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**Relco Locomotives, Inc. and Mark Baugher and Charles Newton and Richard Pace and Nicholas Renfrew.** Cases 18–CA–019720, 18–CA–019721, 18–CA–019744, and 18–CA–019745

April 30, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN  
AND BLOCK

On October 19, 2011, Administrative Law Judge Geoffrey Carter issued the attached decision. The Respondent filed exceptions and a supporting brief. 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 record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Relco Locomotives, Inc., Albia, Iowa, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. April 30, 2012

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Mark Gaston Pearce, Chairman

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Richard F. Griffin, Jr., Member

<sup>1</sup> 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 judge's findings.

The Board's decision in *Relco Locomotives, Inc.*, 358 NLRB No. 32 (2012) (*Relco I*), involves the same Respondent and similar findings of violations. Judge Carter in the present case referred to the decision of a different judge in *Relco I*, but did not rely on the findings in that decision in making his findings here. Neither do we rely on *Relco I* in deciding this case.

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Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*David Biggar and Catherine Homolka, Esqs.*, for the Acting General Counsel.

*L. Steven Platt, Paul Starkman and Svetlana Zavin, Esqs.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

GEOFFREY CARTER, Administrative Law Judge. This case was tried in Albia, Iowa, on August 9–10, 2011. Mark Baugher filed the charge in Case 18–CA–19720 on March 21, 2011, and filed an amended charge on May 27, 2011.<sup>1</sup> Charles Newton filed the charge in Case 18–CA–19721 on March 22, 2011, and filed an amended charge on May 27, 2011. Richard Pace filed the charge in Case 18–CA–19744 on April 6, 2011. Nicholas Renfrew filed the charge in Case 18–CA–19745 on April 6, 2011. The Acting General Counsel issued a consolidated complaint (covering all four cases) on June 8, 2011.

The complaint alleges that Relco Locomotives, Inc. (Relco or Respondent) violated Section 8(a)(3), (4) and (1) of the National Labor Relations Act (the Act) by taking the following steps because Baugher engaged in union or other protected concerted activities and/or because Baugher gave testimony at an unfair labor practice hearing in Case 18–CA–19175 issuing a written warning to Baugher on November 1, 2010; suspending Baugher for 2 days on November 1, 2010; issuing an unfavorable performance evaluation to Baugher on or about December 22, 2010; placing Baugher on probation on or about December 22, 2010; and terminating Baugher on March 11, 2011.

Regarding Newton, the complaint alleges that the Respondent violated Section 8(a)(3), (4) and (1) of the Act by taking the following steps because Newton engaged in union or other protected concerted activities and/or because Newton gave testimony at an unfair labor practice hearing in Case 18–CA–19175: threatening Newton on November 29, 2010, that he was being watched; issuing a verbal warning to Newton on November 29, 2010; issuing an unfavorable performance evaluation to Newton on or about December 22, 2010; placing Newton on probation on or about December 22, 2010; and terminating Newton on March 11, 2011.

As for Pace and Renfrew, the complaint alleges that the Respondent violated Section 8(a)(1) of the Act by terminating them on December 23, 2010, because they engaged in protected concerted activities in the form of discussing their concerns about the possible discharge of a coworker.

The Respondent filed a timely answer denying each of the alleged violations in the complaint.

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

<sup>1</sup> All dates are from 2010, unless otherwise indicated.

## FINDINGS OF FACT

## I. JURISDICTION

The Respondent, a corporation, repairs and rebuilds locomotives at its facility in Albia, Iowa, where it annually purchases and receives goods and materials valued in excess of \$50,000 directly from suppliers located outside of the State of Iowa, and sells and ships goods and materials valued in excess of \$50,000 from its Albia, Iowa facility directly to customers located outside the State of Iowa. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Brotherhood of Railroad Signalmen (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

*A. Background Facts*

This case follows on the heels of another trial involving Relco that was conducted by Administrative Law Judge William Schmidt. See *Relco, Inc.*, Cases 18-CA-19175, 18-CA-19350, 18-CA-19367 and 18-CA-19499, slip op. (March 28, 2011). Although my analysis does not depend on the findings that Judge Schmidt made in his decision (which is still pending before the Board), I have summarized portions of Judge Schmidt's findings below because they provide some useful background for the complaint allegations that are at issue in my case.

## 1. Overview of Relco's operations

Relco maintains a facility in Albia, Iowa where it employs approximately 100 workers in its mission of repairing and rebuilding locomotives. GC Exhibit (Exh.) 36 at 2-3 (*Relco, Inc.*, Cases 18-CA-19175, 18-CA-19350, 18-CA-19367 & 18-CA-19499, slip op. (J. Schmidt 2011)); Transcript (Tr.) 95.

## 2. Welding tests and the responsibilities of fabricators

Several of Relco's employees work as fabricators (including charging parties Mark Baugher and Charles Newton). Although fabricators handle a variety of tasks ranging from creating parts, using blow torches, cutting and grinding, welding is an important aspect of their responsibilities. Tr. 193, 384. In light of that fact, Relco encourages its fabricators to become certified as welders (although such certification is not mandatory), and provides opportunities for fabricators to initiate their welding certification tests at the facility. Tr. 384.

Project Manager Cliff Benboe handled the welding tests that Relco conducted before approving the tests to be reviewed by an outside firm.<sup>2</sup> Tr. 321. As Benboe explained, Relco asked new employees to take the welding test within 30 days of their date of hire. Employees who failed that initial test could retake the examination after the waiting period expired (30 days after

<sup>2</sup> To administer the welding test, Benboe prepared a "coupon" for the employee to demonstrate their vertical-up and overhead welds. If the employee's welds passed Benboe's visual inspection, Relco would send the coupon to an outside agency to determine if the coupon met the strength test requirements for certification. Tr. 320-321, 345. In this case, the employees who failed the welding test generally failed because their welds did not pass Benboe's visual inspection.

the first unsuccessful attempt, and 90 days after the second unsuccessful attempt), but Relco did not have formal deadlines for employees to retake or pass the test if their initial attempts failed.<sup>3</sup> Tr. 330, 407, 414.

## 3. Performance reviews

Relco conducts annual performance reviews at the end of the year, and often grants raises at that same time to certain employees. Tr. 437. To complete the reviews, Relco's foremen complete questionnaires to rate employees in 26 areas,<sup>4</sup> with each area assigned a score between 1 (outstanding) and 5 (unacceptable).<sup>5</sup> The foremen then meet with Relco's Chief Operations Officer Mark Bachman to discuss their ratings and make changes or additions as deemed necessary. Tr. 51-52, 386; see also GC Exhs. 6-18 (example performance reviews).

In addition to the numerical ratings, Relco's performance reviews provided opportunities for Relco to indicate the employee's strengths and weaknesses, as well as areas where the employee was in the process of improving their skills. See GC Exhs. 6-18. Specifically, in section D of the review, Relco listed goals "that the employee needs to work towards as a growing employee." GC Exh. 4, p. 4; see also GC Exhs. 6-18. By contrast, in section C of the review, Relco listed required areas of improvement, defined as "items that are unacceptable and must be improved, else disciplinary action up to and including discharge may apply." GC Exh. 4, p. 4; see also GC Exhs. 6-18.

Relco also rated employees for their growth potential. Specifically, in the growth potential section of the performance review, Relco rated employees as: (1) Performance Growth: an employee who is learning and developing new job skills and knowledge; (2) Performance Plateau: an employee who has learned basic job skills and knowledge and is actively working on refining that skill and knowledge; and (3) Performance Peaking: an employee who has been performing similar tasks for an extended period of time and shows little sign of im-

<sup>3</sup> I have not credited Benboe's assertion that Relco lacked sufficient work to assign to fabricators who had not passed the welding certification test. See Tr. 322. To the contrary, Relco employed several fabricators (including charging parties Baugher and Newton) for well over a year even though they did not pass the welding certification test. In addition, Operations Manager David Crall was not able to identify any occasion when it was difficult to find work for Baugher because Baugher was not a certified welder. Tr. 404.

<sup>4</sup> Employees are rated in the following 26 areas: stays on task; attendance; has required tools/equipment; safety practices; operation and care of equipment; organization of workstation; job knowledge; job skills; attitude (respectful, positive); problem solving; proactive; contingency planning; volume of acceptable work; quality of work; planning and organization; judgment and decisions; meets deadlines; accepts responsibility; accepts direction; oral communication; print reading/job understanding; recognize and facilitate improvements; fulfillment of goals; improvement in job knowledge/skill; supervisor interaction; and effective working relationships. See, e.g., GC Exhs. 6-18; see also GC Exh. 4 (performance review instructions, including definitions of each of the rating areas noted here).

<sup>5</sup> The specific scores that Relco could give to employees in each rating area were: '1' = outstanding; '2' = exceeds expectations; '3' = satisfactory; '4' = below expectations; and '5' = unacceptable. See, e.g., G.C. Exhs. 6-18.

provement or desire to expand his/her job knowledge or skill diversity. GC Exh. 4, p. 3; GC Exhs. 6–18.

In 2008 and 2009, Relco did not do performance reviews for its entire staff, in part because the poor economy made it difficult to give any raises.<sup>6</sup> Tr. 170–171, 218–219, 403, 422, 437. In 2010, however, Relco resumed doing performance reviews for its entire staff (regardless of whether raises would also be given), in part because the economy began to improve, and in part because it had been a long time since the previous reviews. Tr. 422. Accordingly, Relco’s foremen filled out performance evaluation questionnaires for the employees they supervised, and then discussed them with Bachman before the reviews were finalized. Tr. 51–52, 386. Operations Manager David Crall then met with the individual employees one-on-one to discuss their performance review. Tr. 386 (noting that Crall occasionally took notes about what happened in the performance review meeting).

4. Events leading to litigation in *Relco, Inc.*, Cases 18–CA–19175, 18–CA–19350, 18–CA–19367, and 18–CA–19499

In early 2009, some of Relco’s employees began exploring the possibility joining a union, and to that end began communicating with the Brotherhood of Railroad Signalmen. GC Exh. 36 at 4–5. A union representative met with Relco employees at an offsite meeting in April 2009, and shortly thereafter, employees (including Jeffery Smith, Ronald Dixon, and Timothy Kraber) began soliciting their coworkers to sign union cards and support the union organizing campaign. GC Exh. 36 at 5.

Bachman learned of the union organizing campaign (at the latest) in May 2009, and responded by contesting the merits of unionization in a 1-hour meeting with employees on May 15, 2009 staff meeting, and in a letter sent to employees on or about August 28, 2009. GC Exh. 36 at 7.

In early 2010, employees objected to Relco’s relatively new (since early 2009) practice of charging employees a \$36 monthly fee for a uniform cleaning service. GC Exh. 36 at 7. In an employee meeting held on March 4, 2010, about the uniforms, Kraber questioned management about the actual cost that Relco paid a contractor to clean the uniforms. Later in the day, Dane See communicated with the uniform cleaning service directly about the cost of cleaning Relco uniforms. The cleaning service forwarded See’s e-mails to Relco. GC Exh. at 8.

Between June 8, 2009 and March 9, 2010, Relco terminated Smith, Dixon, See, and Kraber, citing various infractions of company policy. GC Exh. 36 at 8–12. Specifically, Relco provided the following justifications for the terminations: Smith—terminated for a gross safety violation (failing to wear steel-toed boots); Dixon—terminated for insubordination (violating instructions to stop working with his feet hanging off the side of a locomotive he was repairing); See—terminated for inappropriate interaction with a vendor (alleged repeated harassing telephone calls); and Kraber—terminated for poor attendance. GC Exh. 36 at 9–14.

<sup>6</sup> Because economic conditions caused Relco to limit the number of raises that it gave to employees in 2008 and 2009, I am not persuaded by Relco’s argument (see R. Posttrial Br. at 24–25) that it put Baugher and Newton on notice that their performance was subpar in 2008 and 2009 by not giving them raises those years.

In July 2010, Relco asked its employees to sign a revised nondisclosure agreement that, among other provisions, barred employees from disclosing to any third party information about compensation, payments, correspondence, job history, reimbursements or personnel records without Relco’s authorization. GC Exh. 36 at 15. Employees were advised at the staff meeting that anyone who refused to sign the revised agreement would have to speak with Bachman. Id.

5. Trial in *Relco, Inc.*, Cases 18–CA–19175, 18–CA–19350, 18–CA–19367, and 18–CA–19499

On August 19, 2010, the Acting General Counsel (based on charges filed by the Union) issued a complaint alleging, inter alia, that Relco violated Section 8(a)(3) and/or (1) of the Act when it discharged Smith, Dixon, See, and Kraber. The complaint also alleged that Relco violated Section 8(a)(1) of the Act by maintaining an unlawful nondisclosure agreement and by coercing employees to sign that agreement. GC Exh. 36 at 1.

On September 14–16, 2010, Relco, the Union, and the Acting General Counsel participated in a trial before Judge Schmidt concerning the allegations in the complaint for Cases 18–CA–19175, 18–CA–19350, 18–CA–19367, and 18–CA–19499. GC Exh. 36 at 1. Two of the individual charging parties in my case (Mark Baugher and Charles Newton) testified as witnesses for the Acting General Counsel in Judge Schmidt’s case. Baugher provided testimony that conflicted with Relco’s assertion that Dixon was observed working on top of a locomotive with his feet dangling off of the edge. See GC Exh. 34 at 358–359; see also GC Exh. 36 at 11. Newton testified about the nondisclosure agreement and the warnings that employees received about needing to speak with Bachman if they refused to sign the agreement. GC Exh. 33 at 344–347; see also GC Exh. 36 at 15 (noting that Newton denied seeing a memorandum that Relco asserted that it posted in August 2010 to rescind the nondisclosure agreement).

On March 28, 2011, Judge Schmidt issued his decision in Cases 18–CA–19175, 18–CA–19350, 18–CA–19367 and 18–CA–19499. GC Exh. 36 at 27.

## B. Mark Baugher

### 1. Baugher’s protected activities

Mark Baugher began working as a fabricator at Relco on March 7, 2007. Tr. 146. In 2009, Baugher attended union meetings and signed a union card in connection with the Union’s efforts to organize the employees at Relco. Tr. 146.

In the morning on September 13, 2010, Baugher contacted supervisor Shawn Shaffer and requested a personal day. Baugher needed time off to testify as a witness in the trial regarding Smith, Dixon, Kraber, and See’s discharges, but he did not communicate that reason to Shaffer. Shaffer advised Baugher that he only had a half-day available to use. Tr. 148–149, 197. Baugher then asked about taking a vacation day instead, but Shaffer expressed doubt that such a request would be approved given that Baugher did not provide 2 weeks notice. Baugher decided to table the issue for the day, without telling Shaffer that he needed time off to testify at the unfair labor practice trial. Tr. 149, 197.

## 2. Relco considers warning Baugher for a safety violation

Later on September 13, Bachman sent Operations Manager David Crall an e-mail with the instruction to prepare a letter of reprimand to Baugher for not wearing his hard hat (a/k/a PPE—personal protective equipment) while on duty that day.<sup>7</sup> R. Exh. 2; see also Tr. 86, 328, 374 (noting that Bachman and Crall made their observations from a conference room approximately 50 yards away from the B-cab where Baugher was working). When Crall responded by asking Bachman to provide him with details to use in the letter, Bachman indicated that he was occupied with court hearings (in Judge Schmidt's case) and suggested that he and Crall handle the matter the following week. Id. No one in management spoke to Baugher on September 13 about any infractions that he allegedly committed that day. Tr. 79–80, 378–379.

## 3. Baugher testifies as a witness in Judge Schmidt's case

The following day (September 14), Baugher asked project manager Cliff Benboe for a vacation day for September 15. When Benboe expressed doubt that Baugher's request would be approved, Baugher showed Benboe his subpoena, prompting

<sup>7</sup> The witnesses who addressed this incident provided conflicting testimony about precisely what (if anything) happened on September 13. Baugher denied working on the locomotive (a Herzog B-cab) where Bachman and Crall reported seeing him without a hard hat, but his testimony is undermined by the fact that he did not remember the events of September 13 when Relco disciplined him on November 1 (though Baugher asserted that he later was able to remember what happened). Tr. 198–200. I have not credited Baugher's account because of those memory issues, and also because Baugher's time card does show that he worked on a B-cab on September 13 (though the record does not demonstrate that it was the specific B-cab where Crall and Bachman reported observing Baugher's conduct, and there is a 2-hour time discrepancy between the timecard entry showing that Baugher worked on a B-cab and the time that Relco asserts the violations occurred). See GC Exh. 2.

As for Relco's witnesses, Benboe testified that he observed Baugher's conduct on September 13, but later admitted during cross-examination that he did not see the September 13 incident. Compare Tr. 326–328 with Tr. 336. Crall also provided detailed testimony about Baugher's conduct on September 13 (see Tr. 375–376), but Crall's September 13 email to Bachman indicates that Crall in fact relied on Bachman for specifics about Baugher's actions. See R. Exh. 2. I also note that Crall erroneously testified that he, rather than Bachman, supplied the detail for the reprimand letter (prepared later) for the September 13 incident. Compare Tr. 377–378 with R. Exh. 2. I therefore have not credited Benboe's or Crall's testimony about the events of September 13.

Finally, Bachman testified briefly about the September 13 incident, but did not explicitly testify that he saw Baugher engage in any misconduct on that date. See Tr. 86, 90, 428–429 (describing the B-cab and its status of repair, stating that he saw Baugher going in and out of the B-cab to perform miscellaneous repairs, and asserting that he did not see Baugher doing any welding). However, Bachman did imply that Baugher improperly was working without his hard hat, and his implied testimony is corroborated by the September 13 email that Bachman sent to Crall to write Baugher up for not wearing his hard hat. See Tr. 429; R. Exh. 2. I have credited Bachman's September 13 email to Crall as the most reliable source of information about Baugher's conduct on September 13, because Bachman prepared the email on the same day as the events of September 13 (and before Baugher notified Relco that he would be testifying in the trial before Judge Schmidt).

Benboe to say “Oh, you're involved in this too?” and to place a call to Crall. Tr. 149–150. Baugher was granted time to appear and testify in the trial. Tr. 196–197.

Baugher testified on September 15 as a witness for the Acting General Counsel in the unfair labor practice trial handled by Judge Schmidt. Tr. 150. As previously noted, Baugher provided testimony that conflicted with Relco's assertion that Dixon was observed working on top of a locomotive with his feet dangling off of the edge. See GC Exh. 34 at 358–359; see also GC Exh. 36 at 11. Consistent with the Board Rules, Bachman was present in the courtroom when Baugher testified, and had an opportunity to listen to Baugher's testimony and (along with Relco's attorneys at the time) review a statement that Baugher provided to the Union and the affidavit that Baugher provided to the Acting General Counsel. Tr. 150–152; see also GC Exhs. 19, 24.

## 4. Union election held at Relco

On October 20, the Board held an election at Relco to assess whether a sufficient number of employees supported the Union. Tr. 36. A majority of employees voted against bringing the Union to Relco.

## 5. Baugher's blue flag policy violation

On October 26, Baugher and a coworker (employee D. F.) were assigned to work on a locomotive together. Tr. 156. As required by company policy, both Baugher and D. F. placed blue flags on the locomotive to indicate that the locomotive was currently being serviced.<sup>8</sup> Tr. 156, 347. When Baugher completed his shift, however, he neglected to remove his blue flag from the locomotive.<sup>9</sup> Tr. 156. Relco personnel attempted to locate Baugher, and when those efforts failed, personnel verified that the locomotive was clear and then removed Baugher's blue flag.<sup>10</sup> Tr. 382. When Baugher returned to work the next day, he was unable to find his blue flag in his toolbox or on the locomotive that he last serviced. Baugher therefore notified Benboe that he did not have his blue flag. Tr. 157.

## 6. Relco disciplines Baugher and places Baugher on probation

On November 1, Relco suspended Baugher for 2 days without pay and placed him on probation, citing “multiple policy infractions” that Baugher had committed. Tr. 159; GC Exh. 25; see also GC Exhs. 26–27 (noting that Relco also was giving Baugher a written warning for the September 13 infractions, and a verbal warning for the October 26 infraction). As indicated in documentation that Relco provided to Baugher,<sup>11</sup> Relco

<sup>8</sup> The blue flag policy is essentially a safety measure. If a locomotive is marked with a blue flag, Relco personnel are prohibited from moving the locomotive or removing the flag until the worker who placed the blue flag can be located. Tr. 84, 347, 380–381.

<sup>9</sup> Baugher suggested that D. F. also left his blue flag on the locomotive. Tr. 156. I have not credited that testimony because Baugher offered it in a tentative manner, and because it is not corroborated by any other evidence.

<sup>10</sup> Baugher did write his cell phone and home phone numbers on the back of his blue flag to facilitate being contacted in the event he left his blue flag on a locomotive. Tr. 157. However, no one called Baugher on October 26 about the blue flag. Tr. 157.

<sup>11</sup> The record includes an unsigned and undated summary of Baugher's infractions that was apparently not given to Baugher. See

specifically relied on alleged infractions that occurred on September 13 and October 26. See GC Exhs. 26, 27; see also Tr. 382–383. Relco described the September 13 infractions in an undated and unsigned document as follows:

On Monday, September 13th, between the approximate hours of 1430 and 1530, Mark Baugher was observed working on the Herzog “B-Cab.” During this time period, Mark exhibited poor job performance, smoking in an enclosed area and disregard for the Personal Protective Equipment (PPE) policy of Relco Locomotives.

Poor job performance was demonstrated by long lapses in production work. Mark would do a small task, then, he would stand, smoke and loiter for 3–5 minutes before moving to the next task.

Mark was observed smoking inside the “B-Cab,” which is classified as a non-smoking area.<sup>12</sup>

Disregard for the company’s PPE policy was demonstrated by the fact that Mark was working for an extended period without his head protection (Helmet) while either loitering or performing tasks that would not be an interference with his protective head gear.

This written warning is for the documentation of the above described infractions and may be considered progressive discipline. Any recurrence of the incidents listed above or other incidents in conflict with company policies or procedures will result in further disciplinary action, up to and including discharge.

GC Exh. 26.<sup>13</sup> Regarding the October 26 blue flag violation,

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GC Exh. 37(v). The additional summary generally contains the same information as the documents that Relco provided to Baugher (GC Exhs. 26 and 27), but identifies Crall and Bachman as the managers who observed Baugher’s conduct on September 13, and identifies the specific policies that Baugher allegedly violated on September 13. See GC Exh. 37(v).

<sup>12</sup> Bachman testified that Iowa law prohibits smoking in a confined space. Bachman added that locomotives are considered confined spaces, and noted that the State had cited Relco twice for employees who violated the law by smoking in confined spaces. Tr. 431; see also Tr. 397 (Crall testimony that the State could impose penalties on Relco if employees smoked in confined spaces).

Regarding enforcement of the no-smoking policy, Baugher testified that in March 2011, Benboe smoked while inside of a 200 Amtrak locomotive. Tr. 179–200. However, Bachman testified that Benboe did not violate the no-smoking policy because the 200 Amtrak was a wrecked train and was not a confined space since its top had been removed. Tr. 430. I have credited Bachman’s explanation, which was not challenged with any rebuttal evidence.

<sup>13</sup> Bachman testified that Relco held off on disciplining Baugher for the September 13 incident because the company’s former attorneys advised that Relco should avoid actions (such as giving raises or reprimands) that might influence the Board election that was scheduled for (and held on) October 20. Tr. 80; see also Tr. 382–383. However, in the same preelection timeframe (on September 24), management (Benboe) spoke to another employee (employee K. S.) about driving recklessly on company property, and notified K. S. that disciplinary action would be forthcoming. GC Exh. 37(p) (signed and dated statement prepared by Benboe on September 27). Relco did wait until November

Relco described the incident in an undated and unsigned document as set forth below:

Documentation of verbal warning:

Blue Flag Policy

The “Blue Flag” policy was initially rolled out to the Relco Locomotives, Inc. Albia Facility in the Spring of 2010. The final written policy became documented and effective August 6, 2010. The key line of the policy states, (Blue) “Flags will be applied at all times when working on a unit and removed when not.”

On the evening of October 26, 2010, Mark Baugher’s Blue Flag was found left on a unit by Relco Locomotives, Inc. management. After validation that Mark was not on company property, the Blue Flag was removed.

On the morning of October 26, 2010, Mark Baugher started work on the Amtrak 200 as assigned. It was noted by Dave Crall, Cliff Benboe and Shawn Shaffer that he proceeded to the job without applying his Blue Flag or notifying his Supervisor that his Blue Flag was not in his possession.

GC Exh. 27.<sup>14</sup> Relco also provided Baugher with a copy of the blue flag policy to sign on November 1. Baugher signed and returned blue flag policy to Relco on the same date.<sup>15</sup> GC Exh. 28.

In early December 2010, Baugher contacted Crall at the end of his shift and asked when his probation might be lifted. Tr. 168. A few days later (after conferring with Bachman), Crall told Baugher that he would remain on probation until he demonstrated no further problems would arise. Crall did not identify any specific steps (such as obtaining a welding certificate) that Baugher needed to take to demonstrate that his probation should be lifted. Tr. 169.

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1 to formally suspend K. S. and place him on probation. See GC Exh. 37(q); see also GC Exh. 37(o) (disciplinary letter for K. S. was initially dated October 4, 2010).

<sup>14</sup> Relco customarily issued verbal warnings to employees who committed blue flag violations for the first time. Tr. 399–400; GC Exh. 37(g), (h). Relco has suspended employees who violate the blue flag policy on multiple occasions. See GC Exh. 37(z).

I have given little weight to Baugher’s testimony that Relco did not follow the blue flag policy when employees were assigned to work on a TRE project in February 2011. Tr. 177–178. Baugher acknowledged that Relco had an alternate practice of placing blue flags on the rails (because the TRE cars were aluminum and could not accommodate the magnetic blue flag holders), and Baugher could not state that Relco failed to place blue flags on the rails. Tr. 208.

Similarly, I have given little weight to Baugher’s testimony that Crall did not take issue with a group of employees who were not wearing hard hats while on duty in February 2011. Tr. 178–179. While Baugher testified that Crall did not speak to the employees on the shop floor, Baugher did not have information about whether Crall later warned or disciplined those employees for not wearing hard hats as required. Tr. 179.

<sup>15</sup> Although Baugher did not sign the blue flag policy until November 1, he was aware of the policy before October 26 because the policy was discussed at a safety meeting that he attended shortly after returning to work (after an excused absence) in August 2010. Tr. 153–154.

#### 7. Baugher's December 2010 performance review

On December 22, Crall met with Baugher to discuss Baugher's performance review.<sup>16</sup> Tr. 171, 387; GC Exh. 18. Relco gave Baugher "satisfactory" ratings in 16 areas, and an "exceeds expectations" rating in 1 area, but indicated that Baugher was performing "below expectations" in the following 8 areas: staying on task; organization of workstation; problem solving; proactive; contingency planning; judgment and decisions; accepts responsibility; recognizing and facilitating improvements; and fulfilling goals. GC Exh. 18 at 1. For weaknesses, Relco identified Baugher's focus on job assignments and his lack of a welding certification, and stated more broadly that Baugher was on probation for poor job performance and that Baugher had not bettered himself since joining the company. Relco set goals for Baugher to obtain his welding certification and to keep his work area clean and organized.<sup>17</sup> GC Exh. 18 at 2-3. Crall's notes describe the actual review as follows:

Spoke to Mark about his productivity incident that he was written up & placed on probation for. Mark insists that he always works & shares his knowledge and always has.

We also spoke about self improvement. Mark has never proactively taken steps to improve himself. We spoke about certifying & Mark thought he would certify just after the start of the New Year.

We spoke about his probation & when he would come off of it. I told him that it would be determined by his performance, self improvement & attitude.

We spoke about his attitude and that it needed to improve. Mark had an angry attitude throughout the review.

GC Exh. 18 at 4.

#### 8. Baugher's early 2011 work assignments

In January 2011, Baugher retook the welding certification test, but did not pass the overhead welding portion of the test because the beginning and end of the welds were not completely filled in.<sup>18</sup> Tr. 175. Baugher did not attempt to retake the certification test, in part because he had trouble finding

<sup>16</sup> Benboe, who served as Baugher's direct supervisor for 60 percent of Baugher's time at Relco, completed the initial paperwork for Baugher's performance review. Tr. 336-337. Relco did not obtain input from Foreman Jim Cronin, who supervised Baugher for 6 months in 2010 when Baugher was assigned to the night shift. Tr. 171. Crall did not show Baugher the actual performance review paperwork during the meeting. Tr. 172.

<sup>17</sup> I do not credit Bachman's assertion that Baugher had a 60 to 90 day period to obtain his welding certificate. See Tr. 76-77. No such timetable is stated in Baugher's performance review.

<sup>18</sup> This was not the first time that Baugher failed the welding certification test, as he failed the test on three other occasions between 2007 and September 2010. Tr. 196; see also Tr. 173 (noting that as in January 2011, Baugher passed the vertical-up portion of the welding test in late 2008, but did not pass the overhead welding part of the test). Relco management did not advise Baugher to retake the welding certification test at any point between Baugher's late 2008 attempt and the 2010 performance evaluation. Tr. 173-174.

times when both he and Benboe were available. Tr. 176 (noting that Benboe switched to the night shift a few days after Baugher failed the welding test in January 2011). Nevertheless, between January and March 2011, Relco assigned Baugher to work 60-70 percent of his time repairing an Amtrak 200, an assignment that required Baugher to perform welding tasks. Tr. 181-182. Relco managers also did not speak to Baugher again about the weaknesses or goals listed on his performance review, or otherwise indicate that they were unhappy with his performance.<sup>19</sup> Tr. 184, 338.

#### 9. Relco terminates Baugher

On March 11, Benboe asked Baugher to come to the office, where Crall notified Baugher that Relco was terminating Baugher's employment because he did not make sufficient improvement on the deficiencies listed in his performance review.<sup>20</sup> Tr. 69, 182, 389; GC Exh. 29. As Baugher was leaving the office, he asked Benboe if he had any problems with Baugher's performance. Benboe replied "No Mark. I didn't know they [were] going to do this myself until about a half hour ago." Tr. 185, 339.

Baugher applied for unemployment compensation after he was terminated. Tr. 187-188. During the unemployment compensation hearing, Crall (who participated to represent Relco) asserted that Baugher had until the end of the 1st quarter of the year to complete his weld test. Tr. 190. Baugher had never heard about such a deadline before. Tr. 190.

#### C. Charles Newton

##### 1. Newton engages in protected activities and testifies in Judge Schmidt's case

Charles Newton began working as a fabricator at Relco on November 24, 2008. GC Exh. 17; Tr. 95. In 2009, Newton attended meetings in connection with the Union's efforts to organize the employees at Relco. Tr. 98. Newton also shared his opinion about the Union with his supervisor, Foreman Jim Cronin, stating that Relco's rough-handed tactics probably had a lot to do with the Union coming to the company. Tr. 100.

Shortly before the unfair labor practice trial handled by Judge Schmidt, Crall approached Newton (who had previously requested a day off because of the trial) and asked if he would be willing to speak to Relco's attorney. Newton agreed, and met with Relco's attorney and Crall for 5 minutes about Newton's involvement in the case and what he might address in his testimony. Tr. 101.

On September 15, Newton testified as a witness for the Acting General Counsel in the unfair labor practice trial handled by Judge Schmidt. Tr. 100; GC Exh. 33. As previously noted, Newton testified about a nondisclosure agreement that Relco asked employees to sign, and the warnings that employees re-

<sup>19</sup> Also in this timeframe, Baugher began attending meetings regarding the possibility of bringing another union (the IBEW) to Relco. Tr. 186-187. There is no evidence, however, that Relco supervisors or agents were aware of this renewed union activity.

<sup>20</sup> Bachman made the decision to terminate Baugher after speaking informally with some supervisors, but did not consult with Benboe or review any of Baugher's timesheets to gain a sense of the work that Baugher did after his performance review. Tr. 70, 73, 339.

ceived about needing to speak with Bachman if they refused to do so. Tr. 105; GC Exh. 33 at 344–347; see also GC Exh. 36 at 15 (noting that Newton denied seeing a memorandum that Relco asserted that it posted in August 2010 to rescind the non-disclosure agreement). Bachman was present in the courtroom when Newton testified, and had an opportunity to listen to Newton’s testimony and (along with Relco’s attorneys at the time) review a statement that Newton provided to the Union and the affidavit that Newton provided to the Acting General Counsel. Tr. 102–104; see also GC Exhs. 19, 20.

## 2. Union election held at Relco

On October 20, the Board held an election at Relco to assess whether a sufficient number of employees supported the Union. Tr. 36. Newton served as an observer for the Union at the election, and in that capacity attended a briefing with Crall, Foreman Jeff Dalman and an NLRB agent about the procedures that would be used during the election. Tr. 106–107. A majority of employees voted against bringing the Union to Relco.

## 3. Relco disciplines Newton for lack of productivity

On November 29, Newton received a work order to make a rear headlight (for a cab) similar to the front headlight on a locomotive. Since the work order was unclear, Newton discussed it with Cronin, who suggested that Newton look at the locomotive headlight, which was located in a different part of the shop (approximately 150 feet away from where the cab was located). Tr. 108. Accordingly, Newton walked from the locomotive to the cab to compare the headlights, and back again, passing Crall twice along the way. Tr. 109, 387–388. Crall asked Newton what he was doing, and Newton responded that he was building a headlight. Tr. 405 (noting that Crall also asked Cronin about Newton’s assignment, but Cronin only told Crall the locomotive that Newton was working on).

A few minutes later, Cronin warned Newton that he needed to be careful and should not walk around any more because Newton was being watched. When Newton responded that he was simply walking over to inspect the cab headlight, Cronin responded, “I know but . . . be careful, they’re watching you.” Tr. 109.

Later in the day, a coworker asked Newton for assistance with bending a remote box. Newton agreed, and went to get his work gloves, which were located with Newton’s tools approximately 50 feet away.<sup>21</sup> Tr. 109–110. While Newton was on his way to get his gloves, Benboe approached him and asked what he was doing. When Newton explained that he was going to assist a coworker, Benboe responded that Crall had observed Newton walking around too much. Newton advised Benboe that he was willing to list his steps on a piece of paper to prove what he was doing, prompting Benboe to tell Newton to drop the matter because the discussion wouldn’t work out well for Newton. Tr. 112.

When Newton completed his shift and was clocking out, Cronin handed him a piece of paper that read as follows:

<sup>21</sup> It was not uncommon for Relco employees to assist each other with certain jobs. If a foreman was not available to assign someone, employees approached each other directly to ask for assistance. Tr. 110–111.

This letter is to document the verbal warning you received on November 29, 2010, in regards to your lack of productivity.

Any further occurrences will result in disciplinary actions, up to and including termination.

GC Exh. 21; Tr. 112. Relco also prepared a memorandum (signed by Crall, Benboe, and Cronin) that asserted that Newton took 5 hours to complete tasks that should have taken 2 hours, and noted that Crall and Benboe observed Newton walking around the shop. R. Exh. 1 (listing the tasks of fixing 3 cracks on a batter box lid, straightening the side of a battery box, and pulling 2 windows; the headlight assembly task was not listed). Newton had never before been disciplined while employed at Relco, or told by any supervisor that he needed to speed up or increase his productivity. Tr. 113, 118.

## 4. Newton’s December 2010 performance review

On December 22, Crall met with Newton to give Newton his performance review.<sup>22</sup> Tr. 113; GC Exh. 17. Relco gave Newton “satisfactory” ratings in 22 areas, but indicated that Newton’s attendance was “unacceptable” and that Newton was performing “below expectations” in the following 3 areas: attitude; volume of acceptable work; and meeting deadlines. GC Exh. 17 at 1. Relco stated that Newton’s speed, welding and quality of work were very poor, and added that Newton needed to stay on task and not walk around the shop. Relco set goals for Newton to improve his attendance, obtain his welding certification and stay on task. GC Exh. 17 at 3. Crall advised Newton that he would not be receiving a raise. Tr. 116. Crall’s notes describe the actual review as follows:

Spoke to Charley about some questionable attendance and he challenged that his attendance was better than reported.

We talked about work ethic & the previous write up for wandering & lack of productivity. Charley claims that he does not wander & is always working. This needs to be monitored & improved immediately.

We spoke about the need to have proper tools so he can do his job correctly and he needed them for the New Year.

We spoke about the need for Charley to continue bettering himself & that he needed to weld certify in the 1<sup>st</sup> quarter of the year.<sup>23</sup>

Charley’s attitude was defensive but not rude.

GC Exh. 17 at 4.

Newton contested parts of his review when he met with Crall. First, Newton maintained that his attendance record was inaccurate, as he had fewer absences than the amount stated by Relco. Tr. 114–115, 131. Crall subsequently confirmed that Newton was correct, and agreed that Newton’s attendance rate was acceptable. Tr. 406. Second, Newton contested Crall’s

<sup>22</sup> Newton did not receive a performance review in 2008 or 2009. Tr. 114.

<sup>23</sup> There is no evidence that Crall shared his notes with Newton. In any event, Newton did attempt the weld certification test in 2010 (at some point before his performance review), but the test was voided due to an equipment failure. Tr. 120, 136–137.

claims that he had a bad attitude and welded poorly.<sup>24</sup> Crall did not provide Newton with any examples of those alleged deficiencies. Tr. 115. Newton did agree that he needed to make more of an effort to notify a supervisor before helping coworkers on the shop floor. Tr. 116.

#### 5. Newton's early 2011 work assignments

From January to March 2011, Newton primarily worked on the TRE DART project. In connection with that project, Relco employees refurbished two-story passenger rail cars, including the interiors, sidewalls, ceiling, floors, seats, air conditioning, brakes and electrical components. Tr. 96; see also Tr. 119 (noting that several employees were assigned to the TRE DART project). Newton also spent 4 or 5 days doing electrical work on another project. Tr. 97. No welding was required for either assignment. Tr. 96, 120. Foreman Dragan Jankovic complimented the electrical work that Newton and his colleagues performed in this time period. Tr. 140–141. Newton did not receive any negative feedback or criticism from his supervisors at any point after his December 2010 performance review.<sup>25</sup> Tr. 121.

#### 6. Relco terminates Newton

On March 11, 2011, Cronin contacted Newton during his shift and advised that Newton was needed in Crall's office. Tr. 123. Crall told Newton that he was being terminated because his production did not increase despite being on probation since his performance review.<sup>26</sup> Newton responded that he had remained busy and did not stand around and talk like half of the employees in the shop were doing, but Crall reiterated that Newton did not meet production standards. Tr. 124, 390–391. Crall did not mention any examples of poor performance that occurred between Newton's performance review and the date of Newton's discharge. Tr. 124. Crall gave Newton a termination letter that stated as follows:

On December 22, 2010, you were put on probationary employment because of specific deficiencies as noted in your evaluation of the same date. As of today sufficient improvement has not been made on these deficiencies, and consequently your employment is hereby terminated.

GC Exh. 22.

#### *D. Disparate Treatment Evidence—Baughner and Newton*

As evidence of disparate treatment, the Acting General Counsel presented a variety of records from Relco's personnel files. Below, I have described the patterns that are apparent in

<sup>24</sup> Newton denied that Crall told him that he needed to pass a weld certification test, and also denied that Crall specified a deadline for obtaining such a certification. Instead, according to Newton, Crall merely stated that Newton's welds needed to improve. Tr. 115, 117.

<sup>25</sup> Also in this timeframe, Newton attended meetings regarding the possibility of bringing another union (the IBEW) to Relco. Tr. 121–123. There is no evidence, however, that Relco supervisors or agents were aware of this renewed union activity.

<sup>26</sup> Newton had never before been told that he was on probation. Tr. 125, 140. I credit Newton on this point because his testimony is corroborated by his performance review, which does not indicate that Relco was placing Newton on probation. See GC Exh. 17.

those records regarding certain types of employment actions.

#### 1. Verbal warnings for productivity

Relco has a very limited track record of giving employees verbal warnings for poor productivity (or conduct that would result in poor productivity). In June 2009, Relco issued a verbal warning to Nicholas Renfrew for engaging in horseplay that raised concerns about employee safety and shop productivity. GC Exh. 36(r); see also GC Exh. 36(s) (Renfrew's statement, asserting that he did not engage in horseplay as alleged). In March 2011 (and thus after most of the relevant events in this case), Relco gave verbal warnings to two employees for poor productivity or inconsistent performance. See GC Exhs. 37(a) (employee J.R., on March 14, 2011); (m) (employee C.M., on March 9, 2011).

#### 2. Suspensions for safety violations

Consistent with the testimony presented during trial, Relco has an established track record of issuing verbal warnings to employees who violate its blue flag policy. See GC Exh. 37(g)–(h) (employees D.G. and W.D.); but see GC Exh. 37(z) (employee M.D. was suspended for 3 days in July 2011 for committing a second blue flag violation).

There is no clear pattern of discipline for other safety violations, as Relco has addressed some safety violations by issuing verbal warnings,<sup>27</sup> and has addressed other safety violations with suspensions.<sup>28</sup> The record does not include an example of formal discipline issued to an employee (other than Baughner) for smoking in an enclosed space or for failing to wear a hard hat.

#### 3. Discharges for poor productivity and lack of a welding certification

When Relco discharged Baughner and Newton, it cited their poor productivity and their failure to obtain their welding certifications.<sup>29</sup> See GC Exh.29 (citing deficiencies listed in

<sup>27</sup> See GC Exhs. 37(c), (t) (warnings to employee M.Dr. and to Richard Pace for crossing tracks without permission while switching was occurring); (k) (warning to employee G. J. for performing paint repairs in an improper location and near employees who might not be wearing protective equipment); (l) (warning to employee C. B. for not following procedure in the water treatment building; and (r) warning to Nicholas Renfrew for horseplay in the shop).

<sup>28</sup> See GC Exh. 37(b) (employee S. D. suspended for 3 days for not wearing a safety harness while operating the JLG lift); (i) (employee D. J. suspended for 2 days for not following switching procedures (in the form of not properly clearing a unit)); and (q) (employee K. S. suspended for 3 days for reckless driving on company property). I have also considered the fact that Relco suspended employee M. D. for 3 days in July 2011 for committing a second blue flag violation, but that suspension carries less weight in my analysis since it occurred after Baughner and Newton were discharged.

<sup>29</sup> Although Baughner's performance review stated that he was on probation for poor job performance, I note that Relco's assessment of Baughner's performance was at least in part based on Baughner's alleged poor productivity. See GC Exh. 18 (rating Baughner "below expectations" in areas such as staying on task, organization of workstation, problem solving, being proactive, judgment and decisions, recognize and facilitate improvements, and fulfillment of goals); GC Exh. 26 (in connection with Baughner's November 1 suspension, Relco identified alleged lapses in Baughner's production work on September 13).

Baugher's performance review, found at GC Exh. 18); GC Exh. 22 (same, regarding Newton's performance review, found at GC Exh. 17). Specifically, Baugher's and Newton's performance reviews state as follows in section C (required improvement or correction needed) and D (goals set for the next performance period) of the review:

Employee Hire Date Growth Potential (GP)	Required Improvement (Section C)	Goals (Section D)
Mark Baugher Hired – March 2007 GP: Performance Plateau (see GC Exh 18)	Received suspension for job performance	Certify for welding requirements Keep work area clean and organized
Charles Newton Hired – November 2008 GP: Performance Plateau (see GC Exh. 17)	None	Attendance <sup>30</sup> Weld test Stay on task

I identified 4 employees who received performance reviews in December 2010 that identified deficiencies similar to Baugher's and Newton's. The records for those employees state as follows:

Employee Hire Date Growth Potential	Required Improvement (Section C)	Goals (Section D)
S.C. Hired – June 2009 GP: Performance Plateau (see GC Exh. 6)	None	Become a certified welder Improve attendance Speed up production level
J.R. Hired – June 2010 GP: Performance Plateau (see GC Exh. 9)	None	Become a certified welder Improve attendance Improve speed of production
J.N. Hired – April 2010 GP: Performance Plateau (see GC Exh. 10)	None	Drastically improve attendance Be more proactive in workplace Become a certified welder
M.D. Hired – April 2010 GP: Performance Plateau (see GC Exh. 15)	Stay on assigned work task	Work on fabrication skills Become a certified welder

Unlike Baugher and Newton, none of the 4 employees listed

<sup>30</sup> As previously noted, Relco later confirmed that Newton's attendance was at an acceptable level. Tr. 406.

above was discharged because of the deficiencies identified in their performance reviews.<sup>31</sup>

In addition, although Relco attempted to distinguish Baugher and Newton from these 4 employees by asserting that Baugher and Newton had been employed at Relco for a longer time period without improving their skills, that argument is undermined by the growth potential assessments that Relco made in its December 2010 performance reviews. In those reviews, Relco indicated that Baugher, Newton, and the 4 employees I have identified were similarly situated in their skill development because Relco gave each employee (including Baugher and Newton) performance plateau growth potential ratings. Perhaps a misnomer, a performance plateau growth potential rating is given to an employee who has "learned basic job skills and knowledge and is actively working on refining that skill and knowledge." See GC Exh. 4 at 3 (also explaining, in another misnomer, that the performance peaking rating is appropriate for an employee who has been performing similar tasks for an extended period of time and shows little sign of improvement or desire to expand his/her job knowledge or skill diversity).

#### 4. Treatment of other employees who testified as witnesses for the Acting General Counsel in Judge Schmidt's case

Five employees testified as witnesses in the Acting General Counsel's case-in-chief in the trial handled by Judge Schmidt: Mark Baugher; Jonathan Graber; Charles Newton; Jamie McKim; and Richard Purdun. See GC Exhs. 32–35. Of those 5 witnesses, only Newton and Baugher have been discharged. Tr. 420.

Although that fact allows for a somewhat superficial argument that the Respondent did not target all of the Acting General Counsel's witnesses for termination, the evidentiary record shows that Newton and Baugher's actions before and during trial were materially different than the actions of the other 3 employee witnesses.

Specifically, Baugher and Newton were the only employee witnesses who signed a statement for the Union regarding comments that Bachman allegedly made in a May 2009 staff meeting. See GC Exh. 19. Two discriminatees in Judge Schmidt's case (Ron Dixon and Jeffrey Smith) also signed the statement. *Id.* As previously noted, the Respondent received a copy of the statement to review before cross-examining Baugher and Newton in Judge Schmidt's case. Tr. 102–104, 150–152.

In addition, Graber and Purdun were openly reluctant witnesses for the Acting General Counsel in Judge Schmidt's case.

<sup>31</sup> Of the employees that Relco discharged between 2008 and March 2011 (excluding the discriminatees in this case and in Judge Schmidt's case), the majority of those employees were discharged for absenteeism (see GC Exhs. 38(a)–(e), (h), (k)–(q), (s)–(t), (v)–(aa), (cc)–(ff), (jj)–(kk), (mm)–(pp), (rr), (uu)–(ww)) or for leaving their shift without authorization (see GC Exhs. 38(i)–(j)). One employee was discharged for each of the following reasons: poor performance and lack of job safety (see GC Exh. 38(u)); not having skills that met Relco's needs (see GC Exh. 38(hh)); evidence of using a controlled substance (see GC Exh. 38(ll); and inability to perform assigned duties (see GC Exh. 38(qq)).

Both Graber and Perdun declined to meet with Board agents or attorneys before trial until compelled to do so by subpoena. See GC Exh. 32 at pp. 264 (Perdun) and 305 (Graber); see also GC Exhs. 30–31. Graber openly opposed the Union, and admitted that he periodically apprised Relco managers about the union organizing campaign. See GC Exh. 32 at pp. 308–312. As for Perdun, Judge Schmidt permitted the Acting General Counsel to question him as a hostile witness under Rule 611(c) of the Federal Rules of Civil Procedure. See GC Exh. 32 at p. 267. Baugher and Newton, by contrast, did not demonstrate any comparable reluctance to support the Acting General Counsel (and the Union) in litigating against Relco in Judge Schmidt’s case.<sup>32</sup>

*E. Richard Pace and Nicholas Renfrew*

Richard Pace began working as an electrician for Relco in February 2009. Tr. 244–245. Nicholas Renfrew also worked for Relco as an electrician, joining the company in March 2006. Tr. 275.

1. Rumors circulate that coworker Chris Kendall was fired

In the morning on December 22, 2010, both Pace and Renfrew reported to work and attended an employee meeting. Tr.

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<sup>32</sup> The Respondent missed the mark when it contended in its posttrial brief that I should have denied the Acting General Counsel’s request to admit the transcripts of Baugher, Graber, McKim, Newton, and Perdun’s testimony (from Judge Schmidt’s case) into evidence. See R. Posttrial Br. at 36–38. First, the Respondent asserts that the testimony is hearsay because the Acting General Counsel did not show that the 5 witnesses were unavailable (per Rule 804(b)(1) of the Federal Rules of Evidence regarding admitting prior testimony into evidence as an exception to the hearsay rule). That argument fails because I did not admit the transcripts for the truth of the testimony offered there, but rather for the nonhearsay purpose of showing that the Relco was on notice of the nature of the testimony that the 5 witnesses provided in Judge Schmidt’s case (and thus received information that may supplied a motive for Relco to react negatively to the testimony of some witnesses, but not others).

Second, the Respondent argues that my decision to admit the transcripts violated its due process rights. That argument also fails, because the Respondent was a litigant (indeed, the Respondent) in Judge Schmidt’s case, and therefore had an opportunity to cross-examine each of the 5 witnesses for which I admitted transcripts. Moreover, since I only admitted the transcripts for the limited purpose of showing that the Respondent was aware of the nature of each witness’ testimony in Judge Schmidt’s case, the fact that the Respondent had an opportunity to cross-examine the 5 witnesses is somewhat beside the point, since the truth of the testimony is not at issue. Instead, what matters is the undisputed fact that the Respondent heard what each witness said in Judge Schmidt’s case, regardless of how truthful the testimony was.

Third, the trial transcripts from Judge Schmidt’s case (and Judge Schmidt’s decision itself—see GC Exh. 36) are not evidence of propensity that would be excluded under Rule 404(b) of the Federal Rules of Evidence. To the contrary, the trial transcripts are relevant to show notice (as explained above), and Judge Schmidt’s decision was admissible to the extent that it may contain factual findings that provide background for the allegations in my case (as well as findings that could serve as evidence that Relco acted with animus in this case, though I did not rely on Judge Schmidt’s decision for that purpose). As the trier of fact, I have adhered to those limitations, and I have taken into account the fact that Judge Schmidt’s decision has been appealed to the Board, and thus is only persuasive, nonbinding, authority.

245–246, 277. Pace did not see coworker Chris Kendall at the meeting. Tr. 246.

Later that morning, Pace overheard two employees (Richard Purdun and another employee) talking about Chris and opining that he had been fired. Pace stopped and asked, “Do you mean Chris Kendall?”, and Purdun answered yes and repeated his belief that Kendall had been fired. Tr. 246. Pace was shocked to hear this rumor because Kendall seemed like a good employee who did a lot around the shop.<sup>33</sup> Tr. 246.

Pace walked to his unit, where he encountered another employee (employee D. K.). Pace asked D. K., “What’s this I hear about Chris?” D. K. replied that he had just heard from employee B. C. that Kendall had been fired, and wondered if Kendall had been fired for absenteeism (noting that Kendall had been off work the previous day because he played Santa Claus for his child’s school). Tr. 247.

Renfrew also heard the rumor that Kendall had been discharged, first hearing the rumor from Pace and another employee (employee W. L.) who stated that Kendall had been “fired for playing Santa Claus.” Tr. 278. Like Pace, Renfrew was surprised to hear the rumor because Kendall was a friend, and also because Kendall had a reputation as Foreman Jeffrey Dalman’s go-to person for assignments. Tr. 279. Renfrew and Pace shared their concern that if Relco could fire an employee as well-regarded as Kendall, then Relco could fire anyone. Tr. 279.

Kendall, who was actually at work, but in the paint blast booth (a separate building from the main facility), got wind of the rumors that he had been fired when he received a text message from his cousin (employee N. B.) at 9 a.m. Tr. 222–223 (noting that Kendall’s first break occurred at 9 a.m.). Employee D. K. also texted Kendall to ask if he had been fired. Kendall sent reply text messages during his 9 a.m. break to both N. B. and D. K. to state that he had not been fired. Tr. 224.

Meanwhile, other employees continued to chatter about Kendall’s status. Pace and Renfrew spoke to 2 to 3 other employees about Kendall during the lunchbreak (from 12 to 12:30 p.m.), expressing their surprise that Kendall had been fired. Tr. 248, 261, 280–281. Pace, Renfrew and many other employees felt that it was wrong that Kendall had been fired, and some thought that Kendall’s discharge was a sign that Relco was cutting back its operations because it did not have as much work lined up for the next year.<sup>34</sup> Tr. 249–250. In an effort to ascertain Kendall’s status, Pace sent Kendall a text message during his (Pace’s) lunchbreak to ask Kendall if indeed he had been fired.<sup>35</sup> Tr. 250–251; see also Tr. 224–225 (noting that

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<sup>33</sup> Kendall worked as a switchman at Relco, joining the company in October 2008. In that capacity, Kendall was responsible for switching locomotives in and out of the main facility or paint blast booth. Tr. 221. In the paint blast booth, employees use hot water to blast paint and primer off of locomotives so they can be repainted. Tr. 222.

<sup>34</sup> Pace and Renfrew admitted that employees did not talk specifically about working together to address their concerns about Kendall’s termination. Tr. 263, 293–294.

<sup>35</sup> Relco policy prohibits employees from sending text messages or using their cell phones while on duty. Employees may, however, use their cell phones while on break. Tr. 264–265.

Renfrew did not send any text messages to Kendall).

2. Pace and Renfrew learn that the rumor of Kendall's discharge is incorrect

A while after the lunchbreak, employee D. K. advised Pace that Kendall was at work and was simply working in the paint blast booth. Tr. 251; see also Tr. 221–222 (noting that the paint blast booth is a separate facility from the main shop). Kendall responded to Pace's text message at approximately 3 p.m., stating that if Relco did fire him, they were "playing a hell of a cruel joke on me, sticking me over here in blast." Tr. 226, 251.

Renfrew, meanwhile, spoke to maintenance man E. C. about Kendall's status, and learned from E. C. that Kendall had not been fired and was on duty in the paint blast booth. Tr. 225–226, 279–280. After speaking with E. C., Renfrew made a point of telling other employees that Kendall had not been fired, and was simply working in the blast booth. Tr. 280, 281–282.

3. Relco management learns about the rumor and reassures Kendall

Towards the end of Kendall's shift, Foreman Jeffrey Dalman noticed that Kendall seemed agitated and asked him what the problem was. Kendall replied, "If I'm going to be fired, I would like for a supervisor to be the one to tell me." Tr. 365, 370 (noting that Kendall mentioned receiving a text message). Dalman notified Crall about Kendall's concerns. Tr. 366.

Crall, who had planned on giving Kendall his performance review that day, met with Kendall. Initially, Kendall was upset and told Crall that, "If you're going to fire me, let's get it over with." Tr. 239, 392. Crall assured Kendall that he was not going to be fired (to Crall's knowledge), and once Kendall calmed down, gave Kendall his performance review. As part of the performance review, Crall advised Kendall that he would be receiving a raise in salary. Tr. 226–227, 239–240, 242–243, 392. Kendall thereafter concluded his shift and went home. Tr. 240 (noting that Kendall calmed down by the time he left work on December 22).

Both Crall and Dalman notified Bachman about their interactions with Kendall. Crall also mentioned that Kendall had been upset about the rumors that he was going to be fired. Tr. 366–367, 392. At Bachman's request, Dalman called Kendall and asked him to save the text messages on his cell phone because Bachman wished to meet with him (Kendall) and see the mes-

sages the next morning. Tr. 227, 367.

In the early morning on December 23, Bachman, Crall and Dalman met with Kendall, who showed Bachman the text messages on his cell phone (including Pace's), and mentioned that Renfrew had asked employee E. C. if Kendall had been fired. Tr. 228–230, 394. Bachman reiterated that Kendall was doing a good job and was not going to be fired, and stated that he would take care of the matter.<sup>36</sup> Tr. 229–231, 394.

4. Pace and Renfrew discharged for spreading malicious rumors

Later on December 23 (at approximately 8:30 a.m.), Dalman contacted Pace and instructed him to report to Bachman's office (where Bachman and Crall were waiting). Tr. 252–253. Bachman asked Pace to tell him about the rumors involving Kendall, and Pace replied that everyone in the shop knew about the rumor. Tr. 254. Pace acknowledged that he sent Kendall a text message to ask if he (Kendall) had been fired. When Bachman asked Pace if he thought it was right to send Kendall the message, Pace answered that he did not see a problem with it because Kendall was a friend and Pace wanted to find out if the rumor of Kendall's discharge was true or not. Tr. 254. Bachman disagreed, asserting that spreading malicious rumors messed with employees' livelihoods and their families' well being. Bachman added that he would not tolerate the spreading of malicious rumors, and informed Pace that his employment with Relco was terminated. Tr. 255; see also GC Exh. 5 (December 23, 2010 letter given to Pace, stating that he was being terminated for violating Relco's standard of conduct); R. Exh. 76 at p. 20, par. 13 (Relco employee manual, identifying spreading malicious rumors as unacceptable conduct that can result in disciplinary action up to and including termination).

Similarly, Renfrew's supervisor (Shawn Shaffer) contacted him on the shop floor and instructed him to report to Bachman's office, where Bachman and Crall were waiting. Tr. 283. Bachman asked Renfrew about the rumors concerning Kendall, and Renfrew explained that once he learned from employee E. C. that the rumor was false, he tried to stop the rumors by telling employees that Kendall had not been fired.<sup>37</sup> Tr. 283–284. Bachman responded that in his view, Renfrew had potentially destroyed Kendall's life by continuing to spread malicious rumors. Tr. 284. Bachman then informed Renfrew that he was terminated and should collect his tools and leave the property. Tr. 284–286; see also GC Exh. 23 (December 23, 2010 letter given to Renfrew, stating that he was being terminated for violating Relco's standard of conduct); Tr. 287–288 (noting that in a telephone hearing regarding Renfrew's request for unem-

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Bachman testified that when he inspected Kendall's phone, the text message from Pace was time-stamped as being received at 1:06 pm. Tr. 425, 439. Pace, however, insisted that he sent the text message during his lunchbreak (between 12 and 12:30 p.m.), and added that on prior occasions, there was a delay before his text messages reached the intended recipient. Tr. 271.

I have credited Pace's explanation regarding when Pace sent the text message to Kendall. Relco did not suggest in its termination letter that Pace improperly sent a text message while on duty. To the contrary, Relco merely asserted that Pace violated Relco's standards of conduct. See GC Exh. 5. In addition, the inherent probabilities relating to the time stamp on Pace's text also support Pace's testimony. Bachman inspected Kendall's phone, not Pace's. It stands to reason that Kendall's phone would show when the text was received (not sent), since Kendall was the message recipient.

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<sup>36</sup> Kendall was reluctant to show Bachman his cell phone because he viewed it as his personal phone, and also because he felt the matter had been resolved. Tr. 227–228. Although Crall and Bachman testified that Kendall was still upset on December 23 (see Tr. 394), I have credited Kendall's testimony that he calmed down after meeting with Crall on December 22 (see Tr. 239). Since Crall reassured Kendall on December 22 that he was not going to be terminated, and also advised him that he would be receiving a raise, it stands to reason that Kendall would not have been upset when he returned to work on December 23.

<sup>37</sup> Renfrew explained that he asked employee E. C. about the rumor because E. C. works in multiple buildings, and thus Renfrew thought E. C. would know what was happening. Tr. 284.

ployment compensation, Crall reiterated that Renfrew was discharged spreading malicious rumors and violating Relco's code of conduct).<sup>38</sup>

#### Complaint Allegations

The consolidated complaint alleges that Relco violated the National Labor Relations Act by:

1. threatening Charles Newton, on or about November 29, 2010, that he was being watched (in violation of Section 8(a)(1) of the Act);
2. discharging Richard Pace and Nicholas Renfrew on or about December 23, 2010, because they engaged in protected concerted activities by discussing their concerns that a co-worker (Chris Kendall) had been fired (in violation of Section 8(a)(1) of the Act);
3. issuing a written warning to Mark Baugher on or about November 1, 2010, for workplace misconduct that allegedly occurred on September 13, 2010 (in violation of Section 8(a)(1), (3) and (4));
4. suspending Baugher on or about November 1, 2010, for workplace misconduct that allegedly occurred on September 13 and October 26, 2010 (in violation of Section 8(a)(1), (3) and (4));
5. issuing a documented verbal warning to Newton on or about November 29, 2010, for alleged lack of productivity (in violation of Section 8(a)(1), (3) and (4));
6. issuing unfavorable performance evaluations to Baugher and Newton on or about December 22, 2010 (in violation of Section 8(a)(1), (3) and (4));
7. placing Baugher and Newton on probation on or about December 22, 2010 (in violation of Section 8(a)(1), (3) and (4)); and
8. discharging Baugher and Newton on or about March 11, 2011 (in violation of Section 8(a)(1), (3) and (4)).

See GC Exh. 1(m), pars. 5–9.

#### Legal Standards

##### A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Roosevelt Memorial Medical Center*,

348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may be reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622.

##### B. Section 8(a)(1) Violations

Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection. Section 8(a)(1) of the Act makes it unlawful for an employer (via statements, conduct, or adverse employment action such as discipline or discharge) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. See *Brighton Retail, Inc.*, 354 NLRB 441, 447 (2009).

The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities. *KenMor Electric Co.*, 355 NLRB 1024, 1027 (2010) (noting that the employer's subjective motive for its action is irrelevant); *Yoshi's Japanese Restaurant, Inc.*, 330 NLRB 1339, 1339 fn. 3 (2000) (same); see also *Park N' Fly, Inc.*, 349 NLRB 132, 140 (2007).

The discipline or discharge of an employee violates Section 8(a)(1) of the Act if the employee was engaged in activity that is "concerted" within the meaning of Section 7 of the Act, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the discharge was motivated by the employee's protected, concerted activity. *Correctional Medical Services*, 356 NLRB No. 48, slip op. at 2 (2010) (citing *Meyers Industries*, 268 NLRB 493, 497 (1984), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied* 474 U.S. 948 (1985), *supplemented* 281 NLRB 882 (1986), *affd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988)). If the General Counsel makes such an initial showing of discrimination, then the respondent may present evidence, as an affirmative defense, demonstrating that it would have taken the same action even in the absence of the employee's protected activity. See *Timekeeping Systems, Inc.*, 323 NLRB 244, 244 (1997).

Regarding activities that qualify as concerted activities, false and inaccurate employee statements are protected under the Act unless they are malicious. However, **knowingly** false statements are defined as malicious, and are therefore not protected. *Central Security Services*, 315 NLRB 239, 243 (1994).

##### C. Section 8(a)(3) and (4) Violations

The legal standard for evaluating whether an adverse employment action violates Section 8(a)(3) or (4) of the Act is generally set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). To sustain a finding of discrimination, the General Counsel must make an initial showing that a substan-

<sup>38</sup> Both Pace and Renfrew noted that on other occasions when rumors circulated around the shop (about the Union or other issues), Bachman responded by appearing at a staff meeting to talk about the issue. Bachman did not follow that approach to address the rumors that Kendall had been discharged. Tr. 260–261, 289–290. Renfrew was not aware of any employees ever being disciplined or terminated for spreading rumors. Tr. 290.

tial or motivating factor in the employer's decision was the employee's union or other protected activity. *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003). The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), *enfd.* 577 F.3d 467 (2d Cir. 2009). If the General Counsel makes the required initial showing, then the burden shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union or protected activity. *Id.* at 1066; *Pro-Spec Painting*, 339 NLRB at 949; *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010) (explaining that where the General Counsel makes a strong initial showing of discriminatory motivation, the respondent's rebuttal burden is substantial), *enfd.* 646 F.3d 929 (D.C. Cir. 2011). The General Counsel may offer proof that the employer's reasons for the personnel decision were false or pretextual. *Pro-Spec Painting*, 339 NLRB at 949 (noting that where an employer's reasons are false, it can be inferred that the real motive is one that the employer desires to conceal—an unlawful motive—at least where the surrounding facts tend to reinforce that inference.) (citation omitted). However, Respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. Ultimately, the General Counsel retains the burden of proving discrimination. *Park N' Fly, Inc.*, 349 NLRB at 145 (citations omitted).

The *Wright Line* standard does not apply where there is no dispute that the employer took action against the employee because the employee engaged in activity that is protected under the Act. In such a single motive case, the only issue is whether the employee's conduct lost the protection of the Act because the conduct crossed over the line separating protected and unprotected activity. *Phoenix Transit System*, 337 NLRB 510, 510 (2002), *enfd.* 63 Fed. Appx. 524 (D.C. Cir. 2003). Specifically, when an employee is disciplined or discharged for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act. *Aluminum Co. of America*, 338 NLRB 20 (2002). In making this determination, the Board examines the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Stanford Hotel*, 344 NLRB 558, 558 (2005) (citing *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979)).

## Discussion and Analysis

### A. Credibility Findings

My credibility findings are generally incorporated into the findings of fact that I set forth above. My observations, however, were that the Acting General Counsel's witnesses were poised, forthright and composed when they testified. To the extent that the Acting General Counsel's witnesses were inconsistent in their testimony, the inconsistencies related to collat-

eral matters or matters beyond the scope of their personal knowledge<sup>39</sup> that did not undermine their overall credibility.

The Respondent's witnesses, by contrast, had trouble squaring their testimony with documentation (such as disciplinary records and performance reviews) that they prepared or approved (Bachman and Crall), and also had trouble recalling details without the assistance of leading questions (Benboe).<sup>40</sup> In the instances where Relco's own documentation failed to corroborate the testimony that Relco's witnesses provided about a particular issue, Relco's witnesses offered post hoc rationalizations for the inconsistencies that were not believable and thus undermined the witnesses' credibility.

### B. Mark Baugher

#### 1. The November 1, 2010 written warning, suspension and probation<sup>41</sup>

As previously noted, the Acting General Counsel alleges that Relco unlawfully discriminated against Baugher by giving him a written warning (for the September 13 incident), suspending him and placing him on probation on November 1, 2010 (citing violations that allegedly occurred on September 13 and October 26) because Baugher supported the Union and gave testimony under the Act. Those allegations are covered by the familiar *Wright Line* standard, which requires the Acting General Counsel to make an initial showing that Baugher's union or other protected activity was a substantial or motivating factor in Relco's decision to discipline Baugher.

I find that the Acting General Counsel did make an initial showing of discrimination. Relco managers learned that Baugher was going to testify in Judge Schmidt's case when Baugher (on September 14) asked Benboe for time off so he could testify. Further, when Baugher did testify the next day (on September 15), Bachman was present and was able to hear Baugher's testimony, review the affidavit that Baugher provided to the NLRB, and also review a statement that Baugher submitted to the Union regarding an incident involving Bach-

<sup>39</sup> As indicated in my findings of fact, Baugher occasionally strayed into testifying about matters beyond his personal knowledge. I did not credit certain portions of Baugher's testimony for that reason. However, Baugher's testimony as a whole was credible.

<sup>40</sup> Benboe also had to backtrack from his testimony that he observed Baugher commit safety infractions on September 13, 2010, after he was confronted with his admission (found in his affidavit) that he did not see the alleged infractions on September 13 and simply signed the disciplinary paperwork.

<sup>41</sup> In the complaint, the Acting General Counsel alleged that Relco placed Baugher on probation on December 22 (the same date as Baugher's performance review). However, the trial testimony established that Relco began Baugher's probation on November 1. Although the Acting General Counsel did not amend its complaint to correct the date of Baugher's probation, that oversight is not fatal because the validity of Baugher's probation was fully litigated during the trial. Accordingly, I have considered the Acting General Counsel's allegation that Baugher's probation was unlawful on its merits (and using the correct date of November 1). See *Pergament United Sales*, 296 NLRB at 335 ("It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated.").

man that occurred in May 2009. Based on that sequence of events, there is no dispute that Baugher engaged in Union and protected activities, and there is no dispute that Relco had knowledge of those activities. The Acting General Counsel also presented sufficient evidence of animus, as the record shows that Relco provided shifting reasons for giving Baugher a written warning for the September 13 incident, and disciplined Baugher less than 2 months after learning of his union and protected activities, and less than 2 weeks after the union election was held. See *Medic One, Inc.*, 331 NLRB 464, 475 (2000) (“Evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation.”); see also *North Carolina License Plate Agency #18*, 346 NLRB 293, 294 (2006), *enfd.* 243 Fed. Appx. 771 (4th Cir. 2007) (suspicious timing of adverse employment action can provide strong evidence of an employer’s animus); *Master Security Services*, 270 NLRB 543, 552 (1984) (animus demonstrated where an employer used a multiplicity of reasons to justify disciplinary action).

Turning to Relco’s affirmative defense, I find that Relco failed to show that it would have taken the same adverse action against Baugher even in the absence of Baugher’s union and protected activities. The blue flag violation that Baugher committed on October 26 is essentially undisputed,<sup>42</sup> and standing alone would have supported a verbal warning based on Relco’s past practices and its admissions during trial.<sup>43</sup> I also found that Relco believed that Baugher committed a safety violation on September 13 by failing to wear his hard hat, and planned to issue a separate warning for that violation.

With that being stated, however, I still find that Relco fell short in establishing its affirmative defense, primarily because the alleged workplace misconduct that Relco ultimately cited in support of its ultimate decision to warn and suspend Baugher and place him on probation is not credible.<sup>44</sup> Specifically, between Bachman’s September 13 email to Crall (which only mentioned Baugher’s failure to wear a hard hat on the same day) and Relco’s decision to discipline Baugher on November 1, Relco’s description of Baugher’s September 13 misconduct transformed significantly. Indeed, instead of consistently main-

taining that Baugher failed to wear his hard hat, Relco added new claims that Baugher improperly smoked in a confined space (inside the B-cab) and demonstrated poor performance by repeatedly loitering while on duty. Furthermore, the credibility of Relco’s claims about Baugher’s misconduct on September 13 is undermined by the fact that no one in management bothered to speak to Baugher about the alleged misconduct (among other things, in the interest of safety and avoiding penalties that can be imposed on Relco when employees violate Iowa’s smoking regulations).<sup>45</sup> In short, I find that Relco embellished its account of Baugher’s misconduct on September 13 to justify the written warning, suspension and probation that it imposed. Because of that fact, Relco’s affirmative defense fails, and I find that the Acting General Counsel demonstrated that Relco discriminated against Baugher in violation of Section 8(a)(3), (4) and (1) when it warned Baugher for misconduct that allegedly occurred on September 13, suspended Baugher and placed him on probation.

#### 2. Baugher’s December 22, 2010 performance review

The complaint also alleges that Relco violated the Act by giving Baugher a negative performance review on December 22. I agree. In Baugher’s performance review, Relco cited Baugher’s November 1 suspension and probation explicitly, and relied on that prior (unlawful) discipline to justify its decision to deny Baugher a pay raise and to support its assertion that Baugher needed to improve his job performance. See GC Exh. 18 at p. 3 (sections C and E). The performance review that Relco gave Baugher is tainted by its reliance on the unlawful November 1 discipline, and thus also violates the Act. See *Care Manor of Farmington, Inc.*, 318 NLRB 725, 726 (1995) (explaining that a decision to discipline or discharge an employee is tainted if the decision relies on prior discipline that was unlawful); *Dynamics Corp.*, 296 NLRB 1252, 1253–1254 (1989) (same), *enfd.* 928 F.2d 609 (2d Cir. 1991).

A brief analysis using the *Wright Line* framework supports my conclusion. As summarized above (in section B(1)), Baugher engaged in union and protected activities, and Relco was aware of those activities. Animus is established not only by the circumstantial evidence regarding the suspicious timing of Relco’s actions, but also by the unlawful disciplinary actions that Relco took against Baugher on November 1. The Acting General Counsel therefore made an initial showing of discrimination.

As for an affirmative defense, Relco’s argument that it

<sup>42</sup> Baugher admitted his own blue flag violation, but suggested that his coworker also committed a blue flag violation on the same date. I did not credit that aspect of Baugher’s testimony because Baugher was not in fact certain that his coworker failed to remove his blue flag, and no other evidence supported the proposition that another coworker committed a blue flag violation on October 26.

<sup>43</sup> Indeed, the Acting General Counsel does not contend that the verbal warning for the blue flag violation was unlawful. The Acting General Counsel does, however, challenge the validity of Baugher’s suspension and probation (which were also predicated, in part, on the blue flag violation).

<sup>44</sup> I emphasize that I am not ruling that Relco could never discipline (via warning, suspension and/or probation) an employee for the types of workplace violations that it alleged Baugher committed. Rather, I have found that Relco’s claims that Baugher committed workplace violations on September 13 are not credible and thus cannot establish an affirmative defense under *Wright Line*.

<sup>45</sup> I do not credit Relco’s explanation that decided not to speak to Baugher because its former attorneys warned against taking disciplinary action with the union election approaching. While perhaps Relco did delay taking formal disciplinary action against employees (such as employee K. S., see GC Exhs. 37(o)–(q)) until after the election, it defies logic that Relco would adopt any anything goes attitude towards safety violations (or smoking violations that could result in penalties) in the workplace and refrain from taking even the basic step of verbally correcting employees about ongoing misconduct. Consistent with my analysis (and contrary to Relco’s explanation), Benboe did speak to employee K. S. about driving recklessly in a company parking lot shortly before the election, and also advised K. S. that Relco would take some sort of corrective action to address the misconduct. See GC Exh. 37(p).

would have given Baugher a negative performance review irrespective of his union and protected activities fails (as stated above) because Relco explicitly relied on the unlawful November 1 discipline as a significant predicate for giving Baugher a negative performance review. I therefore find that Relco unlawfully discriminated against Baugher (in violation of Section 8(a)(3), (4) and (1)) by giving him a negative performance review on December 22.

### 3. Baugher's termination on March 11, 2011

Finally (as to Baugher), the complaint alleges that Relco unlawfully discriminated against Baugher in violation of the Act by terminating him on March 11, 2011. Once again, the Acting General Counsel made an initial showing of discrimination. Relco was aware of Baugher's union and protected activities (see section B(1), *supra*), and the Acting General Counsel presented sufficient evidence of animus insofar as (among other things) Relco unlawfully disciplined Baugher on November 1, and unlawfully gave Baugher a negative performance review on December 22.

In light of the initial showing of discrimination, the burden shifted to Relco to show that it would have terminated Baugher even in the absence of his union and protected activities. On that issue, Relco maintained that it terminated Baugher because he did not address deficiencies (job performance and the lack of a welding certification) that Relco identified when it placed him on probation.<sup>46</sup>

The evidentiary record shows that Relco's proffered reasons for terminating Baugher are pretexts for discrimination. First, Relco's decision to discharge Baugher based on ongoing deficiencies identified in his performance review is tainted because as previously noted, the performance review (and the November 1 discipline on which it relied) was unlawful. Second, Relco's assertion that Baugher was terminated because he did not obtain his welding certification does not ring true because Relco did not suggest in Baugher's performance review that the welding certification required immediate attention or could serve as a basis for some sort of adverse employment action if it was not obtained. Instead, Relco merely listed the welding certification as a goal that Baugher should work toward.<sup>47</sup> Third, although Relco's performance reviews identify 4 other employees who had both poor job performance/productivity and lacked welding certifications in December 2010, none of those employees were placed on probation or discharged because of those deficiencies. See findings of fact, section D(3), *supra*. And fourth, there is no evidence that Baugher's performance was substandard, or that he committed any workplace

infractions during the time period between the start of his probation (November 1) and the date of his discharge (March 11, 2011). Accordingly, I find that Relco failed to establish an affirmative defense regarding Baugher's discharge, and I find that the Acting General Counsel met its burden of proving that Relco unlawfully discriminated against Baugher by discharging him in violation of Section 8(a)(3), (4) and (1) of the Act.

### C. Charles Newton

#### 1. The November 29, 2010 threat and verbal warning

The Acting General Counsel alleges that on November 29, 2010, Relco unlawfully threatened Newton by telling him that he was being watched, and also unlawfully discriminated against Newton by giving him a documented verbal warning because Newton supported the Union and gave testimony under the Act.

On November 29, Newton's supervisor (Jim Cronin) assigned him a work task (building a headlight) that required Newton to walk back and forth between two locations in the main shop. While Newton was in the midst of completing that assignment, Cronin advised him that he should be careful and not walk around the shop because he was being watched. Newton also testified that later in the day, Benboe challenged Newton to explain what he was working on at the time, noting that Crall had advised him (Benboe) that Newton was walking around the shop too much. See findings of fact, section C2. Notably, Newton's account of both conversations was un rebutted, because the Respondent did not call Cronin as a witness, and Benboe (who was called by Relco as a witness) did not testify about the conversation with Newton.

I agree with the Acting General Counsel that Cronin's remark to Newton (to be careful because he was being watched) ran afoul of Section 8(a)(1) of the Act. Although Cronin may have been a friendly messenger, the message to Newton was that Relco management was giving additional scrutiny to Newton's activities at work. Cronin's remark had a reasonable tendency to interfere with, restrain or coerce Newton (or any reasonable employee) in the exercise of his Section 7 rights, because the logical inference was that Newton was being targeted because of his recent union activities and testimony as a witness for the Acting General Counsel in Judge Schmidt's case. See *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (employer's remark that a union supporter should watch his step because "the eyes are on you" violated Section 8(a)(1)).

As for the documented verbal warning that Newton received later in the day on November 29, the *Wright Line* standard governs whether that warning was discriminatory in violation of the Act. I find that the Acting General Counsel made an initial showing of discrimination. Relco managers were aware that Newton was going to testify in Judge Schmidt's case in early September 2010, a fact that prompted Crall to ask Newton if he would be willing to discuss the case with one of Relco's former attorneys. When Newton testified on September 15, Bachman was present and heard Newton's testimony, reviewed the affidavit that Newton provided to the NLRB, and also reviewed a statement that Newton submitted to the Union regarding an incident involving Bachman that occurred in May 2009. In addition, Relco management was aware that Newton served as

<sup>46</sup> In Baugher's termination letter, Relco stated that Baugher was placed on probation on December 22 in connection with his performance review. See GC Exh. 29. Trial testimony established, however, that Baugher was placed on probation on November 1, the same date of his suspension and warning.

<sup>47</sup> To be sure, Baugher suggested that he might try to obtain his welding certification in early 2011, but that was Baugher's suggested timetable, rather than Relco's. See GC Exh. 18 at 4 (Crall's notes from performance review). Relco did not have any strict deadlines for Baugher (or other employees) to obtain a welding certification, and continued to assign Baugher welding jobs even though he was not certified.

an observer for the Union during the election on October 20. Based on that sequence of events, it is clear that Newton engaged in union and protected activities, and it is also clear that Relco had knowledge of those activities. The Acting General Counsel also presented sufficient evidence of animus, in the form of Cronin's threat to Newton on November 29, as well as the short timeframe between Relco learning of Newton's union and protected activities (in September and October 2010) and the November 29 discipline. See *North Carolina License Plate Agency #18*, 346 NLRB at 294 (explaining that the timing of an adverse employment action in relation to protected concerted activity can provide strong evidence of an employer's animus).

Turning to Relco's affirmative defense, Relco asserts that its verbal warning to Newton was warranted because Newton lacked productivity in his work. Once again, however, Relco's proffered explanation for the discipline suffers from significant credibility problems. First, Relco chose not to call Cronin as a witness, even though Cronin was Newton's immediate supervisor and would have been able to testify about Newton's assignments on November 29, as well as what he (Cronin) said to Newton that day. Given Relco's failure to call Cronin as a witness to rebut Newton's testimony, I have inferred that Cronin's testimony would not have supported Relco's defense regarding the November 29 allegations involving Newton. See *Roosevelt Memorial Medical Center*, 348 NLRB at 1022 (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may be reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent).

Second, a finding of pretext is supported by the fact that Relco made (at best) a bare-bones investigation of Newton's productivity before deciding to discipline him. When Crall had concerns after seeing Newton walking in the main shop, he did not obtain any information from Cronin about Newton's assignment beyond the locomotive associated with the assignment. Similarly, when Benboe confronted Newton later in the day about what assignment Newton was doing, Benboe did nothing to verify Newton's explanation that he was assisting a coworker. Such a failure to investigate is strong evidence of pretext. See *Rood Trucking Co.*, 342 NLRB 895, 899 (2004); *Golden State Foods Corp.*, 340 NLRB at 385. Because of those shortcomings in Relco's explanation for its actions, I find that Relco failed to establish an affirmative defense, and I find that Relco did discriminate against Newton in violation of Section 8(a)(3), (4) and (1) of the Act when it disciplined Newton on November 29.

#### 2. Newton's December 22, 2010 performance review and probation

The complaint also alleges that Relco violated the Act by giving Newton a negative performance review and placing Newton on probation on December 22. In Newton's performance review, Relco repeated the claims that it used to discipline Newton on November 29, asserting that Newton worked at a slow speed and needed to stay on task and not walk around the shop. In addition, Relco relied on those claims to justify its decision to deny Newton a pay raise, and its decision to place

Newton on probation. See GC Exh. 17 at pp. 3–4 (sections D and E, as well as Crall's notes, discussing Newton's productivity); see also GC Exh. 22 (termination letter, asserting that Newton was placed on probation on December 22 based on deficiencies in his performance review). The performance review and probation that Relco gave Newton are tainted by Relco's reliance on the unlawful November 29 discipline, and therefore violate the Act. See *Care Manor of Farmington, Inc.*, 318 NLRB at 726 (explaining that a decision to discipline or discharge an employee is tainted if the decision relies on prior discipline that was unlawful); *Dynamics Corp.*, 296 NLRB at 1253–1254 (same).

The *Wright Line* framework supports my conclusion. As summarized above (in section C(1)), Newton engaged in union and protected activities, and Relco was aware of those activities. Animus is established not only by the circumstantial evidence regarding the timing of Relco's actions, but also by the unlawful threat and disciplinary action that Newton received from Relco on November 29. The Acting General Counsel therefore made an initial showing of discrimination.

Relco's affirmative defense that it would have given Newton a negative performance review and placed him on probation because of poor productivity and his lack of a welding certification (and thus irrespective of Newton's union and protected activities) also falls short. Contrary to Relco's proffered defense, the evidence shows that Relco explicitly relied on the unlawful November 29 discipline as a significant predicate for giving Newton a negative performance review. I also note that although Relco maintains that it placed Newton on probation on December 22, Newton credibly testified (without rebuttal) that Relco managers never told him that he was on probation, and Newton's testimony on that point is corroborated by his performance review and Crall's notes from that review, neither of which state that Newton was being placed on probation. The assertion in Newton's termination letter that Newton was placed on probation on December 22 therefore does not ring true, and in fact suggests that the probation was imposed without Newton's knowledge at a later date to serve as a springboard for Newton's subsequent discharge. Since Relco's affirmative defense falls well short of the mark, I find that Relco unlawfully discriminated against Newton (in violation of Section 8(a)(3), (4) and (1)) by giving him a negative performance review December 22 and placing him on probation (whenever that in fact occurred).

#### 3. Newton's termination on March 11, 2011

Finally, the complaint alleges that Relco unlawfully discriminated against Newton in violation of the Act by terminating him on March 11, 2011. Once again, the Acting General Counsel made an initial showing of discrimination. Relco was aware of Newton's union and protected activities (see findings of fact section C(1), supra), and the Acting General Counsel present sufficient evidence of animus insofar as (among other things) Relco unlawfully threatened and disciplined Newton on November 29, and unlawfully gave Newton a negative performance review on December 22 and placed Newton on probation.

Given the initial showing of discrimination, Relco needed to

show that it would have terminated Newton even in the absence of his union and protected activities. On that issue, Relco maintained that it terminated Newton because he did not address deficiencies (work speed/productivity and the lack of a welding certification) that Relco identified in Newton's performance review.

The evidentiary record shows that Relco's proffered reasons for terminating Newton are pretexts for discrimination. First, Relco's decision to discharge Newton based on ongoing deficiencies identified in his performance review is tainted because as previously noted, the performance review and probation (and the November 29 discipline on which they relied) were unlawful. Second, Relco's assertion that Newton was terminated because he did not obtain his welding certification does not ring true because Relco did not suggest in Newton's performance review that the welding certification required immediate attention or could serve as a basis for some sort of adverse employment action if it was not obtained. Instead, Relco merely listed the welding certification as a goal for Newton to shoot for in the next evaluation period.<sup>48</sup> Third, although Relco's performance reviews identify 4 other employees who had both poor job performance/productivity and lacked welding certifications in December 2010, none of those employees were placed on probation or discharged because of those deficiencies. See findings of fact, section D(3), *supra*. And fourth, there is no evidence that Newton's performance was substandard, or that he committed any workplace infractions during the time period between his receiving his performance review on December 22 his discharge on March 11, 2011. To the contrary, the only feedback that Newton received (from supervisor Jankovic) about his performance was positive. Accordingly, I find that Relco failed to establish an affirmative defense regarding Newton's discharge, and I find that the Acting General Counsel met its burden of proving that Relco unlawfully discriminated against Newton by discharging him in violation of Section 8(a)(3), (4) and (1) of the Act.

#### D. Richard Pace and Nicholas Renfrew

The complaint alleges that Relco violated Section 8(a)(1) of the Act by discharging Richard Pace and Nicholas Renfrew on or about December 23, 2010, because they engaged in protected concerted activities in the form of discussing their concerns that coworker Chris Kendall had been fired. To make an initial showing of such a violation, the Acting General Counsel needed to show that: Pace and Renfrew engaged in activity that is "concerted" within the meaning of Section 7 of the Act; Relco knew of the concerted nature of Pace and Renfrew's activity; the concerted activity was protected by the Act; and Relco's decisions to discharge Pace and Renfrew were motivated by Pace and Renfrew's protected, concerted activity. See *Correctional Medical Services*, 356 NLRB No. 48, slip op. at 2.

Relco's leading challenge to the Acting General Counsel's initial showing of discrimination is that Pace and Renfrew's discussions (and texts, as to Pace) with other employees do not count as "concerted" activities. The Board has broadly defined

concerted activities as "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries*, 281 NLRB 882, 887 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). In *Meyers*, the Board also recognized that at its inception, concerted activity only involves a speaker and a listener, and added that the initial conversation is an "indispensable preliminary step to employee self-organization," provided that the conversation had some relation to initiating, inducing or preparing for group action in the interests of employees. *Id.* (quoting *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951) and *Vought Corp.*, 273 NLRB 1290, 1294 (1984), enf. 788 F.2d 1378 (8th Cir. 1986)). Notably, the object or goal of initiating, inducing or preparing for group action does not have to be stated explicitly when employees communicate. See *Whittaker Corp.*, 289 NLRB 933, 933 (1988). Instead, a concerted objective may be inferred from a variety of circumstances in which employees might discuss or seek to address concerns about working conditions, including, but not limited to: a single employee speaking out at a staff meeting about the lack of wage increases (see *Whittaker Corp.*, 289 NLRB at 934); an employee talking with coworkers and a manager about his belief that the employer gave preferential treatment to some employees when making driving assignments (see *Rock Valley Trucking Co.*, 350 NLRB 69, 69 (2007)); or an employee discussing recent disciplinary action with coworkers (see *Bryant Health Center, Inc.*, 353 NLRB 739, 749 (2009)).

Based on the preceding authority, I find that Pace and Renfrew were indeed engaged in concerted activities when they communicated with other employees about their concern that Kendall had been discharged. Among other purposes, Pace's and Renfrew's discussions about Kendall's discharge related to the collective employee concern about job security at Relco, because if Kendall (by all accounts, a good employee) could be fired, then all employee jobs were at risk. It matters not that Pace and Renfrew had not yet taken their concerns to management—their discussions with coworkers were indispensable initial steps along the way to possible group action.<sup>49</sup>

I also find that the Acting General Counsel met its burden of proving the remaining elements of its initial showing that Relco discharged Pace and Renfrew in violation of Section 8(a)(1). It is undisputed that Pace and Renfrew spoke to other employees about their (incorrect) belief that Kendall had been fired. The record also shows that Relco was aware of Pace's and Renfrew's activities (having confirmed them through Kendall, Pace and Renfrew), and in fact decided to discharge Pace and Renfrew because Relco believed that their discussions about Kend-

<sup>48</sup> Relco did not have any strict deadlines for Newton (or other employees) to obtain a welding certification.

<sup>49</sup> Recently, the Board determined that an employer may not nip concerted activity in the bud by preemptively discharging an employee before the employee has discussions with coworkers about working conditions. See *Parexel Int'l, LLC*, 356 NLRB No. 82, slip op. at 3-4 (2011) (employee discharged before she could speak to coworkers about perceived wage disparities). That recent authority underscores the fact that preliminary conversations between employees about working conditions are indispensable steps towards group action, and thus are themselves concerted activities.

all's perceived discharge violated Relco's standards of conduct (specifically, the policy against spreading malicious rumors).<sup>50</sup> And, the record shows that Pace and Renfrew's communications with their coworkers were protected by the Act. While the rumors about Kendall's discharge turned out to be false, there is no evidence that either Pace or Renfrew were aware of that fact when they spoke about the issue with other employees. See *Central Security Services*, 315 NLRB at 243 (explaining that while knowingly false statements are malicious and thus not protected, false statements standing alone (i.e., statements that are not knowingly false) are protected under the Act). Further, once Pace and Renfrew learned that Kendall was still employed, they stopped spreading the rumor and Renfrew took the additional step of correcting other employees who continued to believe that Kendall had been fired.

Since Relco's only reason for discharging Pace and Renfrew was their protected concerted activities (discussing the concern that Kendall had been fired), the Acting General Counsel's initial showing of discrimination stands and no further analysis is required. See *Correctional Medical Services*, 356 NLRB No. 48, slip op. at 2-3. I therefore find that Relco violated Section 8(a)(1) of the Act when it discharged Pace and Renfrew on December 23 because of their protected concerted activities.

#### CONCLUSIONS OF LAW

1. By issuing a written warning to, suspending, and placing Mark Baugher on probation on or about November 1, 2010, Relco violated Section 8(a)(3), (4) and (1) of the Act.

2. By threatening Charles Newton on or about November 29, 2010, that he was being watched, Relco violated Section 8(a)(1) of the Act.

3. By issuing a documented verbal warning to Newton on or about November 29, 2010, for alleged lack of productivity, Relco violated Section 8(a)(3), (4) and (1) of the Act.

4. By issuing unfavorable performance reviews to Baugher and Newton on or about December 22, 2010, Relco violated Section 8(a)(3), (4) and (1) of the Act.

5. By placing Newton on probation on or about December 22, 2010, Relco violated Section 8(a)(3), (4) and (1) of the Act.

<sup>50</sup> During trial, Relco suggested that it also discharged Pace because he sent a text message to Kendall while he (Pace) was on duty. Although there is some suggestion that Relco has abandoned that position (see R. Posttrial Br. at 35-36, arguing that Pace was discharged for spreading false rumors; but see id. at 10, 34, asserting that Pace violated company policy by texting Kendall while on duty), I note that I did not credit the explanation that Relco discharged Pace because he sent his text while on duty. Relco did not mention any texting violation in the termination letter that it gave to Pace, or in the subsequent hearing concerning Pace's request for unemployment compensation. See findings of fact section E(4), supra. In addition, Bachman's testimony did not establish that he (or Relco) ever determined that Pace indeed sent his text message to Kendall while he was on duty. While Bachman did inspect Kendall's phone (noting that the message was received at 1:06 p.m.), Bachman did not inspect Pace's phone, which may have contained some information about when Pace sent the text to Kendall. See findings of fact section E(1), supra. Relco's failure to investigate the timing of Pace's text is strong evidence that this proffered rationale for discharging Pace is a pretext. See *Rood Trucking Co.*, 342 NLRB at 899; *Golden State Foods Corp.*, 340 NLRB at 385.

6. By discharging Richard Pace and Nicholas Renfrew on or about December 23, 2010, because they engaged in protected concerted activities by discussing their concerns that a coworker (Chris Kendall) had been fired, Relco violated Section 8(a)(1) of the Act.

7. By discharging Mark Baugher and Charles Newton on or about March 11, 2011, Relco violated Section 8(a)(3), (4) and (1) of the Act.

8. The unfair labor practices stated in conclusions of law 1-7 above are unfair labor practices that affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully disciplined Baugher (on November 1, with a written warning,<sup>51</sup> suspension and probation) and Newton (on November 29, with a documented verbal warning), and having unlawfully given unfavorable performance reviews to both Baugher and Newton (on December 22), I shall require the Respondent to rescind the disciplinary actions and performance reviews and post an appropriate notice.

The Respondent, having discriminatorily discharged employees Mark Baugher, Charles Newton, Richard Pace, and Nicholas Renfrew, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Back-pay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), 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).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>52</sup>

#### ORDER

The Respondent, Relco Locomotives, Inc., Albia, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, disciplining or otherwise discriminating against any employee for supporting the Brotherhood of Railway Signalmen or any other union.

(b) Discharging, disciplining or otherwise discriminating against any employee for giving testimony under the Act.

(c) Discharging, disciplining or otherwise discriminating against any employee for engaging in concerted activities protected by Section 7 of the Act.

<sup>51</sup> As previously noted, the written warning that Relco issued to Baugher (regarding alleged misconduct on September 13) is unlawful because it contains assertions that are not credible. The warning must therefore be rescinded even though I credited Relco's initial claim that Baugher violated company policy by failing to wear a hard hat on September 13.

<sup>52</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Threatening employees to be careful because they are being watched because they support the Union or gave testimony under the Act.

(e) Giving employees unfavorable performance reviews because they support the Union or gave testimony under the Act.

(f) 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 Mark Baugher, Charles Newton, Richard Pace, and Nicholas Renfrew full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Mark Baugher, Charles Newton, Richard Pace, and Nicholas Renfrew whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

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

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

(e) Within 14 days after service by the Region, post at its facilities in Albia, Iowa, copies of the attached notice marked "Appendix."<sup>53</sup> Copies of the notice, on forms provided by the Regional Director for Region 18, 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 physical posting of paper notices, the 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 November 1, 2010.

(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. October 19, 2011

#### 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 discharge, discipline or otherwise discriminate against any of you for supporting the Brotherhood of Railroad Signalmen or any other union.

WE WILL NOT discharge, discipline or otherwise discriminate against any of you for giving testimony under the National Labor Relations Act (the Act).

WE WILL NOT discharge, discipline or otherwise discriminate against any of you for engaging in concerted activities that are protected under Section 7 of the Act.

WE WILL NOT threaten employees that they should be careful and that they are being watched because they support the union or gave testimony under the Act.

WE WILL NOT give employees unfavorable performance reviews because they support the union or gave testimony under the Act.

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

WE WILL, within 14 days from the date of this Order, offer Mark Baugher, Charles Newton, Richard Pace, and Nicholas Renfrew full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Mark Baugher, Charles Newton, Richard Pace, and Nicholas Renfrew whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

<sup>53</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful disciplines, performance reviews and discharges of Mark Baugher, Charles Newton, Richard Pace, and Nicholas Renfrew, and WE WILL, within 3 days thereafter, notify each of them in writing that this

has been done and that the disciplines, performance reviews and discharges will not be used against them in any way.

RELCO LOCOMOTIVES, INC.