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American Medical Response of Connecticut, Inc. and National Emergency Medical Services Association. Cases 34–CA–12465, 34–CA–12466, 34–CA–12467, 34–CA–12471, 34–CA–12499, 34–CA–12500, 34–CA–12514, 34–CA–12515, 34–CA–12520, and 34–CA–12551

May 10, 2011

DECISION AND ORDER

BY MEMBERS BECKER, PEARCE, AND HAYES

On November 9, 2010, Administrative Law Judge Mindy E. Landow issued the attached decision. The Respondent filed exceptions¹ and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.²

¹ The Respondent did not except to the judge's findings that it violated Sec. 8(a)(1) of the Act by: threatening employees with the loss of their annual wage increase because of their union activities; engaging in unlawful surveillance of employees' union activities; prohibiting employees from possessing union materials on company time and property; prohibiting employees from using a bulletin board to post union-related items; prohibiting employees from wearing a union lapel pin; and prohibiting employees from displaying a union decal while working and threatening employees with discipline if they refused to remove the union decal. The Respondent also did not except to the judge's findings that it violated Sec. 8(a)(3) and (1) of the Act by refusing to allow Michael Gerrity to attend a company meeting on paid time, and violated Sec. 8(a)(5) and (1) of the Act by: unilaterally failing to make upgrade payments, tuition reimbursement payments and recertification payments; modifying overtime distribution procedures; and failing to post the biannual shift bid. The Respondent excepts solely to the judge's finding that it violated Sec. 8(a)(5) and (1) of the Act by unilaterally withholding the January 2010 annual wage increase.

² We have modified the judge's order to conform to the Board's standard remedial language. Further, we amend the judge's recommended remedy to provide that all payments to employees shall be with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

ORDER

The National Labor Relations Board orders that Respondent American Medical Response of Connecticut, Inc., Waterbury, Avon, and Southington, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with the loss of their annual pay raise because they engage in union activities.

(b) Unlawfully surveilling employees' union activities.

(c) Prohibiting employees from possessing union materials on company time and property.

(d) Discriminatorily prohibiting employees from using a bulletin board to post union-related items.

(e) Discriminatorily prohibiting employees from wearing a union lapel pin.

(f) Discriminatorily prohibiting employees from displaying a union decal while working and threatening employees with discipline if they refuse to remove the union decal.

(g) Discriminatorily refusing to allow its employees to attend a company meeting on paid time.

(h) Unilaterally and without notice and bargaining with the National Emergency Medical Services Association (the Union), failing to pay eligible bargaining unit employees upgrade pay, tuition reimbursement payments, and recertification payments.

(i) Unilaterally and without notice and bargaining with the Union modifying overtime distribution procedures applicable to bargaining unit employees.

(j) Unilaterally and without notice and bargaining with the Union failing to post the biannual shift bid for bargaining unit employees.

(k) Unilaterally and without notice and bargaining with the Union failing to grant paramedics, emergency medical technicians, and chair car drivers a scheduled annual wage increase.

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

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

(a) Make Michael Gerrity whole for any losses he may have suffered as a result of Respondent's discriminatory refusal to allow him to attend a company meeting on paid time, with interest as set forth in the remedy section of the judge's decision as amended in this Decision.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All full-time and part-time and per diem paramedics, emergency medical technicians, and chair car drivers employed by the Employer at its Waterbury, Southington, and Avon, Connecticut facilities, but excluding all other employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

(c) Upon request of the Union, rescind the unilateral changes made on or after September 4, 2009, to the terms and conditions of employment of bargaining unit employees and restore the status quo as it existed as of that date until a new contract is concluded, the parties have bargained to a valid impasse, or the Union has agreed to the changes.

(d) Make whole its affected former and current unit employees for losses they suffered by virtue of Respondent's unlawful unilateral changes in the manner set forth in the remedy section of the judge's decision as amended in this Decision.

(e) Within 14 days from the date of this Order, implement the wage increase withheld from paramedics, emergency medical technicians, and chair car drivers that had been scheduled for January 1, 2010.

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

(g) Within 14 days after service by the Region, post at its facilities in Waterbury, Southington, and Avon, Connecticut copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 34, 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. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable

³ 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."

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 August 1, 2009.

(h) 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. May 10, 2011

Craig Becker, Member

Mark Gaston Pearce, Member

Brian E. Hayes, Member

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with the loss of your annual pay raise because you engage in union activities.

WE WILL NOT unlawfully surveil your union activities.

WE WILL NOT prohibit you from possessing union materials on company time and property.

WE WILL NOT discriminatorily prohibit you from using a bulletin board to post union-related items.

WE WILL NOT discriminatorily prohibit you from wearing a union lapel pin.

WE WILL NOT discriminatorily prohibit you from displaying a union decal and threaten you with discipline if you refuse to remove it.

WE WILL NOT discriminate against you because of your union or other concerted, protected activities by refusing to allow you to attend a company meeting on paid time.

WE WILL NOT unilaterally and without notice or bargaining with the National Emergency Medical Services Association (the Union) fail to pay eligible bargaining unit employees upgrade pay, tuition reimbursement payments, and recertification payments.

WE WILL NOT unilaterally and without notice and bargaining with the Union modify overtime distribution procedures applicable to bargaining unit employees.

WE WILL NOT unilaterally and without notice and bargaining with the Union fail to post the biannual shift bid for bargaining unit employees.

WE WILL NOT unilaterally and without notice or bargaining with the Union fail to grant paramedics, emergency medical technicians, and chair car drivers a scheduled annual wage increase.

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

WE WILL make Michael Gerrity whole for any losses he may have suffered as a result of our discriminatory refusal to allow him to attend a company meeting on paid time, with interest.

WE WILL, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All full-time and part-time and per diem paramedics, emergency medical technicians, and chair car drivers employed by the Employer at its Waterbury, Southington, and Avon, Connecticut facilities, but excluding all other employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

WE WILL, upon request of the Union, rescind the unilateral changes made on or after September 4, 2009, to the terms and conditions of employment of bargaining unit employees and restore the status quo as it existed as of that date until a new contract is concluded, the parties have bargained to a valid impasse, or the Union has agreed to the changes.

WE WILL make our affected former and current bargaining unit employees whole for losses they suffered by

virtue of our unlawful unilateral changes to their terms and conditions of employment.

WE WILL, within 14 days from the date of this Order, implement the wage increase withheld from paramedics, emergency medical technicians, and chair car drivers that had been scheduled for January 1, 2010.

AMERICAN MEDICAL RESPONSE OF
CONNECTICUT, INC.

Thomas E. Quigley, Esq., for the General Counsel.
Miguel A. Escalera Jr. and Lisa D. Lazarek, Esqs. (Kainen, Escalera & McHale, P.C.), of Hartford, Connecticut, for the Respondent.

DECISION

STATEMENT OF THE CASE

MINDY E. LANDOW, Administrative Law Judge. Based upon a series of unfair labor practice charges and amended charges filed by National Emergency Medical Services Association (NEMSA or the Union) against American Medical Response of Connecticut, Inc. (the Employer or Respondent),¹ between September 28 and November 17, 2009,² an Order Further Consolidating Cases, amended consolidated complaint and notice of hearing (the complaint) issued on March 29, 2010, alleging violations of Section 8(a)(1), (3), and (5) of the Act. The complaint alleges that the Respondent violated the Act by: prohibiting employees from using a bulletin board to post union-related materials; threatening employees with the loss of an annual wage increase because of their support for the Union; prohibiting employees from wearing union lapel pins and decals and threatening them with discipline should they do so; surveilling employees and prohibiting the possession of union materials on company time and property; discriminatorily refusing to allow employee Michael Gerrity to attend a company meeting on paid time and making a series of unilateral changes in terms and conditions of employment including: failing to make contractually required upgrade, tuition reimbursement and recertification payments, modifying overtime distribution procedures, failing to post the biannual shift bid and failing to grant a scheduled annual wage increase. The Respondent filed an answer to the complaint which denied that it had violated the Act, as alleged.³

A hearing in this matter was held before me in Hartford, Connecticut, on April 14 and 15, 2010. At the hearing, counsel for the General Counsel moved to amend paragraphs 11 and 12 of the complaint to allege that certain unfair labor practices had occurred on dates consistent with the testimonial evidence. Respondent did not oppose this motion, and it was granted.

¹ At times, the parties also referred to the Employer as AMR, although that designation was also used to indicate a national entity as well. Unless otherwise specified, the use of the term AMR will refer to the Respondent herein.

² All dates are in 2009, unless otherwise specified.

³ Although Respondent admitted those paragraphs of the complaint alleging that it had modified its overtime distribution procedures applicable to unit employees and that it failed to post the biannual shift bid for unit employees it denied that by doing so it violated the Act.

After the close of the hearing, but before briefs were filed, Respondent moved to reopen the record to introduce into evidence an arbitration award concerning the discharge of James Gambone, a NEMSA organizer and one of the General Counsel's witnesses. I granted that motion by Order on June 7, 2010. In conjunction with the filing of its posthearing brief, counsel for the General Counsel moved to amend the transcript in various respects. Respondent responded with two proposed and unopposed clarifications, and the General Counsel's motion as modified by Respondent is hereby granted.

Based upon the entire record, the briefs filed by counsel for the General Counsel and the Respondent and my assessment of the evidence including my evaluation of the credibility of the witnesses,⁴ I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a domestic corporation with various facilities in the State of Connecticut. Respondent admits and I find that during the 12-month period ending February 28, 2010, Respondent purchased and received at its Connecticut facilities goods valued in excess of \$50,000 directly from points located outside the State of Connecticut. Respondent further admits, and I find that at all material times, it has been an employer in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent additionally admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Overview of operations

The Employer provides emergency and nonemergency medical transportation services in the State of Connecticut. This case involves the so-called "Waterbury Division" which consists of facilities located in Avon, Southington, and Waterbury. The headquarters of the Waterbury Division are located in Waterbury, and this facility is sometimes referred to as "Company 2." The Waterbury Division employs approximately 162 employees. Since 1999, Robert Retallick has been its general manager. Retallick supervises, among others, employees in human resources, business development, payroll, and scheduling. The Waterbury Division's lead supervisor, Mark Hughson, oversees approximately five field supervisors who, in turn, directly supervise all employees in the relevant bargaining unit. National Vice President for Labor Relations David Banelli is responsible for all labor relations policies, programs, practices, and contract negotiations for Emergency Medical Services Corporation (EMSC) which is a parent corpo-

⁴ Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or because it was inherently incredible or unworthy of belief.

ration to American Medical Response⁵ and all of its subsidiaries (including the Respondent herein).⁶

2. The NEMSA organizing campaign

On September 21, 1998, following a Board-conducted election, the Waterbury Emergency Services Union (WESU) was certified as the collective-bargaining representative of a unit of all full-time and regular part-time paramedics, emergency medical technicians (EMTs), chair car drivers, school bus drivers, and livery drivers employed by the Employer at its Waterbury and Southington facilities. WESU was an independent union which solely represented employees of the Employer in the Waterbury division. WESU thereafter affiliated with the International Union of Police Association (IUPA). The first collective agreement between the Employer and WESU was effective from late 1999 through October 2002. Thereafter, a successor agreement was entered into by the parties, effective from November 1, 2002 to October 30, 2006. A subsequent collective-bargaining agreement was effective by its terms from October 31, 2006 to October 30, 2010 (the 2006 collective-bargaining agreement or WESU agreement).

According to the testimony of Raymond Caruso Jr., a paramedic in the Waterbury division and former WESU treasurer, IUPA, a union which primarily represents police officers, had a servicing agreement with WESU. In the summer of 2007, IUPA notified WESU that it no longer wished to represent employees in the private sector, and wanted to concentrate on organizing and representing employees in municipal police departments, and the service agreement was severed. WESU then signed a service agreement with the International Association of EMTs and Paramedics (IAEP), but that agreement ended in late 2008 or early 2009. At this time, the WESU officials were President Mike West, vice president and paramedic Michel Gerrity and Caruso.⁷

In January 2009, WESU sought to sign a servicing agreement and affiliate with NEMSA, but Respondent opposed such an affiliation. In late-May or early June, NEMSA began an organizing campaign and solicited authorization cards from employees. Thereafter, on July 10, NEMSA filed a petition for an election with the Board. After a hearing, the Regional Director directed an election in the following unit:

All full-time and regular part-time and per diem paramedics, emergency medical technicians and chair car drivers employed by the Employer at its Waterbury, Southington and Avon, Connecticut facilities, but excluding all other employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

After receiving the election petition, Scott Rowencamp, the Employer's employment and labor counsel, sent an email to

⁵ American Medical Response is a corporation with facilities nationwide which employs approximately 18 thousand employees, about 50 percent of which belong to a labor organization.

⁶ Retallick, Hughson, Banelli, and Human Resources Representative Anthony Cardenas testified in this proceeding for the Respondent.

⁷ Gerrity and Caruso testified herein, West did not. Also testifying for the General Counsel were paramedic Robert Velletri and NEMSA organizer James Gambone.

West, which in pertinent part, provides as follows: “I just received NEMSA’s petition for an NLRB election. Does WESU intend to be on the ballot in the event there is an election?” West replied: “No, WESU does not intend to seek placement on the ballot in the event of an election.”

Thereafter, on July 31, West sent an email to General Manager Retallick and Vice President of Human Resources Robert Zagami which states in relevant part:

WESU’s communications with the NLRB have been very clear. While WESU disclaimed interest in being on the upcoming ballot, we specifically stated that WESU would continue to represent the employees of this division until such time as an election was held.

It is undisputed that Respondent campaigned against the selection of NEMSA as bargaining representative. To this end, it distributed literature to its employees at the workplace and conducted group meetings, both mandatory and voluntary, as will be discussed below. The election was held on September 4 and the Union prevailed with a vote of 82 employees voting for representation and 55 employees voting against.⁸ Thereafter, on September 15, NEMSA was certified as the exclusive collective-bargaining representative of the above-described unit.

3. Subsequent correspondence

After the election, on September 6, West sent the following email addressed to Vice President Banelli and Retallick:

You seem to be operating under some various misconceptions about the intentions or actions of WESU regarding our representation of the employees in the Waterbury Division. Please let me disabuse you of those notions.

—WESU informed Melissa Barrows/NLRB that WESU was not seeking a place on the ballot.

—In response to a direct question from Melissa Barrows/NLRB, WESU maintained that it would continue to represent the employees of the Waterbury Division throughout the election process.

—WESU never informed any representative of AMR of any intention to disavow the unit or cease our representation of our members.

—WESU has continued to operate as the representative of our members in all appropriate fashions, and has been recognized by local AMR management in the carrying out of these duties.

—The NLRB has continued to recognize that WESU is the duly elected representative of the unit, as evidenced by certain findings that you are well aware of.

[Conclusory paragraph omitted.]

Thereafter, on September 14, NEMSA’s labor attorney Timothy K. Talbot sent the following letter to Banelli:⁹

We understand that AMR managers in the Waterbury Connecticut operation are advising bargaining unit members that AMR will not adhere to any provisions contained in the

WESU labor agreement between AMR and WESU. Most recently, AMR managers refused to pay annual stipends provided by the labor agreement.

As an initial matter, we previously expressed our position that AMR has impermissibly refused to recognize WESU’s status as the exclusive bargaining representative pending resolution of the representation election. While WESU advised the NLRB that it did not wish to be on the election ballot and continue representing the bargaining unit following the election process, WESU remains the exclusive representative until the NLRB certifies NEMSA as the new exclusive representative. AMR’s assertion that WESU disclaimed interest in representing the bargaining unit as of the date ballots were cast rather than following completion of the election process is disingenuous. AMR’s refusal to recognize WESU as the exclusive representative and to honor all terms and conditions of the WESU labor agreement until the NLRB certifies NEMSA as the exclusive representative is an unfair labor practice.

Following NEMSA’s certification as the exclusive bargaining representative, AMR is required to continue the terms and conditions of employment established by the WESU labor agreement and maintain all other existing working conditions pending negotiations with NEMSA. AMR’s obligation to maintain the status quo precludes the company from altering or eliminating terms and benefits established by the WESU labor agreement until the parties bargain for a new contract or reach an impasse in negotiations. While AMR is not required to arbitrate grievances arising under the WESU labor agreement with NEMSA or extend agency shop provisions to NEMSA, AMR is required to honor the remaining provisions of the WESU labor agreement.

The annual stipends provided under the WESU labor agreement are part of the status quo that AMR is obligated to maintain. The annual stipends are automatic increases to which AMR has already committed itself. Even where annual wage increases involve both automatic and discretionary elements, an employer is obligated to bargain with the union before discontinuing entirely the practice of granting annual wage increases. The NLRB has made it clear that an employer may not unilaterally discontinue an established practice of granting stipends or merit increases without agreement from the union. Consequently, AMR commits an unfair labor practice by unilaterally discontinuing annual stipends that are fixed as to timing, criteria and amount.

Moreover, in *Arizona Portland Cement* the NLRB adopted an administrative law judge’s finding that the employer was obligated to honor the union’s rights provisions (e.g. union release time, bulletin boards, etc.) in a labor contract negotiated with a preceding labor organization. The ALJ specifically rejected the employer’s contention that it could refuse to honor provisions of the former agreement relating to “the employer-union rather than the employer-employee relationship.” The ALJ went on to find that the employer was required to extend the same union rights provisions contained in the former labor contract to the new union, even though those provisions were negotiated with the former union.

⁸ There were four challenged ballots, a number insufficient to affect the results of the election.

⁹ The letter contains multiple case citations which are omitted here.

We trust there will not be any lingering confusion or misunderstanding on the part of AMR management concerning its obligation to maintain the status quo and honor the terms and conditions established by the WESU labor agreement. We expect AMR will immediately pay employees their annual stipends as required by law and make employees completely whole for all losses. WESU has advised us that it will pursue all legal remedies available to it against AMR and its managers for these violations. NEMSA, as you know, will do likewise.

On September 16, Banelli replied, in relevant part, as follows:

I am in receipt of your letter of September 14, 2009 and your email of September 16 pertaining to the newly organized Waterbury operation. Please accept this communication as our response to both your assertions in your September 14 letter and your request to roll over the former WESU agreement to its original expiration date.¹⁰

It appears that your office has suffered a communication breakdown with your client NEMSA, as shortly after receiving your request this morning to rollover the former WESU agreement; I received a letter from Jason Herring requesting to begin bargaining. While I may have seriously considered the potential of rolling over the former agreement, the pure fact that you would have the audacity to seek to rollover the Agreement and at the same time put forth a request to begin negotiation is not only ingenuous but clearly bad faith intentions. Therefore, I decline your request to rollover the former agreement.

Pertaining to your various assertions in your September 14 letter allow me to address them individually. First, your allegation that Waterbury managers are advising unit employees that AMR will not adhere to any provision of the former WESU agreement are as usual union rumor as you provide no specificity and as such are unfounded and inaccurate.

Regarding WESU's representation status and your position that AMR has impermissibly refused to recognize WESU is once again a misrepresentation by the union of the facts. AMR's position is and always has been predicated based on WESU's (Mr. West) statements and position to the NLRB clearly indicating that WESU as of the date of the election would cease representing the employees of Waterbury. Therefore, your position, again is unfounded and without basis or fact.

While I appreciate your desire to provide me with an extended level of education on the requirements of maintaining the "status quo" pertaining to wages, hours and conditions of employment please be assured that I am as equally versed as you in such matters. To that point, it appears we have and shall continue to have a difference of opinion as it relates to the payment of stipends. We believe those payments are not wages; hours or conditions of employment and like other aspects of the former collective bargaining agreement are not

withheld within the "status quo" doctrine and therefore will not be maintained.

In response to your concern related to bulletin boards and union release time, allow me to be clear on our position. First, the bulletin board in the Avon operation was purchased by WESU and is rightfully WESU's property and as such has been removed and returned to WESU. Upon certification of the election, NEMSA will have access to the general employee bulletin boards until such time as that matter is addressed in a new collective bargaining agreement. Pertaining to the issue of union release time, as WESU has disclaimed interest (referenced earlier in this communication) and NEMSA has not named any individuals as officers or stewards in the matter of union release time is moot.

After NEMSA's certification, the parties commenced bargaining in mid-December. At the time of the hearing, the parties had met for three sessions totaling 9 days and negotiations were ongoing. Both Gerrity and Caruso are on the negotiating committee for NEMSA, as is Gambone.

It is apparently undisputed, and the record reflects, that the Employer took the position that if NEMSA won the election, the WESU agreement would be "null and void." This position was articulated at the hearing by various witnesses, including Human Resources Representative Cardenas and Banelli. Additionally, in responding to a grievance filed by NEMSA in January 2010, regarding the Employer's failure to grant wage increases to employees, Zagami, who answered the grievance replied, in pertinent part: "As of September 4, 2009, the Collective Bargaining Agreement became null and void."

4. The parties' bargaining history at other AMR facilities

In defense to certain allegations of the complaint, in particular those relating to the failure to grant employees an annual wage increase, Respondent relies in part on the conduct of bargaining at other AMR facilities nationwide. In particular, Banelli testified that NEMSA represents 11 other bargaining units of AMR employees and has, on eight occasions, won elections where there was an existing unit and exclusive representative already in place. In three of these eight cases, there were collective-bargaining agreements in effect due to expire subsequent to the date of NEMSA's certification as the exclusive collective-bargaining representative. According to Banelli, NEMSA never took the position in any of those cases that those prior agreements continued in effect. Rather, NEMSA and AMR negotiated to "roll over" the extant agreements, or to continue them through their original terms with NEMSA replacing the former representative in enforcing the agreement. Each of these "roll over" agreements contains language reflecting the fact that AMR and NEMSA agreed to "continue the wages, hours and all other terms and conditions of employment." Thus, the predecessor's agreement became the operative collective-bargaining agreement governing terms and conditions of AMR employees going forward. I note, however, that there is no evidence that the parties' practice at other facilities as binding upon the Waterbury Division.

To the contrary, as noted above, after NEMSA was certified for the Waterbury unit, Talbot requested a "roll over" of the

¹⁰ The issue of the proposed "roll over" of the WESU agreement is discussed below.

existing WESU collective-bargaining agreement, but Banelli refused to do so in this instance. According to Banelli, this decision was reached due to a change in the economic and operational conditions in Waterbury which had occurred since the WESU agreement was first negotiated. Thus, the parties entered into negotiations for a new agreement in December 2009. At the outset, to avoid forfeiting future bargaining over the issue, NEMSA submitted a wage proposal. Consistent with the parties' agreed-upon practice, however, economic proposals were to be addressed after noneconomic matters were resolved and, as Banelli testified, had not been discussed as of the date of the hearing.

B. The Alleged Violations of Section 8(a)(1)

1. The alleged prohibition on the use of a bulletin board to post union materials

The complaint alleges that since on or about July 1, Respondent has prohibited employees at its Waterbury facility from using a bulletin board to post union-related items. Respondent has denied this allegation.

Article V of the WESU agreement contains the following provision:

The Employer shall furnish a portion of a bulletin board at all stations for the posting of proper Union notices. The Union shall be responsible to see that posted matters involve only Union affairs, are business-like, and contain no material disparaging the Employer or its clients.

The record establishes that there was a bulletin board provided for WESU at the Waterbury facility. It is also not disputed that WESU posted materials in support of NEMSA on this bulletin board. For example, Retallick acknowledged seeing the following memorandum posted to WESU members:

On behalf of Mike, Ray, Nikki and myself I want to take this opportunity to make it clear that the Board's decision to support NEMSA in the upcoming election is rooted solely in our deep desire to advance the concerns of us all.

While WESU has served Waterbury well these past ten years, it has become increasingly apparent that the corporate changes at AMR call for a change in how we represent ourselves. AMR has become increasingly hostile to our concerns, pushing the clearest of issues to arbitration rather than agreeing to settle our issues in a mutually respectful manner. WESU has offered on many occasions to work with AMR to better our work environment and increase the spirit of cooperation. This new AMR that we face chooses argument over agreement and derisiveness over unity. The best choice we have for representation in this new environment is NEMSA.

NEMSA has proven itself effective against this new corporate giant AMR. NEMSA has been successful in its negotiations with AMR, representing thousands of unionized EMS professionals across the country. As an important cornerstone to NEMSA's success against AMR is that NEMSA is 100% EMS, start to finish. Obtaining better contracts through their better understanding of the needs of EMS workers has be-

come a hallmark of NEMSA. NEMSA is exactly what we need.

We have all heard various opinions about what WESU might or might not have done differently or better. The truth is, WESU has been extremely effective in its representation of our members. It is also true that, going forward, our members will need the backing of a large and strong EMS union. That is NEMSA. While I have entertained many questions about the Board's endorsement of NEMSA, I have not heard one question that would make me think that going without a union would be beneficial to any of us.

We strongly encourage each and every one of you to vote "NEMSA" at the upcoming election. WESU can show AMR our continued solidarity by a 100% endorsement of NEMSA. With a complete rejection of AMR's propaganda, and a unified voice in support of NEMSA, we can show AMR that we will continue to stand as one.¹¹

The record establishes that the union bulletin board at the Waterbury facility was under a locked glass cover and could only be accessed with a key. Those having copies of this key included members of the Employer's supervisory staff as well as WESU officials West, Gerrity, and Caruso.

Both Caruso and Gerrity testified that, during the campaign, they posted pro-NEMSA literature on the Waterbury bulletin board and that while WESU material would remain posted, NEMSA literature would quickly disappear. Caruso testified that if he put pro-NEMSA literature up on the weekend, it would be gone by Monday or sometimes even the same day. Neither Caruso nor Gerrity ever saw anyone remove literature from this bulletin board. Caruso testified that sometime after the election, but prior to NEMSA's certification, a supervisor named Joseph Spagna instructed him to remove an item from the bulletin board; however, Caruso did not identify what this item was.¹²

Gerrity testified that he asked both Caruso and West whether they had removed the NEMSA literature and they denied doing so. He further stated that this sort of thing had not happened in the past, and that during the course of his employment with the Employer he had never seen any supervisor or manager remove notices from the WESU board. Paramedic Rob Velletri, who works out of the Southington (Company 6) facility, testified that, while there was no specific bulletin board designated for such a purpose, union communications would be posted on the wall next to the punch-in system. When pro-NEMSA literature was posted, it would be removed shortly thereafter. Velletri was unable to identify, however, who had removed such literature.

Retallick testified that he saw the above-described notice encouraging WESU members to support NEMSA posted on the WESU board. There is no evidence as to how long this document remained on the WESU board or whether it was removed at any point. He further testified that at some point prior to the

¹¹ This posting, dated August 25, was signed by West, Caruso, Gerrity, and WESU secretary Nicole Weber.

¹² The parties stipulated at the hearing that Spagna is a statutory supervisor.

election, the WESU sign was removed from the bulletin board located at Company 2 and a NEMSA sign put up in its stead. Retallick did not feel that the substitution was appropriate because the Employer, which owned the bulletin board, had allowed WESU to use it for its own purposes and not for NEMSA. At some point after the election, the WESU board was taken down inasmuch as that union no longer represented employees at the facility.

According to Retallick, the Waterbury facility also contains a large employee information center, which is primarily for company use; however, employees may request permission to post notices in this area. In addition, there is an area near the employee punch-in phone where notices of immediate interest to employees are posted. As Retallick testified, the Employer has allowed employees to post information there as well. However, neither Retallick nor any other company witness offered specific testimony as to what materials have been posted at such locations or whether the Employer gave employees permission to post NEMSA material there. On cross-examination, Caruso confirmed that WESU would post material on the wall next to the punch-in system. When asked whether NEMSA material was posted at that location, Caruso stated that he could not recall.

Hughson testified generally that employees were permitted to post union information next to the punch-in phone. Hughson offered no specific testimony that NEMSA literature had been posted there or whether the Employer's permission was required before employees could do so. Cardenas was asked whether pro-NEMSA literature was put up on "take down walls" or the WESU board and relied "I believe so."

On cross-examination, Banelli was asked whether he was aware of the fact that, during the NEMSA campaign, one of the Employer's supervisors removed some literature pertaining to that labor organization from the WESU bulletin board. Banelli replied:

I am, and in my affidavit I referenced the reason why it was removed is the bulletin board was owned by WESU, and so therefore they had the limited, they were the exclusive organization who could post the material on that bulletin board.

The record further reflects that, at the time of the hearing, all of the bulletin boards in Company 2 had been removed due to ongoing renovations of the garage area.

2. The alleged threat of loss of an annual wage increase

The complaint alleges that, on or about August 1, the Employer threatened employees with the loss of their annual wage increase if they voted for the Union. Respondent has denied this allegation of the complaint.

The WESU agreement provides, *inter alia*, that EMTs, paramedics and drivers "shall on the first pay period that encompasses the effective date listed below have their base hourly wage increased as identified below over the course of the life of this Agreement." For the calendar year 2010, the effective date was January 1, as it had been for the prior 3 years of the contract. EMTs and paramedics were scheduled to receive a base hourly wage increase of 3.5 percent and drivers an increase of 3 percent. The testimony of employee witnesses establishes that

going back to the period of time prior to the 2006 collective-bargaining agreement, raises might not have been granted in January of any particular calendar year; nevertheless employees consistently received an annual wage increase.

During the election campaign, in August, the Employer circulated a letter from Retallick to employees entitled: "Here are our answers . . . Where are yours?" which stated, in pertinent part:

Last week—we received an unsigned letter from WESU/NEMSA, asking us to answer "TEN QUESTIONS." Well, our Answers are set out below. No excuses/no bull. Now that we've offered honest answers to the union's questions—maybe they'll provide straight answers to our 10 questions to them from last week.

Question number 8, as posed by WESU/NEMSA is as follows:

"Will you, right now, guarantee in writing the pay raises that you say we will get if were to vote "no union?"

Retallick's written response was:

I never said that Waterbury employees would get pay raises if the new union is voted down. In fact—the union tossed out your 1-1-2010 pay increases when Mike West told the Labor Board that the current CBA would end when the NLRB election was held. Do the non-union employees in Bridgeport get regular raises? Yes. Do they make more than we do—even with our union contract? Yes.

The General Counsel alleges that this communication constitutes an unlawful threat to employees that they would not receive the January 2010 wage increase due to their union activities.¹³

3. The alleged prohibition on wearing union lapel pins

The complaint alleges that in or about August, Hughson prohibited employees at the Waterbury facility and at the EMS room at Waterbury Hospital from wearing a union lapel pin. Respondent has denied these allegations of the complaint.

Caruso testified that in about August, NEMSA organizer Gambone gave employees NEMSA literature and other material such as pens, notepads, and lapel pins. The pins that were distributed to employees are approximately one inch in diameter and are fastened by a stopper at the rear so to prevent someone from being inadvertently stuck by its sharp point. Upon receiving the pin, Caruso placed it on the lapel of his uniform. Caruso was at the Waterbury facility at the time and testified that approximately 1 hour later Hughson saw him wearing the pin and asked him to please remove it. Caruso, who did not want to be charged with insubordination, complied. Caruso wore the pin later that month, prior to the election. Once again Hughson asked Caruso to remove the pin, and he did.

¹³ Caruso testified that, after the election, both Cardenas and Supervisor Mike Popyk told employees that employees would not be receiving raises insofar as the WESU labor contract was "null and void." Gerrity testified that Popyk told him essentially the same thing. Cardenas acknowledged making such statements to employees after, but not before, the election. These statements were not alleged as independent unfair labor practices.

Caruso additionally testified that at some point after the election, in about September, he was at Waterbury Hospital, a major client of the Employer, in the EMS room where employees complete paperwork after they bring patients to the hospital. Again, he was wearing a NEMSA pin and Hughson, who was present, asked him to remove it. Caruso testified that Hughson never specified why he was making such a request and that he did not reference any safety concerns.

Caruso further testified that in his 13 years as an AMR employee he had worn other union pins, in particular those designating IUPA and IAEP, and had never been told to remove them. Caruso stated that he has also observed employees wearing other sorts of pins such as American Flag, breast cancer awareness, and military pins. Hughson was not asked and offered no testimony about this matter.¹⁴

EMSC has a dress code applicable to employees of the Employer. There are lists and illustrations of attire that is appropriate for men and women as well as lists and illustrations of inappropriate attire. The latter includes: hiking boots, jogging suits, leggings or stirrup pants, shorts and crop pants, slippers and house shoes, flip flops or “thong” sandals, athletic-style shoes, beachwear, team jerseys, casual T-shirts, “cros” or jellies shoes, Birkenstocks, halter and tank tops, visible piercings other than earrings, athletic sweatshirts, pants or yoga pants, bare shoulder dresses or shirts, visible tattoos, hats, denim. With regard to jewelry in general, the dress code provides: “Jewelry may be worn provided it is professional in appearance. One earring on each ear on the bottom lobe is appropriate. Jewelry related to any other body piercings is not acceptable.” There is no express prohibition on lapel or other pins.

On August 12, Cardenales sent a memorandum to members of the supervisory staff pertaining to attempts by Gambone to visit with employees on company property and at client locations.¹⁵ Of relevance to the discrete issue under consideration here, is Cardenales’ admonition as follows: “Employees are expected to adhere to the company “Approved Uniform” policy with each of its respective components as such. No unauthorized pins, stickers etc. allowed for display.”

Cardenales testified that an authorized pin or sticker was an item approved by the company, given directly to an employee by the company and that these are the only types of pins or stickers allowed at work. Cardenales denied that employees wore WESU stickers or pins, although he acknowledged that they have worn American Flag pins. When asked whether those were kept and distributed by the company he replied, “I won’t necessarily say that we have not given it out,” but acknowledged that he had not distributed such pins to employees.

¹⁴ Velletri similarly testified that employees regularly wear other types of pins such as breast cancer awareness, Connecticut Children’s Medical Center, and stork pins, among others.

¹⁵ Gambone’s visit and Cardenales’ subsequent memorandum will be discussed in further detail below.

4. The alleged surveillance of employees and prohibition on possession of union materials on company time and company property

The complaint, as amended at the hearing, alleges that on or about August 11 or 12, Hughson engaged in surveillance of employees’ union activities and that, on those same dates, Respondent prohibited employees from possessing union materials on company time and property. Respondent has denied these allegations of the complaint.

Respondent maintains a no-solicitation and no-distribution policy which is set forth in its employee handbook, which provides:

It is the policy of the company to prohibit solicitation and distribution by non-employees on Company premises and through Company mail and e-mail systems, and to permit solicitation and distribution by employees only as outlined below. The Company limits solicitation and distribution on its premises because, when left unrestricted, such activities can interfere with the normal and orderly operations of the Company, can be detrimental to efficiency, and can pose a threat to safety and security.

Solicitation of others regarding the sale of material goods, contests, donations, etc. is to be limited to approved announcements posted on designated break room bulletin boards. Use of the electronic mail system for solicitation is strictly prohibited. Distributing literature and circulating petitions in work areas at any time is also prohibited. Solicitation and distribution by any person who is not employed by the Company are prohibited at all times on Company property and throughout all Company operated facilities.

The Company on occasion may approve certain charitable or informational campaigns (e.g. related to employment benefits). At no time, however, will you be required to donate or participate as a condition of employment.¹⁶

Respondent additionally relies upon the following language, contained in article V of the WESU agreement:

Nothing in this Agreement shall abridge the rights of employees to engage in Union activities in accordance with the law. However, there shall be no discussion of Union affairs on the premises of accounts or facilities serviced by the Employer. Employees may confer with representatives of the Employer in the administration of this Agreement at times mutually agreed upon b[y] the employee and the Employer. Employees with Union investigation responsibilities shall seek the permission of the Employer to investigate grievance matters during working hours and the Employer’s permission shall not be unreasonably withheld. However, there shall be no Union meetings on the Employer’s premises without the Employer’s permission. The names of Union employees with investigation responsibilities are to be specified by the Union in writing and delivered to the Employer at the beginning of each contract year.

¹⁶ It is not alleged that this no-solicitation, no-distribution policy is unlawful.

Gambone testified that on either August 11 or 12 he visited the Employer's Waterbury facility.¹⁷ Gambone drove a NEMSA vehicle which he characterized as a "rolling billboard" as the Union's name was prominently featured. By that point, NEMSA had obtained a sufficient number of authorization cards to support its petition and the purpose of Gambone's visit was to speak with employees and answer any questions they might have. He stated that did not contact anyone to seek their permission to enter the facility or meet with employees.¹⁸

Gambone stated that he arrived at Company 2 at about 10 or 10:30 a.m. and parked his vehicle in the parking lot where employees typically park their cars. He entered the premises through the garage and proceeded to a picnic table situated in the facility where several crews (approximately six to eight employees) were located. As Gambone entered the building he saw Cardenas, but the two did not speak at this time. He proceeded to the picnic table, spoke with employees and offered them some materials consisting of pens, stickers, and notepads bearing the NEMSA logo.

As Gambone testified, shortly thereafter, Cardenas and Hughson came over to the picnic area and told Gambone he did not have permission to be there and should leave. Hughson then began confiscating the materials Gambone had distributed to employees. Gambone had given one employee a box of pens and other items to distribute to coworkers. As this employee was sitting in her ambulance, which was parked in the garage at the time, Hughson walked over and collected the materials. Gambone went over to Hughson and asked that they be returned to him, and Hughson complied with his request.

At this point, Gambone left the premises and drove a short distance to a local Dunkin' Donuts franchise. In the store, he encountered two of the crew members who had been at Company 2 during his visit, who came in after he was in line.¹⁹ He spoke with the employees, and gave them his business card. At this point Hughson entered the restaurant and interrupted their conversation, telling the employees that they had a pending

¹⁷ During his testimony, Gambone acknowledged that this date differed from the date specified in his prehearing affidavit, and that a review of documents before the trial had refreshed his recollection as to when the events in question had actually occurred.

¹⁸ During Gambone's direct examination, counsel for the General Counsel appeared to suggest that Gambone had an ongoing employment relationship with Respondent. In fact, Gambone had been previously employed by American Medical Response of Massachusetts, Inc. He had been terminated on August 9, 2007, and both a grievance and an unfair labor practice charge relating to his discharge was pending at the time of the hearing. On May 20, an arbitration decision was issued on his discharge finding that he had been discharged for cause and denying the grievance. In particular, the arbitrator concluded that Gambone had made false statements in a patient care report regarding a call involving a minor and again in a subsequent interview about the incident. Respondent suggests that I rely upon these findings to discredit Gambone's testimony.

¹⁹ Gambone denied planning to meet the crew members there, and stated that it was merely a coincidence. As Respondent has noted, however, in his pretrial affidavit, Gambone stated that he went to the Dunkin' Donuts to meet with two of the employees that had been at the garage. Respondent asserts that it was clear that Gambone must have arranged the meeting with that crew while he was at the garage.

call. They replied that they did not hear any call and Hughson responded that they were about to get one and needed to get on the road. Gambone purchased coffee and left the restaurant as the employees were still waiting for their order.

Gambone then proceeded a short distance to Waterbury Hospital. He observed that some employees were situated in the staging area, which is where employees await dispatch. Gambone parked next to one of the ambulances, exited his vehicle, spoke with two employees who were waiting in the area and offered them NEMSA materials. Hughson pulled up. It appeared to Gambone that he instructed the other crews in the staging area to leave. Gambone then left the facility. As he was doing so, he observed Hughson approaching the crew he had been speaking with and confiscating the materials Gambone had given to them. Gambone's visit at Waterbury Hospital had lasted only a few minutes.

Gambone next drove over to Saint Mary's Hospital, another major client, approximately 5 minutes away. He parked on a public street near the ambulance bay. As Gambone sat there, one of the crews situated in the ambulance bay exited the hospital and parked in front of him. Gambone walked over to their vehicle and asked if they were on a call. The employees stated that they were not and were waiting for an assignment. Gambone spoke with them and offered them NEMSA materials. At this point in time Hughson arrived and took the materials from the employees. Gambone returned to his vehicle and waited. Approximately 5 minutes later, two members of hospital security came over and instructed him to leave the vicinity, which he did.

Hughson testified that Gambone's visit to the facility did not occur until noon.²⁰ He was notified that a NEMSA vehicle had pulled in to Company 2 and entered the garage where he observed someone speaking with employees. At the time, Hughson did not know Gambone. He approached the picnic table, and asked Gambone to step over to the soda machines, about 15-20 feet away. The two men introduced themselves. Hughson asked Gambone if he had permission to be on the property, and as Hughson testified, Gambone stated that Cardenas had given him permission. At this point Cardenas arrived and stated that Gambone was not authorized to be on the premises and, according to Hughson, Gambone replied, "Why don't you just tell me to get the 'F' off the property." Gambone also said that this would make the newsletter.²¹

Hughson testified that two ambulance crews and at least one or two transportation crews²² were present in the garage at the time, and that this was an unusual circumstance because crews are usually either out at posting locations or transporting pa-

²⁰ Cardenas offered no specific testimony about the timing of the events in question. On cross-examination, he responded affirmatively to a question from counsel for the General Counsel which placed Gambone's visit as occurring in the "morning."

²¹ According to Cardenas, Gambone stated, "Why don't you just throw me the hell out then." Cardenas replied that it was not necessary to be rude, but that Gambone was not authorized to be on the premises. Gambone then stated that "it was going to be on the website, anyway."

²² Transportation crews provide nonemergency services, such as transporting clients to the doctor.

tients. The garage is not a post location. Cardenales similarly testified that it was unusual to have so many employees present in the garage at any particular time. According to Cardenales, the employees also seemed “very nervous,” which he found to be “strange.”

While the three men were speaking, employees had dispersed and returned to their vehicles. Gambone was in the process of exiting the garage, and handed a box of material to an EMT employee who was getting ready to deploy. Hughson approached the employee and asked for the material. Hughson then returned the articles to Gambone, asking him to “refrain from stopping and taking to the employees during work hours. You have their names. You have their phone numbers. You have their e-mails. You have regular union meetings. Those are your time[s] that you could talk to employees. Please don’t disrupt business and our daily operations.” Hughson then escorted Gambone to his vehicle and he drove off.

Hughson and Cardenales discussed Gambone’s visit and, decided to go to Waterbury Hospital, to reassure the client that the Employer’s operations would not be compromised by any organizing activity. Hughson and Cardenales testified that, as they were driving over, they heard one of the ambulances getting a call over the radio for an out-of-town transfer, with no response. They then noticed that this particular vehicle was parked at Dunkin’ Donuts, as was the NEMSA vehicle. Hughson informed dispatch that he would get the crew to log on to respond to the call. According to Hughson, he then pulled over and entered the Dunkin’ Donuts to speak with the crew. He told the crew that they had a call and asked them not to delay any further, it was business as usual.²³ Hughson gave the employees permission to remain behind long enough to purchase coffee. While they were waiting, Gambone returned to his vehicle and drove off.

Respondent introduced into evidence a record referred to by Hughson as a “CAD report” for the transfer call referred to above which shows the time of dispatch, the time the vehicle went en route to the call and the time it arrived at the scene. According to this document, the crew was contacted by dispatch and given the assignment to transport a patient to a dialysis facility at 13:34 (or 1:34 pm) and departed for the call at 13:37 (or 1:37 pm).

Cardenales and Hughson then proceeded to Waterbury Hospital. As the two men entered the parking lot, they noticed the NEMSA vehicle in the ambulance parking area. As they approached, the vehicle left the area. Contrary to Gambone, neither Hughson nor Cardenales offered any testimony regarding any confiscation of pro-NEMSA material from employees at this time or location. However, they also did not specifically deny Gambone’s testimony that this had occurred.

Cardenales and Hughson then entered the hospital and spoke with Employer’s on-site transportation coordinator and asked him to report any service delays or unusual activity within the parking lot to the duty supervisor. The men then spoke next with the hospital’s director of security, Oscar Herrera. Hughson explained that there was an organizing campaign, reassured

²³ These crew members had been present at the garage during Gambone’s visit.

the hospital that patient services would remain a priority, and requested that the hospital be alert to unauthorized visits from NEMSA representatives. Herrera stated that the hospital maintained a no-solicitation policy.

The visit to Waterbury Hospital took about 20 to 30 minutes. After that Hughson and Cardenales proceeded to Saint Mary’s Hospital. They noticed the NEMSA vehicle parked on a public street in an area which typically is used for patient drop off, and which is adjacent to the hospital emergency room parking lot. One of the company’s vehicles was also parked in that location, in a manner which partially blocked both the sidewalk and the street. Hughson spoke with the crew and instructed them to move their vehicle. He saw that they had NEMSA materials in the ambulance and removed them. One of the employees asked Hughson whether she could keep a sticker and he replied that she could get one on her own time. At this time, it did not appear to Hughson that Gambone was in his vehicle. As Hughson proceeded to the emergency room, Gambone returned to his vehicle and drove off. Hughson and Cardenales then spoke with hospital security and told them that there was a union vote upcoming, that AMR did not want any union activity within the parking lot that would disrupt the flow of traffic or interfere with the drop off area and requested that the hospital contact the duty supervisor if any problems developed. As Hughson testified, he and Cardenales returned to Company 2 by 3 p.m.

Later that day, Hughson returned to Waterbury Hospital. As he testified, Gerrity and his partner had been dispatched to a critical care transport from that facility.²⁴ Hughson testified that due to the nature of the call, he decided to proceed to the hospital to make sure that “everything was going to be business as usual.” When he arrived he saw Gerrity in his vehicle on the telephone, with the stretcher still in the car. At that time, Gambone’s vehicle pulled into the driveway, and then immediately drove off. Gerrity then took the stretcher out of his vehicle and proceeded with the call. The CAD notes produced by the Employer with regard to this assignment show that the vehicle was dispatched at 15:44 (or 3:44) p.m. and en route 7 minutes later.

After the events of this day, Cardenales wrote the memorandum to the Employer’s supervisory personnel which has been discussed, in part, above. The document notes “repeated attempts” by Gambone to stop and talk with crews, “either at Company 2 or facilities where we do business” and that “NEMSA informational material has been removed from the employee and discarded appropriately and also returned back to the NEMSA rep when requested.” Supervisors were also instructed to be diligent in making rounds to remove “unauthorized materials and persons from our facilities.”

Gerrity testified that at some point prior to the election, Hughson told him he could not have pro-NEMSA literature in his vehicle. On another occasion he attempted distribute a NEMSA T-shirt to a coworker and Hughson told him that he was not allowed to distribute it on company property. Hughson did not rebut this testimony.²⁵

²⁴ A critical care transport is one where a patient is being sent to another facility which offers a higher level of care.

²⁵ Gerrity also testified that in the past, he had distributed WESU T-shirts and stickers, and had never been told he could not do so.

5. Alleged prohibition on wearing union decals and the related threat of discipline

The complaint alleges that in February 2010, Hughson prohibited employees from displaying a union decal while working and further, that he threatened employees with discipline if they refused to remove the decal. Respondent has denied these allegations of the complaint.

Velletri, who works as a paramedic at Respondent's Southington facility, is also an elected steward for NEMSA. He testified that in about November, Gambone gave him NEMSA stickers. He placed one on his vehicle and another on the company radio holder which he wears across his chest.

Velletri wore the sticker on his radio holder without incident for some period of time. On February 9, 2010, he was working out of the Waterbury facility and had occasion to encounter Hughson in the office. As Velletri testified, Hughson told him that there was nothing official with NEMSA yet, that the parties were still in negotiations, and that he should remove the sticker or go home. Velletri replied that he did not think he had to remove the sticker, but Hughson insisted, so Velletri removed the sticker from his radio holder and placed it on his wallet.

Hughson acknowledged asking Velletri to remove the sticker from his radio holder. According to Hughson, Velletri "went on a little, little rampage, very small, couldn't even tell you what it was. Didn't say too much. Walked out of the office and that was the end of the conversation." Hughson was asked generally whether he "communicated any threat" to Velletri and he denied doing so but he did not specifically deny that he told Velletri that if he did not remove the sticker he would have to go home. Although Hughson did not offer specific testimony about the date of this incident, he confirmed that it happened "recently."

C. The Alleged Violation of Section 8(a)(3)

The complaint alleges that during the week of August 17 or 24, Respondent unlawfully refused to allow Gerrity to attend a company meeting on paid time. Respondent has denied this allegation of the complaint.

Gerrity has been a paramedic with AMR for over 15 years. He served as vice president of WESU for 4 years including the period of time NEMSA was campaigning to represent employees. As noted above, during the NEMSA campaign he attempted to distribute pro-NEMSA materials to employees and was told by Hughson he could not do so.

He currently serves as a steward²⁶ and secretary of NEMSA and is a member of the bargaining committee.

The record establishes that during the month of August, Respondent held various meetings with employees regarding the upcoming election which were conducted by Retallick and Hughson. Some were mandatory, and others voluntary.

At some point during August, Retallick circulated the following memorandum to employees:

IN RESPONSE TO DOZENS OF REQUESTS, Mark and I will be conducting informational meetings for all employees over the next few days.

We will schedule meetings so you can attend while on duty. If in the event you can not make a meeting during your shift you are welcome to attend another time slot. All we ask is please SIGN IN upon arrival. You will be paid for your time while at the meeting.

The memorandum sets forth various times for meetings which were scheduled at 2-hour intervals on Wednesday, August 19 through Friday, August 21. It further provides that more meetings will be added as necessary and requests that employees contact a company representative to schedule a meeting time.

Gerrity works the 3 to 11 p.m. shift on Tuesday, Wednesday, and Thursday. He testified that on Thursday, August 20, he arrived 1 hour early for his shift and planned to attend the 2 p.m. meeting scheduled for that day. According to Gerrity, he went up to the supervisors' window in the garage and asked where the meeting was being held. Hughson and another supervisor named Bryan Reynolds told him that the meeting had been cancelled.

The following morning Gerrity, who does not work on Fridays, came to the facility to attend a meeting scheduled for 8 a.m. When he arrived at the facility, at about 7:45 a.m., he went up to the conference room and was met by Hughson and Cardenales. No one else was present. According to Gerrity, Hughson stated that, "the meeting wasn't for me, and that I wasn't welcome" and that Gerrity had "already made up [his] mind." Gerrity testified he argued with the two supervisors for approximately a half-hour before leaving the facility. No other employee arrived for a meeting during this period of time. Gerrity further testified that if he had been allowed to attend the meeting, he would have received 2 hours of pay. Gerrity's payroll records show that he did not receive any pay for the date of August 21. Gerrity testified that he subsequently complained to the payroll department that he was owed 2 hours of pay for that date.

On August 25 and 26, the Employer scheduled mandatory meetings for all employees in the bargaining unit. Gerrity attended such a meeting on August 25, where Banelli spoke, and was paid. There is no claim here that Gerrity or any other employee was excluded from or not paid for their attendance at these mandatory meetings.

During Gerrity's cross-examination, counsel for Respondent failed to address his account of what had occurred on August 21. Rather, Gerrity was asked whether he attended a half-hour meeting with Cardenales and Hughson on August 11, for which he was paid. Gerrity replied that he did not believe that he was at a meeting on August 11. Gerrity was then shown his time and attendance records for the week from August 8 to 14 which indicate that on August 11 he punched in at 2:36 p.m., or 24 minutes prior to the start of his shift. Gerrity acknowledged that typically he would not have been allowed to punch in early for his shift which began at 3. Gerrity's payroll record further confirms that he was paid for the half-hour period which preceded his regularly scheduled shift. After being shown these records, Gerrity was asked again whether this reflected the time when he met with Cardenales and Hughson, but Gerrity insisted that he was referring to events which occurred on August 20

²⁶ There are approximately 10 elected stewards.

and 21. He stated that he did not know why he had punched in early on August 11. When questioned further on this issue by the General Counsel, Gerrity stated that he had, in fact, been instructed to punch in prior to the start of his shift on other occasions for various reasons such as to relieve an employee who had to leave early, or make preparations such as getting a car ready for the next crew or to place a stretcher in the back of an ambulance.

Respondent similarly questioned both Cardenas and Hughson about events which occurred on August 11, but not about August 20 or 21. According to Cardenas, Gerrity came for a meeting scheduled for 2 to 4 p.m. on August 11. When he arrived, he punched in about 30 minutes prior to the start of his shift at 3 p.m. and was then informed that the meeting was cancelled. Gerrity asked if he should punch out, and was told that it was not necessary. According to Cardenas, he and Hughson met with Gerrity for about 1 half hour and he was paid for his time. Cardenas denied that Gerrity was excluded from any employee meeting in August 2009, and further testified that he never received a complaint from Gerrity that he had not been paid for attending an employee meeting.

On cross-examination, Cardenas acknowledged that he was not aware of any notice to employees or other document which had been distributed advising employees that the Employer had planned or scheduled an informational meeting for August 11. He further admitted that some drivers tend to show up early for their shifts and that it would have not been out of the ordinary for Gerrity to have arrived for his shift 25 minutes early. Cardenas further acknowledged that employees may be asked to punch in and begin their shifts prior to their official start time.

On cross-examination, Cardenas was also asked what he remembered discussing with Gerrity during their meeting on August 11. He responded:

I remember Mr. Gerrity had a lot of questions concerning things that he became aware of but was unclear, namely Mr. Gambone's background, he was discussing. He wasn't aware Mr. Gambone was no longer employed by AMR or was, at one time, employed with AMR and no longer employed. His concern with—he, quite frankly, told us he was unsure whether or not there should be a union in place. He didn't know.

Hughson was also asked about this issue during his cross-examination. He initially responded in the affirmative when asked whether he knew, during the timeframe of August 2009, that Gerrity was in favor of unionization. He then stated, however, that at their 20-minute meeting, Gerrity was "confused" and that Hughson did not know what his vote would be.

Hughson further testified that Gerrity was not excluded from attending any company meeting in August 2009, and that he was paid for the meetings that he did attend. According to Hughson, the meeting scheduled for 2 p.m. on August 11 had been cancelled and Gerrity "wasn't notified for whatever reason." Gerrity arrived at the facility between 2:15 and 2:30 and asked if the meeting was still taking place. He was informed that it was cancelled due to lack of participation. Retallick, who was on a conference call at the time and had been desig-

nated to conduct the meeting, was unavailable. According to Hughson, "[w]e asked if it was okay, because Rob wasn't going to be present, if he wanted to talk to Tony and myself, and he did agree to it." The three men spoke for 15 to 20 minutes. Hughson denied telling Gerrity that he was not permitted to attend an employee meeting.

Retallick, who had issued the memorandum informing employees of the meetings to be held on August 19 through 21, and who was designated to conduct these meetings with employees, testified generally that employee meetings were held in August in connection with the union campaign and that AMR paid employees for their attendance at such meetings. He further stated that AMR wanted employees to attend such meetings so that they could get the information that the company thought they needed to make their decision. Retallick testified that he was not aware of Gerrity having been excluded from any employee meeting in August 2009. Retallick was not asked and offered no specific testimony regarding any meeting which may have been scheduled for employees on August 11 or 21.

D. The 8(a)(5) Allegations

The General Counsel has alleged that Respondent has engaged in several postcertification unilateral changes in violation of Section 8(a)(5) of the Act, thereby removing or delaying certain contractual benefits affecting terms and conditions of employment. Respondent has admitted certain allegations of the complaint, and there are few disputed facts here. Respondent generally maintains, however, that it has not violated the Act, as alleged.

1. The alleged unlawful delay in processing recertification, tuition reimbursement, and upgrade payments

Article XVII (training) of the WESU agreement provides that the Employer "shall pay tuition costs for any courses which are required" for full- and part-time EMTs not receiving such reimbursement from another employer which are necessary for the employee to retain his or her certification. In addition, eligible unit employees are entitled to annual recertification payments in the amounts of \$1750 for paramedics and \$300 for chair car drivers.²⁷ The applicable provision further provides for other tuition reimbursements to employees. Under the 2006 collective-bargaining agreement, employees are additionally eligible for "upgrade pay."

The General Counsel has alleged that, in September, shortly after the election and the certification of NEMSA, the Employer, taking the position that the WESU agreement was "null and void," ceased processing such payments without notice to or bargaining with the Union and only reinstated making such payments in late-December and early-January 2010, after unfair labor practice charges were filed.

Cardenas testified that he is responsible for submitting recertification and tuition reimbursement requests and to process

²⁷ Employees are required to recertify their qualifications annually, within 90 days of their anniversary date. The 2006 collective-bargaining agreement sets forth what is required for an employee to be eligible for a recertification payment.

upgrade payments to employees.²⁸ The requisite paperwork is sent to the corporate office in Colorado, which then issues the payment to the employee in question or takes other appropriate action, usually within 2 weeks of submission. Cardenas acknowledged that during the period after NEMSA's certification up until December 2009, when the Employer resumed processing payments to employees, he took the position that these benefits were part of the WESU agreement which had become "null and void" and that he communicated this position to employees.

Gerrity testified that he submitted a request for recertification payment in September 2009, but did not receive it until January 2010. Cardenas testified, contrary to Gerrity, that no request was received from him until November 15, and that Gerrity had not received or submitted appropriate documentation to support his request until shortly prior to that date.²⁹ Cardenas submitted Gerrity's request in late December.

In support of its contention that the Employer unlawfully discontinued processing recertification payments to employees, the General Counsel adduced evidence that Laurie Jackson submitted her request on September 9, but was not paid until January 8, 2010. Mark DeFonce requested his recertification payment on October 19, but was not paid until January 8, 2010. Gabriel Cozmata was eligible for her recertification payment on November 10, but was not paid until January 8, 2010.

The record also shows that DeFonce was due for a tuition reimbursement of \$1500 on May 30, but that it was not submitted for payment until December 18. Foley was due under the contract for tuition reimbursement on November 25 and was not paid until December 18.

Employee Lisa Landino was eligible for a pay upgrade in late August, but did not receive it until December 24. Joseph Nolan was due for an upgrade in June 2009, but similarly did not receive it until December 24.

At some point in mid- to late-December the Employer resumed processing the recertification, tuition reimbursement, and upgrade payments owed to employees. According to Cardenas, he conducted a review of all requests for recertification, tuition, and upgrade step increases after September 2009 and that, as of the date of the hearing, all such amounts have been processed and paid by the Employer. Specifically, Cardenas testified that since December 18, all requests for tuition reimbursement submitted by Waterbury Division employees have been processed and paid in the normal course; that he resumed processing requests for grade step increases after December 10, and all recertification payments have been processed since the third week in December.

2. Alleged changes to the overtime procedure

The complaint alleges that since on or about October 1, Respondent modified overtime distribution procedures applicable

²⁸ Respondent has not argued that any of these employees were not owed the amounts as claimed by the General Counsel.

²⁹ According to Cardenas, employees are required to have a letter of good standing from the employee's sponsor hospital stating that they are in good standing for medical control purposes. Waterbury Hospital did not issue Gerrity a required letter of good standing until November 5, 2009.

to unit employees. In its answer, Respondent admits this allegation, but denies the conclusion that such conduct amounts to an unfair labor practice.

Both Caruso and Gerrity testified that, in the past, employees seeking to work overtime could sign up for open assignments as soon as the schedule for any given month came out, which was usually during the previous month.³⁰ The assignment was not guaranteed however: an employee could be "bumped" from a desired shift if a part-time employee wanted it. Caruso testified that this had been the practice during the 13 years he had been employed for the Employer.

Both Caruso and Gerrity testified that in October employees were told that they would not be able to sign up for overtime until 24 hours prior to any given shift. Then, in November, Caruso saw Supervisor Amanda Rochette³¹ post a notice on the wall of the Waterbury facility. Dated November 15, it states as follows:

Due to the changing nature area codes in CT, InfoRad is being updated. We are currently unable to page out open shifts (or anything for that matter) from OPS so I have received permission to change the OT policy until further notice. All Supervisors have been notified.

OT Policy

72 Hours (3 DAYS) Before Shift

Velletri testified that he saw this memorandum posted at both the Southington and Waterbury facilities.

Retallick testified that, in October 2009, overtime was high for the division, and consequently the Employer instituted a procedure by which full-time employees could no longer put their names on the schedule for an open shift. They could, however, place their name at the bottom of the schedule to indicate their availability. In the event the desired shift was not claimed by a part-time employee 48 hours prior to the start of the shift, it went to the full-time employee who had placed his name on the bottom of the schedule. According to Retallick, this change was put into place because "it got to be to the point where the supervisors would look at the schedule and just see that the schedule was full, and not really be looking at who was working the overtime. So, our overtime hours were, were spiraling, you know, way out of control because we didn't see where the open spots were on the schedule for the part-timers to take, and nor did the part-timers really see or know how many hours that a full-timer was working. And it wouldn't give them the option to bump a full-timer because they didn't know if they were in that position or not." When asked whether this was a change which he felt was prudent from an operational perspective, Retallick replied: "Absolutely, it was a financial reason. Our call volume was going down. Our costs were going up. Our, like I said before, our overtime percentage was going up. And it was something that I had to do as part of the business."

³⁰ Caruso testified that "the second or third week of the previous month they'll have the next following month out."

³¹ Caruso testified that Rochette is a supervisor on his shift at the Waterbury facility. Rochette did not testify in this proceeding. There is no evidence that she is no longer employed by Respondent.

When asked about the memo posted by Rochette, Retallick replied that he had never seen it.³²

Caruso testified that employees do not work as much overtime as they had previously and were affected by the change. Caruso, however, does not work overtime and failed to offer any specific evidence to support these assertions. Velletri testified that in 2009 he worked as much as 30 to 40 hours of overtime per week, that now he was “down to a lot less than that” and that not being able to schedule overtime has affected his income. Responding to this testimony from the General Counsel’s witnesses, Retallick stated that certain operational factors affected the amount of overtime available to full-time employees. In particular, he testified that the facility hired approximately 15 part-time and per diem employees. In addition, the facility experienced a decrease in call volume.

Bargaining committee members Gerrity, Caruso, and Gambone testified, without rebuttal, that no notice was given to the Union prior to any change in the Employer’s overtime distribution policy.

3. Alleged change to the shift bid process

The complaint alleges that since on or about November 1, Respondent has failed to post the biannual shift bid for unit employees. In its answer, Respondent admitted this allegation of the complaint, but denied the conclusion that it constitutes an unfair labor practice.

As Caruso testified, employees bid on shifts by seniority and bids are posted twice per year. Article IV, section 9 of the WESU agreement provides in relevant part that “the bidding process shall occur two (2) times annually . . . Bid selection shall start on November 1st and be posted on December 1st for the months of January–June.”

According to Caruso, this practice had been followed for the 13 years he had been employed by the Employer. He further testified that the Employer never posted the November 2009 bids for the January 2010 shifts and that this issue was not raised in bargaining. Similarly Gambone also testified that this issue never came up during bargaining.

4. Alleged failure to grant the January 2010 wage increase

The record establishes that for many years employees have received wage increases every year. In the past such increases were given to employees in the months of September, October, and/or January.³³ Under the 2006 collective-bargaining agreement, the Employer was obliged, “on the first pay period that encompasses the effective date listed below” to increase employees’ base hourly wages by a designated percentage. For the effective date of January 1, 2010, EMTs and paramedics were to receive a 3.5 percent increase and drivers a 3 percent increase.

It is undisputed that the January 2010 annual increases were not given to unit employees. This had been communicated to

employees on a number of occasions beginning with the August campaign memorandum where it was stated that WESU had “tossed out your 1-1-2010 pay increase.” After the election, Cardenales and Popyk told employees that they would not be receiving the January 2010 raises. At the hearing, Banelli testified that it is the Employer’s position that the annual wage increases set forth in the 2006 collective-bargaining agreement were not due because that labor agreement became null and void as a result of the certification of NEMSA as the collective-bargaining representative of the Waterbury Division employees. Banelli further testified as of the date of the hearing, the parties had not bargained over that issue, or over the issue of wages generally.

On January 14, Caruso filed a grievance alleging that Respondent “failed to give all EMTs and Paramedics their wage increases. AMR has also failed to give transportation employees their lump sum payments.” Vice President Zagami answered the grievance as follows: “As of September 4, 2009 the Collective Bargaining Agreement became null and void. In addition there is a pending ULP case. Grievance denied.”

III. ANALYSIS AND CONCLUSIONS

A. The 8(a)(1) Allegations

1. The prohibition on using a bulletin board to post union materials

The record establishes that Respondent provided WESU with a bulletin board to use for union business and that, prior to the NEMSA campaign, there was no apparent effort to censor or remove the material posted by employees on that board. The record further establishes that during the union campaign, Caruso and Gerrity posted pro-NEMSA literature on the WESU bulletin board. This material was quickly removed by persons unknown. Three WESU officials (Caruso, Gerrity, and West) along with various management personnel had access to the board so as to enable them to remove such materials. Both Caruso and Gerrity testified that they did not do so, and West did not testify in this matter.³⁴

In addition, Banelli acknowledged his awareness and apparent approval of the fact that, during the election campaign, a supervisor had removed NEMSA literature from the WESU board because the Employer took the position that the board was designated for WESU and was not for use by NEMSA. The evidence further establishes that subsequent to the election Supervisor Spagna instructed Caruso to remove certain unspecified material from the WESU board.

Moreover, as noted above, on August 12, Cardenales issued a memorandum in which he advised Respondent’s supervisory personnel that NEMSA informational materials had been con-

³² The exemplar of this notice in evidence has a partial signature. No witness who testified could identify it.

³³ The 1999–2002 collective-bargaining agreement provided for raises to be given in January and October of each year and the 2002–2006 agreement for annual raise increases in September of each year of the contract.

³⁴ Gerrity offered hearsay testimony that West denied removing NEMSA items from the bulletin board. I give weight to this testimony as it is corroborated by other record evidence including admissions from Respondent’s agents. I additionally note that in the August 25 memorandum posted on the WESU bulletin board, all the WESU officers, including West, encouraged employees to vote for representation by NEMSA; thus, it would be improbable that West would have removed such literature.

fiscated from employees and instructed supervisors to remove such “unauthorized materials” from the facility.

In its posthearing brief, Respondent argues that there is no evidence to establish that NEMSA materials were removed from the Waterbury facility when they were posted in general employee posting areas. In this regard, Respondent echoes Banelli’s testimony and apparently concedes that NEMSA items were removed when they were posted on the WESU bulletin board insofar as it argues: “[t]his does not constitute unlawful employer conduct, because NEMSA had no right to post materials on a bulletin board dedicated to the use of another union.” In support of the foregoing position, Respondent argues that had WESU been on the ballot for the election, NEMSA would have had no right to post its election notices on WESU’s bulletin board and the fact that WESU was not on the ballot does not change this analysis.

In support of its argument that employees were permitted to post pro-NEMSA material in general posting areas, in particular by the timeclock, Respondent relies upon Caruso’s “equivocal, at best” testimony that he “could not recall” if NEMSA had posted materials there, as well as Hughson and Cardenales’ testimony that employees could, with permission, post items in this location. Respondent failed to adduce, however, any evidence that such permission had been granted or that any specific item of pro-NEMSA literature was allowed to be posted in any location where employee notices are customarily posted. In fact, the only specific evidence presented regarding the posting of such campaign literature relates to the letter in support of NEMSA signed by WESU officials, which Retallick saw posted on the WESU board. In this regard, however, there is no evidence that the notice Retallick saw remained posted for any appreciable period of time.

More to the point however, is the fact that Respondent admittedly considered pro-NEMSA material to be “unauthorized material” subject to removal or confiscation and so instructed its supervisory personnel.

An employer is under no obligation to permit employees to use its bulletin boards to post pronoun materials or literature, even where the employer itself uses the same bulletin boards to post its own antiunion messages. *Register-Guard*, 351 NLRB 1110, 1114, 1118 (2007). However, if the restrictions on employees’ use of bulletin boards are discriminatorily enforced or promulgated with antiunion motivation, then an employer has violated Section 8(a)(1) of the Act. *Register-Guard*, supra; see also *Roadway Express*, 279 NLRB 302, 304 (1986) (removal of bulletin board a violation of Section 8(a)(1) when action motivated by the posting of union material.) Applying these principles here, I conclude that the evidence establishes that the Employer unlawfully promulgated and discriminatorily enforced a prohibition against employees’ use of its Waterbury bulletin board to post pro-NEMSA literature.

In *Register-Guard*, supra, the Board modified extant Board law concerning what constitutes discriminatory enforcement of policies and rules, such as the use of bulletin boards. Pursuant to *Register-Guard*, the Board will find discriminatory enforcement if the disparate treatment relates to activities and communications of a similar character because of their union status. While the Board did not define precisely what communications

or activities are of “a similar character” to union activities or communications, it did provide some examples of where discrimination would be construed as unlawful and along Section 7 lines. For example, and of particular relevance to the instant case, the Board found that an employer would clearly violate the Act if it permitted employees to use email (and by extension, other property such as bulletin boards) to solicit for one union but not another. In such an instance, the employer has drawn a line between permitted and prohibited activities on Section 7 grounds. *Register-Guard*, supra at 1118.

Here the evidence shows that the employer was contractually obliged to and regularly permitted employees the use of its property for postings related to WESU. It is also the case that it was apparent that WESU in its representational capacity showed support for the NEMSA election campaign. Once indicia of such support became apparent, as the Employer has conceded, it was removed from the WESU board. Thus, the Employer undertook to censor WESU’s communications to employees, as well as employees’ communications among themselves, along Section 7 grounds. Such discriminatory enforcement of its existing policies and rules is unlawful.³⁵

Moreover, as the Board has made clear, it continues to find that if the evidence shows that the employer’s motive for the line drawing was antiunion then the action would be unlawful. *Register Guard*, 331 NLRB 1118 at fn. 18. Here, there is no evidence that the Employer had imposed restrictions on the posting of material on the so-called WESU board until pro-NEMSA material began appearing there. Moreover, there is no evidence that any other material was removed from the employee board during the relevant period of time. Further, contrary to the Employer’s suggestion, there is no specific evidence that the Employer countenanced the posting of NEMSA literature at any other location where any notices to and by employees were customarily posted. To the contrary, supervisors were instructed to remove such materials from Respondent’s facilities. Thus, the record supports a finding that the alleged restrictions on the employees’ use of the bulletin board designated for their use was motivated by antiunion considerations.

Accordingly, I find that by prohibiting employees at its Waterbury facility from using a bulletin board to post certain Union-related items, Respondent has violated Section 8(a)(1) of the Act.

2. The threat to employees that they will lose an annual wage increase if they vote for the Union

The complaint alleges that since on or about August 1, Respondent has threatened employees with the loss of their annual pay increase if they voted for the Union. Respondent has denied violating the Act, as alleged. While Respondent does not specifically address this allegation in its posthearing brief, it argues generally that it could not lawfully give employees a

³⁵ In disagreement with the Employer, I do not find that WESU’s decision not to appear on the ballot countenances Respondent’s censorship of employees’ use of the bulletin board upon which employees had freely been allowed to post materials relating to their Section 7 rights.

raise in January 2010, a contention that will be discussed in detail below.

It is undisputed that in August, Retallick issued a memorandum to employees where he stated that: “the union tossed out your 1-1-2010 pay increases when Mike West told the Labor Board that the current CBA would end when the NLRB election was held.” As an initial matter, I note that there is no evidence in this record which would suggest, let alone establish that West, WESU, or NEMSA ever took such a position with the Board, the Employer or members of the bargaining unit.

In agreement with the General Counsel, I find that by issuing this statement Respondent tied its refusal to grant the January 2010 raise to the union campaign and the Board-held election. Thus, the Employer advised its employees that its course of action in regards to the January 2010 raises, i.e., the withholding of benefits, would be prompted by their concerted, protected activity. As will be discussed in detail at a later point in this decision, Respondent’s employees had consistently received and had every reason to expect an annual wage increase. Accordingly, by threatening employees with a loss of benefits and less favorable treatment because of their protected conduct, Respondent violated Section 8(a)(1) of the Act. *Wellstream Corp.*, 313 NLRB 698, 707 (1994) (“When an employer attributes to the [u]nion its failure to grant a pay raise, it violates Section 8(a)(1) of the Act”) (citing *Centre Engineering, Inc.*, 253 NLRB 419, 421 (1980)); *More Truck Lines, Inc.*, 336 NLRB 772 (2001), *enfd.* 324 F.3d 735 (D.C. Cir. 2003) (employer violated Section 8(a)(1) of the Act when it informed employees that if a new union was elected, the old union contract would be “null and void” thereby freezing employee wage levels and denying them the annual wage increases contained in the predecessor’s contract); *First Student, Inc.*, 341 NLRB 136, 141 (2004).

3. The prohibition on wearing union pins

The complaint alleges that in or about August 2009, Hughson prohibited employees from wearing a union lapel pin. Respondent has denied this allegation of the complaint and asserts that the company does not permit employees to wear unauthorized pins or other items on their AMR uniforms. Notwithstanding this assertion, Caruso’s testimony, as corroborated by Velletri and Gerrity, and which I credit, is that employees have historically worn a variety of pins on their work clothes, including other union pins, those in support of a variety of charitable causes, American flag,³⁶ and military pins. As noted above, Respondent’s dress code does not specifically ban the wearing of pins. Here, the evidence demonstrates that on three occasions where Hughson saw Caruso wearing a small NEMSA pin he instructed Caruso to remove it. At no time did Hughson explain to Caruso why he had issued such a directive; nor did he do so at the hearing.

³⁶ In its posthearing brief, Respondent asserts that the company has authorized its employees to wear American Flag lapel pins. Cardenales testified merely that he “[wouldn’t] necessarily say that we have not given [them] out.” As neither he nor any other manager who testified asserted that such pins were approved or distributed by management, I do not find that they were authorized as the Employer suggests.

It is well established that employees generally have the right to wear union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). It is also true, however, that this right is not without limitation. The Board is charged with balancing the conflicting rights of employers to manage their businesses safely and efficiently. *Id.* at 797–798; *Sam’s Club*, 349 NLRB 1007, 1010 (2007). “Thus, an employer may limit or ban the display or wearing of union insignia at work if special circumstances exist and if those circumstances outweigh the adverse effect on employees’ Section 7 rights resulting from the limitation or ban.” *Id.* (citing *Albis Plastics*, 335 NLRB 923, 924 (2001); *Macks Supermarkets*, 288 NLRB 1082, 1098 (1988)). “The Board has found special circumstances justifying the proscription of union insignia when its display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image which the employer has established as part of its business plan, through appearance rules for its employees.” *United Parcel Service*, 312 NLRB 596, 597 (1993) (citing *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982)); see also *Sam’s Club*, *supra* (limitations on the wearing of union insignia have been approved based upon safety concerns and on the employer’s need to have neatly uniformed employees as part of its public image). Conversely, limitations that are based merely upon an employee’s contact with customers or that are overly broad have been found to be invalid. *Id.*

Respondent has failed to substantiate its claim that Hughson’s demand that Caruso remove the NEMSA pin was because it was in violation of Respondent’s dress code, or otherwise related to a requirement that only company authorized pins are allowed to be worn by employees. Notably, not one witness who testified on behalf of Respondent pointed to any specific provision of the dress code as a rationale for the restriction imposed. While it may be apparent that Respondent desires that its employees present a certain image to the public, the record establishes that the company countenances the wearing of other buttons and pins. Further, as the Board has held, customer exposure to union insignia, standing alone, is not a special circumstance which allows an employer to prohibit the display of such insignia. *United Parcel Service*, *supra* at 597 (citing *Nordstrom, Inc.*, 264 NLRB 698 (1982)). Moreover, even where a legitimate need exists, discriminatory enforcement of a dress code has been found to be violative of the Act. *Holladay Park Hospital*, 262 NLRB 278, 279 (1982).

In its posthearing brief, Respondent suggests that the situation at the Waterbury Division is analogous to a hospital setting and argues that the Board has determined that potential for disruption of patient care or health care operations constitutes a legitimate reason to restrict employee solicitation or distribution of union materials. Respondent cites no legal support for drawing the analogy between its operations and those of a health care institution. In any event, while it is the case that the Supreme Court has recognized that a hospital (or other health care institution) “may be justified in imposing somewhat more stringent prohibitions than are generally permitted,” with respect to union activity at its premises, *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 495 (1978), this is to “accommodate the special needs of patients for a tranquil environment.” *Eastern*

Maine Medical Center v. NLRB, 658 F.2d 1, 4 (1st Cir. 1981). Absent a demonstration of such need, the Board and courts uniformly hold that union activity such as the display of union insignia is protected, and that a rule prohibiting it violates Section 8(a)(1). *Asociation Hospital Del Maestro, Inc. v. NLRB*, 824 F.2d 575 (1st Cir. 1988), enfg. 283 NLRB 419 (1987); *Cogburn Healthcare Center, Inc.*, 335 NLRB 1397, 1412 (2001) (and cases cited therein).

In support of its contentions, Respondent relies upon *NLRB v. St. Francis Healthcare Center*, 212 F.3d. 945, 961 (6th Cir 2000). However, in that case the court affirmed the Board's finding that the employer had violated Section 8(a)(1) of the Act, and in so doing, found that the employer had not articulated, much less demonstrated, any special circumstance to justify its restriction on union pins. In particular, there was no evidence that the restriction was necessary to maintain production, reduce employee dissension, or maintain employee safety or discipline. Likewise, the employer failed to make an affirmative showing that the union pins would harm the employer's public image. Finally, the court noted that the employer did not consistently enforce its uniform policy. To the contrary, substantial evidence supported the Board's finding that the employer regularly tolerated nonunion pins and buttons on employee uniforms.

Here, too, Respondent has neither asserted nor proven any need or special circumstance, nor does it cite any legitimate safety concern which would warrant a restriction on the wearing of a small union pin. Moreover, Hughson instructed Caruso to remove his NEMSA pin when he was in the office at Company 2 and, subsequently in a room at Waterbury Hospital designated for employees to complete paperwork. Thus, Respondent's restriction on the wearing of NEMSA insignia apparently applied regardless of whether the employee was in contact with patients, performing other tasks, or between calls. The Board has found that a rule which fails to take similar circumstances into account is overbroad. See *Albertsons, Inc.*, 272 NLRB 865, 966 (1984). Moreover, there is substantial evidence that prior to the NEMSA campaign Respondent allowed employees to wear a variety of other pins, including union pins, regardless of whether they were obtained from the company or elsewhere.

Accordingly, I find that by instructing Caruso to remove the NEMSA pin from his uniform, Respondent violated Section 8(a)(1) of the Act.

4. The surveillance of employees and prohibition on the possession of union materials on company time and property

The General Counsel alleges that on or about August 11 or 12, Respondent engaged in unlawful surveillance of its employees' union activities. The evidence establishes that Gambone visited and attempted to meet with employees at Respondent's Waterbury facility. After an interaction with Cardenales and Hughson, Gambone was directed to and did leave the facility. It is undisputed that Hughson confiscated NEMSA materials from employees at this time. Respondent then determined that it would go to client facilities because of its concern that continued union activity created a potential for disruption of operations at these locations. Their first stop, however, was not

at any client facility but at the nearby Dunkin' Donuts, where both NEMSA and AMR vehicles were spotted. After speaking with employees who were purchasing coffee, Hughson and Cardenales proceeded to visit Respondent's two major clients in the area. Respondent's suspicion that Gambone would continue to attempt to meet with employees was confirmed when he was seen at or nearby these other facilities. Gambone testified that at two points during the day, at Waterbury Hospital and on a public thoroughfare adjacent to Saint Mary's Hospital, Hughson confiscated union materials from employees. Hughson admitted confiscating material at one location (Saint Mary's) and did not deny that he removed NEMSA materials from employees stationed in an ambulance at Waterbury Hospital.³⁷

Respondent contends that the General Counsel is relying upon mere suspicion and has failed to meet its burden to prove that Respondent alleged in unlawful surveillance, as alleged. In particular, Respondent argues that the evidence shows that on the date in question it was "merely doing that which it had an unfettered right to do: ensuring that its business operations were not disrupted." In this regard, Respondent argues that it has a right to monitor its employees' conduct during work hours and to pay regular visits to its biggest customers to assure that the union campaign would have no negative impact on operations. The Employer further contends that as all employees' break periods are on paid time, all hours on the clock are work hours and employees are not entitled to ignore their duties while being paid by the company.

Whether an employer is engaged in unlawful surveillance of its employees' union activities depends on the specific circumstances in each case, including the nature and duration of the employer's observations. In *Aladdin Gaming, LLC*, 345 NLRB 585 fn. 2 (2005), the Board held that while an employer's "routine observation" of open, public union activity on or near its property does not constitute unlawful surveillance, an employer violates the Act when it "surveils employees engaged in Section 7 activity by observing them in a way that is 'out of the ordinary' and thereby coercive." As indicia of coerciveness, the Board looks to factors such as "the duration of the observation, the manager's distance from employees while observing them, and whether this was an isolated incident or the employer engaged in other coercive conduct during its observation." *Id.*, citing *Sands Hotel & Casino, San Juan*, 306 NLRB 172 (1992), enf. sub nom mem. *S.J.P.R., Inc. v. NLRB*, 993 F.2d 913 (D.C. Cir. 1993).

Respondent defends its actions by noting that Gambone's presence in its facility was unauthorized and alleges that he disrupted the work flow and created a risk to public safety. I am in agreement with Respondent that Gambone did not have the authority to enter its premises to meet with employees or distribute material on its property and that Respondent could lawfully monitor his presence at that time. However, there is no direct evidence to support Respondent's claim that Gambone's presence at Company 2 interrupted the work flow of

³⁷ Cardenales admitted that such materials had been confiscated from employees in his August 12 memorandum, but did not specify where this occurred.

Respondent's operations or interfered with patient care. There is similarly insufficient evidence to support Respondent's assertion that Gambone interfered with company operations at any other time during the course of the day.³⁸

In support of its argument that its conduct was not unlawful, Respondent relies upon *Aladdin Gaming LLC*, supra, and *Airport 2000 Concessions, LLC*, 346 NLRB 958 (2006), where it was held that where a supervisor's presence in a particular work area is not out of the ordinary it does not constitute unlawful surveillance. However, neither case is apposite to the circumstances here.

In *Aladdin Gaming*, a supervisor observed an employee engaged in Section 7 activity in a dining area frequented by managers and employees, approached the employee, waited 2 minutes, and interrupted the employee to express the supervisor's views on unionization. A Board majority found no surveillance because the supervisor's presence in the dining area was not out of the ordinary and therefore not coercive. Similarly, in *Airport 2000 Concessions*, the same Board majority dismissed an allegation that a supervisor unlawfully surveilled an employee when she interrupted a breaktime conversation between a union organizer and an employee in the dining area adjacent to food service counters. Again, the Board found that it had not been shown that the supervisor's presence in the dining area was out of the ordinary. In both of these cases, the Board relied upon the fact that the supervisor's conduct in each instance was unaccompanied by coercive conduct.

Here, it is undisputed that Hughson approached employees and confiscated union-related items which had been distributed to them, both on Respondent's property and on public property. I additionally credit Gambone's testimony that he observed the confiscation of materials in the ambulance bay at Waterbury Hospital and note that it was not specifically rebutted by Respondent.³⁹

Employees have the right to possess and display union insignia on the job absent special circumstances. *Republic Aviation Corp. v NLRB*, supra at 802 fn. 7 (interference with production, safety, or discipline.) Here, there is no evidence that the material confiscated by Hughson interfered in any way with the employees' performance of their work duties or the operations of company trucks. Rather, for the most part they were small

³⁸ The crew purportedly meeting with Gambone at Dunkin' Donuts was en route 3 minutes after receiving the transfer call. Similarly, there is insufficient evidence to support the conclusion that Gambone was responsible for any alleged delay in Gerrity's response to the critical care call later that day. To the contrary, the evidence adduced by Respondent demonstrates that Gambone and his partner had collected the patient for transfer and were en route within 7 minutes of receiving the assignment in question. Respondent presented no evidence to show that these are not appropriate response times.

³⁹ Respondent points to the fact that, in denying the grievance based upon Gambone's discharge, the arbitrator concluded that Gambone had filed a false report and had given false testimony at an investigatory interview. Accordingly, Respondent argues, Gambone is a witness who has a propensity to proffer false testimony. It is the case, however, that with few exceptions which are explained above, my findings with regard to what occurred on August 12 are based generally on uncontested evidence, or evidence which has been adduced by the Respondent.

personal items such as pens and notepads and stickers which could be easily maintained by employees in out-of-the way areas or on their persons. I further note that no special circumstances have been pled or alleged by the Respondent and there is no evidence that employees were otherwise prohibited from carrying personal items with them on the job. Under similar circumstances, the confiscation of union materials from employees has been found to be a violation of Section 8(a)(1) of the Act. *Brandeis Machinery & Supply Co.*, 342 NLRB 530, 538 (2004), *Alle-Kiski Medical Center*, 339 NLRB 361, 366 (2003). See also *NRC Corp.*, 313 NLRB 574, 577 (1993) (confiscation of union material is unlawful even where distributed in violation of a valid no-distribution rule, where the company has no basis for taking such action).

I conclude therefore, that by approaching employees and demanding that they give to him union materials in their possession, Hughson engaged in conduct which was sufficiently coercive to extend beyond permissible "routine observation" and therefore constitutes unlawful surveillance within the meaning of Section 8(a)(1) of the Act.⁴⁰

Moreover, I do not credit Hughson and Cardenas that their stop at the Dunkin' Donuts was precipitated by an unanswered transport call, and find this reason to be pretextual. Gambone testified that he arrived at the Employer's facility at approximately 10 or 10:30 am. Hughson, contrary to Gambone, testified that Gambone did not appear at Company 2 until about noon. For various reasons I conclude that Gambone's account, on whole, is more credible. As an initial matter, I note that even though the timing of events clearly was at issue, Cardenas did not specifically testify about this matter and thus failed to corroborate Hughson or explain why he could not do so. Further, during his cross-examination, Cardenas responded affirmatively to a question which contained, as its premise, the assertion that Gambone had visited Respondent's facility in the morning.

Moreover, Hughson's account of events contains certain inherent improbabilities which lead me to question its veracity. Thus, according to Respondent, the call which purportedly triggered the stop at Dunkin' Donuts was issued at 1:34 p.m., more than an hour and a half after Gambone's initial visit to the Waterbury facility. I note that neither Cardenas nor Hughson accounted for what may have occurred during this interval. It is uncontested that the Dunkin' Donuts is located a mere few minutes' drive from Company 2. Further, I find it highly unlikely that Gambone's unwelcome presence at Respondent's

⁴⁰ I recognize that the complaint does not specifically allege that Respondent violated the Act by confiscating union materials from its employees. However, it does allege that Respondent violated Sec. 8(a)(1) of the Act by prohibiting the possession of union materials on company time and property. Moreover, Hughson testified to this matter and admitted to confiscating such materials from employees. Under these circumstances, I find that the issue is closely related to the subject matter of the complaint and has been fully litigated. *Dickens, Inc.*, 352 NLRB 667 fn. 2, 671 (2008) (and cases cited therein). However, even if I were to find that this particular issue was not sufficiently related to the complaint or had not been fully litigated, the fact remains that Hughson's conduct in this instance went beyond permissible observation of open union activity.

facility coupled with the presence of six to eight of Respondent's employees who were not at their assigned posts would have gone unnoticed for 1 hour or more. Moreover, it is apparent from the testimony of both Hughson and Cardenales that they decided to visit their clients' facilities within minutes of Gambone's departure from the facility.

I conclude therefore, that the ambulance call cited by Respondent did not occur until some point later in the day, subsequent to the stop at Dunkin' Donuts, and was not the reason why Hughson stopped his vehicle and entered the restaurant. Respondent has proffered no other lawful reason for Hughson to have made such a stop. I find, therefore, that by following employees to and into the Dunkin' Donuts, to observe their encounter with Gambone, Hughson was engaging in conduct out of the ordinary which amounted to unlawful surveillance of employees' union activities. *Nueva Engineering*, 269 NLRB 999, 1004 (1984); *Kosher Plaza Market*, 313 NLRB 74, 86 (1993).

With regard to the complaint allegation relating to Respondent's prohibition on the possession of union materials on company time and company property, Respondent, relying upon *S. E. Nichols, Inc.*, 284 NLRB 556, 579 (1987), contends that inasmuch as it may lawfully prohibit all solicitation and distribution by nonemployees on its premises, it may also forbid employees to accept material from outsiders on its property. In *S. E. Nichols*, supra, the administrative law judge read the rule under consideration there as forbidding employees only from receiving literature on company premises and only directly from outsiders and as not prohibiting employees from accepting literature from other employees merely because it may have originated with nonemployees. Given that construction, the judge found the rule was permissible.⁴¹

Here, however, Respondent's announced policy went beyond the specific confiscation of materials which Gambone had distributed during his unauthorized visit to Company 2. Rather, as Cardenales made clear in his memorandum to supervisors, Respondent considered all NEMSA material unauthorized, and subject to confiscation. In this regard, I note that Hughson failed to rebut Gerrity's testimony that Hughson prohibited him from possessing NEMSA literature in his vehicle and distributing a NEMSA T-shirt to a coworker. As has been discussed above, as a general matter, employees have a protected right to have access to such materials in the workplace. Accordingly, I find that Respondent's policy prohibiting the possession of union materials on company time and property, as announced in Cardenales' memorandum, and as implemented by Hughson, was impermissibly overbroad in violation of Section 8(a)(1) of the Act.

5. Restrictions on the wearing of a union sticker and related threat of discipline

As Velletri testified, at some point in November he placed a union sticker on his vehicle and another on his radio holder, which is worn across his chest.

⁴¹ The relevant rule read as follows: "Employees shall not accept any literature distributed, for any purpose, by persons not employed by the Company inside Company buildings or on Company property."

Thereafter, on February 9, 2010, Hughson noticed the sticker and instructed Velletri to remove it. Velletri and Hughson got into a discussion about the matter and, as Velletri testified, Hughson offered him the option of taking off the sticker or going home. I credit Velletri's version of events.⁴² Although Hughson generally denied communicating a "threat" to Velletri, he did not specifically deny telling him that if he did not remove the sticker he should go home.

Velletri further testified, without contradiction, that during his 2 years of employment with AMR he has seen other types of pins worn by other employees such as breast cancer awareness pins. He was not aware of any circumstance where employees were instructed to remove such pins.

There is no dispute that Velletri placed his stickers on company property. Nevertheless, I do not find that factor to be determinative under the circumstances here.

In *Malta Construction Co.*, 276 NLRB 1494, 1495 (1985), the Board found that in the absence of any special circumstances based upon legitimate production or safety concerns, an employer's rule prohibiting the placement of union stickers on distinctive colored hard hats interfered with the right to wear union insignia on personal apparel, even though the hard hats had been supplied by the company and were not the property of the employee. Subsequently, in *Eastern Omni Constructors*, 324 NLRB 652, 656 (1997), the Board adopted the decision of an administrative law judge who rejected an employer's contention that so long as it permitted employees to wear union buttons or stickers on their clothing, it could prohibit them from wearing such items on a company-supplied hard hat. By contrast, the Board found no violation where there was a threat of discharge relating to the posting of numerous stickers on the walls, windows, bathrooms, and bulletin boards in the company facility. Due to the difficulty of removal and the number of stickers posted, they constituted a defacement of company property. *Minette Mills, Inc.*, 305 NLRB 1032, 1035 (1991), *enfd.* 983 F.2d 1056 (4th Cir. 1993).

Here, the Employer has neither pled nor shown special circumstances or that the placement of the sticker on Velletri's radio holder would somehow compromise the operation or integrity of its property. Accordingly I find that Velletri's conduct was protected under the rationale of *Malta Construction Co.*, supra, and Hughson's instruction that he remove the sticker violated the Act. See *St. Luke's Hospital*, 314 NLRB 434 (1994). I further find that his admonition to Velletri that, if he did not remove the sticker he should go home, amounted to a threat of discipline for protected conduct, again in violation of Section 8(a)(1) of the Act. *American Screen Products Co.*, 138 NLRB 87, 90 (1962).

B. The Discriminatory Refusal to Allow Gerrity to Attend a Union Meeting on Paid Time

The complaint alleges that in or about the week of August 17 or 24, Respondent discriminatorily refused to allow Gerrity to

⁴² Velletri's status as current employee testifying against the interests of his employer is a factor which I may, and do, consider in evaluating and crediting his testimony. See, e.g., *Flexsteel Industries*, 316 NLRB 745 (1995) (and cases cited therein).

attend a company meeting on paid time. Respondent denies that it excluded Gerrity from any meeting whatsoever and that he was paid for all meetings he attended during that period.

1. The *Wright Line* standard

Allegations of discrimination which turn on Employer motivation are analyzed under the framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enf.d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To establish a violation of Section 8(a)(3) under *Wright Line*, the General Counsel must first show, by a preponderance of the evidence, that the employee engaged in protected concerted activity, the employer was aware of that activity, and the activity was a substantial or motivating reason for the employer's action. *Wright Line*, supra; *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Proof of an employer's motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Ronin Shipbuilding*, 330 NLRB 464 (2000); *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004); enf.d. mem. 179 LRRM (BNA) 2954 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). The Board has long held that where adverse action occurs shortly after an employee has engaged in protected activity an inference of unlawful motive is raised. See *McClendon Electrical Services*, 340 NLRB 613 fn. 6 (2003) (citing *La Gloria Oil*, 337 NLRB 1120 (2002), enf.d. mem. 71 Fed Appx. 441 (5th Cir. 2003) (table)). As part of its initial showing, the General Counsel may offer proof that the employer's reasons for the personnel decision were pretextual. *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003); see also *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995). In addition, proof of an employer's animus may be based upon circumstantial evidence, such as the employer's contemporaneous commission of other unfair labor practices. *Amptech, Inc.*, 342 NLRB 1131, 1135 (2004).

Once the General Counsel has made out the elements of a prima facie case, the burden of persuasion then shifts to the employer to "demonstrate that the same action would have taken place even in the absence of the protected conduct." *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004); *Wright Line*, supra. To meet its *Wright Line* burden, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enf.d. mem. 99 F.3d 1139 (6th Cir. 1996). See also *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996).

2. Application of the *Wright Line* standards

Respondent has argued that the General Counsel has failed to make out a prima facie case that Gerrity was discriminated against because of his union activities. It is not disputed, however, that Gerrity, as a WESU official, was a well-known union supporter generally. Hughson initially admitted that it was known that Gerrity was in favor of unionization. I further note that Hughson did not dispute Gerrity's testimony that he told Gerrity that he could not have NEMSA literature in his vehicle

or distribute NEMSA T-shirts to a coworker. Moreover, it cannot be disputed that it was apparent that WESU supported NEMSA in the election. Thus, contrary to Cardenales' assertion that Gerrity expressed doubts about whether the facility should be unionized, I find that Gerrity's course of conduct throughout the preelection period demonstrated that he supported the NEMSA campaign, and that this would have been apparent to Respondent.

Respondent further argues that no adverse employment action has been shown. Respondent argues that Gerrity was paid for any time he spent in meetings with managers, either voluntary or mandatory. The evidence fails to support Respondent's contentions in this regard.

In this case there is testimony regarding three dates: August 11, 21, and 25. There is no dispute that Gerrity attended a mandatory company meeting held on August 25, and was paid for his attendance at this meeting. The dispute between the General Counsel and the Respondent concerns what may have occurred on August 11 and subsequently on August 21.

Respondent asserts in its brief that an "impromptu" meeting occurred on August 11 among Gerrity, Hughson, and Cardenales, and that Gerrity was paid for his time in attendance at this meeting. According to the testimony of Respondent's witnesses, Gerrity arrived early for work on that date, thinking a meeting had been scheduled, but upon arriving was told that it had been cancelled. Gerrity then asked if he should punch out, and was told no. According to Hughson and Cardenales, they then spoke with Gerrity until the commencement of his shift. Gerrity's time records confirm that he punched in at 2:36 p.m. on that day, even though his scheduled shift did not begin until 3 pm. Gerrity acknowledged that he punched in early on that day, but stated that he could not recall why he did so. Cardenales acknowledged that drivers will show up early for their shifts and it would not have been unusual for Gerrity to have done so.

As an initial matter, I note that the memorandum distributed by Respondent to its employees regarding its planned voluntary meetings states that they would be held between the dates of August 19 and 21. There is no evidence of any other notice to employees setting dates and times for voluntary meetings. Cardenales admitted that he had not put out a notice to such effect and did not know of any written notification of meetings to be held on August 11. Respondent adduced no evidence to show that such a meeting had been scheduled. Retallick offered no testimony whatsoever regarding specific dates when meetings were to be held. Inasmuch as Retallick testified that the company wanted employees to attend such meetings to obtain information regarding the union campaign, I find it inherently improbable that Respondent would schedule a meeting for its employees for August 11, but never issue a notice to such effect.

Moreover, the account offered by Respondent's witnesses of what occurred during the purported August 11 meeting is similarly improbable. In particular, Cardenales testified that Gerrity had a lot of questions about Gambone and was unsure whether there should be a union in place. Hughson similarly testified that Gerrity was "confused." I find it hard to believe that Gerrity, who was at the time a WESU official, would have voiced

such doubts to Respondent, or that Respondent would have taken any such “doubts” seriously. After all, it was no secret that WESU supported the NEMSA campaign, going so far as to withdraw from the election ballot. Respondent was aware that WESU posted NEMSA literature on its bulletin board and Gerrity had, in fact, attempted to distribute NEMSA materials to employees. I find it unlikely that Gerrity would have supported and engaged in such actions if, in fact, he harbored doubts about whether there should be a union at the Employer’s facility. I therefore discredit the testimony of Respondent’s witnesses regarding what occurred the purported August 11 meeting.

To the contrary, I credit Gerrity’s testimony regarding what occurred on August 20 and 21. The evidence establishes that Respondent planned to hold meetings with employees on those dates, and so notified them. I additionally credit Gerrity’s testimony that when he arrived for the August 21 meeting he was told that it was not for him, and he had already made up his mind. The record further establishes that Respondent had promised its employees that they would be compensated for the time spent in these meetings, and that Gerrity received no compensation for a meeting scheduled for August 21, which he sought to attend.

Respondent argues that Gerrity should not be credited due to a faulty recollection of events. In particular, Respondent notes that in Gerrity’s prehearing affidavit, he stated that the meeting resulting in the alleged unlawful conduct took place at some time during the week of August 10 or 17. Respondent additionally challenges Gerrity’s veracity because the charge, as filed, alleges that Gerrity was excluded from a mandatory rather than a voluntary meeting. I do not find Gerrity’s initial inability at the time this matter was investigated to recall the precise date of the meeting from which he was excluded to constitute a sufficient basis upon which to discredit his testimony, which was otherwise specific and clear.⁴³ Nor do I find that the alleged discrepancy between the charge as filed and the evidence adduced at hearing would warrant a similar result.⁴⁴

Although both Cardenales and Hughson testified generally that Gerrity had not been excluded from any meetings during August, I find this to be insufficiently probative. Respondent failed to adduce specific testimony to rebut Gerrity’s testimony regarding the events of August 21. An adverse inference is warranted where a witness does not deny, or only generally denies without further specificity, certain adverse testimony from an opposing witness. *Asarco, Inc.*, 316 NLRB 636, 640 fn. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996). Accordingly, I infer from Respondent’s failure to adduce specific testimony regarding the events of August 21, that had Cardenales and Hughson had been questioned in this man-

⁴³ I note that it was the General Counsel who sought to bring forward the relevant portions of Gerrity’s affidavit for the purpose of rebutting a challenge to Gerrity’s veracity and that Respondent objected to its use at the time. In its brief, Respondent has now reversed course and claims that it would be error for me *not* to consider it.

⁴⁴ In this regard I note that the applicable charge was not filed or signed by Gerrity, but rather by Gambone.

ner and they had testified truthfully, that their testimony would have been adverse to Respondent.⁴⁵

Respondent further argues that there is no evidence of discriminatory motive. In disagreement with Respondent, I find that there is sufficient evidence to warrant a finding of discriminatory motive here. As the Board has found, “[u]nlawful motive may be demonstrated not only by direct evidence but by circumstantial evidence, such as timing, disparate or inconsistent treatment, expressed hostility toward the protected activity, departure from past practice and shifting or pretextual reasons being offered for the action.” *Real Foods Co.*, 350 NLRB 309, 312 fn. 17 (2007).

As an initial matter, I have found Respondent’s account of an August 11 meeting is false. There is no evidence that a meeting was scheduled for that date or that employees were so notified. While Gerrity may have punched in early on that date, there could have been any number of reasons why he had been authorized to do so, and Cardenales admitted that such an occurrence would not have been unusual. As the Board and courts have found, the proffer of a false, pretextual defense supports an inference of an unlawful motive. *Kentucky River Medical Center*, 355 NLRB No. 129, slip op. at 3 (2010) (and cases cited therein).

I further find evidence of unlawful motive in Respondent’s commission of contemporaneous unfair labor practices such as the discriminatory prohibition of the posting of pro-NEMSA literature, the prohibitions on wearing and distribution of union insignia and materials and the unlawful surveillance of employees. See *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204 (2007), enf’d. 519 F.3d 373 (7th Cir. 2008) (unfair labor practices committed during an organizing campaign constitute evidence of animus for purposes of *Wright Line* analysis.)

In addition to the inferences drawn above, I find that the General Counsel had adduced direct evidence of both knowledge and animus. Thus, Gerrity arrived for a meeting to which all employees had been invited and was told that it was not for him and that he had already made up his mind. I credit this specific account over the general denials of Respondent’s witnesses. In this regard, I find it unlikely that Gerrity would have fabricated this testimony, which could have been (but was not) easily rebutted by mutually corroborative specific denials on the part of Hughson and Cardenales. Accordingly, I find that Gerrity’s testimony is evidence that the decision to exclude him from a scheduled meeting on August 21 meeting was prompted by unlawful considerations, i.e. his support for the NEMSA organizing campaign.

Thus, I find that the General Counsel has met its initial burden under *Wright Line* of showing discriminatory motivation by proving protected activity, the employer’s knowledge of that activity and animus against such protected activity. Accordingly, the burden of persuasion shifts to the Respondent to

⁴⁵ In this regard, even if I were to find that Gerrity, Cardenales, and Hughson had a discussion about the Union on August 11, and that Gerrity was paid for the time spent in that discussion, this does not necessarily provide a basis to discredit Gerrity regarding what he alleges to have occurred on August 21.

prove that it would have taken the same action toward Gerrity even in the absence of protected activity. *St. Margaret Mercy Healthcare Centers*, supra at 203 (and cases cited therein). I find that Respondent has failed to meet this burden. As noted above, the record establishes Respondent wanted employees to attend its meetings and provided numerous opportunities for them to do so. There is no evidence that any other employee was barred from attending such a meeting or not paid for his attendance.⁴⁶

Accordingly, I find that by refusing to allow Gerrity to attend a company meeting on paid time, thereby denying him of 2 hours of pay to which he otherwise would have been entitled, Respondent violated Section 8(a)(1) and (3) of the Act.

C. The Alleged 8(a)(5) Violations

The complaint alleges that Respondent violated Section 8(a)(5) of the Act by making a series of unilateral changes without affording the Union notice or an opportunity to bargain over such changes. These are: a failure to make contractually required upgrade, tuition reimbursement and recertification payments; the modification of overtime distribution procedures; a failure to post the biannual shift bid and a failure to grant scheduled annual wage increases. Respondent has posed a series of defenses to these allegations, as discussed below.

1. Applicable legal principles

It is settled law that when employees are represented by a labor organization their employer may not make unilateral changes in their terms and conditions of employment. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962). An employer violates the Act's proscription against unilateral changes when it makes material, substantial and significant changes in employees' conditions of employment or working conditions without notice or bargaining with the representative about such changes. *Illiana Transit Warehouse Corp.*, 323 NLRB 111, 122 (1997). The duty to maintain the status quo imposes an obligation upon an employer not only to maintain that which has already been given to employees, but also to "implement benefits which have become conditions of employment by virtue of prior commitment or practice." *Alpha Cellulose Corp.*, 265 NLRB 177, 178 fn. 1 (1982), enfd. mem. 718 F.2d 1088 (4th Cir. 1983); *More Truck Lines*, 336 NLRB 772 (2001), enfd. 324 F.3d 735 (D.C. Cir. 2003); *Jensen Enterprises, Inc.*, 339 NLRB 877 (2003). Either an explicit employer commitment or a regular practice can generate such expectations and transform a future benefit into a present term and condition. See, e.g., *Illiana Transit Warehouse Corp.*, supra at 122 (examples of terms and conditions established by practice).

2. The upgrade, tuition reimbursement and recertification payments

There is no dispute that these payments were contractually required under the WESU agreement, that bargaining unit em-

⁴⁶ Respondent argues that it makes no sense to conclude that it barred Gerrity from a voluntary meeting on August 21 when it required him to attend one on August 25. I find this argument to be unpersuasive in light of the evidence which otherwise meets the General Counsel's burden under *Wright Line*, and Respondent's failure to rebut it.

ployees had been routinely submitting requests for such payments to the Employer and that they had been processed expeditiously. The evidence shows that, after NEMSA won the representation election, the Employer ceased processing claims submitted after that date for employees for several months.⁴⁷

Respondent initially took the position that it was not obligated to make such payments. As Banelli wrote to Talbot on September 16, 2009: "Those payments (the stipends) are not wages, hours or conditions of employment and like other aspects of the collective bargaining agreement are not withheld under the 'status quo' doctrine and therefore will not be maintained." Cardenales similarly testified that the Employer took the position that the payments were not due because the WESU agreement had become "null and void" as a result of NEMSA's certification.

Respondent argues in its brief that it had a "reasonable belief" that by making such payments it would be violating its obligations to maintain the status quo until a new collective-bargaining agreement was reached with NEMSA and further, that all payments due have now been issued. Respondent thus argues that under a "totality of the circumstances" there should be no violation found.

Regarding Respondent's assertion of reasonable belief that making such payments would violate its duty to maintain the status quo, I note that the Union had agreed to the continuance of existing terms and conditions, which included making contractually mandated payments to employees.⁴⁸ Moreover, it is well-settled that an employer violates Section 8(a)(5) of the Act if it makes unilateral changes in wages, hours or working conditions without first bargaining with a majority representative of its employees, regardless of its motive in doing so. *NLRB v. Katz*, supra.

Here, the upgrade, tuition reimbursement, and recertification payments set forth in the WESU agreement were established monetary terms and conditions of employment. Moreover, employees had come to expect such remuneration, and by Respondent's own admission the delay in processing such payments were due to its stated position that the 2006 collective-bargaining agreement was null and void. Accordingly, I find that the delay of several months in processing these payments was a material and substantial change in terms and conditions

⁴⁷ Contrary to the General Counsel, I do not find that Gerrity submitted a claim for recertification payments in September. Rather, the record establishes that he was not prepared to do so until November.

⁴⁸ As noted above, on September 14, Talbot advised the Employer that:

Following NEMSA's certification as the exclusive bargaining representative, AMR is required to continue the terms and conditions of employment established by the WESU labor agreement and maintain all other existing working conditions pending negotiations with NEMSA. AMR's obligation to maintain the status quo precludes the company from altering or eliminating terms and benefits established by the WESU labor agreement until the parties bargain for a new contract or reach an impasse in negotiations.

It is thus apparent that NEMSA made clear from the outset that it consented to the continuance of the existing terms and conditions of employment, including those promised under the WESU agreement, while bargaining for a successor agreement was taking place.

of employment. The un rebutted testimony of the General Counsel's witnesses is that Respondent never provided the Union with notice or an opportunity to bargain over this matter. Accordingly, by ceasing such payments without appropriate notice and bargaining, Respondent violated Section 8(a)(1) and (5) of the Act.

3. Overtime distribution procedures

In its answer to the complaint, Respondent admitted that since on or about October 1, 2009, it has modified overtime distribution procedures applicable to unit employees. This admission was referenced by counsel for the General Counsel in his opening statement and I note that at no time during the hearing did Respondent seek to amend its answer in this regard.

In its posthearing brief, Respondent contends that there was no change in the procedure for overtime distribution, and that the General Counsel has not proven that one occurred.

As an initial matter, I consider Respondent's answer to constitute a confessionary admission that such a change was made. *Consolidated Bus Transit*, 350 NLRB 1064, 1065 fn. 6 (2007). Moreover, I find that the General Counsel has otherwise adduced sufficient evidence, corroborated by the testimonial admissions of the Respondent, to show that the overtime distribution procedure was altered on at least one, if not two occasions without notice to or bargaining with the Union.

Both Caruso and Gerrity testified that in the past employees could sign up for open shifts during the previous month, although they could be bumped from such an assignment if it were sought by a part-time employee. They further testified that at a point in time after the election, this procedure changed and that full-time employees were told that they could not sign up for overtime until 24 hours prior to a shift. Retallick did not specifically deny this testimony, rather he testified that in October 2009, a change occurred because of the high level of overtime being paid to employees whereby the Employer put into place a procedure where the full-time employees could no longer sign up for a specific shift but rather could indicate their availability for overtime at the bottom of the monthly schedule. The point of the change was to make it apparent to the supervisors and part-time employees that there were shifts available for part-time employees to claim.

As for the alleged change in November, Caruso testified he saw Supervisor Amanda Rochette post a notice to employees announcing a "change" in the overtime policy whereby employees could now sign up for overtime work 72 hours prior to the start of the shift. Velletri testified that he saw this memorandum at both the Southington and Waterbury facilities. I credit the mutually corroborative testimony of these current employees. *Flexsteel Industries*, supra. While there is no definitive evidence as to who might have signed this notice, the fact remains that there is employee witness testimony that was posted by an individual with ostensible supervisory authority at Respondent's Waterbury facility. This is specific evidence which could have easily been rebutted by Respondent. However, Respondent did not call Rochette and has failed to explain why it did not or could not do so. In this regard, I do not find Retallick's testimony that he was had not seen this notice to be sufficient to rebut Caruso and Velletri's account of events.

The evidence further shows that there was no notice to the Union or bargaining over these adjustments to the Employer's overtime distribution policy.

Respondent suggests that since full-time employees always could have been bumped from the schedule there was no significant change. Further, Respondent argues the General Counsel could not establish that this purported change resulted in less overtime for employees. In this regard, Respondent points to the fact that there were other operational factors which affected the amount of available overtime, such as the hiring of additional part-time and per diem employees, coupled with a decrease in call volume. It is true that the evidence proffered by the General Counsel on this issue was based upon hearsay evidence and the subjective observation of employees rather than on specific documentation regarding hours of overtime worked by bargaining unit members. The force of Respondent's argument however, is undermined by Retallick's clear admission that the October change was specifically instituted to reduce the amount of overtime that the Employer was paying to its full-time employees and to increase overtime opportunities for part-time employees. I note that both categories of employees are in the bargaining unit, and the fact that a change may benefit certain employees does not excuse Respondent's bargaining obligation. See *Carrier Corp.*, 319 NLRB 184, 195 (1995). This prospective change in the availability of overtime (and therefore compensation) for employees is sufficiently material and substantial to warrant bargaining. See *Keeler Brass Co.*, 327 NLRB 585, 589 (1999).

Accordingly, I find that by failing to provide notice and the opportunity to bargain with the Union over the changes in the manner in which employees may bid for overtime shifts, Respondent has violated Section 8(a)(5) of the Act, as alleged.

4. Discontinuance of the shift bid process

The record establishes that the Respondent provided its employees with an opportunity to bid for shifts on a biannual basis, in January and June. This was not only a matter of past practice; it had been memorialized in the WESU collective-bargaining agreement. As such, it was a term and condition of employment on which employees had come to rely. In its answer, Respondent admitted that since on or about November 1, it has failed to post the shift bid. As Caruso testified, without rebuttal, this issue had not been brought up by the Respondent during bargaining. The failure to follow the bidding procedure which had previously been in place clearly has an effect on employees' hours and other terms and conditions of employment and is therefore a mandatory subject of bargaining. See, e.g., *Raven Government Services*, 331 NLRB 651, 659 (2000). Accordingly, by discontinuing its past practice of allowing employees to bid on shifts on a biannual basis, without notice to or bargaining with the Union, Respondent has violated Section 8(a)(5) of the Act.

5. Failure to grant the January 2010 wage increase

There is no dispute that Respondent did not give its employees a wage increase in January 2010. Respondent has proffered several arguments in support of its contention that it was not obliged to grant such a wage increase to employees and that its failure to do so was not an unlawful unilateral change.

The Employer first argues that granting employees such a wage increase would have deprived the Union of its legal right to engage in full collective bargaining on all mandatory subjects. Respondent further argues that even assuming argendo that the Employer had a legal duty to provide the Union with notice and an opportunity to bargain about its decision not to implement a wage increase for 2010, there is no evidence that the Union did not receive such notice and, moreover, there is no evidence that Respondent has refused to bargain in good faith regarding this matter. Respondent argues that the record establishes that the Union had received ample notice that the Employer did not intend to raise wages in January 2010, and that the Union has had every opportunity to engage in collective bargaining over future and retroactive wage increases.

In addition, Respondent has argued that inasmuch as WESU disclaimed interest in representing the unit, and the existing collective-bargaining agreement was voided as of the date of NEMSA's certification, it had no obligation to pay a wage increase which had been negotiated to occur in the future with WESU. As Respondent argues, such an obligation was contingent on WESU remaining the collective-bargaining agent and the contract continuing in effect as of the date such wage increases were due. In support of this contention, Respondent relies upon language contained in article VIII that employees "shall have their base hourly wage increased as identified below over the course and life of this Agreement."

As an initial matter, I find that the record does not support Respondent's assertion that WESU disclaimed interest in representing the bargaining unit at any time prior to the election or the certification of NEMSA. It is well established that the Board requires such a disclaimer to be clear and unequivocal. Based upon the record evidence relied upon by Respondent, which consists solely of the decision of WESU to not appear on the ballot in the representation election, a disclaimer of interest cannot be inferred. Even if I were to conclude, which I do not, that WESU's stated decision not to appear on the ballot in the representation election was tantamount to a statement of disclaimer, the fact remains that the Board has long held that a union's bare statement of disclaimer is not sufficient to establish that it has abandoned its claim to representation if the surrounding circumstances justify an inference to the contrary. The union's conduct must not be inconsistent with its alleged disclaimer. *Sweetner Products*, 268 NLRB 1106, 1111 (1984); *Electrical Workers (Texlite, Inc.)*, 19 NLRB 1792, 1798 (1958). In this regard, I note that there is no evidence that WESU abandoned any of its responsibilities as the bargaining representative of unit employees prior to the September 4 election or NEMSA's subsequent certification.

Respondent's contention that NEMSA was properly afforded notice and an opportunity to bargain regarding its decision to refrain from granting an annual wage increase in January 2010 must be rejected as inconsistent with the record evidence. In this regard, on September 14, NEMSA's labor attorney clearly stated the Union's position that the Employer was obliged to continue terms and conditions of employment under the WESU contract. Rather than providing notice and any opportunity to bargain over prospective changes, Respondent admittedly took the position that the contract was "null and void" and was not

obliged to abide by it or (certain of) its terms. Moreover, Banelli conceded that there had been no bargaining with the Union over this issue.

Any argument that the Union waived its right to bargain over the Employer's failure to implement the January 2010 wage increase is unpersuasive. The waiver of a right under the Act will not be found in the absence of clear and unambiguous evidence to such effect. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). In *Ciba-Geigy Pharmaceutical Div.*, 264 NLRB 1013, 1017 (1982), the Board held that when notice is given to a union of a proposed change, and it is apparent that the employer has no intention of changing its mind, that notice is nothing more than a "fait accompli." Such notice has been found to be merely informational and fails to satisfy the requirements of the Act, *Gannett Co.*, 333 NLRB 355 (2001) (citing *Ciba Geigy Pharmaceutical Div.*, supra). Here, it is apparent that any purported "notice" provided by Respondent regarding its intentions as to the January 2010 increase was presented as such a "fait accompli." Thus, Retallick told employees that WESU had "tossed out" their January raise and Cardenas and Popyk told employees that they would not be receiving wage increases as the WESU agreement was "null and void." This position which was echoed by Zagami in his response to NEMSA's grievance. Thus, the Union could reasonably conclude that Respondent had made up its mind and that it would be futile to object to the failure of the Respondent to grant the pay raises. See *Burrows Paper Corp.*, 332 NLRB 82, 83 (2000). Moreover, Respondent has failed to show that the Union was ever afforded an opportunity to bargain over this issue prior to its implementation.

Respondent further asserts that insofar as the General Counsel has predicated its theory of the case upon *More Truck Lines*, supra, such reliance is misplaced because that case involved a threat, not the duty to bargain, and that the statements found to be unlawful were made by the employer during a campaign in which the union who had negotiated the agreement did not voluntarily terminate its representation of bargaining unit employees and thereby abandon the contract it had negotiated.

Respondent's arguments regarding the inapplicability of *More Truck Lines*, supra, are beside the point. While that case did, as Respondent asserts, decide only whether a particular series of statements amounted to an unlawful threat under the Act, the underlying issue was whether the employer in that case was authorized to take the action contemplated by such statements. There, the company made various oral and written campaign statements to the effect that, should the Teamsters win a runoff election between the Teamsters and the incumbent union, the extant collective-bargaining agreement would be "null and void" and the employer would freeze its drivers' wages while it negotiated with the Teamsters. The employer argued to the Board that while the previously implemented terms of an incumbent contract continue as terms and conditions of employment after a challenger union is certified, its uneffectuated terms do not. Specifically, the employer argued that it was not obliged to provide any further raises dictated by the contract after the new union's certification date.

The Board found that the uneffectuated raises in the predecessor union's contract had become terms and conditions of

employment, “by prior commitment or practice.” *Alpha Cellulose Corp.*, 265 NLRB 177, 178 fn. 1 (1982), enf. mem. 718 F.2d 1088 (4th Cir. 1983). As such wage increases were reasonably expected by the drivers, the employer would be required to follow the contract’s wage provisions until it reached agreement or impasse with the Teamsters. See *Liberty Telephone & Communications*, supra at 318 (“conditions of employment” include not only what the employer has already granted, but also what it proposes to grant and are comprised of the normal foreseeable expectations arising out of the employment relationship, including “announced or expected benefits.”); *Jensen Enterprises, Inc.*, supra at 877 (“[b]y withholding customary increases during the potentially long period of negotiations for an agreement covering overall terms and conditions of employment an employer, in effect, changes existing terms and conditions without bargaining to agreement or impasse, in violation of Section 8(a)(5).”) See *Lee’s Summit Hospital & Health Midwest*, 338 NLRB 841 (2003) (unlawful for employer to discontinue past practice of granting annual wage adjustment during bargaining for initial contract); *Deaconess Medical Center*, 341 NLRB 589, 590 (2004) (deciding objection to an election). See also *Arc Bridges, Inc.*, 355 NLRB No. 199, slip op. at 4 fn. 8 (2010) (citing *More Truck Lines*, supra).

In *More Truck Lines*, therefore, it was precisely because the Employer was not authorized to withhold the annual wage increase promised in the contract it had with the predecessor union, that its statement to employees that it would freeze wages constituted an unlawful threat in violation of Section 8(a)(1) of the Act.

I further note that in that case the employer argued, as Respondent does here, that implementing the annual, nondiscretionary wage increase would have constituted unlawful unilateral action on its part. The Board, citing *Alpha Cellulose Corp.*, supra, rejected such an argument as “unfounded”: “As explained above, established law dictates that the Respondent could have, and should have implemented those predetermined increases.” 336 NLRB at 773.

Respondent further attempts to distinguish *More Truck Lines* by arguing that the nature of the contractual obligation imposed there was different. In particular, Respondent points to article VIII of the WESU agreement which provides that employees “shall have their base hourly wage increased as identified below over the course of the life of this Agreement.” Thus, Respondent argues, once the WESU agreement became “null and void” it ceased to have “life” and the January 1 increase did not vest or accrue within the meaning of *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991). *Litton* however fails to support Respondent’s position insofar as it stands for the proposition that the Act, independent of any contract, requires preservation of existing terms and conditions of employment. 501 U.S. at 198, 206–207; see also *NLRB v. Katz*, supra at 747.

In *More Truck Lines*, the employer, like the Respondent herein, relied upon an assertion that the agreement with the predecessor union was “null and void” to justify its conduct. The Board rejected this defense, finding that the phrase “null and void”:

cannot be read literally to mean that an employer may treat the terms and conditions of employment established under an agreement with a defeated incumbent union as if they never existed. To do so would allow, or arguably compel, an employer to reset employees’ then existing conditions of employment to those that were in effect prior to the final employer-incumbent agreement.

The Board then went on to state that the phrase “null and void” meant that a successful intervening union:

must be afforded an opportunity to negotiate a new contract rather than being saddled with the one entered into by the defeated incumbent. Thus, if a challenging union is certified, then the contract between the employer and the incumbent becomes void but, as usual, the employer must abide by the then existing terms and conditions of employment until such time as it reaches an agreement with the new union or a lawful impasse occurs.

336 NLRB at 772–773 (emphasis and internal citations omitted).

Respondent has pointed to no authority or propounded any theory in law as to why this analytical framework should not apply to the case at hand: that is, where the incumbent union was not defeated but rather has not sought placement on the election ballot.⁴⁹

In further support of its contention that it was not required to grant a wage increase to employees in January 2010, Respondent relies upon *American Seating Co.*, 106 NLRB 250 (1953), and *Consolidated Fiberglass Products Co.*, 242 NLRB 10 (1979). These cases stand for the proposition that when a union which is party to a collective-bargaining agreement is decertified, the succeeding union is not bound by a prior contract, and the employer has an obligation to bargain with the new union even if the old contract has not yet expired. As the Second Circuit has observed, however, it does not follow from this reasoning that until an agreement is reached with the new bargaining representative, the old agreement, or at least those portions thereof necessary for the continuation of the employer-employee relationship, automatically cease to exist or should not be followed. *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1244 (2d Cir. 1970). In any event, as noted above, in this case the Union consented to the continuance of the existing contractual terms pending bargaining.

Accordingly, I conclude that Respondent’s failure to grant a promised wage increase to its bargaining unit employees in January 2010, a decision that was undertaken as a “fait accompli” without affording the Union notice and an opportunity to bargain, was an unlawful unilateral change in violation of Section 8(a)(5) of the Act.

⁴⁹ I additionally note that even in the absence of specific contractual language defining an employer’s obligation, where there is unequivocal evidence of an established past practice that reaches beyond the scope of a collective-bargaining agreement, the Board has held that it is unlawful for an employer to institute a unilateral change which conflicts with such a past practice. See, e.g., *Rosdev Hospitality, Secaucus, LP*, 349 NLRB 202 (2007).

CONCLUSIONS OF LAW

1. Respondent, American Medical Response of Connecticut, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, National Emergency Medical Services Association (NEMSA) is a labor organization within the meaning of Section 2(5) of the Act and the exclusive bargaining representative of employees in the following appropriate bargaining unit:

All full-time and regular part-time and per diem paramedics, emergency medical technicians, and chair car drivers employed by the Employer at its Waterbury, Southington and Avon Connecticut facilities, excluding all other employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

3. By the following conduct, Respondent violated Section 8(a)(1) of the Act.

(a) Threatening employees with the loss of their annual pay raise because of their union activities.

(b) Surveilling employees' union activities.

(c) Prohibiting employees from possessing union materials on company time and property.

(d) Prohibiting employees from using a bulletin board to post union-related items.

(e) Prohibiting employees from wearing a union lapel pin.

(f) Prohibiting employees from displaying a union decal while working and threatening employees with discipline if they refused to remove the union decal.

4. By refusing to allow Michael Gerrity to attend a company meeting on paid time, Respondent violated Section 8(a)(1) and (3) of the Act.

5. By the following conduct, Respondent violated Section 8(a)(1) and (5) of the Act:

(a) Unilaterally and without notice and bargaining with the Union failing to make upgrade pay, tuition reimbursement payments and recertification payments to eligible bargaining unit employees.

(b) Unilaterally and without notice and bargaining with the Union modifying overtime distribution procedures applicable to bargaining unit employees.

(c) Unilaterally and without notice and bargaining with the Union failing to post the biannual shift bid for bargaining unit employees.

(d) Unilaterally and without notice and bargaining with the Union failing to grant EMTs, paramedics and drivers a scheduled annual wage increase.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I further recommend that Respondent be ordered to reimburse and otherwise make whole Gerrity for any loss of earnings and other benefits suffered by virtue of its discrimination against him, *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), with interest to be computed as set forth in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

I further recommend that Respondent be ordered to, upon request, rescind all unilateral changes found herein and to place into effect all terms and conditions of employment which were in existence on or prior to September 4, 2009, and to maintain those terms until a new contract is concluded, the parties have bargained to a valid impasse or the Union has agreed to the changes. Provided, however, that nothing in my recommended Order is to be construed as requiring that Respondent cancel any unilateral changes that benefited unit employees without a request from the Union. I also recommend that the Respondent be ordered to make whole current and former unit employees for any loss of wages or other benefits they suffered as a result of Respondent's unlawful unilateral changes in the manner prescribed in *Ogle Protection Service*, supra, with interest to be computed as provided for in *Kentucky River Medical Center*, supra. This includes reimbursing employees for any expenses resulting from Respondent's unlawful unilateral changes to their terms and conditions of employment as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), aff'd. 661 F.2d 940 (9th Cir. 1981), with interest as set forth in *Kentucky River Medical Center*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵⁰

ORDER

The Respondent, American Medical Response of Connecticut, Inc., Waterbury Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with the loss of their annual pay raise because of their union activities.

(b) Surveilling employees' union activities.

(c) Prohibiting employees from possessing union materials on company time and property.

(d) Prohibiting employees from using a bulletin board to post union-related items.

(e) Prohibiting employees from wearing a union lapel pin.

(f) Prohibiting employees from displaying a union decal while working and threatening employees with discipline if they refuse to remove the union decal.

(g) Discriminatorily refusing to allow its employees to attend a company meeting on paid time.

(h) Unilaterally and without notice and bargaining with the Union failing to pay eligible bargaining unit employees upgrade pay, tuition reimbursement payments and recertification payments.

(i) Unilaterally and without notice and bargaining with the Union modifying overtime distribution procedures applicable to bargaining unit employees.

(j) Unilaterally and without notice and bargaining with the Union failing to post the biannual shift bid for bargaining unit employees.

⁵⁰ 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.

(k) Unilaterally and without notice and bargaining with the Union failing to grant EMTs, paramedics and drivers a scheduled annual wage increase.

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

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

(a) Make Michael Gerrity whole for any losses he may have suffered as a result of Respondent's discriminatory refusal to allow him to attend a company meeting on paid time, with interest as set forth in the remedy section of this decision.

(b) Upon request of the Union, rescind the unilateral changes made on or after September 4, 2009, to the terms and conditions of employment of bargaining unit employees and restore the status quo as it existed as of that date until a new contract is concluded, the parties have bargained to a valid impasse or the Union has agreed to the changes.

(c) Make whole its affected former and current unit employees for losses they suffered by virtue of Respondent's unlawful unilateral changes in the manner set forth in the remedy section of this decision.

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

(e) Within 14 days after service by the Region, post at its facilities in Waterbury, Southington, and Avon, Connecticut, copies of the attached notice marked "Appendix."⁵¹ Copies of the notice, on forms provided by the Regional Director for Region 34, 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. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 August 1, 2009.

⁵¹ 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."

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

Dated, Washington, D.C. November 9, 2010

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT threaten you with the loss of your annual pay raise because you engage in union activities.

WE WILL NOT surveil your union activities.

WE WILL NOT prohibit you from possessing union materials on company time and property.

WE WILL NOT prohibit you from using a bulletin board to post union-related items.

WE WILL NOT prohibit you from wearing a union lapel pin.

WE WILL NOT prohibit you from displaying a union decal and threaten you with discipline if you refuse to remove it.

WE WILL NOT discriminate against you because of your union or other concerted, protected activities by refusing to allow you to attend a company meeting on paid time.

WE WILL NOT unilaterally and without notice or bargaining with the Union fail to pay eligible bargaining unit employees upgrade pay, tuition reimbursement payments and recertification payments.

WE WILL NOT unilaterally and without notice and bargaining with the Union modify overtime distribution procedures applicable to bargaining unit employees.

WE WILL NOT unilaterally and without notice and bargaining with the Union fail to post the biannual shift bid for bargaining unit employees.

WE WILL NOT unilaterally and without notice or bargaining with the Union fail to grant EMTs, paramedics and drivers a wage increase scheduled for January 2010.

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

WE WILL make Michael Gerrity whole for any losses he may have suffered as a result of our discriminatory refusal to allow him to attend a company meeting on paid time, with interest.

WE WILL, upon request of the Union, rescind the unilateral changes made on or after September 4, 2009 to the terms and conditions of employment of bargaining unit employees and

restore the status quo as it existed as of that date until a new contract is concluded, the parties have bargained to a valid impasse or the Union has agreed to the changes.

WE WILL make our affected former and current bargaining unit employees whole for losses they suffered by virtue of our

unlawful unilateral changes to their terms and conditions of employment.

AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC.