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**Continental Auto Parts and United Auto Workers,
Region 9, Local 2326.** Case 22-CA-29125

August 26, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND HAYES

On June 16, 2010, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) of the Act by threatening employees with a loss of benefits and violated Section 8(a)(3) and (1) of the Act by discharging employee Stephen Reynolds. Contrary to the judge, we find that Section 10(b) bars litigation of the 8(a)(1) allegation. We further find, even assuming that the Acting General Counsel met his initial *Wright Line*² burden of demonstrating unlawful motivation, that the Respondent met its rebuttal burden of showing that it would have discharged Reynolds absent his union activities.³ Accordingly, we reverse the judge and dismiss the complaint in its entirety.

I. FACTS

The Respondent is a wholesale seller of after-market auto parts. In March 2009,⁴ the Union began an organizing campaign for a unit of drivers. Driver Stephen Reynolds, who had been hired in January 2007, participated

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

³ Since we find that the Respondent met its *Wright Line* rebuttal burden, we need not pass on its exception that it was prejudiced by the judge's ruling permitting cross-examination of one of its witnesses regarding his filing of a deauthorization petition.

⁴ All dates are in 2009 unless otherwise indicated.

in the campaign by soliciting authorization cards, arranging interest meetings, and serving as the Union's election observer on April 28. In an April conversation prior to the election, the Respondent's president, Thomas Lee, told Reynolds that he did not need the Union to speak for him because he could speak for himself. According to Reynolds, Lee then said, "the Union can't do nothing for me and . . . if [I] needed \$300 to kill the baby, that I couldn't get it from him, I would have to go to the Union." Reynolds had previously asked Lee for money to pay an insurance surcharge. Lee later apologized for his remarks.

After the Union prevailed in the election, Reynolds served as the unit's shop steward and as a member of the Union's negotiating team. The parties entered into a collective-bargaining agreement in March 2010.

Drivers' responsibilities include delivering and picking up auto parts from suppliers. Drivers are also responsible for retrieving "bumper cores" from dumpsters at auto body shops. Core retrieval had become an issue with drivers because they believed that climbing into dumpsters was dangerous and not within their job duties. The Union had raised the issue at an early negotiating session. Subsequently, around June, the Respondent held a meeting with drivers and discussed their duties relative to core pickup. The judge, crediting other employees over Reynolds, found that employees were told that they should not enter dumpsters that contained garbage or glass, but should retrieve cores from the top and through sliding doors in the side of "clean" dumpsters, i.e., those containing only bumper cores.

On May 4, the Respondent gave Reynolds a written warning for not signing out his company-provided cell phone the prior week. Reynolds admitted that he had not signed out his phone. On May 6, Reynolds left the Respondent's premises about 7:20 a.m. without signing a required delivery report. Warehouse Manager Redford Cesar called Reynolds about this immediately after Reynolds had departed. Reynolds explained that he had left because the "checker," who ordinarily arrives at 7 a.m., was late and Reynolds' van was loaded and ready to go. When Reynolds returned to the facility, Cesar asked him to sign a written warning for his premature departure that morning. By way of signature, Reynolds drew two diagonal lines across the face of the warning, ripping the paper in the process. General Manager Michael Koren told Cesar to throw out the warning, but Cesar kept it in Reynolds' file because he felt "disrespected" by the way Reynolds had signed. On July 31, the Respondent gave Reynolds a written warning and 1-day suspension for "[falsifying] company documents." Reynolds had signed "Mike Jones" (a rapper's name) on a receipt for parts that

he had picked up from a supplier. Reynolds explained that he was just joking with the supplier's employees; he reasoned that no harm came of his joke because the Respondent knew that he was the only driver who serviced that supplier.

On September 11, the Respondent sent Reynolds to Bridgewater Autobody to make a delivery and to pick up cores. When Reynolds arrived, the cores were in the dumpster and he left them there. Although drivers had been instructed to call the dispatcher, Elmo, whenever they encountered a problem in the field, Reynolds did not call Elmo from Bridgewater. Instead, he returned to the Respondent's facility, told Elmo that the cores were in the dumpster, wrote "VOID" on the invoice, and submitted the invoice to the account clerk. Reynolds then met with the president Thomas Lee's son, Jeff Lee. Stating that employees were not supposed to remove cores from a dumpster, Reynolds asked Jeff to call Bridgewater's manager, Burns, to request that the cores be removed from the dumpster. Jeff responded that it was a "clean dumpster" and that Reynolds could remove the cores.

On September 14, Elmo gave Reynolds another invoice to pick up bumper cores at Bridgewater. Reynolds told Elmo that the last time, the bumpers were in the dumpster, and he asked Elmo to call Burns to remove them. Elmo replied that Jeff had already called Burns and that the matter "was taken care of." The judge credited Reynolds' testimony that he went to Bridgewater as his last stop of the day; when he arrived at Bridgewater, the cores were still in the dumpster, except for five or six on the ground; he did not call Elmo from Bridgewater because he had talked to Elmo before starting his route; he retrieved the cores on the ground but not those in the dumpster; and, upon returning to the Respondent's facility, he put the cores he had retrieved on a rack and again wrote "VOID" on the invoice, while explaining to the account clerk that cores remained in the dumpster.

On September 16, Cesar told Reynolds that he was fired. When Reynolds asked why, Cesar responded that it was "because you wrote void on the invoice," adding that Thomas Lee would speak to him when Lee came in. Lee subsequently told Reynolds that he was fired for "voiding orders without authority or informing management," and that Reynolds should have removed the bumpers from the dumpster. Reynolds responded that drivers had been told that they were not supposed to take bumpers from the dumpsters, at which point Lee became angry. Reynolds then accused Lee of firing him because of his union activities. Crediting Reynolds over Lee, the judge found that Lee responded that Reynolds was "giving information, organizing people . . . you're this big bad shop steward . . . being responsible for the Union

coming in . . . you're giving people advice, you're organizing, and . . . you think you're above everybody because you're union and the union can't do nothing for you." The judge further found that Lee denied discharging Reynolds because of his union activities and alleged that no other employee had refused to pick up bumper cores.

On September 22, the parties met for a scheduled bargaining session. Present for the Union were Union Representative Bob Ambrosini, drivers Angel Narvaez and Luis Collado, and Reynolds, who continued to serve on the negotiating team despite his discharge. Present for the Respondent were Lee and the Respondent's attorney. Ambrosini asked to discuss Reynolds' discharge before the parties began negotiating. Lee addressed Reynolds' work record, stating that his file included one warning and two suspensions. Reynolds accused Lee of lying by overstating his discipline. Lee then became "animated," remarking that Reynolds thinks he is "a big union man" and has a "cocky attitude like he can't be touched, and thinks he's Mr. Big Shot."

Before the Union began organizing, Reynolds had received four raises and had never been disciplined. No manager ever warned Reynolds not to void out an invoice. The Respondent's employee handbook includes, under the heading "SOME ACTIONS THAT MAY RESULT IN IMMEDIATE DISCHARGE," "[f]alsification of Company records or other dishonesty" and "[i]nsubordinate conduct including . . . refusal or failure to accept job assignments." Similarly, the handbook includes, under the heading "OTHER TYPES OF POOR PERSONAL CONDUCT," "[f]ailure to follow directions" and "[f]ailure to meet work standards." These latter offenses "subject the offender to warnings, suspensions or discharge—subject to the nature, frequency, severity of the offense, and the employee's overall work record." The Respondent's disciplinary records show that, over a two-year period, the Respondent disciplined 66 different employees, ultimately firing 11 for refusals to perform assigned work or failures to follow instructions. The chart also shows that the Respondent terminated seven other employees—who, like Reynolds, had as few as two warnings and a single suspension—for, at least in part, "failure to follow job instructions," "refusal to perform job duties," "not following company rules," "failure to perform job duties," "refusal to perform work," and "failure to follow Company procedure."

II. ALLEGED 8(A)(1) THREAT

On November 23, the Union filed an amended charge alleging that the Respondent threatened employees with a loss of benefits, based on President Lee's statements to Reynolds in April, more than 6 months before the filing

of the amended charge. The judge, relying on *Redd-I, Inc.*⁵ and *Carney Hospital*,⁶ found that the amended charge was “closely related” to the timely-filed charge regarding Reynolds’ discharge and was therefore not procedurally barred by Section 10(b) of the Act. We find merit in the Respondent’s exception to this finding.

Redd-I examined whether otherwise untimely allegations sought to be included in an amended charge (1) involve the same legal theory, (2) arise out of the same factual situation or sequence of events, and (3) would be met with the same or similar defenses as the violations alleged in the timely pending charge. *Carney* examined “whether a timely charge alleging an 8(a)(3) violation and otherwise untimely amendments to that charge alleging 8(a)(1) violations are factually ‘closely related’ under *Redd-I* because all of the alleged conduct occurred during the same organizational campaign.”⁷ In *Carney*, the Board acknowledged that its application of prong two of the *Redd-I* test had met with circuit court criticism. In response, it overruled the criticized precedent and held that “mere chronological coincidence”—that is, the occurrence of the alleged violations during or in response to the same organizing campaign—is insufficient to establish the close factual relationship required to exempt the untimely charge from the application of Section 10(b).⁸ Nonetheless, the Board further held that a sufficient factual relationship *can* be established “where the two sets of allegations ‘demonstrate similar conduct, usually during the same time period with a similar object,’ or there is a causal nexus between the allegations and they are part of a chain or progression of events, or they are part of an overall plan to undermine union activity.”⁹ In *Carney*, the Board found that the untimely filed 8(a)(1) allegations (other than alleged handbook rule violations) were time-barred under Section 10(b) because they were not factually closely related to the timely 8(a)(3) charge.

We find that *Redd-I*’s prong-two, factual-nexus test is not met here. As in *Carney*, the untimely threat allegation and the timely discharge allegation do not allege similar conduct. And, in our view, the record fails to support the judge’s finding that the alleged threat was part of an overall plan to undermine union activity. The judge posits that the threat was the “beginning of [the Respondent’s] ongoing effort” to rid itself both of Reynolds and the Union—a beginning followed by warnings and a suspension, and culminating in Reynolds’ dis-

charge. But the complaint does not allege that any of the warnings violated the Act. Thus, the alleged threat was not part of a factually related chain of allegedly unlawful events focused on Reynolds. Moreover, the connection between a threat not to make a personal loan and a discharge is attenuated. In addition, the untimely allegation involves a threat made *during* the Union’s organizing campaign, whereas the timely allegation involves a discharge that took place *after* the Union’s organizing campaign had ended and the parties had begun to bargain. Under like circumstances, the Board has found *Redd-I*’s factual-nexus test unmet.¹⁰ Further, support for an “overall plan” to undermine union activity is undercut both by the absence of any other alleged unfair labor practices regarding the Respondent’s conduct, either preceding the election or relative to negotiations, and by the parties’ execution of a contract in an initial bargaining context. Finally, as in *Carney*, we cannot find that *Redd-I*’s prong 3 test (same or similar defenses) is met absent a factual nexus.¹¹

III. ALLEGED 8(A)(3) DISCRIMINATORY DISCHARGE

The judge found that the Respondent violated Section 8(a)(3) of the Act by discharging Reynolds. Applying *Wright Line*, *supra*, he found that the Acting General Counsel met his initial burden of proving unlawful motivation. The judge further found that the Respondent discharged Reynolds *solely* because he wrote “VOID” on the two invoices, and then reasoned that the Respondent’s assertion of “shifting reasons” for the discharge (including Reynolds’ failure to pick up cores at Bridgewater and/or failure to call the dispatcher when he encountered the problem) evidenced a discriminatory motive. The judge acknowledged that the Respondent had discharged other employees for failures to perform work and failures to follow instructions, but noted that when the Respondent had done so, it had cited those reasons in their termination notices—unlike Reynolds’ case, where the cited reason was voiding invoices. The judge concluded that the Respondent had not shown that it would have discharged Reynolds for voiding invoices absent his union activity.

We find merit in the Respondent’s exceptions to the judge’s analysis.¹² Assuming, *arguendo*, that the Acting

⁵ 290 NLRB 1115 (1988).

⁶ 350 NLRB 627 (2007).

⁷ *Ibid.*

⁸ *Id.* at 628-631.

⁹ *Id.* at 630.

¹⁰ *WGE Federal Credit Union*, 346 NLRB 982, 983 (2006).

¹¹ See *Carney*, 350 NLRB at 631 fn. 14.

¹² Although we affirm the judge’s credibility-based factual findings, we agree with the Respondent that the judge both misread portions of Lee’s testimony and improperly drew an adverse inference from its failure to call Bridgewater’s manager as a witness. An adverse inference is not warranted against a party where it cannot reasonably be assumed that the missing witness would be favorably disposed to that party. *Electrical Workers IBEW Local 3 (Teknion, Inc.)*, 329 NLRB

General Counsel has met his initial *Wright Line* burden, we conclude that the Respondent met its rebuttal burden of proving that it would have discharged Reynolds in legitimate reliance on his recidivist failure to follow orders even in the absence of his union activities.

Specifically, we disagree with the judge's pivotal finding that the "sole reason" for Reynolds' discharge was writing "VOID" on the invoices. Reynolds' own credited testimony—that Lee told him that he was being fired because he wrote "VOID" on the invoice *and that he should have taken the bumpers out of the dumpster*—does not support this narrow view. Instead, Reynolds' credited testimony is consistent with the Respondent's position statement¹³ and with Lee's testimony as to the reasons for the discharge.

The Respondent's progressive disciplinary policy clearly allows for discharge under these circumstances. Notably, the offense for which Reynolds was discharged was a repetition of conduct from 3 days earlier. At least in the second instance, Reynolds could not in good faith have misunderstood his obligation to remove bumper cores from a clean dumpster, or to follow instructions to call the dispatcher from the Bridgewater site to report any problems. Further, Reynolds had previously been lawfully warned and suspended for other admitted misconduct akin to not following directions or procedures. The Respondent's disciplinary records show that, over a 2-year period, it discharged 11 employees for refusals to perform assigned work or failures to follow instructions. In these circumstances, Reynolds' discharge cannot be properly characterized as disparate treatment.

In sum, we find, contrary to the judge's and our dissenting colleague's construction of the evidence, that once the Respondent's reasons for discharging Reynolds are properly construed, it has demonstrated by a preponderance of the evidence that it would have discharged Reynolds in legitimate reliance on these reasons even absent his union activity. We therefore reverse the judge's finding of a violation and dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

337, 337 fn. 1 (1999). Here, customer Bridgewater is a neutral non-party who, despite its alleged complaint about Reynolds, cannot be assumed to be favorably disposed to the Respondent. *Livingston Shipbuilding Co.*, 249 NLRB 1, 11 (1980).

¹³ The Respondent's position statement asserts that Reynolds was "fired for failure to follow instructions . . . and for voiding out orders without permission," his "action amounted not only to poor performance, but also to insubordination," and he was "given several chances [and] refused to pick up bumper cores in accordance with the instructions given him and failed to call his manager if he ran into a problem."

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

Wilma B. Liebman, Chairman

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER BECKER, dissenting in part.

This is a close case turning crucially on an evaluation of conflicting testimony and the credibility of witnesses. For that reason, as more fully explained below, I would not reverse the judge's conclusion that the Respondent fired Reynolds based on his union activity.

Reynolds was a key union supporter, distributing authorization cards to his fellow employees, arranging meetings with union representatives, acting as the Union's observer during the election, and subsequently being elected to serve as a shop steward and on the negotiating committee. Prior to the advent of the organizing drive, the Respondent had awarded Reynolds four pay raises. While Reynolds was disciplined prior to the discharge, none of the discipline resulted from serious misconduct. In only one case did the discipline result in more than a written warning—in that case it was a 1-day suspension. Moreover, none of the discipline predated the organizing drive or the Respondent's first expression of animus directed toward Reynolds, and none of it was related to the alleged reasons for the termination. In other words, the Respondent manifested no concerns about Reynolds or his job performance during the over 2 years between January 2007, when he was hired, and April 2009, when the organizing drive began.

Once the organizing drive began, the Respondent's president, Lee, who was directly involved in the decision to terminate Reynolds, expressed his strong opposition to the Union in crude terms. The expressions of animus occurred both before and after the termination. Moreover, both before and after the termination, the expressions of animus were directed to Reynolds and, in the case of the postdischarge comments, specifically concerned Reynolds' protected activity as a union supporter and steward. Before the election, Lee told Reynolds that he did not need the Union and that if Reynolds' girlfriend needed an abortion, he would not be able to get the money from Lee, but would have to ask the Union. Although Lee later apologized to Reynolds, he did not deny making this statement. Also before the election, Lee told another employee that the Union was "not good" and

would make “empty promises” and told the employee that when Lee had been represented by a union the employees got “screwed.” After the termination, when Reynolds discussed his termination with Lee and Reynolds disputed the reasons advanced by Lee, Lee responded that Reynolds was “giving information, organizing people, [he was a] big bad shop steward being responsible for the Union coming in, giving people advice, you’re organizing, and . . ., you think you’re above everybody because you’re Union and the Union can’t do nothing for you.”¹ Later, when the parties met in a bargaining session and the Union raised the issue of the discharge, Lee and Reynolds again became engaged in a verbal dispute concerning the matter and Lee stated that Reynolds thought he was untouchable, a “big union man,” and a “big shot.”²

Given this strong prima facie case of discrimination, the Respondent had a “substantial” burden to show it discharged Reynolds for nondiscriminatory reasons. *Bally’s Atlantic City*, 355 NLRB No. 218, slip op. at 3 (2010), *affd.* *Bally’s Park Place, Inc. v. NLRB*, ___ F.3d ___, 2011 WL 3375578 (D.C. Cir. 2011) (“Where, as here, the General Counsel makes a strong showing of discriminatory motivation, the employer’s rebuttal burden is substantial. *See Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991); see also *Van Vlerah Mech., Inc.*, 320 NLRB 739, 746 (1996).”). This substantial burden was not simply to prove that Reynolds engaged in misconduct, and not simply to show that the Respondent would thus have disciplined him even absent his protected activity, but to prove that Respondent would have *terminated* Reynolds even absent his pro-

tected activity. In my view, the judge correctly concluded that Respondent failed to carry that substantial burden.

As the judge found, the Respondent gave shifting explanations of the grounds for Reynolds’ termination. Reynolds testified that Warehouse Manager Cesar told him that he was being terminated because he wrote void on two invoices.³ This testimony is consistent with (1) that of Union Representative Ambrosini, who testified that Reynolds called him after his termination and so reported, (2) the Respondent’s termination record and summary of disciplinary records, and (3) the Respondent’s answer. Yet the Union Representative testified that Lee told him that Reynolds was fired for insubordination, not for writing void on the two invoices. Moreover, the Respondent’s answer states that Reynolds was terminated “because he voided out orders without authority after being instructed on several occasions that doing [sic] would lead to discipline, up to and including discharge,” but the Respondent offered no evidence of any such warnings. In fact, Reynolds testified that he had previously voided invoices and had never been disciplined or even told not to do so. Indeed, despite taking the position that writing “void” on an invoice was so serious that it merited immediate discharge, the Respondent took no action, even to warn Reynolds, after he wrote “void” on the first invoice on September 10, yet terminated him after he did so again on September 14.

Reynolds may not have been a model employee, and he may even have engaged in some intentional misconduct or confrontational behavior. Yet, in my view, the judge correctly concluded that the evidence shows the Respondent would not have terminated him but for his protected activity.

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

Craig Becker,

Member

NATIONAL LABOR RELATIONS BOARD

Bert Dice-Goldberg, Esq., for the General Counsel.
Jed L. Marcus, Esq. (Bressler, Amery & Ross, P.C.), Morristown, New Jersey, for the Respondent.
Robert Ambrosini, Vice-President and Business Agent, for the Union.

³ The majority reads Reynolds’ testimony differently from the judge, but, as explained above, that testimony is not the only basis for a conclusion that the Respondent gave shifting explanations of the grounds for the discharge.

¹ Although Lee denied making this statement, the judge credited Reynolds over Lee. Moreover, Respondent’s warehouse manager, Cesar, who joined the meeting, was not called as a witness to bolster Lee’s denial.

² Again, Lee denied making these statements, but Reynolds’ testimony was credited by the judge and was supported by that of Union Representative Ambrosini, who was present at the meeting. The testimony of two employees who were also present at the meeting corroborates that of Reynolds only in part (Lee calling Reynolds a “big shot,” but not referencing the Union), but the testimony of all three of the other witnesses is inconsistent with that of Lee (who denied remarking on anything other than Reynolds’ disciplinary record).

The Respondent correctly points out that the judge erred in several respects in explaining why he discredited Lee’s testimony. Specifically, the judge pointed to two inconsistencies in Lee’s testimony when there was only one. In addition, the judge found that Lee testified that Reynolds had written the name of a rap singer as his emergency contact on his employment application but that the Respondent failed to introduce the application, when Lee actually testified, accurately, concerning Reynolds’ emergency contact form, which is in evidence. But these were not the judge’s only grounds for discrediting Lee. Thus, I agree with the majority that the clear preponderance of relevant evidence does not suggest that the judge’s credibility resolutions were incorrect.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge and a first amended charge filed on September 23 and November 23, 2009, respectively, by United Auto Workers, Region 9, Local 2326 (Union), a complaint was issued on January 15, 2010 against Continental Auto Parts (Respondent or Employer).

The complaint, as amended at the hearing, alleges that in or about late April, 2009, the Respondent threatened its employees with the loss of benefits if they engaged in union activities, and discharged employee Stephen Reynolds because he engaged in activities in behalf of the Union.

The Respondent's answer denied the material allegations of the complaint, and asserted that Reynolds was fired "because he voided out orders without authority after being instructed on several occasions that doing [so] would lead to discipline, up to and including discharge." A further defense was that the complaint is barred by the 6-month limitations period in Section 10(b) of the Act. A hearing was held before me on April 6, 2010 in Newark, New Jersey.

Upon the evidence presented in this proceeding and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent, a New Jersey corporation having an office and place of business in Newark, New Jersey, has been engaged in the warehousing and distribution of auto parts. During the 12-month period ending March 30, 2009, the Respondent purchased and received at its Newark facility, goods valued in excess of \$50,000 directly from points outside New Jersey. The Respondent admits and I find that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits and I find that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Union Election Campaign

The Union began organizing the employees of the Respondent in March, 2009. Reynolds assisted in the campaign by distributing authorization cards to his co-workers and arranging meetings with them and Union representatives. The Union filed a petition for representation on March 17, 2009,¹ and an election was held on April 28 in a unit of drivers. Reynolds served as the Union's election observer. The Union was certified on May 8 as the employees' bargaining representative.

The driver's responsibilities include making deliveries of auto parts and picking up and signing for parts from suppliers. In addition, they pick up bumper "cores," plastic automobile

bumpers, from auto body shops. The cores are taken to the Employer's premises where they are repaired and refinished and then sold to the body shops. Cores which are too damaged for repair are cut up, sold and recycled.

Reynolds was hired in January, 2007 as a driver with a starting wage rate of \$9 per hour. He received four raises, and at the time of his discharge in September, 2009, he earned \$12.00 per hour. Reynolds served as the Union's observer at the election, and was elected as the unit's shop steward, helping with issues raised by the employees. He also was a member, with other employees, of the negotiating committee which met in bargaining sessions with the Respondent's president, Thomas Lee, and its attorney, Jed Marcus. The bargaining led to a three-year collective-bargaining agreement which was signed on March 1, 2010.

Reynolds and Angel Narvaez, a driver, both testified that in April 2009, shortly before the election, they had separate conversations with the Respondent's officials. Narvaez stated that he met with President Lee and Dee Santiago, the head of the accounting department, in Santiago's office. Santiago asked Narvaez whether he knew "how the union worked?" Narvaez said that he did not, and she told him that it would deduct \$50 or \$100 from his paycheck each month, and that the Union "is not good" and would offer him only "empty promises." She also mentioned that she used to work at a unionized employer and they all got "screwed."²

Reynolds stated that he spoke with president Lee, Santiago and Michael Koren, the Respondent's general manager in an upstairs office. Lee told Reynolds that he did not need the Union to speak for him because he could speak for himself, and that the Union could not do anything for him. Lee further told Reynolds that if his [Reynolds'] girlfriend needed \$300 for an abortion, he would not be able to get that money from Lee, but would have to ask the Union. Reynolds testified that he had asked Lee for money in the past, to pay an insurance surcharge. Two weeks later, Lee apologized to Reynolds for his comment about Reynolds' girlfriend. Lee testified that during the election campaign, he did not threaten to eliminate employees' benefits because of the Union.

B. Reynolds' Work Record

On May 4, Reynolds received a written warning for "not signing out or in his company Nextel phone during the week of April 27 to May 4, 2009." Reynolds acknowledged that he did not sign out the phone.

On May 6, Reynolds left the premises with his loaded van at about 7:20 a.m. Ordinarily, an employee checks the parts on the van before the driver leaves, but on that day the checker had not yet arrived, and Reynolds left the premises without signing the "delivery report" which shows the driver's name, the customers to whom deliveries and pick ups are to be made, the number of items to be delivered, and the amount of money to be received. Warehouse manager Redford Cesar called Reynolds immediately after he left the premises, and Reynolds explained that he checker had not arrived and he left since his

¹ All dates hereafter are in 2009 unless otherwise stated.

² The transcript reads "scooped" but the context of the phrase appears to indicate that the word is as set forth above.

van was loaded and ready to go. Reynolds did not have the delivery report when he left, but apparently used the information on the invoices which he had, to make the deliveries.

When Reynolds returned to the premises that day, Cesar gave him a written warning for leaving the premises before signing his driver's print-out of deliveries to be made that day. Cesar asked him to sign the warning notice. Reynolds drew two diagonal lines across the face of the warning, intending that to be his signature. Cesar noted on the notice that Reynolds "did not sign but made the above mark." While making his mark, the warning notice tore. Koren told Cesar to throw it out, but Cesar said that he felt "disrespected" in the way the mark was made and the paper torn, and would keep it in Reynolds' file.

On July 31, Reynolds received a written warning for falsifying company documents and was suspended for one day without pay. He signed "Mike Jones" on a receipt for parts he picked up from supplier Key Parts. Reynolds said that he signed the name "Mike Jones," a non-employee rap singer, as a joke to the clerks at Key Parts. He reasoned that since he was the only driver who serviced Key Parts, the Employer must have known that he was the driver who delivered the parts.

President Lee testified that a driver must sign the receipt with his own name because it signifies that the driver received those items. Lee stated that when the Employer receives a bill for the items its driver picks up, the bill is checked against the receipt to ensure that the parts were actually received by the driver. With such proof, payment to the supplier is then authorized. An improper signature, such as "Mike Jones," could lead to confusion as to whether the parts were actually picked up by the Employer. Although Lee stated that Reynolds listed "Mike Jones" as his emergency contact on his employment application, the application, received in evidence, does not so state.

Reynolds conceded that he received a copy of the Employee Handbook, and also acknowledged that he was supposed to follow the instructions given by the company, and to perform the assignments given to him.

1. Whether the Drivers Must Remove the Cores from the Dumpsters

As set forth above, the driver's duties include picking up bumper cores from auto body shops and bringing them to the Employer for refurbishing or recycling.

In addition to his regular pay, the driver receives \$2.25 for each core capable of repair which he picks up and returns to the Respondent's facility. For those cores which are beyond repair, he is paid \$2.25 for three cores. Reynolds estimated that he earned at least \$100 per month just from picking up the cores. He also stated that he is paid only when he has picked up a total of \$25.00 worth of cores. If he picked up fewer than that amount, a record is kept of the number of cores retrieved and when the amount totals \$25.00 or more, he is paid that amount.

The cores to be picked up are placed in dumpsters or containers at the auto body shops. The drivers complained to the Union that in order to retrieve the cores from those receptacles they had to physically enter the container and remove the cores. They believed that climbing into the dumpsters was unsafe, and that it was not part of their duties. The Union raised this issue at one of the negotiating sessions and the Employer said that it would look into the matter

Reynolds testified that in May or June, 2009, he attended a drivers' meeting with Employer officials, at which Employer official Koren and manager Cesar told the men that they would no longer be required to take bumper cores out of the dumpster. Rather, the auto body shops must stack the cores outside the dumpster in a safe place where the drivers would have easy access to them. Koren added that the driver was not required to climb into the dumpster. Reynolds stated that he interpreted Koren's instructions that the drivers should no longer enter the dumpster to get the cores as an order that they should "take anything that was on the ground, stacked and ready to go," noting that Koren used those words. Reynolds' pre-trial affidavit stated that Koren and Cesar told the men that "they would no longer send anyone to take bumpers out of dumpsters."

Union president Robert Ambrosini corroborated Reynolds' testimony. He stated that Reynolds and employee Angel Narvaez told him that they were told by the Employer at the meeting that the drivers did not have to climb into the dumpsters to retrieve the cores. Rather, they would pick up the cores that were on the ground outside the dumpster. The matter was raised by Ambrosini at a bargaining session at which he said that drivers complained that they may be injured by climbing into the dumpsters. President Lee testified that the drivers were referring to dumpsters which contained garbage in addition to the bumper cores.

Driver Felix Rivera stated that at the meeting, the drivers were told that they should not go into the dumpster if there was any trash, glass or radiators therein, or anything that could hurt them. He stated that if the drivers found garbage in the dumpster, they should call dispatcher Elmo and advise him of the situation, and then go to the next stop. Rivera stated that the drivers were not told that they should not pick up the cores simply because they were in the dumpster. Rather, if there was any other material in the dumpster which could injure them they should not enter the dumpster.

Driver Luis Collado testified that at the meeting, Cesar told the men that they were not permitted to enter the dumpster if it contained garbage and cores. Collado stated the rule a little more broadly during further examination. He stated that "nobody climbs in the dumpsters to pick up any bumpers because they're afraid that if they have glass or anybody gets cut, somebody can sue." Cesar told the men to make sure that the dumpsters did not contain garbage or glass.

Collado further stated that if the drivers encountered a dumpster which had garbage, they were instructed to tell the auto body store manager to ask someone to help the driver remove the cores. The men were further told that if they can remove the cores without entering the dumpster, they should do so. It was Collado's practice that if he saw glass in the dumpster he would call Elmo and refuse to retrieve the cores until the body shop removed them from the dumpster, at which time he would return and pick them up. Collado testified that the drivers were told that if they had a problem they should call the Employer and advise that they could not pick up the cores because they may get hurt if they enter the dumpster, and that another invoice should be produced for another pick up at another time.

Collado denied being told that he should not pick up the bumpers if they were in the dumpsters, adding that that was his

job.

Narvaez' pre-trial affidavit stated that, although he was not at the drivers' meeting, he was told by other employees, not Reynolds, that Koren told the men that they should no longer climb into the dumpsters.

President Lee stated that he and Cesar met several times with the drivers at which time the workers were told that they "didn't have to climb into the dumpsters." Lee further testified that drivers are not required to pick up cores that are in dumpsters in which garbage or glass is also present. Otherwise, the cores must be picked up. The driver is not required to climb into the dumpster. Rather, the proper method of retrieving cores from a full dumpster is to lean over the top of the container and remove the cores that are on top of the dumpster which constitute 80% of the cores. The remaining 20 percent are removed through the side doors of the dumpster.

Reynolds stated that he complained to a Union official about the matter after he was directed to pick up cores at Bridgewater Auto Body in August, 2009. The Union agent told him to take photographs of the cores in the dumpster, and he did. Reynolds explained that he took cores that were on the ground outside the dumpster, but also, importantly, removed all the cores from the dumpster. He stated that if the cores could be removed from the dumpster's side sliding door, he would do so. He stated that his only problem was with Bridgewater, the only customer on his route which kept the cores in the dumpster. The other customers stacked them on the ground near the container.

2. The September pickups

a. September 10

On September 11, Reynolds received an invoice, dated September 10, to make a delivery and also pick up cores at Bridgewater. On September 11, he made the delivery, but observed that the cores to be picked up were in the dumpster. He testified that, according to his understanding of the Employer's instructions that he need not remove them from the dumpster, but was required to pick up only those cores which were on the ground outside the dumpster, he left them in the dumpster. He then left Bridgewater without calling the Employer for instructions and returned to the Employer's facility. Upon his arrival, he told dispatcher Elmo that the cores were in the dumpster. Reynolds wrote "void" on the invoice and gave it to accounting department employee Natalia. After Reynolds submitted the invoice, accounting department supervisor Dee Santiago wrote on it "claim [sic] it was already pickup [sic] by other driver." Reynolds denied that he wrote that message and also denied telling Natalia to write that note. According to President Lee, Reynolds told Santiago to write that notation.

Reynolds explained that he wrote "void" on the invoice so that the document would "stay open in the system" because the cores were not picked up and the assignment was not completed.

Reynolds then immediately met with Jeffrey Lee, the president's son, and told him that the cores were still in the dumpster. Reynolds asked Jeffrey to tell Mr. Burns at Bridgewater that the cores should be removed from the dumpster. Jeffrey

replied that it was a "clean" dumpster and that Reynolds could remove them.³ Reynolds did not reply and left the premises.

Reynolds stated that he was never told that he should not write "void" on an invoice.

He further stated that after writing "void" on the invoice that day, no Employer agent told him not to do that again, and he was never disciplined before for doing so. In fact, President Lee conceded that, with respect to the September 10 invoice, no one told Reynolds that he should not have written "void" on the invoice, but that "everyone knows" that they are not supposed to write "void" on the invoice.

Lee testified that a driver may not write "void" on an invoice. The driver's job is to make a delivery or pick up and return to the shop. If the invoice is to be voided, the dispatcher, and not the driver, does so upon the driver's return. Lee explained that a "voided invoice" means that no transaction occurred – no cores were picked up.

b. September 14

Reynolds stated that on September 14, dispatcher Elmo gave him another invoice to pick up cores at Bridgewater. He told Elmo that, three days before, the bumpers were in the dumpster. Reynolds asked Elmo to call Burns and request that he remove them from the dumpster. Elmo replied that Jeffrey Lee had already called Burns and was told that no cores were in the dumpster.

Reynolds made various deliveries to customers that day. He left Midas Muffler at about 2:50 p.m., and then traveled to Bridgewater, arriving at about 3:00 p.m. At Bridgewater he saw a large number of cores in the dumpster and five or six on the ground. He took those on the ground and returned to the Employer with them, arriving about 30 minutes later. He put the cores on a rack where they are stored. He then told Natalia that the Bridgewater cores were still in the dumpster, he wrote "void" on the invoice, gave it to Natalia, and left. It must be noted that, in retrieving the five or six cores that day, Reynolds did complete a transaction, but nevertheless marked the invoice as "void."

Reynolds explained that he did not call Elmo or Jeffrey Lee when he saw that the cores were still in the dumpster because he understood from them that the bumpers had been removed from the container.

The Respondent contends that Reynolds did not visit Bridgewater that day. President Lee testified that his son Jeffrey spoke with Burns at Bridgewater on September 14, and was told that Reynolds did not visit that facility and did not pick up any cores. Burns sent photographs of the dumpster to Lee. The photos showed a dumpster full of cores, and no cores located on the ground. Thus, this would be consistent with Reynolds' version that he picked up the cores on the ground but left those in the dumpster. Accordingly, if Reynolds brought in cores on September 14 but did not claim them, they would be unaccounted for. But Lee stated that all cores received at the

³ In this regard, Reynolds' testimony is inconsistent. He first testified that on September 11 he was not told by Jeffrey Lee that he could have removed the bumpers from the dumpster.

Employer's facility that day were accounted for, and none were received that day from Bridgewater.

Reynolds testified that, although there are sliding doors on both sides of the dumpster at Bridgewater, it was not possible to remove cores from the side door because they are piled too high. President Lee testified that 80% of the cores could be removed from the top of the dumpster by leaning over the top without entering it, and the remaining 20 percent could be removed through the side doors.

Reynolds' daily record log for his pick-ups and deliveries on September 14 was received in evidence. The one-page log received in evidence lists all his activities that day. Included are his notations of the customer identification number, the invoice number, the amount of money received either in cash or check, and the times he arrived and left each customer. Reynolds concedes that he is supposed to record on the log that he picked up cores, and his arrival and departure time from such pick ups.

The page contains no entry that he visited Bridgewater that day. The last entry on the log's page shows that he left Midas Muffler at 2:50 p.m. Reynolds stated that from Midas he traveled to his last and final stop, Bridgewater. Reynolds testified that he entered the Bridgewater stop on the second page of the log, which would have been the only entry on that page. That page, if it exists, was not produced at hearing. In addition, although the bottom of the page in evidence has spaces for "grand total" and for the signatures of the driver, accounting department and cashier, no signatures appear. Reynolds stated that the second page was missing from the report offered in evidence, and that those entries were included on the second page of the log.

Reynolds conceded that there was no physical record that he had visited Bridgewater that day or even that he had picked up and brought back the five or six cores. Thus, his usual practice was to put his initials on the cores when he left them on the rack at the Employer's facility, but he did not do so on September 14 because he had not yet reached his \$25 threshold for payment. Nevertheless, it appears that he would have received credit for these cores which would have, in the future, been added to the amount he had already picked up, so that those five or six cores would have counted toward the total of \$25 which he would have received at some later time.

Reynolds conceded that the Respondent requires that he call the dispatcher if he encountered a problem in the field, such as where the customer could not pay for the parts he delivered. Reynolds did not call the dispatcher from Bridgewater because prior to his leaving the Employer's facility that day he had already told Elmo that the cores were in the dumpster, and Elmo told him that Jeffrey had called and reported that it was "taken care of." Reynolds, therefore, expected to see the cores outside the dumpster. President Lee stated that if the driver encounters a problem he is supposed to call the dispatcher from the site and ask for instructions.

Driver Rivera stated that he could not recall whether he picked up cores at Bridgewater prior to Reynolds' discharge. In contrast, Lee testified that when Reynolds was on vacation in August, 2009, other drivers, including Rivera, picked up cores there without difficulty, but then stated that he did not know if Rivera was at Bridgewater prior to Reynolds' discharge.

D. The Discharge

1. The employee handbook

The Respondent's Employee Handbook, which Reynolds acknowledged receiving, states, in material part, that "actions that may result in immediate discharge" include:

Falsification of Company records or other dishonesty.
 Insubordinate conduct including, but not limited to, refusal or failure to accept job assignments, or interference with the performance of work instructions given by supervisors.

Other actions which may subject the employee to discipline such as warnings, suspensions or discharge subject to the "nature, frequency, severity of the offense, and the employee's overall work record," include:

Loafing or loitering.
 Failure to follow directions.
 Failure to meet work standards or production output.

On September 16, manager Cesar told Reynolds that he was fired. Reynolds asked for an explanation, and Cesar explained that he had written "void" on an invoice. Reynolds left the office and told his co-workers what had happened. They offered to stop work until he was reinstated, but then Reynolds convinced them to continue working.

Reynolds testified that he spoke to president Lee and Cesar shortly after. Lee said that "you are being terminated because you wrote 'void' on the invoice," adding that he should have removed the bumpers from the dumpster. Reynolds testified that he told Lee that the drivers were instructed at the meeting with the Employer prior to that time that they were not supposed to take the bumpers from the dumpsters. Reynolds testified that Lee became angry, and Reynolds told him that "the real truth is you're just mad because of the union and now I'm shop steward."

Lee denied that Reynolds made that comment, but then conceded that Reynolds accused him of firing him because he was "with the Union." Lee denied doing so.

Reynolds stated that Lee got angry, and said that Reynolds was "yelling [sic] everybody—giving information, organizing people and everything else . . . You shop stewards, you're this big bad shop steward and the union can't do nothing for you." Lee also spoke about him "being shop steward, being responsible for the union coming in... you're giving people advice, you're organizing, and doing this and that and you think you're above everybody because you're union and the union can't do nothing for you."

Reynolds further testified that Lee told him that he did not believe that he went to Bridgewater on September 14, but Reynolds insisted that he had, mentioning the cores that he picked up. Lee continued, saying that Burns was loading Reynolds' van but Reynolds drove away. Reynolds replied that Burns was not present at Bridgewater when he was there, and he was not loading Reynolds' van. Reynolds told Lee that if Burns put the cores on the ground Burns could call him and Reynolds would pick up the cores. He also told Lee that he told Elmo before he left on the day's deliveries that the cores were still in the dumpster at Bridgewater, and that Elmo told him that Jeffrey was

told by Burns that he had taken care of it, and that the bumpers would be outside the dumpster.

Reynolds further stated that Lee said that he should have called the office when he arrived at Bridgewater and saw the cores inside the dumpster. Reynolds replied that he had already told the office to tell Bridgewater to remove them from the dumpster, because they were there three days before his September 14 visit.

Lee denied disciplining Reynolds or discharging him because of his activities in behalf of the Union or because he was the Union's shop steward, and stated that no other employee refused to pick up bumper cores. The Respondent's Employee Disciplinary Chart states that Reynolds was discharged for "voiding orders [of September 10 and 14] without authority or informing management." According to the chart, prior to Reynolds' discharge, two employees were fired for "failure to follow job instructions,"⁴ two employees were fired for "failure to perform job duties,"⁵ and one worker was fired for "refusal to perform work."⁶ None was fired for voiding out invoices.

E. The September 22 Meeting

On September 22, a collective-bargaining negotiation session was held at the office of the Employer's attorney. Present were Reynolds, Union official Ambrosini and employees Luis Collado and Angel Narvaez. President Lee and attorney Marcus were present for the Employer.⁷

Ambrosini testified that he told the group that he wanted to discuss Reynolds' discharge first, before contract negotiations began. Ambrosini stated that Reynolds did his job and picked up the cores that were outside the dumpster, noting that the instructions to the drivers were that they should not enter the dumpster, but that they should pick up the cores that were outside the container, on the ground.

According to Ambrosini, Lee stated that Reynolds was not discharged for writing "void" on the invoice. Rather, he was fired for insubordination because he did not call the Employer from the worksite. Ambrosini explained that Reynolds never called the dispatcher from the field in the past and he did not know he was required to do so, but that if Lee wanted him to call from the site he would do so in the future. Ambrosini further stated that Lee said that Reynolds' file included one warning and two suspensions. Reynolds responded that Lee was lying; he had only one warning, which was supposed to have been removed, and one suspension. Reynolds asked to see his records but Lee did not have them available.

At that point, according to Ambrosini, Lee became "animated," his voice grew louder as he moved his head and hands from side to side, remarking to Reynolds "you think you're a big union man."

They then discussed Reynolds' disciplinary record, including his signing the name "Mike Jones" on an invoice. Reynolds protested that he was only "kidding around" and had no intent

to defraud the Employer. Ambrosini asked the Employer to reinstate Reynolds and the Respondent refused.

Ambrosini stated that Lee explained the rule concerning entering the dumpsters. Lee said that employees do not have to climb into the dumpster. He did not recall Lee stating that if the drivers encountered a problem they should call the dispatcher. Lee claimed that Reynolds did not pick up any cores at Bridgewater on September 14. Reynolds protested that he picked up those that were on the ground.

Reynolds' version of the meeting was that "words were exchanged" with Lee stating that there were suspensions and warnings in his file. Reynolds asked to see them and Lee said that he did not have them with him. Reynolds then said that Ambrosini and Lee "got into some words," which he could not recall, at which point Reynolds told them to "forget about it"—just continue with bargaining.

Driver Collado stated that, at the meeting, he heard Lee state that Reynolds "has a cocky attitude like he can't be touched. He was too cocky and he thinks he's Mr. Big Shot." Collado denied that Lee seemed angry and noted that he did not raise his voice or shout. He stated that Lee did not make any disparaging remarks toward anyone at the meeting. Collado also testified that Lee never made any threats or promises regarding the election, and did not say that he disliked Reynolds because he was the shop steward.

Driver Narvaez stated that at the meeting, he heard Lee state that Reynolds had several warnings and suspensions. Reynolds told Lee that that was a lie, and asked to see the written records. He also heard Lee say that Reynolds "thought that he was a big shot." He did not hear Lee criticize the Union or mention the terms "shop steward, union or union activity."

Lee denied telling Reynolds at the meeting that he thought he was a "big union member" or a "big shot." He further denied becoming animated or raising his voice. Lee stated that the parties simply spoke about Reynolds' work record—"several warnings and suspensions and he was supposed to pick up the bumper cores and he didn't, that's why he was fired."

Lee conceded that September 14 was not the first time that Reynolds failed to pick up cores, but "we usually do not discharge people the first time." He testified inconsistently that on September 22, Reynolds probably told him that he picked up five to six cores at Bridgewater on September 14, but then stated that Reynolds did not make that statement.

Analysis and Discussion

I. CREDIBILITY

I cannot credit the testimony of Lee where it differs from the General Counsel's witnesses. While Lee denied telling Reynolds that he thought he was a big union member or a big shot, that testimony was contradicted by others present at the meeting - Union agent Ambrosini and employee witnesses Collado and Narvaez.

Lee's testimony was also inconsistent in two instances. He first testified that at the September 22 meeting, Reynolds told him that he picked up a few cores at Bridgewater on September 14, but then stated that Reynolds did not make that claim. Secondly, he first denied that when Reynolds was discharged he accused Lee of firing him because he was a union member, and

⁴ Delacruzortiz Balarminio and Anwar Jeffress.

⁵ Oscar Rosario and Deron Sarpley.

⁶ Koulebla Salima.

⁷ Reynolds continued to attend bargaining sessions after his discharge with no objection by the Respondent.

then stated that Reynolds did make that claim.

Further, Lee attempted to exaggerate the extent of Reynolds' disciplinary record by stating at the September 22 meeting that Reynolds had one warning and two suspensions whereas Reynolds' file included only one suspension. Although Lee testified that he said that Reynolds had only one suspension, Reynolds, Ambrosini and driver Narvaez heard Lee claim that he had two suspensions, and also heard Reynolds' contradiction of that claim.

Finally, Lee's testimony that Reynolds listed "Mike Jones" as his emergency contact on his employment application is not correct since the application, received in evidence, does not so state.

II. THE THREAT OF LOSS OF BENEFITS

A. The Section 10(b) Claim

The Respondent's answer asserted the affirmative defense that the complaint or part thereof is time-barred by Section 10(b) of the Act. Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge. . . ."

The original charge, filed on September 23, 2009, alleges that Reynolds was unlawfully discharged, and was timely filed inasmuch as he was fired on September 16. The allegedly untimely first amended charge, filed on November 23, alleges that the Respondent threatened employees with the loss of benefits, which as testified by Reynolds, was a threat that he would no longer receive a loan from the Employer because of his union activities.

Inasmuch as the first amended charge was filed in November, 2009, it would ordinarily be considered as untimely as it was filed more than six months after the alleged unlawful statement was made in April, 2009. However, in *Redd-I, Inc.*, 290 NLRB 1115 (1988), the Board held that allegations made in an untimely filed charge may be considered to be timely filed if they are legally and factually "closely related" to an otherwise timely filed charge.

In making this determination, the Board considers whether the otherwise untimely allegations are of the same class, involving the same legal theory and usually the same section of the Act as the timely filed allegations. It also analyzes whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge – meaning that the allegations must involve similar conduct, usually during the same time period with a similar object, for example, aimed at stopping a union organizing campaign. Finally, the Board considers whether the respondent would raise the same or similar defenses to both allegations – whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely charge.

The Board has held that a "sufficient factual relationship can be established by showing that the timely and untimely alleged employer actions are 'part of an overall employer plan to undermine the union activity'" and that if "allegations are demonstrably part of an employer's organized plan to resist union

organization, they are closely related." The Board requires that the two sets of allegations "demonstrate similar conduct, usually during the same time period with a similar object, or there is a causal nexus between the allegations and they are part of a chain or progression of events, or as part of an overall plan to undermine union activity." *Carney Hospital*, 350 NLRB 627, 630 (2007).

The Board's "closely-related" requirement is clearly met here. First, the alleged unfair labor practices set forth in the first amended charge are of the same class and involve the same legal theory and the same section of the Act as the timely filed charge. Thus, the first amended charge alleges a violation of Section 8(a)(1) of the Act concerning interference with the right of employees, specifically that if the Union succeeds in representing the employees, they would no longer be given loans by the Respondent. Similarly, the original charge alleged that Reynolds' discharge was a violation of Section 8(a)(1) and (3) – that his discharge interfered with his right to engage in union activities and constituted discrimination against him for engaging in such an effort.

Although the threat occurred five months earlier than the discharge, the two events were not isolated. Following the election on April 28, and the Union's certification on May 8, Reynolds played an active role as a bargaining committee member and the Union's shop steward. His aggressiveness as a steward was the subject of negative comment by Lee when he was discharged. Thus, the threat toward Reynolds was the beginning of an ongoing effort, accompanied by warnings and a suspension, which only commenced when he began acting in behalf of the Union. Accordingly, the allegation in the first amended charge relates to and is connected to the Respondent's reaction to the Union's campaign and Reynolds' prominent role therein, and its attempt to thwart that campaign which ultimately led to Reynolds' discharge. It is further clear that the Respondent would reasonably raise the same or similar defenses to the allegations in the first amended charge since they relate to Reynolds' credibility as those in the timely filed charge. I find and conclude, therefore, that the allegations in the first amended charge are closely related to the prior timely filed charge and that therefore Section 10(b) does not bar the issuance of the complaint based on the allegations in the first amended charge. *Redd-I and Carney*, above.

B. The Threat

The complaint alleges that in April, 2009, the Respondent threatened its employees with the loss of benefits if they engaged in union activities. This refers to Reynolds' testimony, which I credit, that in April 2009, president Lee told him that if his girlfriend needed \$300 for an abortion he would not be able to receive that money from Lee, but would have to ask the Union for it.

I have considered the fact that Lee testified generally that he did not threaten anyone with the loss of benefits, Lee did not specifically deny the comment attributed to him by Reynolds, and also did not contradict Reynolds' testimony that he had received a loan from Lee in the past. I have also considered the testimony of employee Felix Rivera, who denied that Lee or

any manager spoke to him regarding the Union during the election campaign, and further denied that he had been the subject of unlawful threats, promises or offers of benefits during the campaign. Rivera stated that he never heard Lee shout or speak loudly in anger, nor did he lose his temper or insult anyone. It must be noted that it was not alleged that Rivera was present during the threat to Reynolds and thus his testimony is irrelevant to the issue of whether Reynolds was threatened at a meeting with Lee and other company officials.

In addition, Reynolds' testimony is particularly believable because other Employer officials who were present at the time of Lee's comment did not testify. Further, Reynolds' testimony that Lee apologized later for the remark makes it more believable that Lee did make that threat. Lee did not deny that he apologized for making that comment to Reynolds.

The Board has held that the denial of future benefits such as the grant of a personal loan if the union was selected as the employees' representative constitutes a threat in violation of Section 8(a)(1) of the Act. *Regency Service Carts*, 325 NLRB 617, 623 (1998).

III. THE DISCHARGE

A. Legal Principles

The question of whether the Respondent unlawfully discharged Reynolds is governed by *Wright Line*, 251 NLRB 1083 (1980). Under that test, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the employment actions taken. He must show union activity by Reynolds, employer knowledge of such activity, and union animus by the Respondent.

Once the General Counsel has made the requisite showing, the burden then shifts to the Respondent to prove, as an affirmative defense, that it would have discharged Reynolds even in the absence of his union activity.

To establish this affirmative defense "an 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 been taken even in the absence of the protected activity." *L.B.&B. Associates, Inc.*, 346 NLRB 1025, 1026 (2006). "The issue is, thus, not simply whether the employer 'could have' disciplined the employee, but whether it 'would have' done so, regardless of his union activities." *Carpenter Technology Corp.*, 346 NLRB 776, 773 (2006).

Accordingly, the Respondent may present a good reason for its actions, but unless it can prove that it would have issued such discipline absent his union activities, the Respondent has not established its defense. "The policy and protection provided by the Act does not allow the employer to substitute 'good' reasons for 'real' reasons when the purpose of the discipline is to retaliate for an employee's concerted activities. Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for taking the action in question; rather it "must show by a preponderance of the evidence that the action would have taken place even without the protected conduct." *North Carolina Prisoner Legal Services*, 351 NLRB 464, 469, fn. 17 (2007).

B. The General Counsel's Prima Facie Case

It is clear that Reynolds was an open and active supporter of the Union. He distributed authorization cards to his fellow employees and arranged meetings with them and Union agents. He served as the Union's election observer and after the Union was certified by the Board, acted as its shop steward and served as a member of the contract negotiating committee.

Animus is shown in the finding, which I have made, that president Lee threatened Reynolds that if the Union was selected, the Respondent would no longer make available a personal loan to him. Animus is further shown in Lee's comments to Reynolds, immediately after his discharge, in which he said that Reynolds was "giving information, organizing people, [he was a] big bad shop steward being responsible for the union coming in, giving people advice, you're organizing, and . . . you think you're above everybody because you're union and the union can't do nothing for you." Six days later, Lee's anger still unabated, he remarked at a collective bargaining/grievance meeting that Reynolds thinks that he is "a big union man," had a "cocky attitude like he can't be touched, and thinks he's Mr. Big Shot."

I have considered whether these comments by Lee simply reflected his belief that he properly discharged Reynolds for misconduct, and that he could not use his steward's status as protection. However, the evidence establishes that Lee bore unlawful animus against Reynolds for his activities as the union's organizer and its steward. Thus, immediately after the discharge, as set forth above, Lee accused him of disseminating information to the workers, organizing them and also held him responsible for the Union's organizing the shop.

Reynolds was described by employee Rivera, following the election, as an "instigator" who was confrontational, seeking to "confront" Lee and the Employer's managers. He described him as "cocky"—someone who believed that he was "untouchable" who could do whatever he wanted, when he wanted.⁸

Of course, there is nothing improper in a steward's acting aggressively in support of the employees he represents. The Board has found that discharging a shop steward for his aggressive advocacy violates the Act. *Postal Service*, 308 NLRB 893, 898 (1992); *Enercon Testing & Balancing Corp.*, 328 NLRB 784, 786 (1999) where the employer, in unlawfully discharging an employee, stated that he had decided that he was "going to be a big union man."

A determination must first be made as to the reason for which Reynolds was discharged. I find that the Employer fired Reynolds for voiding two orders on September 11 and 14. The Employee Termination Record dated September 16 states that the reason for his termination was "voiding orders nos. 3178079 and 3184523 without authority or informing management." The "Employee Disciplinary Chart" prepared by the Respondent which lists all disciplinary actions taken against employees lists the same reason.

Reynolds testified that immediately after he was fired, president Lee told him that he was fired because he wrote 'void' on

⁸ On March 16, 2010, Rivera filed a union deauthorization petition which has been blocked by this proceeding.

the invoice, and he also said that he should have taken the bumpers from the dumpster. That conversation supports a finding that the sole reason that Reynolds was fired was because he wrote 'void' on the invoice and not because he did not remove the bumpers from the dumpster. Thus, Lee told him that the reason for discharge was voiding the invoice, only adding that he should have retrieved the bumpers. Accordingly, I find that Reynolds was fired for voiding out the two invoices.

This finding is supported by the Employee Disciplinary Chart which contains numerous instances of discipline setting forth instances where the employee's misconduct consisted of "failure to perform an assignment," "failure to follow company procedure," "failure to follow job instructions," "refusal to perform work," "failure to perform job duties," "failure to perform job duties properly," "failure to carry out instructions," and "failure to follow directions."

A finding that the sole reason for Reynolds' discharge was his voiding the two invoices is further supported by the Respondent's answer to the complaint which states that he was fired "because he voided out orders without authority after being instructed on several occasions that doing [so] would lead to discipline, up to and including discharge." In finding a discharge to be unlawful, the Board has noted that where a respondent asserts one reason for discharge in its answer and then shifts from that reason to another at hearing, doubt is cast on the "true reason for its action." *Don Pizzolato, Inc.*, 249 NLRB 953, 957 (1980).

Following the discharge, the Respondent, in its position statement and at hearing, asserted other reasons for Reynolds' discharge. Thus, in the position statement, the Respondent asserted that he was discharged for "failure to follow instructions and carry out instructions and for voiding out orders without permission . . . poor work performance and insubordination." At the September 22 meeting, according to Ambrosini, Lee asserted that Reynolds was not discharged for writing "void" on the invoices, but rather was fired for insubordination for not calling the Employer from Bridgewater. At hearing, Lee testified that Reynolds did not even go to Bridgewater on September 14, but failed to produce Bridgewater official Burns to support that assertion. In this regard, I credit Reynolds' testimony that his visit to Bridgewater was his last assignment that day, and that his notation of the visit was on the second page of the invoice which was missing from the record received at hearing. It is well settled that shifting defenses is evidence of a discriminatory motive. *Taft Broadcasting Co.*, 238 NLRB 588, 589 (1978). "When an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted." *Sound One Corp.*, 317 NLRB 854, 858 (1995).

Based on the above, I find that the General Counsel has proven that the Respondent was motivated in firing Reynolds by his activities in organizing the Union and acting aggressively as a shop steward. The Respondent was aware of his union activities and bore animus against him because of those activities. I accordingly find and conclude that the General Counsel has met his *Wright Line* burden of proof.

C. The Respondent's Case

Inasmuch as I have found that the General Counsel has established a prima facie showing that Reynolds' discharge was motivated by his union activities, the burden then shifts to the Respondent to prove, as an affirmative defense, that it would have discharged Reynolds even in the absence of his union activity.

The Respondent argues that part of Reynolds' job duties was to retrieve the cores from the dumpsters and bring them to its facility. I agree.

In addition, I cannot agree with Reynolds' assertion that he was not required to remove the cores from the dumpsters. Employee witnesses Collado, Narvaez and Rivera all testified that it was their job to retrieve the cores from the dumpsters, but that they did not have to enter the dumpsters to do so if they contained garbage or glass. Apparently, Reynolds interpreted the Employer's instruction that they not enter the dumpster under those conditions to include a prohibition on his removal of the cores from the dumpster at all. However, Reynolds contradicted this belief by testifying that he removed cores from the dumpster at Bridgewater in August, after he was allegedly told at the employee meeting that he did not have to do so. I therefore find Reynolds' testimony in this regard concerning his responsibilities less than truthful.

However, the discrete question which must be answered is what is the misconduct the Respondent cited for discharging Reynolds. I have found, above, that Reynolds was discharged for voiding out the two invoices, not his refusal to pick up the cores or his alleged insubordination. As set forth above, the Respondent did not assert any of those other alleged reasons at the critical time of his discharge or in the termination notice. It is noted that numerous other workers who committed such offenses as failure to perform work or not following instructions were terminated for precisely those reasons and such reasons were set forth in their termination notices. That was not done in Reynolds' case whose asserted reason for termination was the voiding of two invoices.

Accordingly, the question which must be answered is whether the Respondent has proven that it would have discharged Reynolds for voiding two invoices even in the absence of his union activities. *Wright Line*, above. I find that it has not met that burden.

First, Dee Santiago, the supervisor of the accounting department became aware that Reynolds wrote "void" on the invoice of September 10 because she wrote on it that Reynolds claimed that someone else picked up the cores.⁹ President Lee conceded that no one told Reynolds that he should not have voided that order or written "void" on it. Reynolds' testimony that he told Jeffrey Lee that the cores were still in the dumpster and that Bridgewater's supervisor Burns should be told to remove them was uncontradicted since Jeffrey Lee did not testify. Reynolds stated that he was never told that he should not write "void" on an invoice.

He further stated that after writing "void" on the invoice that

⁹ It should be noted that Santiago was present when president Lee threatened Reynolds with the loss of the benefit of a loan if the Union was selected.

day, no Employer agent told him not to do that again, and he was never disciplined before for doing so. In fact, president Lee conceded that, with respect to the September 10 invoice, no one told Reynolds that he should not have written “void” on the invoice.

Three days later, Reynolds again voided out the order and was fired for that alleged misconduct. The fact that Reynolds was not warned that he should not void out orders or told that he was not permitted to do so, or given an opportunity to correct such misconduct supports a finding that the Respondent would not have discharged him in the absence of his union activities. *DPI New England*, 354 NLRB No. 94, slip op. at 19-20 (2009). Lee’s testimony that “everyone knows” that they are not supposed to write void on an invoice has not been proven. No harm to the Employer has been shown by Reynolds’ writing “void” on the invoices. It simply meant that the cores had not been picked up, and that another pick up should be rescheduled. In fact, Reynolds gave uncontradicted testimony that he told Elmo, Jeffrey Lee and Natalia that the cores were not picked up.

It should also be noted that no evidence was presented at hearing that Reynolds had been told at any time that voiding out orders would lead to discipline. Indeed, Lee testified that no one told Reynolds that he should not have written “void” on the September 10 invoice. At hearing, Lee further asserted that Reynolds was fired for not picking up cores at Bridgewater for a second time, but that it does not terminate employees the first time for such an offense. In fact, that is exactly what was done. The Respondent waited for the second time that Reynolds wrote “void” on an invoice and it fired him for that reason, without warning him the first time that he should not have done so. Clearly, if voiding an invoice was a dischargeable offense, Reynolds should have been warned on September 11, or immediately thereafter, that he should not do so.

Reynolds, who had received four raises in pay during his 2½ year employment for the Respondent, received no warnings and no discipline until he became active in the Union. This supports a finding that once he became involved with the Union and acted assertively as its steward, the Respondent became determined to discharge him. The Respondent seized upon this opportunity when he wrote “void,” for the second time, on a Bridgewater invoice.

I accordingly find and conclude that the Respondent has not met its burden of proving that it would have discharged Reynolds even in the absence of his union activities. *Wright Line*, above.

CONCLUSIONS OF LAW

By threatening employees with a loss of benefits if they engaged in union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging its employee Stephen Reynolds, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

THE REMEDY

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

In the complaint, the General Counsel seeks an Order requiring that the Respondent pay quarterly compounded interest on all monetary awards. Inasmuch as the Board has not adopted this remedy, I will not recommend that it be applied. Simple interest will be assessed. See, e.g. *Glen Rock Ham*, 352 NLRB 516 fn. 1 (2008), citing *Rogers Corp.*, 344 NLRB 504 (2005).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondent, Continental Auto Parts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with a loss of benefits if they engaged in union activities.

(b) Discharging employees because of their union activities.

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

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

(a) Within 14 days from the date of the Board’s Order, offer Stephen Reynolds full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Stephen Reynolds whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

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

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

¹⁰ 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.

(e) Within 14 days after service by the Region, post at its facility in New York, NY, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 2009.

(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., June 16, 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

¹⁰ 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."

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 a loss of benefits if you engage in activities in behalf of United Auto workers, Region 9, Local 2326, or any other labor organization.

WE WILL NOT discharge you because of your union activities.

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

WE WILL within 14 days from the date of the Board's Order, offer Stephen Reynolds full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Stephen Reynolds whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings plus interest.

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

CONTINENTAL AUTO PARTS