

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

TRICONT TRUCKING COMPANY

and

**TEAMSTERS LOCAL UNION NO. 107 a/w
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS**

Cases 04-CA-37945
04-CA-37966
04-CA-38014
04-CA-38153
04-CA-38163
04-CA-61088
04-CA-61105
04-CA-66221
04-CA-66790

Donna Brown, Esq.,
for the General Counsel.
Thomas Bender, Esq., and Nina Markey, Esq.
(Littler Mendelson, P.C.),
for the Respondent Company.
Michael Nugent,
for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

JEFFREY D. WEDEKIND, ADMINISTRATIVE LAW JUDGE. Tricont Trucking Company, the respondent employer in this case, is a wholly-owned subsidiary of Del Monte Fresh Produce, Inc. It transports Del Monte goods to customers through various distribution centers, including a facility in Eddystone, Pennsylvania, which serves customers in Pennsylvania, New Jersey, and New York.

In August 2010, Teamsters Local 107 was elected and certified as the exclusive bargaining representative of the approximately 18 truckdrivers employed by Tricont at the Eddystone facility. Over the next 5 months, the Union filed a series of charges against the Company (Cases 4-CA-37628 et al.) alleging that it committed numerous pre- and post-election unfair labor practices in violation of Section 8(a)(1), (3), (4), and (5) of the Act. The Regional Director issued a consolidated complaint on these charges in February 2011, and a hearing was held before Administrative Law Judge Joel Biblowitz the following month.

On May 23, 2011, Judge Biblowitz issued his decision in the proceeding (JD(NY)-14-11, 2011 WL 2160300). He found that the Company had, in fact, committed several of the alleged violations, including discriminatorily discharging three drivers (Torres, Cajina, and Ditzler) in

August 2010 and January 2011 for falsifying their Department of Transportation (DOT) logs. Thereafter, by unpublished order dated June 22, 2011, the Board summarily adopted Judge Biblowitz' decision and recommended order in the absence of any exceptions.

5 In the meantime, between January and October 2011, the Union filed nine more unfair labor practice charges against the Company. Following an investigation, on October 27 and December 28, 2011, the Regional Director issued complaints on these charges as well. The consolidated complaints allege that the Company committed numerous additional 8(a)(1), (3), (4), and (5) violations between August 2010 and October 2011, including discharging the union shop steward (Lewis) and two other drivers (Baylor and Folds) in January and March 2011, and subsequently again discharging one of the drivers (Ditzler) who was reinstated in June 2011 pursuant to Judge Biblowitz' order.¹

15 A hearing on these additional allegations was held before me on February 6-8, 2012, in Philadelphia, Pennsylvania. Both sides presented multiple witnesses and exhibits, including excerpts from the transcript and related exhibits in the prior hearing before Judge Biblowitz.² Thereafter, on March 14, the General Counsel and the Company also filed extensive posthearing briefs.

20 Having carefully considered the briefs and the entire record herein,³ for the reasons set forth below I find that the General Counsel has adequately established that the Company committed a number of the alleged 8(a)(1), (3), and (4) violations, including unlawfully

¹ Although several of these additional alleged violations occurred during the same time period as the alleged violations in the prior proceeding, the Company does not contend that they should have been consolidated and litigated with those allegations or that it has suffered any prejudice as a result of the allegations being litigated separately.

² The excerpted testimony and related exhibits from the prior hearing were introduced and admitted in the instant proceeding without objection. See Tr. 11, 151, 250, and 627-628. With respect to Judge Biblowitz' findings in the prior proceeding, as indicated above they were adopted by the Board pro forma in the absence of exceptions and thus were never actually reviewed by the Board. Accordingly, no party contends that those findings are entitled to any precedential weight in this proceeding and I have given them none. See generally *Carpenters Local 370 (Eastern Contractors Assn.)*, 332 NLRB 174, 175 fn. 2 (2000); *Watsonville Register-Pajaronian*, 327 NLRB 957, 959 fn. 4 (1999); and *Colgate-Palmolive Co.*, 323 NLRB 515, 515 fn. 1 (1997).

³ Unless otherwise stated, cited evidence has been credited, to the extent supportive, and contrary evidence discredited. In evaluating witness credibility, all relevant and appropriate factors have been considered, including, not only the demeanor of the witnesses, but their apparent interests, if any, in the proceeding, whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts, "inherent probabilities, 'and reasonable inferences which may be drawn from the record as a whole'" (*Daikichi Corp.*, 335 NLRB 622, 623 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003) (unpub.), quoting *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)). As noted above, however, I have in no way relied on Judge Biblowitz' credibility findings in the prior proceeding. See also *Electrical Workers Local 3 (Nixdorf Computer Corp.)*, 252 NLRB 539 fn. 1 (1980) ("it is generally inappropriate for an administrative law judge to rely on credibility findings made in another case").

discharging Lewis; however, a preponderance of the evidence fails to support the remaining 8(a)(1), (3), (4), and (5) allegations.⁴

FINDINGS OF FACT

5

I. Alleged 8(a)(1) interference, restraint, or coercion

The consolidated complaints allege that the Company committed several 8(a)(1) violations between November 2010 and September 2011. Each is addressed in chronological order below.

10

A. 8(a)(1) allegations involving Shop Steward Lewis

Lewis was the lead union organizer during the campaign, and served as the shop steward following the August 2010 election until the Company discharged him in March 2011 (Tr. 301–302). The complaint alleges that on or about November 10, 2010, approximately 3 months after the election, the Company unlawfully: (1) interrogated Lewis about his and other drivers’ union activities and sympathies; and (2) instructed Lewis to tell other drivers to take their concerns to the Company rather than to him. The complaint alleges that these violations were committed by Krise, Del Monte’s northeast regional transportation manager and an admitted supervisor and/or agent of the Company (Tr. 9).

15

20

I find that these allegations are insufficiently supported by the evidence. Although Lewis testified at the hearing, he did not testify about the alleged November 2010 conversation between him and Krise. Nor did Krise, who left the Company in mid-June 2011, and was not called to testify by either side.⁵ Further, contrary to the General Counsel’s contention (Br. 103–104) the violations are not adequately established by a written report of the conversation. The report, which appears in a chronology of Lewis’ work history prepared by another company manager in January 2011, states as follows:

25

30

Friday, November 12, 2010 – Manager Krise reviewed with Lewis his HOS [hours of service] violation of 11-9-10 when he arrived to the DC [distribution center]. Manager Krise questioned Lewis why he logged 1 hour and 45 minutes for activities that typically are completed in 30 minutes. [Twenty] minutes to complete a post-trip and 10 minutes to complete paperwork and submit. Lewis informed Krise that it took him 30 minutes to complete a post-trip, which would leave him 15 minutes to complete and submit his COD [cash on delivery] and paperwork. Krise informed Lewis that if he would have completed his

35

⁴ As in the prior proceeding, jurisdiction is uncontested and is well established by the admitted jurisdictional allegations in the consolidated complaints.

⁵ The circumstances surrounding Krise’s departure from the Company are not entirely clear from the record. According to Del Monte Vice President Gulick, sometime around March 2011 Krise became upset and pulled down all the safety posters in the facility, subsequently went on personal leave, and never returned to work (Tr. 422–423, 474). See also driver West’s testimony, Tr. 138–139 (Krise complained to him that he could not sleep at night and had lost 30 lbs because of “all the things that’s going on, with all of these [truck] accidents and everything, and all of this union stuff.”)

responsibilities and logged off duty after 45 minutes that there would not have been an HOS violation. When Krise asked what he was doing at the DC for an extra hour, Lewis stated that the guys had questions for him. Krise then proceeded to ask him which guys Lewis was talking to. Lewis said he was speaking to West in the break room at the DC and Rodriguez outside in the yard. Lewis did not have a response when questioned, why would he violate his HOS to answer co-workers questions. Krise also asked Lewis if his conversations with West and Rodriguez were work related and Lewis refused to answer. Krise informed Lewis that if his peers had work related questions that they should be directed to him or Lead driver Branyan. (GC Exh. 3; Tr. 538-539.)⁶

On its face, the foregoing account indicates that the November 2010 conversation between Krise and Lewis concerned Lewis' recent violation of DOT limitations on drivers' hours of service, not union or other protected activity.⁷ Further, Lewis voluntarily admitted to Krise during the conversation that he spent the last hour (which apparently put him over the hours-of-service limit) answering other drivers' questions, and Krise's subsequent questions to Lewis were obviously responsive to this admission; Krise asked why Lewis would violate DOT HOS regulations to answer coworker questions and whether the questions were related to work.

Moreover, the General Counsel has offered no explanation or reason why Krise's questions should nevertheless be found unlawful under the relevant test for interrogations set forth in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985) ("whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act"). See also *Comaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 1 (2011)); and *United Services Automobile Assn. v. NLRB*, 387 F.3d 908, 912 (D.C. Cir. 2004). Indeed, the General Counsel's posthearing brief does not even mention the test or cite any supporting precedent. Accordingly, the allegation is dismissed. See *Postal Service*, 350 NLRB 441, 476 (2007).

The same conclusion is warranted with respect to Krise's reported comment that work-related questions should be directed to him or Lead Driver Branyan. As indicated above, this comment was made at the end of a conversation where Krise was reviewing Lewis' hours-of-service violation; Lewis voluntarily admitted that he spent the last hour on duty answering other drivers' questions; and Lewis refused to say whether the questions were work-related or not. Given this context, Krise's concluding comment could reasonably be interpreted, not as an unlawful ban on discussing work-related matters (see discussion, infra, regarding Krise's subsequent statements to West), but as simply a caution that answering coworkers' questions—even work-related ones—is not a justification for violating DOT HOS regulations, and that future such violations could be avoided by referring the drivers' questions to him or Branyan.

Again, the General Counsel has offered no explanation or reason why the comment should nevertheless be found unlawful under the relevant test set forth in *Lafayette Park Hotel*, 326 NLRB 824 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999) (test for rules of conduct is

⁶ First names are omitted and last names substituted in all quoted testimony and exhibits.

⁷ Although not in evidence, I take administrative notice of the DOT HOS regulations, which are set forth in 49 CFR Part 395, and posted on the Federal Motor Carrier Safety Administration (FMCSA) website (<http://www.fmcsa.dot.gov/rules-regulations/topics/hos/index.htm>).

“whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights”). See also *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (in evaluating a challenged rule under the *Lafayette Park* test, the Board gives the rule a “reasonable reading,” refrains “from reading particular phrases in isolation,” and does “not presume improper interference”).⁸ As above, the General Counsel does not even mention the test or cite any supporting precedent. Accordingly, this allegation is dismissed as well.

B. 8(a)(1) allegations involving Shop Steward West

West replaced Lewis as union shop steward after Lewis was discharged in March 2011 (Tr. 112). The complaint alleges that, on or about May 25 and 27, 2011, the Company unlawfully told West not to talk to other employees regarding their complaints, grievances and other terms and conditions of employment, and required West to complete his post-trip work within a half hour and to leave the facility in order to prevent him from talking to other drivers about such matters. The complaint alleges that these violations were also committed by Krise and/or by Maguire, a Del Monte office manager and likewise an admitted supervisor and/or agent of the Company (Tr. 9).

Unlike the previous allegations involving Lewis, I find that these allegations are well supported by the evidence. West testified that the first incident occurred while he was talking to one of the drivers (Gonzalez) about an accident Gonzalez had been involved in the previous day; that Krise approached and told him to stop “bullshitting” with the drivers; and that Krise repeated that he did not want West talking to the drivers even after West reminded Krise that he was the union steward (Tr. 113–115). Gonzalez essentially confirmed West’s testimony, testifying that Krise approached while he was talking to West about the accident; that Krise told West to “leave the drivers alone”; that West responded that he and Gonzalez were talking about the accident; and that Krise replied “I don’t pay you to talk to the drivers. Leave him alone and cut the bullshit” (Tr. 108–109).

West also testified that, when he walked away, Krise followed him around the yard, telling him that he wanted him out of the yard in a half hour; that all of the other drivers completed their post-trip work in a half hour; and that he wanted West off the lot in the same time. (Tr. 115–117.) West testified that Krise basically repeated the same conduct a few days later, when he was pulling out of the dock. According to West, Krise came over and told him that the other drivers finished their post-trip work in a half hour and that he wanted West off the property in a half hour. Krise also again followed him around, repeating that he wanted West out of the yard; to hurry up and get off the property. West testified that, later, as he was heading out to the parking lot to leave, Maguire joined Krise and likewise told him to hurry up and get off the property; to get in his car and get out of the parking lot. (Tr. 120–123.)

As indicated above, Krise no longer works for the Company and was not called to testify. Nor did the Company call Maguire to testify, or present any other evidence to impeach West’s

⁸ The General Counsel does not contend that any prior or subsequent unlawful conduct by Krise or other managers should be considered in evaluating Krise’s November 2010 conduct. See generally *Evergreen America Corp.*, 348 NLRB 178, 209 (2006), *enfd.* 531 F.3d 321 (4th Cir. 2008), and cases cited there.

and Gonzalez' accounts of the incidents.⁹ Thus, their accounts stand un rebutted and I credit them.

Further, unlike the allegations involving Lewis, the alleged conduct here appears unlawful both on its face and in context. It is well established that expressly restricting employees from discussing union matters during working time is unlawful where employees are free to discuss other matters unrelated to work. See *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB No. 90, slip op. at 6-7 (2011), enfd. 459 Fed. Appx. 1 (D.C. Cir. 2012) (unpub.), and cases cited there. See also *Bantek West, Inc.*, 344 NLRB 886, 889 (2005). As indicated by the General Counsel, it is also well established that an employer may not deny off-duty employees access to the parking lot or other nonwork areas without a legitimate business reason to do so. See *Tri-County Medical Center*, 222 NLRB 1089 (1976). See also *ITT Industries, Inc. v. NLRB*, 251 F.3d 995, 999 (D.C. Cir. 2001); and *NLRB v. Pizza Crust Co. of Pennsylvania*, 862 F.2d 49, 53 (3d Cir. 1988).

Here, the Company has failed to establish any legitimate business reason for Krise's and Maguire's conduct. The only proffered explanation is that May 27 was the Friday before Memorial Day weekend; that all trip sheets showing the drivers' recorded hours (or estimated hours if the driver was still on a route) had to be submitted to payroll in Dallas by 6 pm on that day; and that West was the last driver not still on a route to submit his paperwork and the only driver who took considerably longer than 30 minutes to do so (Br. 34, 56-57). However, while there is some record support for this explanation (see Tr. 545-547; and R. Exhs. 67-68), there are two obvious problems with it. First, it fails to address or explain Krise's statements and conduct a few days earlier (which the Company's posthearing brief ignores). And second, it fails to explain why Krise and Maguire insisted that West "hurry up" and get off the property after he logged out at 5:30 pm and submitted his paperwork. There is no evidence that the Company had a policy of prohibiting the drivers from conversing about anything on working time or requiring them to leave the premises immediately after turning in their paperwork. Nor is there any evidence that the Company locked the gates at 6 pm on Friday, May 27, or closed entirely the following Saturday and Sunday, May 28 and 29. Rather, the record indicates the opposite. See R. Exh. 68 (indicating that drivers Sauler and Autry were still on their routes on May 27 and did not log out until 6:15 and 9:30 pm, respectively); and GC Exh. 20 (notifying employees that certain dates, including May 21-29, 2011, would be "blacked out" and require 2-weeks advance notice and general manager approval for time off requests "due to the high volume expected").¹⁰

Accordingly, I find that Krise's and Maguire's May 2011 conduct involving West violated Section 8(a)(1) of the Act as alleged.

⁹ West gave inconsistent reports about the exact dates of the two incidents; his pretrial affidavit stated that the incidents occurred on May 25 and 27, but his testimony indicated that they occurred the prior week. See GC Exh. 5(y) (reporting that Rodriguez's accident was on May 18). However, the Company does not contend that West's account of Krise's and Maguire's conduct should be discredited on this (or any other) basis. In any event, it is obviously an insufficient basis by itself to do so.

¹⁰ As noted above, there is also some question whether the alleged events actually occurred on May 25 and 27, as opposed to a week earlier. However, it is unnecessary to resolve this issue, as it would make no difference in the result.

C. 8(a)(1) allegations involving reinstated driver Ditzler

As indicated above, Ditzler was one of the three previously terminated drivers who were reinstated following Judge Biblowitz' May 23, 2011 order (Tr. 217). The complaint alleges that on June 23, 2011, the day after Ditzler returned, the Company unlawfully told him that it was watching his work more. The complaint alleges that this violation was committed by Branyan, the lead driver and likewise an admitted supervisor and/or agent of the Company (Tr. 9).

I find that the evidence fails to support this allegation. Ditzler testified that Branyan temporarily put him on "light duty" when he returned because he needed to be drug tested before going back out on the road. He therefore initially "just went through a bunch of maps" in the office. When he finished doing this around 10:30 a.m. the second day, at Branyan's direction he swept up nails and other debris around the dock doors until Branyan told him to take lunch.

So, I went and sat in my car, ate my lunch. And then about 45 minutes later Branyan came back from, you know, he went out to take an order or something and got something. He came back. He goes oh, you better get back to work because you know who will be, you know, looking, and I said, yeah, okay. He was just watching after you, I said okay.

Ditzler testified that "you know who" obviously referred to Procak, the general manager of the Eddystone distribution center, as Procak was the only one in the building that day who had any authority after Krise left (Tr. 217-219).

None of the foregoing testimony was disputed by Branyan. See Tr. 741-742. Nor does the Company's posthearing brief offer any other reason to discredit it. However, by itself, it fails to prove the alleged 8(a)(1) violation. First, the circumstances were obviously unusual; although Ditzler was on the clock, he was doing light make-work until he was cleared to resume his usual driving work. Second, it is undisputed that Procak performed daily morning and/or afternoon "walk arounds" in the yard (Tr. 272, 551; R. Exh. 53, p. 590, 641; GC Exh. 21, p. 160-161), and there is no evidence that it was unusual for him or other managers to be "looking" to ensure that employees were working during working time. Third, there was no hint in Branyan's comment that it had anything to do with Ditzler's involvement in the prior unfair labor practice proceeding or his protected concerted activity.¹¹

The General Counsel's posthearing brief fails to address any of the foregoing circumstances. Nor does it cite any authority finding similar statements in similar circumstances unlawful. Although the brief summarily cites *Fieldcrest Cannon, Inc.*, 318 NLRB 470 (1995), the circumstances here more closely resemble those in the cases distinguished in that decision. See 318 NLRB at 503-504. Accordingly, the allegation is dismissed.

¹¹ The record does not reveal whether Ditzler had previously supported or opposed the Union during the campaign. And, again, the General Counsel does not contend that any prior or subsequent unlawful conduct by Branyan or other managers should be considered in evaluating the comment. See fn. 8, supra.

D. 8(a)(1) allegations involving reinstated driver Torres

5 Torres was also one of the three previously discharged drivers who were reinstated in
 June 2011 following Judge Biblowitz' order (Tr. 251). The complaint alleges that, on or about
 July 1, 2011, the Company unlawfully told Torres, who was then off-duty, that he had to leave
 the yard and not to talk to other off-duty employees. The complaint alleges that this violation
 was committed both by Branyan and by Procak, who as indicated above is the general manager
 for Del Monte at the Eddystone facility and likewise an admitted supervisor and/or agent of the
 10 Company (Tr. 9).¹²

I find that this allegation is supported by a preponderance of the evidence. Torres
 testified that the incident occurred around July 1, shortly after he returned to work. He was back
 driving loads, but had still not received his uniform and wore a Teamsters shirt to work instead.¹³
 15 On that particular day, he was outside talking to Ditzler, after turning in his paperwork and
 logging out, when one of the office clerks (Anderson) came out and told him he had forgotten to
 complete and sign one of the CODs. So he went back into the office to do so. When he had
 finished with the COD and was leaving to go back outside, Procak passed behind and stopped
 him.

20 He told me oh, do you know what time it is. I was like what do you mean,
 and do you have a watch, do you know time it is. I told him, yeah, I know what
 time it is and I told him the time.

25 You know, it was like 3:30, 3:45. And he told me, oh, you log out at 3:15,
 what are you still doing here. I was like the lady called me. I told him Anderson
 called me that I forgot to fill something out so I came back because she called me.
 So, he told me, oh, you don't suppose to be here in the property, you already log
 out, you got to be out of here. And I told him well I didn't know that I had to be
 out of the property. She called me that's why I came back inside.

30 So, he told me, oh, you shouldn't be on the property. And you know, when
 I was about to say something, he walk away. So, you know, I put my head down
 and I was like here we go again, then I walk out. When I walk out, when I'm
 walking out, you know, Ditzler was still waiting for me outside. So, you know, I
 told Ditzler what happen, what just happened.

35 You know, like a couple of minutes later Branyan come down the stairs
 running where we were at. So, he called me. He told me, well, listen, you know,
 come here for a minute. So, he told me to, you know, go inside, just went inside
 the office, started screaming at me, what are you still doing on the property.

¹² The December 28, 2011 consolidated complaint also alleges that Procak unlawfully created the impression of surveillance in August or September 2011 by driving slowly past employees who were active union supporters and using his cell phone in a way that suggested he was photographing them. However, the General Counsel presented no evidence or argument in support of this allegation, and appears to have abandoned it. Accordingly, the allegation is dismissed.

¹³ Torres had also openly supported the Union prior to the election (GC Exh. 24; Tr. 301 (Lewis)).

I told Branyan, I was like, you know, I didn't know that we had to be outside the property, you know. We already done. We don't really talk outside of the property. He tell me listen, you know, so he don't be on my ass, Procak be on my ass, be on your ass, you know, when you got to talk to any driver talk to them outside the gate, outside the property, don't talk to them to inside the property because that's going to bring a problem.

And I told him, well, that's a new rule. I didn't know that, you know, you got to talk to the drivers outside the property, that never happened before. He told me, no, you know, just make sure that if you got to talk them, talk to them outside the property, you know, just so to get him off my back I get him out of your back because, you know, he already went inside the other office and scream at me.

So, I told him, all right, you know. So, what we did, Ditzler got on his car. I got on my car. We outside the gate you know, we started talking. (Tr. 251-254, 280)

I credit Torres' testimony. First, his testimony is similar to and consistent with Shop Steward West's undisputed account of what happened to him several weeks earlier, when Krise and Maguire likewise told him not to talk to other drivers and hurried him off the property. Second, both Procak and Branyan admitted that they had conversations with Torres after he logged out that day. Third, although Procak's account differed from Torres' account of their conversation, it was also inconsistent with Branyan's. Thus, Procak testified that he questioned Torres, not about why he was still on the property, but why he was still in the office doing paperwork after he had logged out 15 minutes earlier, and that this is what he told Branyan to talk to Torres about, i.e., turning in his paperwork before logging out (Tr. 671). However, Branyan admitted, consistent with Torres' testimony, that he talked to Torres, not about turning in his paperwork before logging out (as Procak said he told Branyan to do), but about leaving the property immediately after logging out (Tr. 740).¹⁴

Nevertheless, the Company argues that no violation should be found because any effect of Branyan's instruction was "de minimis" (Br. 57). In support, the Company cites the undisputed fact that, a couple of days later, after Branyan learned that Torres had reported his conduct, Branyan approached Torres and denied that he ever told Torres he could not remain on the property to talk to other drivers. According to Torres, Branyan insisted that he had only meant that Torres should not talk to drivers "in the middle of the parking lot" because something might happen to him. Branyan assured Torres that he could talk to any driver inside the property as

¹⁴ Although Branyan said he did this "just to avoid any [hours] of service issues coming up with being still on the property," he was unable to cite any DOT HOS regulation that restricts drivers from being on the property after finishing their work. Indeed, the Company now concedes that Branyan's professed understanding or concern regarding the hours-of-service issue is mistaken (Br. 57).

long as he was not in the middle of the parking lot (Tr. 255–256).¹⁵ The Company also cites the undisputed fact that the issue has not arisen since this second conversation.¹⁶

5 However, as discussed above, Branyan was not the only company supervisor and/or agent to give such an instruction. Three other company managers (Procak, Krise, and Maguire) issued similar instructions to Torres and/or shop steward West. Further, there is no evidence that Procak, whose words as general manager clearly carried more authority than Branyan’s, ever repudiated his prior instruction to Torres to get off the property. Nor is there any evidence that he or any other manager took any affirmative steps to repudiate the similar unlawful instructions
10 previously issued to West by managers Krise and Maguire.

15 In short, the Company’s “de minimis” argument is without merit. See, e.g., *The Southern New England Telephone Co.*, 356 NLRB No. 118, slip op. at 19–20 (2011); *Campbell Electric Co.*, 340 NLRB 825 (2003); and *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284, 1289 (2001), enfd. in relevant part 334 F.3d 99, 108 (D.C. Cir. 2003) (applying the criteria set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978)).¹⁷ Accordingly, like Krise’s and Maguire’s instructions to West, I find that Procak’s and Branyan’s similar instructions to Torres violated Section 8(a)(1) the Act as alleged.

20 II. Alleged 8(a)(3) and (4) discrimination

As indicated above, the consolidated complaints also allege that the Company committed several 8(a)(3) and/or (4) violations between January and October 2011, including discharging drivers Baylor, Folds, and Lewis, and again discharging Ditzler.

25 A. Baylor

30 Baylor worked as a driver for the Company from January 2008 until he was discharged in January 2011 (Tr. 45). The January 6, 2011 disciplinary notice cited two reasons for his termination: first, because he had been in four “preventable accidents” in the past 2 years, on 2/16/09, 6/10/09, 2/9/10, and 12/28/10; and second, because he had failed to report the most recent damage on 12/28/10 (GC Exh. 5(e)/R. Exh. 3). The complaint, however, alleges that the Company actually discharged Baylor because he supported the Union, and to discourage employees from engaging in union activities, in violation of Section 8(a)(3) of the Act.

¹⁵ Branyan was less sure about what he specifically said to Torres beyond denying that he ever told Torres he could not talk to other drivers. He testified, “I think I explained it again, you know. I just worried about the hours-of-service issues of being logged off that they were still on company property” (Tr. 740). Again, I credit Torres’ version of the conversation.

¹⁶ The Company also cites Del Monte Vice President Gulick’s testimony (in response to a leading question) that, at some point after he heard about the issue, he told Del Monte’s senior director of human resources (Humphries), that, in his opinion, there was no issue if drivers wanted to hang around after they had logged out (Tr. 541). However, there is no evidence that Humphries (who did not testify) communicated this to Torres, shop steward West, or anyone else.

¹⁷ Contrary cases cited by the Company—*Albertson’s, Inc.*, 351 NLRB 254 (2007), and *Kurdziel Iron of Wauseon, Inc.*, 327 NLRB 155, 162 (1998)—are plainly distinguishable on their facts.

The analytical framework for evaluating such allegations is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

5 Under that test, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer.

10 If the General Counsel makes the required initial showing, the burden then 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 activity. To establish this affirmative defense, “[a]n employer cannot simply present a legitimate reason for
15 its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity.

20 *Consolidated Bus Transit*, 350 NLRB 1064, 1065–1066 (2007), enfd. 577 F.3d 467 (2d Cir. 2009) (citations omitted). See also *Allstate Power Vac, Inc.*, 357 NLRB No. 33, slip op. at 3 (2011); and *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 935–936 (D.C. Cir. 2011).

Here, the General Counsel has made the required initial showing. It is undisputed that Baylor supported the Union during the campaign, and expressed his support at union meetings (Tr. 45–46, 274–275). The evidence is also sufficient to infer that the Company was aware of
25 Baylor’s support before discharging him. Although Baylor did not express his union sympathies around managers or supervisors during the campaign, it is undisputed that Krise and Branyan were present when he and other drivers, including Lewis, West, and Torres, gathered in the yard and celebrated the Union’s victory after the election (Tr. 45–47 [Baylor], 275 [Torres]).¹⁸

30 There is also sufficient evidence that the Company “harbored animus toward both the Union and union activists” (*Wright Line*, 251 NLRB at 1090). West testified at the prior hearing that, a couple of days before the election, General Manager Procak, who ran the Company’s antiunion campaign, told him, “you know, when this election is over . . . whether ya’ll win or lose I’m going to clean house.” West replied, “Even if I vote no?” And Procak said, “Yeah, I’m
35 going to get rid of you anyway.” (GC Exh. 21, pp. 158–159.) I credit West’s testimony. Although Procak denied at the prior hearing that he made any such preelection statements (R. Exh. 73, p. 640), as discussed above his testimony at the instant hearing regarding his subsequent, postelection statements to Torres demonstrates that he is not always a reliable historian.¹⁹

¹⁸ In light of this, it is unnecessary to address whether, as contended by the General Counsel (Br. 109–110), Branyan learned from another driver (Taylor) that Baylor had attended and expressed support for the Union at a campaign meeting at McDonalds.

¹⁹ See also the discussion, *infra*, regarding Procak’s testimony about the events leading to Lewis’ discharge. Procak’s “clean house” statements to West were previously alleged, litigated, and found unlawful in the prior proceeding before Judge Biblowitz. However, as noted above (fn. 2), Judge Biblowitz’ findings in the prior proceeding have no precedential weight in this proceeding. Nevertheless, such statements are clearly coercive, and may properly be considered

Further, the Company has not disputed the accuracy of West’s account of similar postelection statements made to him by Krise and Maguire. As found above, these postelection statements to West and Torres were clearly unlawful (as were Branyan’s similar statements to Torres), and evidence the Company’s continued animus after the Union’s election victory and certification.²⁰

Finally, contrary to the Company’s contention, the record indicates that both Procak and Krise participated in the disciplinary process, i.e. although final decisions regarding discipline were made by Del Monte Vice President Gulick and the HR department (Humphries and/or Medina) at the corporate headquarters in Florida, Procak and Krise were consulted. See, e.g., GC Exh. 3, p. 929 (Gulick’s prior testimony); GC Exh. 27 (11/8/10 email from Gulick to Procak, Krise, and Rosenfeld regarding Folds accident); and GC Exh. 32 (8/10/11 email from Humphries to both Gulick and Procak regarding Ditzler accident).²¹

However, a preponderance of the credible evidence supports the Company’s defense that it would have terminated Baylor even in the absence of union activity. As indicated above, Baylor’s termination notice cited him for having four “preventable accidents,” on 2/16/09, 6/10/09, 2/9/10, and 12/28/10, and for failing to report the 12/28/10 accident. There is no dispute that the four cited incidents actually occurred, i.e. there is no dispute that, on 2/16/09, Baylor clipped another vehicle’s mirror while merging into traffic; on 6/10/09, he discovered, but failed to immediately report, three broken hinges and a missing latch on his right side trailer door;²² on

as evidence of animus even in the absence of an allegation or finding that they are unlawful. See *Campbell Electric Co.*, 340 NLRB 825, 831 fn. 9 (2003); *Jack in the Box Distribution Center Systems*, 339 NLRB 40, 52 (2003); *Wilmington Fabricators*, 332 NLRB 57, 58 fn. 6 (2000); *Kaumagraph Corp.*, 316 NLRB 793, 794 (1995); and cases cited there. Indeed, the Board and some circuit courts have held that even lawful noncoercive antiunion statements may properly be considered as evidence of animus. See *Galicks, Inc.*, 355 NLRB No. 68 fn. 3 (2010), enfd. 671 F.3d 602, 609 (6th Cir. 2012). See also *Tejas Electrical Services*, 338 NLRB 416, 416 and 418 fn. 5 (2002) and cases cited there, as well as *Wright Line* itself, 251 NLRB at 1090 (citing company’s antiunion campaign as evidence of animus), and 662 F.2d at 907 fn. 14 (noting that, although such statements do not prove discrimination, they “provide a relevant background for analyzing the circumstances of the discharge”). And cf. *NLRB v. Brown*, 380 U.S. 278, 289 (1965) (citing company’s “more than amicable” relationship with union in finding insufficient evidence that company was motivated by union animus).

²⁰ The General Counsel argues that there is also direct evidence that the Company harbored animus toward Baylor. The General Counsel refers to a warning the Company issued to Baylor a month after the election, which cited him for idling his truck for 9 minutes on August 20, 2010 in violation of Pennsylvania anti-idling regulations (GC Exh. 5(xx)). However, there is no allegation that this warning—which also cited Baylor for failing to conduct a post-trip inspection or note his pre-trip on his daily trip sheet the same day—was discriminatory. As discussed below, the complaint only generally alleges that the Company more strictly enforced no-idling rules after the election without bargaining with the Union, in violation of Section 8(a)(5) of the Act. Nor is the warning clearly discriminatory on its face.

²¹ To the extent Gulick’s testimony at the instant hearing on this issue (Tr. 416–417) conflicts with this cited evidence, I discredit it.

²² Although Baylor did not specifically admit the 6/10/09 incident, as discussed *infra* he did

2/9/10, he struck the front driver's side rim of another vehicle in his blind spot while changing lanes; and on 12/28/10, he allowed another truck to pull his truck out of the snow with a chain, thereby damaging his front bumper. There is likewise no dispute that all four incidents were listed as preventable accidents in the accident log, which is maintained by the Company's national safety manager (Rosenfeld) on an ongoing basis and reviewed when determining whether to discharge a driver. There is also no dispute that the Company had previously issued Baylor final written warnings for both the 2/16/09 accident and the 2/9/10 accident. And there is no dispute that Baylor did not report the damage that occurred on 12/28/10. (R. Exhs. 2-4, 13-14, 17-18; GC Exh. 5(c) and (e); Tr. 47-57, 429-430, 452-455, 588.)

Further, although the General Counsel does dispute certain other circumstances surrounding Baylor's termination—whether Baylor was responsible for causing or failing to report the 12/28/10 damage; whether the previous incident on 6/10/09 was properly characterized or charged against Baylor as a “preventable accident”; and whether Baylor's termination was consistent with discipline issued to other drivers—as discussed below there are significant problems with all of the General Counsel's arguments.

(1) The 12/28/10 preventable accident

As indicated above, Baylor's most recent accident on December 28, 2010 occurred when he permitted another company's truck to pull his truck out of the snow with a chain tied to his front bumper, rather than following the normal procedure and waiting for the Company's service provider (Ryder) to pull him out. The General Counsel contends that the Company actually authorized Baylor to let the other truck pull him out, citing Baylor's following testimony about his third phone conversation with Branyan (Tr. 64):

I called Branyan back again. I asked him “[W]hat do you want me to do? Its getting late and I've been here almost 3 hours.” . . . And at that point the truck came about . . . And the guy offered to pull me out of the snow. . . . I said [to Branyan], “there's a guy here that could help me get out. Do you want me to do it?” He said, “Look, do what you got to do.” And at that point the guy pulled me out of there.

However, there are substantial reasons to doubt this testimony. Baylor admitted that Branyan told him to wait for Ryder during both of their previous phone conversations (Tr. 63). Further, Ryder records indicate that Baylor cancelled the service request only 75 minutes after the initial contact, and over an hour before the towing service's estimated time of arrival (ETA) (R. Exh. 4). Moreover, Baylor's otherwise detailed handwritten statement to the Company about the event nowhere mentions that he told Branyan about the other truck's offer or that Branyan told him “do what you got to do” or anything similar (Id.).²³ See also Regional Transportation Manager Krise's February 2, 2011 post-discharge email to Vice President Gulick regarding Ryder's demand for \$262 for the cancelled service request, which specifically states that Baylor

not specifically deny that it occurred.

²³ Thus, even if Branyan had authorized Baylor to let the other truck pull him out, there is no evidence that either Procak (who signed and gave the discharge notice to Baylor), or Del Monte Vice President Gulick and Senior Director of Human Resources Humphries (who Gulick testified jointly made the decision to terminate Baylor), knew of this when Baylor was discharged.

“cancelled the [Ryder] call without reporting” (Id.). Finally, Branyan denied that Baylor told him beforehand about the other truck’s offer or that he told Baylor to “do what you got to do” (Tr. 727). Although Branyan has his own credibility problems, for the reasons indicated above I find that he was the more reliable historian with respect to this particular event.

5

The same conclusion is warranted with respect to Baylor’s failure to mention the bumper damage. The General Counsel cites Baylor’s testimony (Tr. 56) that he did not do the usual post-trip inspection and driver vehicle condition report (DVCR) when he returned to Eddystone because Branyan wanted him to go right back out with another truck and told him not to worry about doing so. However, again, there are substantial reasons to question Baylor’s testimony. Branyan testified that Baylor had sufficient time to do the required post-trip and pre-trip inspections and reports before going back out with the other truck, and denied that he told Branyan not to do so (Tr. 730, 743). Moreover, it is highly unlikely on this record that Branyan would have said such a thing to Baylor. Post (and pre)-trip reports were considered vital to insure compliance with DOT, state, and local accident reporting requirements and to determine fault and liability (see Tr. 203 (yard jockey Rodriguez), Tr. 414–415, 421–428 (Vice President Gulick); and R. Exh. 1, p. 2 (Company’s post accident procedures)), and there is no evidence that any other driver has ever been told it is unnecessary to do them. Indeed, Baylor had been issued a verbal warning just 3 months earlier for, among other things, failing to conduct a post-trip inspection or note his pre-trip on his daily trip sheet on August 20, 2010. See GC Exh. 5(xx); and fn. 20, supra. See also the discussion below regarding the 6/10/09 incident.

10

15

20

25

30

Finally, there are other substantial reasons to doubt Baylor’s veracity. Thus, Baylor testified that he had noticed the bumper damage before he returned to Eddystone, when he started back that morning from the hotel where he spent the night, but simply forgot to tell Branyan until confronted when he returned from the additional run with the other truck (Tr. 55–56). However, he told Branyan at the time that he was not aware of the damage. See R. Exh. 4 (Branyan’s December 30, 2010 statement). Further, Baylor’s contrary testimony at the hearing fails to explain why he admittedly failed to follow company policy by immediately calling Branyan to report the damage before leaving the hotel or thereafter on his way back to Eddystone. Indeed, he acknowledged on cross-examination that he spoke with Branyan over the phone on his way back, and “should have” told him about it (Tr. 67). See also Tr. 438–440 (Gulick).

(2) The reported 6/10/09 preventable accident

35

40

The General Counsel also contends that Baylor did not actually have a preventable accident on 6/10/09; that the Company “made up” a fourth preventable accident to provide additional support for discharging him (Br. 114). In support, the General Counsel cites the description of the incident in the accident log itself, which states only that Baylor did not immediately report the broken door hinges and missing latch, not that he hit anything or caused the damage. The General Counsel also cites the Company’s failure to list similar infractions by other drivers (Coleman and Sauler) as preventable accidents on the accident log; Baylor’s testimony that he only had three preventable accidents; and the absence of any signed disciplinary notice for the alleged accident.

45

However, Vice President Gulick testified that a driver’s failure to report damage can be classified as a preventable accident in certain circumstances, including when it cannot be determined, due to the lack of timely reporting, where or how the damage occurred (Tr. 558–

559). Further, there is some documentary support for Gulick's testimony. Although the similar infractions by Coleman and Sauler on 4/1/09 and 5/16/11, respectively (GC Exhs. 5(k) and 5(kk)), were not listed as preventable accidents in the log, other similar incidents were. See R. Exh. 2, p. 5 and 8 (listing as preventable accidents unknown damage discovered on 12/16/08 (driver Fountain), 3/24/09 (unknown driver), and 8/12/09 (unknown driver)).²⁴

10 In any event, as indicated above, the accident log is maintained by the safety manager on an ongoing basis; incidents are added as they occur (Tr. 429-430). And except for Sauler's 5/16/11 infraction (which is discussed more fully below), all of the above incidents (including the 6/10/09 incident involving Baylor) occurred well before the union campaign. Thus, the determination whether to include the incidents in the log as preventable accidents clearly had nothing to do with it.

15 As for Baylor's testimony, while he admitted to only three preventable accidents, he was never specifically asked about the 6/10/09 incident and never denied that it occurred as described in the accident log. See Tr. 47-57. Moreover, he clearly had a different understanding of the term "accident" than the Company. Indeed, although he initially identified the 12/28/10 incident as one of his three "accidents," he later denied that it actually constituted an "accident" (Tr. 59).

20 This leaves the absence of a signed disciplinary notice for the incident, which is obviously more troubling, but ultimately also fails to prove the General Counsel's allegation. Gulick explained that the Company initially decided to terminate Baylor for failing to report the damage; later reversed this decision upon discovering that Baylor had reported the damage in his DVCR; but still charged him with the accident because he had not immediately reported the damage to management as required (Tr. 450-451, 467). Again, there is some documentary support for Gulick's testimony: an unsigned termination notice for the 6/10/09 incident (R. Exh. 16).²⁵ Further, his testimony was never disputed by Baylor or any other witness.²⁶

²⁴ See generally *Consolidated Biscuit Co.*, 346 NLRB 1175, 1179 fn. 24 (2006), enfd. 301 Fed. Appx. 411 (6th Cir. 2008) (unpub.) (employer's lack of "perfect consistency through the years" was insufficient to establish that terminations were discriminatorily motivated). The log also lists several incidents involving unknown "parked" damage as "non-preventable" accidents. See R. Exh. 2, p. 6. As discussed *infra*, one of these listed incidents involved the unknown damage to Sauler's truck on 5/16/11.

²⁵ The lack of a signature does not necessarily indicate that the discipline was never imposed. See, e.g., R. Exh. 17 (unsigned 3/14/10 final written warning issued to Baylor for 2/9/10 accident); R. Exh. 59 (unsigned 3/7/11 termination notice issued to Lewis for 3/4/11 incident); GC Exh. 5(t)/R. Exh. 43 (unsigned 8/17/11 final written warning issued to Ditzler for 7/18/11 accident). There does not appear to be any dispute that these disciplinary actions actually occurred.

²⁶ Contrary to the suggestion in the General Counsel's brief (p. 115 fn. 41), counsel was not prevented by the "inopportune" close of the hearing at 6:23 p.m. on Wednesday, February 18—which no party opposed—from recalling Baylor to rebut Gulick's testimony. Gulick began testifying about the subject incident at the end of the second day (Tuesday), well before the hearing closed. Further, the Company had provided the General Counsel with a copy of the June 12, 2009 disciplinary notice prior to the hearing. See GC Exh. 5(d). Finally, while all parties endeavored (to their credit) to finish the trial by Wednesday evening, they were not required to do so, i.e., the trial could have continued into Thursday or beyond if necessary.

In sum, while there is certainly reason to question whether the 6/10/09 incident should have been listed as a preventable accident in the log or considered as such by the Company in discharging Baylor, the record as a whole fails to support the General Counsel's theory that doing so was discriminatorily motivated.

(3) The Company's failure to terminate other drivers

As indicated above, the General Counsel also argues that the Company has failed to terminate other drivers who have similar or worse disciplinary records than Baylor. In support, the General Counsel primarily cites Sauler, who, unlike Baylor, did not support the Union during the campaign (Tr. 10). According to the accident log, Sauler has had five preventable accidents: on 10/31/07 (struck turn signal on another truck while backing into dock); 2/28/08 (hit a tree limb while making left turn); 9/23/10 (struck side mirror of parked tractor while backing into staging area at port); 5/19/11 (backed into some customer racks at dock); and 11/16/11 (brushed up against another vehicle while leaving dock) (R. Exh. 2, p. 7). In addition, as discussed earlier, the written warning for the 5/19/11 accident also cited him for failing to immediately report damage to the tractor he was driving 3 days earlier, on 5/16/11 (GC Exh. 5(kk)). And he received only a final written warning for the last accident on 11/16/11, even though it caused \$1576 in damage (GC Exh. 5(II)).²⁷ In contrast, the quoted damage to Baylor's bumper on 12/28/10 was only \$519 (R. Exh. 4).

Again, however, the record provides a reasonable explanation why Sauler has not been terminated. Gulick testified that the Company has historically considered only those accidents occurring within the previous 36 months in determining discipline, and has continued this policy throughout the relevant period consistent with the current CSA (Compliance, Safety, Accountability) accident reporting system that was implemented by the Federal Motor Carrier Safety Administration (FMCSA) in December 2010. (Tr. 417-419, 571, 596-598, 602). No documentary or other evidence has been presented or cited contradicting this testimony and I credit it.²⁸ Thus, based on the log, Sauler at no time had more than three countable accidents (two as of 2/28/08; three as of 9/23/10; two as of 5/19/11; and three as of 11/16/11).

As for Sauler's failure to immediately report the damage to his tractor on 5/16/11, Gulick testified that, unlike with Baylor's infraction on 12/28/10, it was not clear that Sauler was responsible for the damage. Sauler did not admit to it and the safety investigator (Rosenfeld) could not clearly determine otherwise given the large amount of third-party carrier traffic in the yard. (Tr. 516-518). Gulick's testimony is consistent with Krise's emails to him and Rosenfeld at the time, which indicate that Sauler repeatedly denied responsibility for the damage (R. Exh. 76).²⁹ It is also consistent with the accident log, which listed it as "parked," "non-preventable" damage not attributable to any driver (R. Exh. 2, p. 6).

²⁷ The entry in the accident log states that there was no damage (R. Exh. 2, p. 7), but this was incorrect (Tr. 516).

²⁸ Although not in evidence, I take administrative notice of the CSA program, which is described on the FMCSA website (<http://csa.fmcsa.dot.gov>). Accordingly, I reject the General Counsel's contention (Br. 120) that the Company "came up" with the 36-month period to avoid discharging Sauler.

²⁹ See also GC Exh. 29. According to the emails, although Sauler at one point said, "Ok, I

As indicated above, Sauler was eventually charged with his third countable accident on 11/16/11. And if his infraction on 5/16/11 had been separately listed and counted like Baylor's 6/10/09 similar infraction as a preventable accident, he would have had four. However, as discussed above, the record as a whole fails to establish that the Company listed Baylor's 6/10/09 infraction as a preventable accident on the log for discriminatory reasons. Nor, contrary to the General Counsel's contention, does it establish that the Company "cover[ed] up" or deliberately avoided listing Sauler's 5/16/11 infraction as a preventable accident because he was not a union supporter.³⁰

With respect to the repair cost of Sauler's last accident, while it was significantly greater than that of Baylor's, Gulick testified that the amount of damage is only one of many factors considered in determining discipline. Other factors include the number and frequency of accidents, whether the driver followed the required reporting procedures, and prior discipline (Tr. 417-419, 421.) Gulick testified that the second of these factors was given substantial weight in deciding to terminate Baylor following his 12/28/10 accident; indeed, Baylor's failure to report or admit the 12/28/10 damage until confronted justified termination by itself (Tr. 432-433, 437-441). Again, there is documentary support for Gulick's testimony. See R. Exhs. 5-6 (Eddystone driver Derechinsky terminated on 11/8/06 after one preventable accident for failing to report it); R. Exhs. 7-8 (Jacksonville driver Brown terminated on 3/12/08 after his second preventable accident for failing to report the accident); R. Exhs. 9-10 (Denver driver Kenney terminated on 7/28/08 after his second preventable accident for failure to report the accident); and R. Exh. 11-12 (Plant City driver Miller terminated on 11/3/08 after his second preventable accident for failure to report the accident). See also Tr. 468.

All of the foregoing examples were admitted into evidence without objection (Tr. 444-448). Nevertheless, the General Counsel's posthearing brief argues that the latter three examples should not be given significant weight because they involved drivers at other company facilities. However, as indicated above, the record indicates that the final decision to terminate a company driver is made by Gulick and the HR department (Humphries and/or Medina) at the corporate headquarters in Florida. The General Counsel's posthearing brief also argues that the one Eddystone example should not be given significant weight because it occurred before Gulick assumed his position in January 2008. However, there is no evidence that Gulick changed the Company's disciplinary policies to make them more flexible, lenient, or tolerant. On the contrary, the record indicates that Gulick set up a pre- and post-trip audit program, changed the Company's accident reporting to include even minor accidents, and issued warnings to several Eddystone drivers to document the frequency of accidents that they had been involved in prior to his arrival (Tr. 414-415; GC Exhs. 5(z), (dd), (gg), (jj), (nn)).

guess I did it," he did so in a "sarcastic tone" in response to Krise's persistent questioning. Further, when Krise re-interviewed Sauler the following day "to give him another chance to confess" to the damage, he repeated his initial denial.

³⁰ As noted above (fn. 5), although the circumstances preceding Krise's departure from the Company in June 2011 are certainly unusual, the record evidence is insufficient to conclude, as asserted by the General Counsel (Br. 91 fn. 34), that Krise left because he "was not happy about having to cover up Sauler's accidents."

Moreover, no evidence is cited that the Company had not previously terminated Eddystone drivers for failing to report their accidents. Although the General Counsel cites one preelection example in May 2008 involving Torres (who, as discussed above, subsequently supported the Union), the record indicates that Torres did, in fact, verbally notify Branyan “of his own volition” about the accident at the end of his assignment (GC Exhs. 5(mm) and 27 (Procak May 13, 2008 email to Rosenfeld)). Further, the accident (brushing up against the bumper of a parked car while making a left turn) was his very first (R. Exh. 2, p. 8; Tr. 520). Thus, Torres’ situation is clearly distinguishable, as Baylor did not notify anyone either during or at the end of his assignment, and he had at least three preventable accidents.³¹

Finally, the only example cited by the General Counsel since Baylor’s termination, which involved another driver (Clark), likewise fails to prove the allegation. The accident (scraping up against a concrete barrier) occurred relatively recently, on October 30, 2011, and, like Torres’ accident, was apparently Clark’s first. See R. Exh. 2, p. 3. Nevertheless, Gulick acknowledged that Clark should have been disciplined, and that the failure to do so was an oversight on his part. He explained that he was down three managers at the time and was busy with other priorities, including preparing a budget and implementing cost-savings measures (Tr. 524). While this might seem an incredible explanation under other circumstances, it rings true here. It is highly unlikely on this record that the Company would deliberately ignore both the accident and Clark’s failure to report it. Further, the record confirms that it took an extraordinarily long time to discipline some of the other drivers who had preventable accidents around the same time. See R. Exh. 72 (disciplinary notice issued to driver Cole on 11/8/11 for accident almost 3 months earlier on 8/15/11);³² and GC Exh. 5(g) (final warning issued to driver Cornitcher on 11/7/11 for accident almost 2 months earlier on 9/12/11).³³ And while it took relatively little time to discipline two other drivers, one of those drivers was Sauler, who as indicated above did not support the Union during the campaign. See GC Exh. 5(II) (11/28/11 final written warning for 11/16/11 accident).³⁴

Accordingly, the allegation is dismissed.

³¹ The General Counsel also again cites the infractions by Coleman and Sauler on 4/1/09 and 5/16/11, respectively. However, as indicated above, in neither situation did the Company determine that they were responsible for the damage.

³² Although no box is checked on Cole’s 11/8/11 disciplinary notice, Gulik testified that Cole received a final written warning (Tr. 480).

³³ See also Cornitcher’s testimony, Tr. 72–76. Gulick provided the same explanation for this delay (Tr. 479, 566).

³⁴ Cole likewise did not support the Union during the campaign (Tr. 10), but there is no evidence regarding Clark’s or Cornitcher’s sympathies. The other driver who was promptly disciplined was Ditzler, whose 10/7/11 discharge for his 10/5/11 accident is addressed infra. Ditzler is also another example of a driver who was not terminated for failing to report an accident. As discussed infra, he received only a final written warning for failing to report his 7/18/11 accident (sideswiping a parked car) even though the Company concluded that he was clearly responsible for it. However, it was Ditzler’s first accident after being reinstated pursuant to Judge Biblowitz’ order (and his second in 36 months), and the General Counsel does not cite it as evidence of the Company’s disparate treatment of Baylor.

B. *Folds*

Folds worked as a driver for the Company from December 2009 until he was discharged on January 6, 2011, following a preventable accident on 12/30/10 (Tr. 29). The disciplinary notice stated that Folds was being discharged because this was his second preventable accident in just the previous 2 months; his prior accident on 11/6/10 resulted in damages of \$5743; and he had been issued a first and final written warning for that accident due to his actions and its severity (GC Exh. 5(w)/R. Exh. 23). Like Baylor, however, the complaint alleges that Folds was actually discharged because he supported the Union, and to discourage employees from engaging in union activities, in violation of Section 8(a)(3) of the Act.

As indicated above, to satisfy the initial burden under *Wright Line*, the General Counsel must show that Folds engaged in union or protected concerted activity; that the Company had knowledge of that activity; and that the Company harbored union animus. As previously discussed, the last of these has been sufficiently established by Procak’s preelection threat to “clean house” and the unlawful postelection statements he, Krise, Maguire, and Branyan made to shop steward West and Torres. However, the other two factors here are more complicated. Unlike Baylor, Folds testified that he did not support the Union during the campaign, and that he told both his coworkers and managers this (Tr. 29). Accordingly, the General Counsel relies instead on Folds’ testimony about the following postelection exchange he had with Krise after his first accident:

He gave me a final warning. He threw a paper. He said, “Here, sign this.” I looked at it. I said that I need my union rep to be here with me for this. And he said, “You don’t belong to a union. Just sign it.” And I said, “No, I can’t sign it.” And he kept on – a couple days he wanted me to sign that paper. And I told him not without union representation. (Tr. 31 – 32)

The General Counsel contends that Folds’ refusal to sign the notice without the presence of a union representative was an expression of support for the Union, and that it would have been viewed as such by the Company.³⁵ The General Counsel further contends that Krise demonstrated his animosity toward the Union and Folds both by his initial response (“You don’t belong to a Union. Just sign it”) and by his subsequent conduct following Folds’ termination 2 months later. Specifically, the General Counsel cites Folds’ testimony that, when he came back several days after he had been terminated to pick up a hammer he had accidentally left in the truck, Krise threw the hammer across the parking lot and screamed, “Get off the property. I’m calling the police” (Tr. 34–35).

Folds’ testimony regarding his exchange with Krise following his first accident is supported in substantial part by the November 9, 2010 disciplinary notice, which is signed by Krise and specifically states that Folds “refused to sign” (GC Exh. 5(v)/R. Exh. 26).³⁶ Further, his testimony was not disputed by Krise (who as noted did not testify) or anyone else. I therefore

³⁵ The General Counsel does not allege that Folds had a *Weingarten* right to union representation when he was given the disciplinary notice, or that the Company retaliated against him for exercising that right. Cf. *Safeway Stores*, 303 NLRB 989 (1991).

³⁶ It is also consistent with his later response when Procak gave him his January 6, 2011 termination notice following his second accident. See GC Exh. 5(w)/R. Exh. 23 (“Will not listen

credit it. I also agree with the General Counsel that Folds' insistence on having union representation would likely be viewed by the Company as an expression of union support. Accordingly, given Procak's preelection threat to "clean house," I find that the General Counsel has made a sufficient initial showing "to support the inference that protected conduct was a 'motivating factor' in the [Company's] decision" (*Wright Line*, 251 NLRB at 1089).

However, the showing is a relatively weak one. The Company decided to issue a first and final written warning to Folds for his first accident (rather than just a warning) even before he refused to sign it without a union representative. Further, contrary to the General Counsel's contention, Krise's initial response to Folds' refusal is not so much (if at all) a demonstration of union animus, but a demonstration that he continued to believe, consistent with Folds' previous statements during the union campaign, that Folds was not a union supporter. As for Krise's reaction to Folds being on company property several days after he was subsequently discharged, it is not particularly probative of anything except that Krise was not pleased that Folds was on the property several days after being discharged.

The Company's rebuttal burden is therefore less substantial. See *Sasol North America Inc. v. NLRB*, 275 F.3d 1106 (D.C. Cir. 2002); *Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493, 503 (7th Cir. 2003); *GSX Corp. of Missouri, v. NLRB*, 918 F.2d 1351, 1357-1358 (8th Cir. 1990); and *Doug Hartley, Inc. v. NLRB*, 669 F.2d 579, 582 (9th Cir. 1982) (the weaker the General Counsel's initial showing under *Wright Line*, the easier it is for the employer to establish that it would have discharged the employee regardless of union or protected activity). See also *Bally's Atlantic City*, 355 NLRB No. 218, slip op. at 4 (2010), enfd. 646 F.3d 929, 936 (D.C. Cir. 2011) (where the General Counsel "makes out a strong showing of discriminatory motivation, the respondent's rebuttal burden is substantial"); *Garvey Marine, Inc.*, 328 NLRB 991, 992 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001) (given the General Counsel's strong initial showing, the respondent company's burden was "formidable").

In any event, irrespective of the relative strength or weakness of the General Counsel's showing, the Company adequately established that it would have discharged Folds even absent his apparent new-found support for the Union. There is no dispute that Folds was involved in both of the cited preventable accidents. The first (11/6/10) accident occurred when he admittedly failed to notice a low clearance sign and hit a bridge. As indicated in his disciplinary notice (his "first and final" written warning), although the accident caused an estimated \$5700 in damage to the trailer, Folds admittedly failed to notify the Company until 2 hours later after he had left the scene (GC Exh. 5(v); R. Exhs. 26 and 27; Tr. 29-30).³⁷ The second (12/30/10) accident occurred when the right rear side of his trailer bumper scraped a parked car while he was making a left turn, damaging the car's front left turn signal (R. Exhs. 23 -25; Tr. 32).

Further, the record indicates that the Company terminated another Eddystone driver (Brightly) in July 2009 who likewise hit a bridge, resulting in \$7825 in damage—even though Brightly notified the Company right away and did not have any prior preventable accidents on his record (R. Exhs. 31-32; Tr. 483-484). See also R. Exhs. 2, 33-34 (Dallas driver Ricotta terminated after two preventable backing-up accidents in one week).

without union representation").

³⁷ Although Folds testified that the trailer was only "slightly" damaged by the impact (Tr. 30), the General Counsel does not challenge the cited documentation showing the actual damage.

Finally, the contrary examples cited by the General Counsel (Eddystone drivers Coleman, Gonzalez, Cole, and DeJesus) are all readily distinguishable. Thus, although Coleman had two preventable accidents in 2 months during 2009, both were relatively minor (backing into a car in his blind spot; and striking another trailer while pulling away from a customer dock), i.e. no bridges were hit. (GC Exhs. 5(m), (o); R. Exh. 2, p. 3.) Gonzalez' two preventable accidents in one month during 2011 were likewise relatively minor (failing to secure his rear door before backing up from a dock, causing the door to hit a pole; and making contact with another trailer's fender while pulling away from a customer dock). (GC Exh. 5(x), (y).) As for Cole, although he hit a low bridge in June 2010, causing \$3700 in damage (R. Exh. 30), his second countable accident (hitting another trailer's door while backing into a dock) did not occur until over a year later, in August 2011 (GC Exhs. 5(g), 31; R. Exhs. 2, 72; Tr. 480 (Gulick)).³⁸ As indicated above, Folds hit a parked car just 7 weeks after he hit a bridge. Finally, the Company actually discharged DeJesus after he hit a bridge in May 2011 (his second preventable accident in 10 months), and only offered him reinstatement (which he declined) after an unfair labor practice charge was filed over the termination (GC Exh. 5(r); Tr. 485, 569-570 (Gulick)).³⁹

Accordingly, this allegation is dismissed as well.

C. Lewis.

Lewis worked as a driver for the Company from March 2010 until his discharge a year later in March 2011. The complaint alleges that the Company issued three written warnings to Lewis after the August 6, 2010 election in violation of Section 8(a)(3) of the Act: on August 11, 2010 (for failing to pick up a COD), October 8, 2010 (for locking his keys in his truck), and February 14, 2011 (for having a preventable accident, failing to follow post-accident reporting procedures, and insubordinately refusing to fully complete an accident report). It further alleges that his subsequent discharge on March 7, 2011 (for insubordinately refusing to answer questions about a rejected load) violated both Section 8(a)(3) and Section 8(a)(4) of the Act.

1. The written warnings

As with the discharges of Baylor and Folds, the General Counsel has made a sufficient initial showing under *Wright Line* to support an inference that union animus was a motivating factor in issuing the three postelection disciplinary warnings to Lewis. As mentioned earlier, Lewis was the lead union organizer during the campaign and served as the first shop steward following the August 6, 2010 election (Tr. 301-302). In addition, both Procak and Gulick admitted at the prior hearing that they became aware early in the campaign that Lewis was one of the lead organizers (GC Exh.3, pp. 928-929 (Gulick); R. Exh. 73 (p. 589) (Procak)).

³⁸ As noted earlier, although no box is checked on the disciplinary notice issued to Cole for his last accident, Gulick testified that Cole was given a final warning (Tr. 480-482). Cole also had a prior preventable backing-up accident in July 2008; however, this was almost 2 years before his bridge accident in June 2010, and over 36 months before his backing-up accident in August 2011. (R. Exh. 2, p. 3.)

³⁹ The General Counsel also asserts that Sauler had two accidents in one week, on 5/16 and 5/19/11. However, as discussed above, the Company was unable to determine whether Sauler was responsible for the 5/16 damage.

As discussed above, the Company's union animus is also amply established by the record; specifically, Procak's preelection threat to "clean house" and the unlawful postelection statements he, Krise, Maguire, and Branyan made to West and Torres. Moreover, as noted by the
 5 General Counsel, there is substantial evidence that the Company harbored animus against Lewis in particular. For example, when Branyan discovered that Lewis had committed a DOT violation in January 2011, he sent an exuberant email to Procak saying "Check it out. Violation on Lewis!" (GC Exh. 3, attached exh. 53).⁴⁰ About the same time, the Company took the unusual step of
 10 compiling a chronology of Lewis' alleged policy violations and related objectionable conduct (GC Exh. 3, attached exh. 55). And, contrary to company practice, it actually cited some of these alleged policy violations in his third and final warning following his accident, even though they were neither related nor a basis for the warning (GC Exh. 5(ff)/R. Exh. 56; Tr. 506, 531-532).⁴¹

Accordingly, under *Wright Line*, the Company must show that it would have issued the
 15 warnings to Lewis even absent union activity. As discussed below, the Company has satisfied this burden with respect to the first and third warnings, but not the second.

a. The August 11, 2010 warning for failing to pick up a COD

As indicated above, the first written warning at issue was given to Lewis on August 11,
 20 2010 for failing to obtain a check or cash when he made a COD delivery to a customer (R. Exh. 52). There is no dispute that this did, in fact, occur. It is also clear that Lewis had no real excuse for failing to pick up the COD as required. Although Lewis testified that "C.O.D." was only indicated "somewhere in the fine print" (Tr. 306), it was actually prominently indicated in
 25 oversized print in the upper right hand corner of the ticket/invoice and circled in red ink. "C.O.D." was also indicated in regular print under "Payment terms." Further, Lewis was well aware of the proper COD procedures, as he had made numerous COD deliveries during his previous 5 months on the job. (R. Exhs. 63-64; Tr. 526 (Gulick) and 631-633 (Procak).)⁴²

Moreover, the record indicates that other Eddystone drivers have been disciplined for the
 30 same or similar conduct. See R. Exh. 53 (written warning dated September 5, 2007 issued to

⁴⁰ The General Counsel also cites driver Cajina's testimony in the prior hearing that Branyan told him and DeJesus prior to the election that he was not going to allow the Union to get in and was going to remove Lewis and West (GC Exh. 22). This prior testimony was admitted into the record without objection (Tr. 86), and the Company made no attempt to discredit it, either by having Branyan testify about it or by offering the transcript of his prior testimony. However, it was not corroborated by DeJesus, who testified only that Branyan said they did not need a union and they would have work if they voted no (Tr. 93). In any event, given the other evidence of animus cited above, it is unnecessary to address or rely on Branyan's alleged preelection statement to Cajina and DeJesus. I also find it unnecessary to rely on Lewis' undenied testimony that Procak refused to shake his hand when they met for contract negotiations (Tr. 303).

⁴¹ Although Gulick testified that he requested the chronology to determine whether the Company's response was an "overreaction" (Tr. 538), I do not credit this explanation. Rather, the record as a whole indicates the opposite; i.e. that it was created in an attempt to justify more severely disciplining and ultimately discharging Lewis.

⁴² Lewis did not deny that Respondent Exhibit 63 is a true and correct copy of the subject ticket/invoice (Tr. 352).

Barnabe for failing to obtain a check for a COD delivery); R. Exh. 54 (written warning dated August 10, 2007 issued to Ditzler for leaving a COD payment in his truck); and GC Exh. 5(tt) (written warning dated September 14, 2010 issued to Faunce for accepting an unendorsed check for a COD delivery).

5

The General Counsel argues that the foregoing warnings should be disregarded because: (1) the Company consistently failed to discipline drivers for similar offenses in 2008 and 2009, after Gulick was hired, and (2) the September 2010 warning to Faunce was issued solely “in order to make it appear as if Respondent was not discriminating against Lewis” (Br. 149–150). However, there is little reliable evidence to support these arguments. Although Torres testified that he had forgotten to pick up a COD two or three times a year without being disciplined, and also picked up CODs for other drivers who had forgotten to do so, his testimony was both inconsistent and uncorroborated. For example, Torres initially testified that he forgot to pick up CODs both before and after the 2010 campaign; however, he subsequently acknowledged on cross-examination that he did not really remember when this occurred, and “it could have been in 2007, 2008, 2009” (Tr. 269–270, 289). (The record indicates that Torres, who had trouble remembering years generally, began working for the Company as a temp in 2005 or 2006, and was hired in February 2007. Tr. 282, 295.)⁴³

10

15

20

Further, although Torres testified that he had picked up CODs for drivers Cajina and Weir (Tr. 270), Cajina was never asked anything about CODs and Weir was not called to testify. Nor were any other drivers asked to testify whether they had picked up CODs for Torres. Although the General Counsel called 11 drivers to testify, only 2 addressed the COD issue: DeJesus, who opposed the Union during the campaign and testified that he once accepted a postdated check from a COD customer without being disciplined (Tr. 10, 100–101), and West, who testified that he later picked up a properly dated check for DeJesus (Tr. 126–127).⁴⁴

25

30

Moreover, Torres acknowledged that drivers sometimes do not pick up CODs because nobody is there to give it to them, not because they forget to do so (Tr. 292–293). See also Procak’s testimony, Tr. 638–639 (describing the procedure when a customer is not there to give the driver the COD, and denying any knowledge of Torres ever forgetting to pick up a COD).

35

Finally, there is no direct evidence that the Company issued Faunce a warning in September 2010 simply as cover for the warning to Lewis. Nor, as discussed above, is there sufficient circumstantial evidence.⁴⁵

Accordingly, the allegation is dismissed.

⁴³ If Torres did, in fact, forget to pick up CODs after the August 2010 election without being disciplined, this arguably undercuts the General Counsel’s theory since, as previously noted (fn. 13), he openly supported the Union during the campaign.

⁴⁴ Apparently, this incident occurred sometime after February 2010 (when West was hired). In any event, it is insufficient by itself to establish disparate treatment. See generally *Consolidated Biscuit*, 346 NLRB at 1179 fn. 24.

⁴⁵ There is no allegation that the warning to Faunce (whose union sympathies are not revealed by the record) violated the Act.

b. *The October 8, 2010 warning for locking his keys in the truck*

As indicated above, the second written warning at issue was given to Lewis on October 8, 2010 for locking his keys in his truck (R. Exh. 55). Again, there is no dispute that this actually happened; that Lewis was at fault; and that the service provider (Ryder) had to come out and unlock the truck for him (Tr. 307-308).

However, several drivers (Cornitcher, Ditzler, and Torres) testified that they had locked their keys in their truck once or twice over the years without being disciplined (Tr. 75-76, 228-230, 248-249, 270-272, 295-296). Lead Driver Branyan (who as indicated earlier is an admitted supervisor and/or agent) confirmed this testimony, at least in part (Tr. 737-738). Indeed, he acknowledged that he had himself once locked his keys in the truck (Tr. 754).⁴⁶

Further, the Company failed to present any evidence that any other drivers had ever been disciplined for the same offense. Although it offered one example in March 2008, the driver in that case (Pflugh) was disciplined for “willful damage to company property”—breaking the vent window to gain access to the truck—not for locking the keys in the truck in the first place (R. Exh. 65).

In sum, unlike with the previous warning in August, the Company has failed to show by a preponderance of the evidence that it would have issued the October 2010 warning to Lewis absent union activity. Accordingly, given the previously discussed evidence of the Company’s animus toward union activity and Lewis’ union activity in particular, I find that the warning violated Section 8(a)(3) of the Act, as alleged.

c. *The February 14, 2011 final warning following his accident*

Unlike the prior two disciplinary notices, which were merely written warnings, the February 14, 2011 disciplinary notice was a final written warning. However, the notice did not cite or rely on the prior warnings as a basis for the increased level of discipline. Rather, as indicated above, the notice indicated that Lewis was being issued a final written warning for three entirely different reasons:

(1) because he had been in a preventable accident the day before “when he struck a parked trailer while attempting a delivery at 11:45 p.m., resulting in the trailer door being completely torn off”;

(2) because he “failed to follow proper accident reporting procedures by not contacting management, calling the police, and taking photos before departing the scene,” and “did not contact management to report the accident until 2:00 am” from an exit on the turnpike; and

⁴⁶ Branyan attempted to explain his and the other drivers’ lack of discipline on the ground that discipline is not imposed until the second offense; he, Cornitcher and Ditzler had only locked their keys in the truck once (he could not recall Torres ever doing so); and this was the second time Lewis had locked himself out (Tr. 737-738). However, Lewis’ October 8, 2010 disciplinary notice makes no mention of a prior incident. Further, the Company failed to present any other documentary evidence (such as Ryder invoices or disciplinary notices) to substantiate either that Lewis had previously locked himself out or that other drivers have been disciplined for their second offense. Accordingly, I do not credit Branyan’s explanation.

(3) because he was “insubordinate” when completing the post-accident report by “refus[ing] to fully complete the report after Management requested him to do so five times” (GC Exh. 5(ff)/R. Exh. 56).⁴⁷

5 Again, there is no real dispute that Lewis had the 2/13/11 preventable accident as described. Nor is there any dispute that he did not perform any of the cited post-accident
 10 procedures. Indeed, Lewis admitted that he did not even record the license number, name, owner, or other information about the trailer he struck (Tr. 360–361, 365). Lewis also admitted, and the documentary evidence shows, that he refused to fully complete the post-accident report
 15 upon returning to Eddystone, despite being requested at least twice to do so by Transportation Manager Krise. Specifically, although Krise repeatedly asked him to describe the accident in the report under “”Driver’s Description of Accident,” he refused on the ground that he had already
 20 done so in his Driver Vehicle Condition Report (DVCR). Instead, he simply wrote “SAME AS DVR REPORT. REFERENCE THAT.” (Tr. 363–365, 385–387; R. Exh. 57.)⁴⁸ Finally, it is
 25 uncontroverted, by either testimonial or documentary evidence, that such a response is not acceptable, and that no other driver has ever engaged in similar behavior. See Tr. 533–534
 30 (Gulick).

20 Nevertheless, the General Counsel cites several reasons to believe that the Company would not have given Lewis the final written warning (rather than a lesser warning or no
 25 discipline) absent his union activity. For example, the General Counsel notes that the accident occurred at Hunt’s Point market, which Vice President Gulick acknowledged is very congested and difficult to navigate and was considered in reducing the discipline to driver Cole following
 30 his 8/15/11 accident at the market. However, Gulick testified that he actually recommended that Cole be terminated for the accident, given Cole’s previous final warning for hitting a bridge in
 35 June 2010, but HR decided to issue Cole another final warning in view of the passage of time since his prior accident (Tr. 480). Further, while this was Lewis’ first preventable accident (and he did not hit a bridge or cause any injury), as indicated above this was only one of three reasons
 40 for his final warning.

30 The General Counsel also cites Lewis’ testimony that he called and told Branyan shortly before backing up to unload that he would have to “blindsided” into the space, and Branyan told
 35 him, “do the best you can, try to see if you can go” (Tr. 314–316). However, he did not mention this in his DVCR report (or the accident report). Moreover, his testimony is inconsistent with
 40 AT&T phone records. Thus, he specifically testified that the subject conversation with Branyan did not occur until after he got a call from the customer at 11:15 p.m. (As indicated above, there is no dispute that the accident occurred at 11:45 p.m.) However, while the phone records
 45 confirm his 11:15 p.m. call from the customer, they also show that his last call to Branyan before

⁴⁷ As mentioned above, the disciplinary notice also “noted” that Lewis had failed to follow proper scheduling procedures by calling 2 hours later than required on February 7 to alert management to his upcoming absence on the 9th, and failing more than once over the previous few weeks to call in at the appropriate time for his schedule the following day. However, the notice stated that these policy violations were not a basis for the final written warning.

⁴⁸ In his DVCR, he had written: “DOOR CAME OFF WHILE TRYING TO PARK AT J. MARGIOTTA. CLIPPED A TRAILER CORNER WHILE TRYING TO STRAIGHTEN OUT. DOOR(S) CAME UNFOLDED AND CAUGHT THE CORNER OF A PARKED LOADED TRAILER” (R. Exh. 58).

the accident was at 10:21 p.m., and that he did not talk to Branyan again until 2:08 a.m. (GC Exh. 26). Accordingly, I do not credit his testimony.

5 As for Lewis' cited failure to follow reporting procedures, the General Counsel argues that drivers are not required to call the police when an accident occurs on private property. In support, the General Counsel cites several entries in the Company's accident log (R. Exh. 2) indicating that other drivers did not call the police in such circumstances. For example, the General Counsel cites the Baylor accident on 12/28/10 ("Police were not called, private property"); the "Parked" accident on 4/27/09 ("Private property, no police"); the Scatterfield
10 accident on 10/22/08 (same); and the "Unknown" accident on 6/8/09 (same).

However, the accident log also contains several contrary entries. For example, it indicates that Cole called the police when he hit another trailer's door at Hunts Point on 8/15/11. See also GC Exh. 31 (indicating that he also took numerous pictures). Similarly, the log
15 indicates that Coleman called the police when he bumped a car in the parking lot of another market on 8/22/09, and when he scraped a parked trailer at a customer's dock on 10/15/09; that Cornitcher likewise called the police when he hit the bumper of a parked truck at a customer's dock on 9/12/11; and that Gonzalez called the police when he struck the fender of a parked tractor while pulling out of a loading dock on 4/25/11, and when his passenger door struck a pole
20 at a customer's dock on 5/17/11. See also Sauler (9/23/10, 5/19/11, and 11/16/11). Further, there is no "private property" exception listed in the Eddystone "Driver contact procedure for post accident." On the contrary, the procedure states that "all accidents must be reported (Police)" (R. Exh. 1, p. 2; Tr. 421-422, 427).⁴⁹ Finally, as discussed earlier, Baylor was actually terminated following the 12/28/10 accident. And while there is no evidence whether Scatterfield
25 was likewise disciplined following his 10/22/08 accident, even if he was not, this would hardly be sufficient to establish disparate treatment, particularly since Lewis admittedly did not perform any of the other cited post-accident procedures either (immediately contacting management and taking pictures).

30 The General Counsel also argues that other drivers have not been disciplined for failing to call the police even when their accidents occurred on public roads. In support, the General Counsel cites Clark's 10/31/11 accident. However, as discussed above, Gulick credibly explained that he had simply not yet fully reviewed and determined the appropriate discipline for this incident. The General Counsel also cites an incident where a driver (Autry) failed to
35 properly drop a trailer on 3/21/11. However, this incident occurred immediately outside the Eddystone gate and there was no damage. (R. Exh. 2, p. 1). Finally, the General Counsel cites Folds' 11/6/10 accident where he hit a bridge. However, as discussed earlier, although Folds' disciplinary notice for the accident did not specifically mention his failure to immediately call the police, it did state that he "did not report the incident until 2 hours after the occurrence and
40 leaving the scene" (GC Exh. 5(v)). Further, like Lewis, Folds was issued a final written warning for the incident (even though it was his first preventable accident), and there is no allegation that the warning was unlawful.

⁴⁹ The Company's accident "checklist" (Id. at p. 1) does not specifically require calling the police when a parked vehicle is struck and the owner is not available. However, the record is unclear whether Lewis made the required attempt to ascertain or locate the owner of the trailer.

The General Counsel also cites several other drivers who received lesser discipline for their preventable accidents, including, but not limited to Coleman, who received a written warning for his 8/22/09 accident (GC Exh. 5(m)); non-Union supporter DeJesus, who received only a written verbal warning for his 7/16/10 accident (GC Exh. 5(s));⁵⁰ and Gonzalez, who received a written warning for his 4/25/11 accident (GC Exh. 5(x)). However, in none of the cited examples did the drivers likewise fail to follow post-accident reporting procedures and refuse to properly complete the post-accident report on request.

The General Counsel also challenges the Company's assertion that this latter conduct amounted to insubordination. The General Counsel cites the undisputed fact that Lewis complied with Krise's request to draw a diagram of the accident. See Tr. 363 and R. Exh. 57. However, as indicated above, that was not Krise's only request; Krise also requested Lewis to describe the accident in the report in accordance with company policy, and Lewis admitted that he did not comply with that request.

The General Counsel also contends that the warning on its face exaggerates the number of times Krise asked Lewis to describe the accident, citing Branyan's testimony that Krise asked Lewis to do so only "twice" (Br. 148). However, Branyan's testimony was actually more equivocal, i.e. he actually testified that it was "twice probably" (Tr. 736). And an adequate foundation was never laid that he was present during the entire conversation. Further, Lewis himself was likewise equivocal. Although counsel questioned him about the exact number, he would only admit that Krise asked him "a couple of times," and acknowledged that he was "not sure how many" and that Krise was "pressing" him and that they were "going back and forth" about it. (Tr. 319, 363).

Finally, the General Counsel argues that the Company normally considers and disciplines non-accident offenses such as insubordination separately, and that the Company's failure to do so here evidences its unlawful motive. In support, the General Counsel cites: (1) Gulick's testimony that accidents are treated and counted separately from other types of offenses; and (2) the fact that Ditzler received a separate written warning for insubordinate conduct at the port when he was first discharged on January 6, 2011 for allegedly falsifying his log. However, when Gulick testified that accidents are counted separately, he was referring to other offenses such as tardiness and hours-of-service violations (Tr. 506).⁵¹ As for Ditzler, his situation is obviously distinguishable, as there is no apparent connection between his alleged insubordination and the cited log falsification. See GC Exh.5(ww)/R. Exh. 49. Here, Lewis' insubordinate conduct immediately followed and was directly related to his accident.

⁵⁰ DeJesus testified that he never received the written verbal warning (Tr. 95), and this is supported by the warning itself, which is not signed by him. However, it is signed by Transportation Manager Krise, which is consistent with the accident log entry at the time ("Driver is being written up"). Accordingly, I find that DeJesus was, in fact, issued a written verbal warning, even though he was never asked to sign it.

⁵¹ As noted above (fn. 47), although similar types of violations were mentioned in Lewis' February 14, 2011 disciplinary notice, the notice made clear that they were not a basis for the final warning.

Like the first warning, therefore, I find that the Company has adequately established that it would have issued the third and final warning to Lewis even absent union activity. Accordingly, the allegation is dismissed.⁵²

5 2. The March 7, 2011 termination

As indicated above, on March 7, 2011, approximately a month after receiving his final written warning, Lewis was terminated for again engaging in insubordinate conduct. More specifically, the termination notice stated that,

10

[o]n Friday, March 4th, 2011, Lewis returned to the facility with a load rejected by a customer. Upon his return, the General Manager of the facility asked some specific questions as to why the load was rejected and if Lewis had called to notify anyone at the facility that the load had been rejected. Lewis refused to answer the questions, walked away from the questioning and generally refused to cooperate in any manner with the General Manager's questions about the rejected load. Lewis has been warned previously (2/14/11) that his failure to cooperate would not be tolerated and would lead to further disciplinary actions, up to and including termination. Additionally, when Lewis became frustrated with the questioning, he turned around and approached the General Manager in what could have been considered a threatening manner while continuing to refuse to answer questions. This type of uncooperative behavior will not be tolerated and Lewis' employment with Tricont is terminated. (R. Exh. 59).

15

20

25

The General Counsel, however, contends that Lewis answered General Manager Procak's questions, and that Procak deliberately provoked him into doing something that he could be fired for. The General Counsel alleges that Lewis was actually discharged both because he was the leading union supporter and because he was cooperating and assisting with the pending unfair labor practice charges against the Company, in violation of Section 8(a)(3) and (4) of the Act. For the reasons set forth below, I find that a preponderance of the evidence supports these allegations.

30

35

As indicated in the termination notice, the relevant events occurred on Friday, March 4. Lewis was scheduled to make several deliveries in New York that day. His first stop was early in the morning, before 6 a.m., at Blue Ribbon. However, Blue Ribbon was closed, so he went on to his next stop, which was Cesare. When he arrived at Cesare, however, he encountered two problems. First, Cesare was located on a narrow, two-way street, and his truck and another parked truck were blocking traffic. The situation was so bad that Cesare's neighbors started taking pictures, and the receiver told Lewis that they had probably called the police. Second, two of the three pallets (stacked boxes) of produce for Cesare were behind the pallet that was supposed to have been delivered at Blue Ribbon, and it was leaning against the inside of the truck.⁵³ The receiver was concerned that, if he tried to move or unload the leaning pallet to get

40

⁵² As indicated above, the prior, October 2010 unlawful warning for locking his keys in his truck was not a basis for the final warning. Accordingly, the final warning is not tainted by the prior warning. See generally *Dynamics Corp.*, 296 NLRB 1252, 1254 (1989), *enfd.* 928 F.2d 609 (2d Cir. 1991).

⁵³ For a picture Lewis took of the leaning pallet, see GC Exh. 25.

to Cesare's pallets, it would fall over and cause even more traffic problems. The receiver therefore decided to reject the load altogether.

5 It was now shortly after 7 a.m. Lewis knew that Lead Driver Branyan was usually at work by that time, so he called Eddystone to advise him of the situation. Branyan had not yet arrived, however, and the warehouseman on the third shift (Martina) took the call instead. Martina told Lewis that he had spoken to Branyan on the phone and that he would arrive shortly. Lewis told Martina that Cesare was rejecting the load and to have Branyan call him when he got in. He also asked Martina to tell the salesman (Sass). Lewis then left the scene and began
10 driving back to Blue Ribbon.

Approximately 40 minutes later, Branyan called Lewis back. Lewis told Branyan about the traffic jam and the leaning pallet, and that Cesare had refused to take off the load.

15 Lewis subsequently arrived back at Blue Ribbon, which unloaded the leaning pallet and accepted the produce. Lewis then proceeded to his remaining stops, which he completed, except for his last stop (Joseph Kahan), which was closed when he arrived. He called Eddystone to advise of the situation, and was told by another salesman (Perez) to just bring Kahan's load back. So, having no further deliveries, he headed back to Eddystone, still carrying the three pallets for
20 Cesare, plus the several additional pallets for Kahan.

Lewis eventually arrived back at Eddystone about 4 p.m., and backed his truck up to the dock as usual for the pallets to be unloaded. Procak, who was either on the dock when Lewis arrived or came out shortly thereafter, and had previously been advised about what occurred at
25 Cesare, walked over to look at the returned produce. Seeing that one of the pallets was leaning quite a bit, he decided to take a picture of it (although, as indicated above, it was not the Blue Ribbon pallet that caused all the problems). After briefly stopping to talk to a driver on the dock (Sauler), he therefore went back to his office to get a camera. See Tr. 320-328, 365-374 (Lewis); and Tr. 641-646 (Procak).
30

What followed is recorded on videotape taken by the dock security camera. The videotape (R. Exh. 70) did not record sound, and thus does not reveal what was said. However, both Procak and Lewis separately offered narratives at trial, which in the end (i.e. after a full direct and cross-examination), were largely consistent and corroborated in part by another
35 witness. See Tr. 328-340, 372-385, 689-703 (Lewis); Tr. 650-668 (Procak); and Tr. 390-392 (Lofft).

At about the same time Procak exited, Lewis came onto the dock and removed his load bar and pallet jack from the truck so that the forklift driver could begin unloading. Procak then
40 returned, took a picture of the leaning pallet, and immediately walked back to his office. Although Lewis was standing beside the back of the truck during this time, Procak did not say anything to him as he walked by.

At this point, Transportation Manager Krise also walked onto the dock, and began talking
45 to Sauler, who was still standing at the rear of the dock, watching the forklift unload. Procak then also came back out, joined Krise and Sauler for a moment, and then reentered Lewis' truck to help the forklift driver steady the leaning pallet and prevent it from falling.

Once the leaning pallet was unloaded, Procak walked over and stood beside Lewis, who was still standing at the rear of the truck, leaning on his load bar with one hand and holding his paperwork with the other, waiting for the forklift to finish unloading the rest of the product. Procak asked Lewis what had happened; why Cesare had rejected the product. Lewis responded that the pallets were leaning. Procak said, "The pallets were leaning?" Lewis said "yes," adding that one of the receivers had also told him that the police were coming. Procak replied, "The police were coming?" Lewis then briefly described to Procak what had occurred; about the traffic jam and the leaning pallet and why the receiver refused the load. He also reminded Procak of a conversation they had previously had, after he received two wrong-way tickets, when Procak told him he would have to personally pay for any future tickets, and he had replied that, if that was so, he would bring a load back rather than risk getting one. Lewis told Procak that he left Cesare before he would be issued a ticket.

Procak disagreed with Lewis' description of their prior conversation, denying that he had told Lewis he would have to pay for any tickets, rather than just wrong-way tickets. He again asked Lewis why the load was brought back, and Lewis again explained about the leaning pallet and the traffic jam.

Procak and Lewis went back and forth like this for about 2 minutes, with Procak asking more specific questions about exactly what Cesare's receiver said and what Lewis did, and Lewis answering. Procak also asked Lewis what procedures he had followed, and whether he had called Branyan or the salesperson. Lewis told Procak that he had spoken to Branyan. Procak, however, said he did not believe Lewis had called anyone at the warehouse before leaving Cesare, and continued to ask him for more specifics about what had happened.

Although Procak and Lewis began their conversation standing side by side, they now became more animated, turning to face each other, gesturing with their arms, and shuffling or rocking back and forth on their feet. Procak continued to ask Lewis questions, and Lewis became more and more frustrated, eventually protesting that he had told Procak the story "eight or nine times now."

At this point, Krise, who had been standing back with Sauler, now walked up to join them. He told Lewis several times to just answer Procak's questions.

About this time (approximately 4 minutes after the conversation started), the forklift finished unloading Lewis' truck. Accordingly, believing that Procak was now simply harassing him, Lewis turned away, pulled down the door to the truck, and said "I'm done." Procak replied, "What do you mean you're done?" Lewis repeated that he was "done," turned off the light next to the truck, and began walking away to get his paperwork signed by the forklift driver.

However, Lewis at this point noticed Branyan, who had recently also come out and was standing next to the leaning pallet where the forklift had left it on the dock. Lewis therefore stopped and asked Branyan to confirm to Procak that he had called. Branyan, however, denied that Lewis had called. Shocked at this response, Lewis asked Branyan several times again, reminding him of their phone conversation that morning. Branyan eventually acknowledged to Procak, "Oh yeah, he did call; he talked to Martina."

Believing, or at least hoping, this would be the end the matter, Lewis walked over to the forklift driver (who had taken his papers to review and sign during the conversation with Branyan) to retrieve his signed papers and leave. However, Procak followed and continued to ask questions and insist that Lewis answer them. Krise also still hovered close by.

5

Lewis, however, quickly retrieved his papers, stepped between Procak and Krise, and headed toward the exit, still carrying his load bar loosely down by his side. Nevertheless, Procak and Krise continued following after him. Accordingly, after a few steps, about halfway to the exit, Lewis turned back around and said, “Why are you following me? Stop following me.” Procak replied, “I’m not following you. I just want an answer to my questions,” and continued walking toward Lewis.

10

Lewis again turned to walk away. However, Procak continued to follow and ask him questions. Krise also still followed off to one side. After a step or two, Lewis therefore again turned around and said, “Stop following me. Stop harassing me.” Procak denied that he was harassing Lewis, repeated that he just wanted an answer to his questions, and kept walking toward him.

15

Lewis then again turned away and resumed walking towards the exit. Nevertheless, Procak continued to follow him, asking the same questions. Krise also still followed off to the side.

20

Almost to the exit now, Lewis again turned around, and this time actually walked a step back towards Procak, stopping within a few inches. (Both Procak and Lewis are rather large men.) Lewis held his arms outstretched wide in an open position, with his paperwork in one hand and the load bar vertically in the other. Procak at that point also stopped, put both of his hands behind his back in a defenseless position, and said, “Are you going to hit me?” Lewis (who was well aware of the security camera) replied, “No, I don’t want to hit you, I’m at work. This is supposed to be about produce, why are you talking about do I want to hit you. I’m leaving. I’m off the clock.”

25

30

Lewis then again turned away and walked out the exit. As he was leaving, Procak, who remained standing where he was with his hands behind his back, said, “Lewis, were you going to hit me?” Lewis replied, “My load bar doesn’t deserve it.”⁵⁴

35

The Company discharged Lewis 3 days later, on Monday, March 7, after he had completed his deliveries for that day (Tr. 340). As indicated above, the disciplinary notice cited essentially two reasons for the discharge: (1) because Lewis “walked away” and “refused to answer” or “cooperate in any manner with” General Manager Procak’s specific questions; and

⁵⁴ When narrating the security videotape, Lewis testified that Procak twice asked him whether he wanted to “punch him in the face,” both when they were facing each other, and as he was exiting (Tr. 701). However, I do not credit this testimony. Lewis had not mentioned this in his previous testimony about their conversation before the videotape was shown; rather, he testified that Procak asked if he wanted to “take a swing at him or hit him with my low bar” (Tr. 339; see also Tr. 380–381). Further, his initial testimony is consistent both with Procak’s testimony (Tr. 667), and his admitted response that “his load bar doesn’t deserve it.”

(2) because, when Procak continued to question him, Lewis “turned around and approached [Procak] in what could have been considered a threatening manner.”

5 As with the previous warnings, the General Counsel has made a sufficient initial showing under *Wright Line* to infer that Lewis’ union activities were, in fact, a motivating factor for his discharge. As discussed previously, there is abundant evidence that the Company harbored animus toward union activity and Lewis’ union activity in particular.

10 Moreover, as indicated by the General Counsel, there are substantial additional reasons to believe that the discharge was discriminatorily motivated. For example, the Company’s response to the returned load was highly unusual. While product returns were obviously not desirable, they were a relatively frequent and routine occurrence, which were handled exclusively by Branyan and/or the salesman. Several drivers testified, without contradiction, that Procak had never previously interrogated them regarding returned produce. The same drivers also credibly
15 testified that neither Procak nor any other supervisor had ever taken pictures of returned produce. See Tr. 35 (Folds), 57–58 (Baylor), 100 (DeJesus), 168 (West), 227–228 (Ditzler), 275–276, 298 (Torres), and 342 (Lewis). Cf. *Allstate Power Vac, Inc.*, 357 NLRB No. 33, slip op. at 5 (2011) (citing the employer’s unusual response to the employees’ policy violation, including taking pictures, as evidence of the employer’s unlawful motive).⁵⁵

20

Further, the Company has failed to provide any credible reasons for its unusual response. The Company offers essentially three explanations for Procak’s actions: (1) because it was not clear to him or anyone else why Lewis had not completed the delivery at Cesare; (2) because Cesare had reported that there was a “verbal altercation” between Lewis and the receivers; and
25 (3) because Lewis had failed to call Branyan or the salesperson on their cell phones when he was told by Martina that they had not yet arrived to work. As discussed below, however, none of these explanations has any merit.

30 (1) Procak’s alleged lack of prior knowledge

30

In support of this first explanation, the Company cites Procak’s testimony that Branyan had told him he did not know why Cesare had refused to unload the pallets. However, Branyan admitted that he had spoken to Lewis, and the 7:43 a.m. call is confirmed by AT&T phone records (GC Exh. 26, p. 11). He also admitted that Lewis told him about the leaning pallet, and
35 did not deny that Lewis also told him about the traffic jam. (Tr. 737.) Further, he likewise did not deny that he told Procak what Lewis had told him. Indeed, counsel for the Company never asked Branyan about his conversation with Procak. I draw a negative inference that the reason Branyan was not asked about the conversation is because he was more likely than Procak to acknowledge that he had already told Procak about both the leaning pallet and the traffic jam,
40 thereby raising questions about why Procak interrogated Lewis as he did when Lewis returned from his run. Cf. part I.D, above.

⁵⁵ Procak testified that he “occasionally” took pictures of damaged returns (Tr. 652, 686), and Gulick testified that taking pictures of returns is “common” (Tr. 536–537). However, no documentary or other independent evidence was presented to corroborate their testimony and I discredit it given the overwhelming testimonial evidence to the contrary.

(2) The alleged “verbal altercation” between Lewis and the receivers

In support of this second explanation, the Company cites Procak’s and Sass’ testimony about Sass’ conversation with Cesare’s owner regarding the rejected pallets. Procak testified that, after he talked to Branyan, he asked Sass to call Cesare, consistent with the Company’s standard practice, to find out why the load was rejected. However, Sass testified that he called Cesare after being informed by either Martina or Branyan that it had rejected the load. Further, he testified that Procak subsequently told him to call Cesare back, not about why it had rejected the load, but to get a written statement describing an alleged “verbal altercation” between Lewis and the receiver about restacking the pallet. According to Sass, when he first called Cesare, the owner said that, although he was not there at the time, he had been told that such a “verbal altercation” had occurred. Sass testified that he then relayed what the owner said to both Procak and Branyan. (Tr. 712, 714.) However, again, counsel never asked Branyan to confirm this. Indeed, even Procak testified that Sass told him only that there was a “disagreement” between Lewis and the receiver, and it was not about restacking the pallet, but about “who would unload the product” (Tr. 644). Further, as indicated above, Procak testified that he told Sass to call Cesare only to find out why it rejected the product. And there is no evidence that Procak ever asked Lewis about any “verbal altercation” or “disagreement” at Cesare.

Finally, Lewis denied at the hearing that the receiver ever asked him to unload the product or that they had any argument or dispute. Rather, as soon the receiver saw the leaning pallet blocking Cesare’s pallets, he said “no way.” (Tr. 763.) Although Lewis has his own credibility problems, given the inconsistencies summarized above (and the lack of any non-hearsay evidence that such a “verbal altercation” or disagreement” occurred), I credit his testimony in this regard.

In agreement with the General Counsel, therefore, I find that, like Procak’s professed lack of knowledge, the alleged “verbal altercation” or “disagreement” between Lewis and the receiver about restacking or unloading the product was concocted, or at least grossly exaggerated, to provide an arguable explanation for why Procak interrogated and otherwise acted as he did when Lewis returned from his run.

(3) Lewis’ alleged failure to follow call-in procedures

In support of this last explanation, the Company cites Procak’s testimony that a driver is supposed to call Branyan or the salesperson on their cell phones to report a rejected load if they are not in the office (Tr. 641). However, I discredit this testimony as well. There is no documentary evidence of such a policy with respect to returns.⁵⁶ On the contrary, Branyan testified that the normal procedure with returns is simply “to call somebody at the warehouse, sales or myself and notify them” (Tr. 736). See also Ditzler’s testimony, Tr. 228 (he usually talks to the warehouse about returns if Branyan is not in yet). Further, there is no mention of Lewis’ alleged failure to follow proper call-in procedures in his termination notice. If there really was such a policy, it is inconceivable on this record that the Company would not have mentioned it in the termination notice, especially since it had previously issued Lewis a final warning for a similar policy violation relating to his accident. Finally, as indicated above, it is

⁵⁶ Compare R. Exh. 1; and Tr. 427 (drivers are required to try and reach managers on their cell phones in the event of an accident).

undisputed, and confirmed by AT&T phone records, that Lewis called in and told Martina, the early morning warehouseman, that Cesare had rejected the load. Even assuming arguendo that Procak did not know this before he decided to take a picture of the returned produce and interrogate Lewis, he clearly knew it after Branyan eventually acknowledged that Lewis had called Martina. Nevertheless, as indicated above, Procak continued to follow and interrogate Lewis about the returns.

As indicated by the General Counsel, another reason to believe Lewis' discharge was discriminatorily motivated is the termination notice itself. Clearly, the first cited basis for the termination (because Lewis "walked away" and "refused to answer" or "cooperate in any manner with" General Manager Procak's specific questions) is a gross distortion of the incident. Lewis did, in fact, answer Procak's questions—several times. It was only after Lewis reasonably concluded that Procak was simply harassing him, that he "walked away." See, e.g., *Key Food*, 336 NLRB 111, 114 (2001); *Yenkin-Majestic Paint Co.*, 321 NLRB 387, 396 (1996), enfd. mem. 124 F.3d 202 (6th Cir. 1997); *William L. Meyers, Inc.*, 266 NLRB 342, 346 (1983), enfd. mem. 735 F.2d 1371 (9th Cir. 1984); and *Ramada Inn*, 201 NLRB 431, 434-435 (1973) (citing employer's false or exaggerated reasons for disciplining employees as evidence of unlawful motive).

The second cited basis for the discharge is arguably more accurate, as it does not assert that Lewis actually threatened Procak—which he did not—but only that Lewis "turned around and approached [Procak] in *what could have been considered* a threatening manner" (emphasis added).⁵⁷ However, given that Lewis' actions were provoked by Procak's own aberrant conduct, they cannot provide a valid basis for the discharge. See *Key Food*, 336 NLRB at 113, and cases cited there ("The Board and the courts have long recognized that an employer cannot provoke an employee to the point where he commits an indiscretion and then rely on that conduct to terminate his employment"). See also *Monroe Mfg. Co.*, 323 NLRB 24, 60-61 (1997) (finding employee's suspension unlawful where supervisor had goaded and provoked the employee into remonstrating with her in order to provide grounds for harsher discipline).

This leaves only the question of whether the Company has established a sufficient defense for terminating Lewis. However, given that the Company's cited bases for his termination were either false or provoked, the Company clearly has not, and cannot, do so. See, in addition to the cases cited above, *Faurecia Exhaust Systems, Inc.*, 355 NLRB No. 124 (2010); and *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). Accordingly, I find that Lewis' discharge violated Section 8(a)(3) of the Act as alleged.

Applying the same analytical framework,⁵⁸ I also find that Lewis' discharge violated Section 8(a)(4) of the Act, i.e. that the General Counsel has established that Lewis was also discharged in retaliation for cooperating and assisting in the pending unfair labor practice charges against the Company. Although there is no direct evidence of this, there is substantial indirect evidence given the circumstances discussed above and the timing of the discharge 3 weeks after

⁵⁷ As indicated above, although Lewis stepped forward to within inches of Procak, he did so with his arms stretched out wide in an open, rather than a threatening position. Further, there is no contention that Lewis actually said anything that was, or could be considered, a threat.

⁵⁸ The Board analyzes 8(a)(4) allegations under the same *Wright Line* framework for 8(a)(3) allegations. See, e.g., *Newcor, Inc.*, 351 NLRB 1034 fn. 4 (2007).

the unfair labor practice charge was filed challenging Lewis' prior warnings (GC Exh. 1(d)), and the very day that counsel for the General Counsel informed the Company's attorney that Lewis would be serving as her designated representative at the trial before Judge Biblowitz (Tr. 9). See, e.g., *NLRB v. Senftner Volkswagen Corp.*, 681 F.2d 557, 560 (8th Cir. 1982), enfg. 257 NLRB 178 (1981) (citing timing of employer's actions as strong evidence of unlawful motive under Section 8(a)(4) of the Act). Cf. *Ogihara America Corp.*, 347 NLRB 110, 113-114 (2006) (agreeing that timing may sometimes suggest an unlawful motive, but finding that timing was insufficient under the circumstances there to support the alleged 8(a)(4) violation), enfd. sub nom. *Auto Workers v. NLRB*, 514 F.3d 574 (6th Cir. 2008).

D. Ditzler.

As indicated above, Ditzler was first discharged by the Company in January 2011, and was subsequently reinstated along with the two other discharged drivers (Torres and Cajina) in late June pursuant to Judge Biblowitz' order. The complaint now alleges three additional violations; that the Company unlawfully: (1) issued Ditzler a written warning for insubordination on January 6, 2011 (the same day he was first discharged for falsifying his DOT logs);⁵⁹ (2) assigned him demeaning yard-cleanup work on June 23, 2011, the day after he returned pursuant to Judge Biblowitz' order; and (3) again discharged him on October 7, 2011, following an accident.⁶⁰

1. The January 6, 2011 written warning

As indicated above, the January 6, 2011 written warning was issued to Ditzler for insubordination. More specifically, the warning stated that:

[o]n January 4, 2011, Ditzler was reported by port personnel in Gloucester displaying unprofessional conduct and inappropriate behavior. Ditzler was instructed to wait by port personnel for a few minutes so they could load one more box on his truck that was an important transfer to the Jessup DC. Ditzler, as stated by port personnel, threw a fit and stormed out of the warehouse when requested to wait for the one case to be loaded. Ditzler has a pattern of this behavior. (GC Exh. 5(ww)/R. Exh. 49.)⁶¹

The General Counsel, however, alleges that the Company issued the warning to Ditzler for discriminatory reasons in violation of Section 8(a)(3) of the Act. Although there is no record evidence that Ditzler supported the Union prior to receiving the warning, the General Counsel alleges that the Company issued the warning as part of its plan to "clean house" after the election.

⁵⁹ See par. 10(c) of the October 27, 2011 consolidated complaint. Given that the consolidated complaint expressly includes this allegation, there is no need to pass on the General Counsel's posthearing request (Br. 2 fn 3.) to amend the consolidated complaint to add the allegation.

⁶⁰ The December 28, 2011 consolidated complaint also alleges that the Company unlawfully issued Ditzler another written warning on October 7, 2011 (the same day he was again discharged). However, the General Counsel has effectively withdrawn that allegation. See GC Br. at 2 fn. 3.

⁶¹ This last sentence apparently refers to a previous, final written warning Ditzler received for insubordination in March 2010 (GC Exh. 5(vv)). See also Tr. 501-503 (Gulick).

For the reasons set forth below, I find that a preponderance of the evidence supports the General Counsel's allegations.

As discussed above, under *Wright Line*, the General Counsel normally must make an initial showing both that the disciplined employee supported the union and that the employer knew this. However, there are certain well-recognized exceptions. Thus, the Board and courts have held that the General Counsel may also satisfy the initial *Wright Line* burden by presenting sufficient circumstantial evidence to infer that the employer believed that the employee supported the union, and/or that the discipline was part of the employer's plan to retaliate against the workforce generally because of the union campaign. Such evidence may include the employer's unlawful statements and other unfair labor practices during and after the campaign, the timing of the discipline soon after the union campaign or election, and the employer's unsupported and/or shifting reasons for the discipline. See, e.g., *Kajima Engineering & Construction*, 331 NLRB 1604 (2000); and *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162 (D.C. Cir. 1993), cert. denied 114 S.Ct. 1368 (1994).

I find that there is sufficient circumstantial evidence to support such an inference here. As indicated by the General Counsel, Procak specifically threatened during the union campaign that he would "clean house" after the election. He and other managers also continued to demonstrate the Company's union animus after the election by unlawfully disciplining and discharging the union steward (Lewis), and restricting the activities of his successor (West) and another open union supporter (Torres). Further, Ditzler testified, without contradiction, that Branyan warned him 2 days earlier that Procak was going to "try to do something like this," and that Procak subsequently refused his offer to provide the name and number of a witness at the port who would refute the allegations in the disciplinary notice (Tr. 214). Finally, the Company made no real attempt to support those allegations at the hearing (either that he "threw a fit and stormed out of the warehouse" or that he refused to wait for a case to be loaded). Rather, it offered an entirely different reason for the discipline: that Ditzler had left the port without a bill of lading (Tr. 499-500 (Gulick); 618-626 (Standen)).

For essentially the same reasons, I also find that the Company has failed to satisfy its burden of demonstrating that the warning would have been issued even absent union activity. As with Lewis' termination notice, given that the cited reason for Ditzler's warning is unsupported, the Company clearly cannot meet that burden. See also *Kajima Engineering*, 331 NLRB at 1605; *Davis Supermarkets*, 2 F.3d at 1170; and *Kenrich Petrochemicals, Inc., v. NLRB*, 893 F.2d 1468, 1480 (3d Cir.), vacated in part on other grounds 907 F.2d 400 (en banc), cert. denied 111 S. Ct. 509 (1990). Accordingly, I find that the January 6, 2011 warning violated Section 8(a)(3) of the Act as alleged.

2. The June 23, 2011 work assignment

As indicated above, the complaint also alleges that the Company unlawfully assigned Ditzler demeaning yard-cleanup work the day after he returned on June 22, pursuant to Judge Biblowitz' reinstatement order. The complaint alleges that the Company did so both for discriminatory reasons in violation of Section 8(a)(3), and also in retaliation for giving testimony and cooperating in the unfair labor practice proceeding, in violation of Section 8(a)(4) of the Act. However, I find that these allegations are not supported by a preponderance of the evidence.

First, as previously discussed in dismissing the related Section 8(a)(1) violation involving Ditzler (part I.C, above), Branyan temporarily assigned Ditzler light duty work when he first returned only because the Company had not yet received the results of his DOT drug test. Second, Branyan initially gave Ditzler some office paperwork to do, and there is no contention that this was an unlawful work assignment. Third, Branyan did not assign the subject cleanup work to Ditzler until after he had completed this paperwork, around 10:30 a.m. the next day. Fourth, Branyan simply told Ditzler to take a broom and dustpan and sweep up any nails or other debris around the dock doors, which Ditzler did without protest until lunchtime. Fifth, although Procak subsequently came out and took the broom and dustpan away, and told him to use his hands instead, Procak provided a credible explanation for this. Specifically, Procak testified that, when he looked out in the yard, Ditzler appeared to be just sweeping the same spot over and over. He therefore went out and gave Ditzler a large 30-gallon bag and told him to just “go around and pick up the big stuff.” See Tr. 217–219 (Ditzler); 677–679 (Procak); and 741–742 (Branyan).⁶² Finally, this is something that Procak himself does on a regular basis (Tr. 679–680; R. Exh. 73, pp. 590, 641).

In sum, a preponderance of the evidence fails to establish that the yard-cleanup assignment had anything to do with either union activity or the unfair labor practice charges. Accordingly, the allegation is dismissed.

3. The October 7, 2011 discharge

As indicated above, Ditzler was eventually terminated a second time on October 7, 2011, following an accident on October 5 (striking another truck while backing into a dock). Although there is no termination notice in evidence, Ditzler testified that Gulick informed him by conference call that he was being terminated because he had had a previous accident on July 18 (sideswiping a parked car), which gave him two preventable accidents within a 2-month period (Tr. 225). This is confirmed by a termination summary dated the same day, which states that the reason for the termination was “two preventable accident[s] upon returning to work” (R. Exh. 37). It is also consistent with the accident log, which states that Ditzler was being terminated “due to accident frequency” (R. Exh. 2, p. 4). As with Baylor and Folds, however, the General Counsel alleges that Ditzler was actually terminated for discriminatory reasons in violation of Section 8(a)(3) of the Act.⁶³

Given Ditzler’s previous unlawful January 6 warning discussed above, I find that the General Counsel has made a sufficient initial showing that union activity was likewise a motivating factor in his discharge. However, for the reasons set forth below, as with Baylor and Folds, I find that the Company has adequately established that it would have discharged Ditzler anyway.

First, the Company has adequately established that Ditzler was, in fact, involved in the two cited accidents. Although Ditzler denies that the July 18 accident occurred, the insurance

⁶² Although there is no dispute that Procak gave Ditzler the 30-gallon bag, there is conflicting testimony about whether Procak also gave Ditzler gloves. See Tr. 234 (Ditzler) and 679 (Procak). However, it is unnecessary to resolve this conflict, as I would reach the same conclusion regardless.

⁶³ The complaint does not allege that the termination violated Section 8(a)(4) of the Act.

carrier's August 5 report of the accident specifically concluded—based on a picture of Ditzler's truck taken by the owner of the sideswiped vehicle, and the consistent damages to Ditzler's truck—that Ditzler was “at fault for the collision” (R. Exh. 44).⁶⁴ Further, there is no allegation that the final written warning the Company subsequently issued to Ditzler on August 17, which
 5 cited him for both the accident and failing to report it (R. Exh. 43), violated the Act. As for the October 5 accident, it is also fully documented, and, although Ditzler initially denied it as well, he eventually admitted it. See R. Exhs. 38–41; Tr. 222 (Ditzler), and 491 (Gulick).

Second, there is no dispute that Ditzler also had a previous preventable accident in
 10 January 2009. Indeed, it was not just any accident, it was a so-called “DOT reportable” accident, in which Ditzler rear-ended a car in inclement weather, causing a chain reaction and resulting in extensive damage and multiple personal injuries and lawsuits against the Company. See R. Exh. 45 (January 13, 2009 final written warning); R. Exh. 66 (May 2011 civil action summons and complaint); Tr. 226 (Ditzler); and Tr. 493–494 (Gulick). Although this accident was not
 15 specifically mentioned either in the termination summary or by Gulick during the conference call, it is listed in the accident log (R. Exh. 2, p. 10), which, as previously discussed, is reviewed by Gulick in determining the appropriate discipline (Tr. 588). Further, Gulick credibly testified that he did, in fact, consider the January 2009 accident in terminating Ditzler (Tr. 488–497). Indeed, given the seriousness of the accident, which occurred within the countable 36-month
 20 period and was one of only three “DOT reportable” accidents involving the Eddystone facility in the previous 3 years, it is inconceivable that Gulick would not have considered it.⁶⁵

Third, the Company presented several examples where other drivers had been terminated with similar records. See R. Exhs. 21–22 (Eddystone driver Jacques terminated in November
 25 2008 after three accidents in 16 months, including one DOT reportable accident); R. Exh. 47–48 (Columbus driver Wood terminated in November 2009 following three accidents in 6 months, including one DOT reportable accident); and R. Exh. 46 (Portland driver Bleth terminated in April 2011 after three accidents in 6 months, including one DOT reportable accident). As noted by the General Counsel, in all three of these examples the overall time period was shorter and the
 30 third and last accident was DOT reportable rather than the first. However, while such distinctions are certainly relevant (compare, for example, the Company's explanation for discharging Folds but not Cole), they are insufficient to defeat the Company's defense here. As indicated above, Ditzler not only had a particularly severe DOT reportable accident, but he had two more preventable accidents within 2 1/2 months of each other. Further, there is no evidence
 35 that any employees with similar histories have not been discharged. See generally *Merillat Industries*, 307 NLRB 1301, 1303 (1992); and *Host Services*, 263 NLRB 672 (1982), enfd. mem. 720 F.2d 663 (3d Cir. 1983).⁶⁶

⁶⁴ See also Tr. 607–615 (Sentry Insurance investigator Nyhart). I reject the General Counsel's contention that the Company's July 27, 2011 email to Sentry Insurance requesting “anything that would prove that our trailer R06026 caused the damage to the claimant's car” (GC Exh. 33) taints the report or otherwise independently evidences an unlawful motive. As the General Counsel acknowledges, “Who asks their insurance company to find them liable for damages?” (Br. 132.) It is more likely that the request simply reflected the Company's desire to finally resolve whether the Company was liable to the “claimant” for damages.

⁶⁵ I therefore reject the General Counsel's contention that the Company has offered shifting defenses for the discharge.

⁶⁶ For the same reasons discussed previously, I also reject the General Counsel's argument

Accordingly, this allegation is dismissed as well.⁶⁷

III. Alleged 8(a)(5) unilateral changes

Finally, the complaint also alleges three 8(a)(5) violations between August 2010 and January 2011.

A. “No idling” policy

The first 8(a)(5) allegation is that the Company instituted a stricter “no idling” policy on August 8, 2010, immediately after the election, without prior notice or bargaining with the Union. In support of this allegation, the General Counsel cites the testimony of four of the 11 driver-witnesses (Baylor, Torres, West, and Lewis). All four testified that the Company tolerated drivers idling their trucks for extended periods prior to the election. In addition, two of the drivers (Baylor and Lewis) testified that Branyan or Procak reminded and/or warned them about the anti-idling policy on one or two occasions afterwards. And two (West and Lewis) testified that Krise actually required them to sign a document regarding the anti-idling policy. See Tr. 46–47 (Baylor), 124–126 (West), 272 (Torres), and 304–305 (Lewis). See also GC Exh. 5(xx) (September 2010 written verbal warning issued to Baylor in part for idling his truck for 9 minutes).⁶⁸ The subject document, entitled “Employee Responsibilities Regarding the Anti-idling Laws in New Jersey and Pennsylvania,” required them to acknowledge and agree to comply with the anti-idling laws adopted by those states (which were summarized in the document) during the remainder of their employment with the Company (R. Exh. 60).

I find that the General Counsel has failed to prove this allegation by a preponderance of the evidence. As indicated by the subject document itself, the Company’s truck idling policy is mandated by state law.⁶⁹ Further, the Company presented documentary evidence showing that it had reminded drivers of the anti-idling policy, as well as required them to sign the same document, before the union campaign and election. See R. Exh. 65 (March 2008 written warning to driver Pflugh); and R. Exh. 61 (identical document signed by numerous drivers, including Baylor and Torres, in March 2009). Finally, the Company only required drivers who were not employed at that time (including West and Lewis, who were not hired until February and March 2010, respectively) to sign the document in August 2010. See R. Exh. 60 and Tr. 542–545 (Gulick). Accordingly, the allegation is dismissed.

that the two examples from other company facilities should not be considered or given significant weight.

⁶⁷ There is no contention or evidence that Ditzler’s October 2011 termination was based even in part on the prior, January 2011 unlawful warning for insubordination. Thus, the termination is not tainted by that warning. See generally *Dynamics Corp.*, 296 NLRB at 1254.

⁶⁸ As previously noted (fn. 20), there is no allegation that Baylor’s warning for excessive truck idling was discriminatory in violation of Section 8(a)(3) of the Act.

⁶⁹ The state laws are apparently an outgrowth of the Clean Air Act. See *U.S. v. Paul Revere Transportation, LLC*, 608 F.Supp.2d 175 (D. Mass. 2009). See also Tr. 396 (Nugent).

B. *Holiday vacation policy*

5 The second 8(a)(5) allegation is that the Company unilaterally changed its vacation policy in December 2010 by "blacking out" certain dates before and after holidays and requiring that the drivers submit requests for time off on those dates at least 2 weeks in advance. In support of this allegation, the General Counsel cites the testimony of 2 of the 11 driver-witnesses (West and Torres) that no such practice or policy existed before the election, but that the Company posted a notice setting forth such a policy several months afterwards, in December 2010. See Tr. 150 (West), and 272-273 (Torres). The notice listed various dates between April and December 2011 that would be "blacked out" due to the high volume expected, and stated that no time-off requests would be granted on those dates without 2-weeks advance notice and general manager approval (GC Exh. 20).

15 Again, I find that the General Counsel has failed to prove this allegation by a preponderance of the evidence. There is no dispute that the Company posted the subject notice. However, the Company presented documentary evidence that General Manager Procak had sent out an email in December 2009 blacking out similar dates for 2010. See R. Exh. 75. And while Procak was uncertain whether the blackout dates were also posted for employees without company email addresses, he credibly testified that they applied to all employees, including drivers. He further testified, consistent with both the 2009 email and 2010 notice, that, even if a date was "blacked out," the Company would grant a driver's vacation request for that date if the request was received soon enough and there were sufficient other drivers to handle the volume. (Tr. 681-683). Thus, it is quite possible that neither West (who as indicated above was not hired until February 2010) nor Torres would have ever had reason to become aware that dates had been blacked out in 2010. Accordingly, the allegation is dismissed.

C. *Access to copy machine*

30 The last 8(a)(5) allegation is that, about January 2011, the Company unilaterally began denying the drivers access to the copy machine in Branyan's office. Unlike the previous two allegations, there is no dispute that this alleged change did, in fact, occur, i.e. that the Company began restricting access to Branyan's office (where the subject copy machine is located) in early February 2011. Procak admitted that he did so because Branyan and others had told him that drivers were rummaging around Branyan's desk (Tr. 674). And Branyan confirmed this (Tr. 35 738).

40 Nevertheless, I find that this allegation also fails. It is well established that an employer may not make material and substantial unilateral changes in past practices involving mandatory subjects of bargaining—and this may include a past practice of permitting employees access to a copy machine. See *Opportunity Homes, Inc.*, 315 NLRB 1210 (1994), 101 F.3d 1515 (6th Cir. 1996). However, in this particular instance, the General Counsel has failed to prove that restricting the drivers' access to the copy machine in Branyan's office was a substantial or significant change. There is no evidence whether or how any driver's terms and conditions of employment were actually impacted by the change. Indeed, Procak testified, without contradiction, that there is another copy machine in the front office, and that, if that office is 45 locked, a driver could ask one of the warehouse workers to open it (Tr. 676). Further, West (who as indicated above is the current shop steward), acknowledged that, since about June 2011, the Company has again permitted drivers access to Branyan's office (Tr. 147-148). Accordingly,

this last allegation is dismissed as well. See generally *Crittenton Hospital*, 342 NLRB 686 (2004).

CONCLUSIONS OF LAW

5

1. By telling shop steward West and prounion driver Torres in May and July 2011, respectively, not to talk to other employees, to complete their post-trip work within 30 minutes, and/or to immediately leave the property thereafter, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

10

2. By issuing written disciplinary warnings to drivers Lewis and Ditzler on October 8, 2010 and January 6, 2011, respectively, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

15

3. By discharging Lewis on March 7, 2011, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3), (4), and (1) and Section 2(6) and (7) of the Act.

20

4. The Company has not otherwise violated Section 8(a)(1), (3), (4), and (5) of the Act as alleged in the consolidated complaints.

REMEDY

25

The appropriate remedy for the foregoing unlawful conduct is an order requiring the Company to cease and desist and to take certain affirmative action. Specifically, the Company will be required to rescind the unlawful written warning issued to Ditzler and the unlawful written warning and termination notice issued to Lewis, remove any reference to these disciplinary actions from its files, and advise Lewis and Ditzler that this has been done and that the disciplinary actions will not be used against them in any way.⁷⁰ In addition, the Company will be required to offer reinstatement to Lewis and to make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest compounded daily as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). Finally, the Company will be required to post a notice to employees in accordance with *J. Picini Flooring*, 356 NLRB No. 9 (2010).⁷¹

30

35

⁷⁰ As discussed above, I have found that Ditzler's employment with the Company was lawfully terminated for other reasons approximately 10 months after he was given the unlawful warning. Nevertheless, as evidenced by several of the exhibits introduced in this case, the Company maintains disciplinary records regarding former as well as current employees, which may eventually become relevant in unfair labor practice or grievance/arbitration proceedings, or for some other reason. Accordingly, the standard expungement remedy remains appropriate.

⁷¹ The consolidated complaints also request certain additional remedies pursuant to GC Memorandum 11-08 (March 11, 2011); specifically, that the Company be required to: (1) reimburse unlawfully discharged employees for any excess in federal and state income taxes they

Accordingly, on the above findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷²

5

ORDER

The Respondent, Tricont Trucking Company, Eddystone, Pennsylvania, its officers, agents, successors, and assigns, shall

10

1. Cease and desist from

a. Telling the union shop steward or other employees not to talk to their fellow employees, to complete their post-trip work within 30 minutes, and to immediately leave the property thereafter.

15

b. Disciplining, discharging, or otherwise discriminating against employees because of their support for the Union, to discourage employees from supporting the Union, or because they cooperated with or assisted in unfair labor practice charges filed against the Company.

20

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

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

25

a. Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful January 6, 2011 written warning issued to Ditzler and the unlawful October 8, 2010 written warning and March 7, 2011 termination notice issued to Lewis, and within 3 days thereafter notify Lewis and Ditzler in writing that this has been done and that these disciplinary actions will not be used against them in any way.

30

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

35

c. Make Lewis whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

may owe from receiving a lump-sum backpay award; and (2) submit appropriate documentation to the Social Security Administration so that their backpay will be allocated to the appropriate periods. However, neither the General Counsel nor the Company has addressed the propriety of these remedies in their posthearing briefs. Further, the Board has recently advised that, because such remedies have not been issued in the past, they should not be granted in individual cases in the absence of a full briefing. See, e.g., *Met Hotel Detroit/Troy*, 358 NLRB No. 30, slip op. at 6 fn. 4 (2012); and *Consumer Products Services, LLC*, 357 NLRB No. 87, slip op. at 2 fn. 3 (2011).

⁷² 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. 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 facility in Eddystone, Pennsylvania copies of the attached notice marked “Appendix.”⁷³ Copies of the notice, on forms provided by the Regional Director for Region 4, 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 October 8, 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. June 1, 2012

Jeffrey D. Wedekind
Administrative Law Judge

⁷³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT order you not to talk to fellow employees, to complete your post-trip work within 30 minutes, and to immediately leave the property thereafter.

WE WILL NOT discipline, discharge, or otherwise discriminate against you because of your support for Teamsters Local Union No. 107, to discourage you from supporting the Union, or because you cooperated with or assisted in unfair labor practice charges filed against us.

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

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful January 6, 2011 written warning we issued to William Ditzler and the unlawful October 8, 2010 written warning and March 7, 2011 termination notice we issued to Barry Lewis, and within 3 days thereafter notify them in writing that this has been done and that these disciplinary actions will not be used against them in any way.

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

WE WILL make Lewis whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the Board's decision.

TRICONT TRUCKING COMPANY.

(Employer)

Dated _____ By _____
(Representative) (Title)

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

615 Chestnut Street, 7th Floor, Philadelphia, PA 19106-4404
(215) 597-7601, Hours: 8:30 a.m. to 5 p.m.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215) 597-5354.