pasadena yard with a bat in his possession. On both occasions, in 2009 and 2008, Hunter had engaged in this particular behavior in the context of his not having received his quarterly performance bonus.

40 It is also indisputable to me that prior to August 2009, Hunter could and did use a baseball bat to check his tire pressure as part of the pre-trip inspection of his truck and, like other employees, to ward off dogs and vermin encountered on the trash routes. I believe that the Respondent's management knew that bats and other similar implements were kept on the

45 <sup>65</sup> I am aware that the complaint alleges in par. 7 that the Respondent, on October 13, unlawfully ordered Warren to leave work immediately at the end of each shift. I would find and conclude that the Respondent in all likelihood did so instruct her. In my view, as a consequence, the Respondent violated Sec. 8(a)(3) and (1) in this instance also, but I would find and conclude that the action was essentially part and parcel of the October 13 "wood shedding" of Warren and need not merit a separate analysis. I will recommend a proper remedy for this charge.

trucks by drivers and helpers. In that light, prior to August 2009, the Respondent did not view the bats as prohibited weapons under its disciplinary policy then in effect. And even up to August 19, 2009, when the Union and the Company agreed to a new disciplinary policy, the Company did not view baseball bats as prohibited weapons per se.

5

It is with these observations in mind that I have considered in total context Hunter's termination.

As to the *Wright Line* analysis applicable to Hunter's discharge, the General Counsel has shown and, in fact, the Respondent readily concedes the point, that the Company knew that as a member of the negotiating committee Hunter was engaged in and had engaged in union activities at around the time of his termination. The General Counsel has in my view established also that the termination was an adverse action suffered by Hunter contemporaneously with his engaging in protected Section 7 rights.

15

In terms of improper motive or animus against the Union, the General Counsel submits that much prior to discharging Hunter, the Respondent had shown that it was hostile to the Union and that this hostility was projected on or transferred to Hunter in August 2009.

20

The General Counsel cites Warren's testimony about supervisor Morales' hostile actions and words against the Union at Jimmy G's in April 2008 as an example of the Company's hostility toward the Union's organizing campaign at that time. While the date of the posted notice that read "union activity of any kind on company property is prohibited" (GC Exh. 22) is not really known, the General Counsel also points to its posting, if only for a short time, as indicative of the Company's general hostility to the Union, and therefore its adherents like Hunter. The General Counsel finally asserts that the very denial to Hunter of his quarterly bonus in August 2009 during the time he was actively engaged with the negotiating committee is clearly indicative of and constitutes animus.

25

30

However, in agreement with the Respondent, I think that the General Counsel's proof of Hunter's union activity, save for his low-key participation on the negotiating committee, is rather sparse. However, that he participated is established fact on this record and the denial of his bonus and subsequent termination took place while he was engaged in a protected activity; that is, assisting as an employee representative with the negotiation of a collective-bargaining agreement. In likewise, I agree with the Respondent that the evidence of the Company's general animus to the Union is attenuated by time and circumstances, and on this record the contrary seems to be true. It seems after the Union became an existing fact for the Company, Osborne determined that the far better course was to work with the Union and move the relationship and the business forward in a positive way.

35

40

However, I found Warren to be an eminently credible witness, and I would credit her testimony that Morales may have expressed antipathy toward the Union during the first campaign and that theoretically (for purposes of *Wright Line*) that animosity may have carried over to the time of Hunter's denial of his bonus and subsequent discharge.

45

Accordingly, I would find and conclude that the General Counsel has met her initial burden to establish the unlawfulness of the Respondent's treatment of Hunter, but that in my view she did so only barely.

50

Turning to the Respondent's defense, I note that Hunter admitted that while he had received his quarterly bonuses on a number of occasions, he did not always receive one. Hunter admitted also that he did not always help out on the other routes when requested. The

Respondent contends that Hunter was denied his quarterly bonuses in August 2009 because management, mainly his supervisor, Manns, as he credibly testified, told Turner that Hunter did not help out and there were complaints about him from one of the helpers. Turner, taking that information, credibly testified in my view that she did not recommend Hunter for the bonus. I would note that Manns, as I observed him, appeared to be somewhat reluctant to testify against Hunter in the sense that he seemed not to bear him any ill will and, in fact, expressed what I view as something akin to sympathy over Hunter's losing his job, something he only discovered upon his return from vacation.

Nonetheless, Manns confirmed that Hunter presented some supervisory problems for him as a new and probationary manager and he felt duty-bound to report his feelings to Turner. In my view, I would find and conclude that the Respondent did not give Hunter a bonus in August 2009 for legitimate business reasons, that specifically neither Manns nor Turner harbored animosity against Hunter by reason of his union involvement of which I believe she had no actual knowledge. Turner may have known about Hunter's participation on the negotiating committee, but such knowledge in my estimate of her had no effect on her decision to deny him his bonus.<sup>66</sup> Accordingly, I would find and conclude that the Respondent has met its *Wright Line* obligation to show that with respect to its denial of a bonus to Hunter in August 2009, it would have done so irrespective of his possibly engaging in union activities, specifically participating as an employee member of the negotiating committee. I would recommend dismissal of this charge.

As to Hunter's discharge, it bears reminding that while Hunter was terminated by Turner with Osborne's approval on August 25, 2009, the discharge was not finally ratified until around mid-September 2009, after Osborne completed the investigation undertaken by him at the request of the Union. In my view, this is a salient point in determining the bona fides of the Respondent's defense that Hunter was discharged because of his possession of the baseball bat which the Company initially concluded he was brandishing in a menacing (to other employees) fashion. Under such circumstances, the Company determined that Hunter violated the company policy against having a weapon on company property, and that Hunter would have been terminated under these circumstances irrespective of his union or other protected activity.

So, in my view, the Company's investigation of the incident after August 25 is significant. As noted, an employer's investigation if deemed inadequate and unfair, as the Board views it, can supply inferentially animus against an employee's engaging in protected activity or his union support and involvement. And in my view, an inadequate investigation can supply the material for pretext. In my view, any such investigation by the employer should be prompt, thorough, and fair.

I have considered Osborne's investigatory efforts which actually were undertaken at the request of the union officials who believed Hunter's termination was "unjust" and that he should be reinstated, and would conclude that the investigation was promptly undertaken, thorough, and in the end fair.

---

<sup>66</sup> I note in passing on this count that the Respondent's bonus criteria, while definite in form, seems to take on some fluidity in application. It seems that irrespective of an employee's performance under the extant criteria, the recommendation from the immediate supervisor carries great weight in the initial determination. If the supervisor does not make a favorable recommendation, the next level supervisor, the operations manager like Turner, will not forward a bonus recommendation to corporate officials, who also may nix a bonus recommendation.

Osborne testified in this regard and presented as a highly credible witness and in fact, his testimony in significant particulars was corroborated by the Union's Kelm.

5 Osborne stated unequivocally that his decision to ratify Hunter's discharge was arrived at only after receiving various statements from persons with some knowledge of the incident and related matters, specifically Hunter's past and present supervisors, an employee who felt intimidated by the bat, and Hunter himself. Notably, Osborne testified that he simply did not believe Hunter's version of why he was admittedly standing in the yard with the bat.

10 After completing his investigation, Osborne took the unusual, if not unprecedented, step of writing a full report of his investigation and submitting it to the Union. Notably, while the Union (Kelm) did believe that Hunter's termination was unjust because of what Kelm described as "drama" on the part of the supervisors in the yard, it concurred with Osborne's statement that the discharge was based on the bat incident.

15 It is notable on this score that the union representatives testified that the Union had a good and "professional" relationship with Osborne, whom they clearly trusted to be a fair employer. In this light, Osborne's testimony in my view was highly credible. Osborne stated that after the Union's presence became fact at Ecology Services, he decided to treat them as an asset and, in this vein the Respondent claims that by the time of Hunter's discharge, there was a "peace" with the Union and the parties were on the way to reaching agreement as witnessed by their entering into a new disciplinary process on August 19, 2009.

25 Osborne also noted that in point of fact, he treated bargaining committee members Myles and Hall with some deference so as not to disturb the good relationship by imposing discipline on them for violations of company policies. Even as to Warren, Osborne testified that the purpose behind his treatment of her in October stemmed from his concern that she was not comporting herself in a way that was consonant with his views about establishing and maintaining good labor-management relations.

30 On balance, without belaboring or putting too fine a point on the matter, I found Osborne's testimony highly credible and his decision to terminate or not reinstate Hunter to be bona fide. I would find and conclude that the decision to terminate Hunter was made because of legitimate business reasons and based on sound company policy—the safety and security of the work force—and irrespective of Hunter's engaging in protected activity at the time of his discharge, the Respondent would have taken the action it did. I would recommend dismissal of this charge.

40 I note in passing that my decision has been influenced not only because of the foregoing discussion but also because of the Board's admonition to judges not to substitute their judgments for the legitimate business judgments and decisions of an employer. Osborne decided after investigation that Hunter posed a danger to the work force and that he or the Company would be responsible if something bad were to occur if he retained Hunter. I, on this record, questioned Osborne about his decision to keep Hall, who repeatedly violated company policy because of problems with drugs, as well as his decision to keep Myles employed though he was possibly insubordinate. Osborne's reply was that he made the judgment that Hall was salvageable and actually did not hurt anyone and that Myles also did not harm anyone. Besides, both were on the negotiating committee. On the other hand, as I heard him and took in his demeanor, Osborne viewed Hunter's behavior with more alarm and concern for the safety of the employees, and possible workplace violence, a different level of concern when compared with Hall, Myles, or other employees. Osborne simply said he could not abide behavior like Hunter's.

As a trier of fact, I cannot turn a blind eye and a deaf ear to the regrettably all too frequent reports of workplace violence in the United States in recent times. Accordingly, while I, like anyone, could question Osborne's judgment and decision making regarding his employees, I decline to do so with respect to Hunter's discharge. I note along these lines that the Board has determined that where the General Counsel's case is weak regarding the *Wright Line* analysis, as here, the employer's burden is not as high. I would find and conclude that the Respondent has met its burden under *Wright Line* and recommend dismissal of this charge.

#### Conclusions of Law

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

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

3. By disciplining Paula Warren on October 13, 2009, the Respondent violated Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not violated the Act in any other way whatsoever.

#### The Remedy

Having found that the Respondent has engaged in unfair labor practices warranting a remedial order, I shall recommend that it cease and desist from engaging in such conduct and that it take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily disciplined Paula Warren, I shall recommend that it be ordered to remove from its files any references to Warren's discipline and make her whole for any loss of earnings and other benefits she may have suffered by virtue of the discrimination practiced against her, computed (where and if applicable) on a quarterly basis from the date of the discipline less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 350 NLRB No. 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I make the following recommended<sup>67</sup>

#### ORDER

The Respondent, Ecology Services, Inc., Pasadena, Maryland, its officers, agents, successors, and assigns, shall

---

<sup>67</sup> 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.

1. Cease and desist from

(a) Disciplining or otherwise discriminating against any employee for supporting or acting on behalf of Teamsters Local Union No. 311, affiliated with International Brotherhood of Teamsters.

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

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

(a) Make Paula Warren whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the Remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to Paula Warren's unlawful discipline and, within 3 days thereafter, notify her in writing that this has been done and that the discipline will not be used against her in any way.

(c) 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, if any, under the terms of this Order.

(d) Within 14 days after service by the Region, post at its office in Pasadena, Maryland, copies of the attached notice marked "Appendix."<sup>68</sup> Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 13, 2009.

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

Dated, Washington, D.C. January 26, 2011

\_\_\_\_\_  
Earl E. Shamwell Jr.  
Administrative Law Judge

<sup>68</sup> 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 on your behalf with your employer  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT discipline employees engaged in lawful protected activity.

WE WILL NOT discipline or otherwise discriminate against employees because of their known or suspected membership in and/or support for Teamsters Local Union No. 311, or any other labor organization.

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

WE WILL make Paula Warren whole for any loss of earnings or other benefits resulting from her unlawful discipline because of her known or suspected membership in and/or support for Teamsters Local Union No. 311, 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 Paula Warren's unlawful discipline and, WE WILL within 3 days thereafter notify her in writing that this has been done and that the discipline will not be used against her in any way.

ECOLOGY SERVICES, INC.; ECOLOGY  
SERVICES CURBSIDE COLLECTION SERVICES,  
LLC; ECOLOGY SERVICES ANNE ARUNDEL  
COUNTY CARTAGE, LLC; A Single Employer

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

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

JD-02-11  
Pasadena, MD

103 South Gay Street, The Appraisers Store Building, 8<sup>th</sup> Floor  
Baltimore, MD 21202-4061  
Hours: 8:15 a.m. to 4:45 p.m.  
410-962-2822.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 410-962-3113.