Mid-West Telephone Service, Inc. *and* Wilfredo Placeres, Dustin Porter, Ben Fannin, *and* Michael Williams. Cases 08–CA–038901, 08–CA–039168, 08–CA–039297, 08–CA–039398, and 08–CA–039334

September 21, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On December 28, 2011, Administrative Law Judge Mark Carissimi issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Mid-West Telephone Service, Inc., Girard, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. September 21, 2012

Brian E. Hayes, Member

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) by threatening to discharge employee Dustin Porter and Sec. 8(a)(4) by discharging employee Ben Fannin. In addition, no exceptions were filed to the judge's dismissal of the allegations that the Respondent violated the Act by (1) discharging employee Wilfredo Placeres; (2) discharging employee Dustin Porter; (3) requiring Fannin to use a personal vehicle to drive to jobsites; (4) threatening, on January 28, 2011, employees with unspecified adverse action; and (5) engaging in surveillance of an employee meeting on January 28, 2011.

[2] The Respondent's exceptions to the judge's findings that the Respondent violated Sec. 8(a)(3) by discharging Fannin and that it violated Sec. 8(a)(4) by refusing to assign work to employee Mike Williams are limited to contesting the judge's reliance on the small plant doctrine to infer the Respondent's knowledge of the discriminatees' protected activity. We find no need to rely on the small plant doctrine under the facts of this case. The record shows that Foreman Greg Hillier regularly reported to the Respondent's Vice President George Vaughn Jr. about employee actions, including such protected activities as a January 28, 2011 meeting to discuss union representation options. Further, employee Joe Caicco told Hillier that Williams had given an affidavit in support of an unfair labor practice charge and had been subpoenaed to testify. On January 27, 2011, the last day on which the Respondent assigned work to Williams, Hillier asked him if he had been subpoenaed. Similarly, Fannin told Hillier on March 9 that an IBEW representative wanted to speak with the Respondent's employees. Hillier was already aware that Fannin had volunteered at the January 28 employee meeting to explore outside union representation options, which the Respondent opposed. On March 10, Fannin was discharged. Under these circumstances—including the timing of adverse actions proximate to employee conversations with Hillier and the pretextual reasons given for each action—we find it reasonable to infer that Hillier reported Williams' and Fannin's protected activities to Vaughn Jr.

We affirm the judge's finding that Vaughn Jr. violated Sec. 8(a)(1) by soliciting employee support for an in-house union at the January 28 employee meeting. After notifying employees that the Respondent's 8(f) collective-bargaining relationship with CWA Local 4300 had ceased, Vaughn Jr. said that he did not like unions, the IBEW in particular. He then told the employees that they would be better off forming their own union and offered to give them a list of attorneys who could help them do so. In response to concerns that employees could no longer use their CWA T-shirts, he offered to print T-shirts at his own expense if employees designed a logo for an in-house union. He further mentioned that he had discussed the possibility of his employees joining a different firm's in-house union with that union's president. Contrary to our dissenting colleague, these statements were not just lawful expressions of opinion about union representation. Vaughn Jr. indicated that he had taken active steps to lay the groundwork for an in-house union that he wanted the employees to embrace. We accordingly agree with the judge that, taken as a whole, Vaughn Jr.'s statements "strongly suggest" that the Respondent would look favorably only on the choice of an in-house union, and that the statements would therefore interfere with employees' Sec. 7 right to freely choose their own representative.

Member Hayes would dismiss the 8(a)(1) solicitation of support allegation. In his view, Vaughn Jr. did nothing more than lawfully express his general dislike for unions and his opinion that employees might be better off forming their own. He did not threaten adverse consequences if they pursued the outside union representation alternative, and he did not offer any substantive benefits to them if they chose to form their own union. The offer of a list of attorneys who could help them was informational, falling far short of impermissible support.

Melanie Bordelois, for the General Counsel.
Hans Nilges and *Shannon Draher (Morrow & Meyer, LLC),* of North Canton, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Cleveland, Ohio, on October 11–13, 2011. Charging Party Wilfredo Placeres filed the charge in Case 8–CA–38901 on April 20, 2010. Charging Party Dustin Porter filed the charge in Case 8–CA–39168 on September 28, 2010. The Acting General Counsel issued an order consolidating cases, amended consolidated complaint, and notice of hearing in those cases on November 23, 2010. Thereafter, Charging Party Ben Fannin filed the charge in Case 8–CA–39297 on January 5, 2011, and an amended charge was filed on June 21, 2011. Charging Party Michael Williams filed the charge in Case 8–CA–39334 on February 9, 2011. Charging Party Fannin filed the charge in Case 8–CA–39388 on March 18, 2011. On June 24, 2011, the Acting General Counsel issued an order consolidating cases, second amended consolidated complaint, and notice of hearing (the complaint) in these cases.

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of National Labor Relations Act (the Act) by discharging Placeres on April 13, 2010, and Porter on April 29, 2010. The complaint further alleges that the Respondent violated Section 8(a)(4), (3), and (1) of the Act by requiring Fannin to use his own vehicle to drive to and from jobsites from January 17, 2011; discharging Fannin on March 10, 2011, and by refusing to assign work to Williams since January 28, 2011. The complaint also alleges that the Respondent violated Section 8(a)(1) of the Act by Project Coordinator Mark Davis threatening an employee with termination if he talked about the Union on April 1, 2010, and by engaging in surveillance of employees union activities on January 28, 2011. Finally, the complaint alleges that the Respondent violated Section 8(a)(1) of the Act by Vice President George Vaughn Junior, on January 28, 2011, by threatening an employee with an unspecified adverse action because of his union activity and soliciting employees to form an in-house union.

The Respondent's answer denied the material allegations in a complaint. On the entire record,[1] including my observation of the demeanor of the witnesses,[2] and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business located in Girard, Ohio, is engaged in the installation of communication wiring. Annually in conducting its business operations, the Respondent performs services valued in excess of $50,000 in States other than the State of Ohio. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

The Respondent is a communications wiring contractor and is involved in the installation of telephone services, computer network services, and security systems. It also performs service work on existing systems. The Respondent has been in business since 1992, and has an office and facility located in Girard, Ohio. The Respondent's president is Mary Jo Vaughn. Her husband, George Vaughn Junior, is the vice president. Shawn Vaughn is George Vaughn Junior's brother and the Respondent's project superintendent. Brian Singleton is a registered communication distribution designer and Mark Davis is the Respondent's project coordinator. All of the above individuals are admitted supervisors and agents of the Respondent. George Vaughn Junior's father, George Vaughn Senior, is employed as a nonsupervisory employee.

The Respondent employs wire pullers, who are at times referred to as cable installers, whose primary job is to install cable wires and perform the tasks associated with the installation or service of a communications system. The Respondent considers employees with sufficient skill to "troubleshoot" systems to be technicians. Employees with sufficient skill levels are designated as foremen on particular jobs. Subject to the direction of one of the Respondent's supervisors, a foreman gives direction to the other employees on the jobsite regarding specific assignments and the order in which work is to be completed. Foremen spend a great majority of their time actually performing installation or service work. There is no dispute regarding the fact that foremen are statutory employees.

The number of employees that Respondent has employed has varied over the years. In 2008, the Respondent employed 21 nonsupervisory employees while at the time of the hearing it employed 9. The Respondent generally employs approximately 12 nonsupervisory employees.

The Respondent has some history of collective bargaining. In approximately 2003, the Respondent signed a 2-year agreement with the Communications Workers of America, Local 4300 (the Union or CWA, Local 4300). This agreement was entered into pursuant to Section 8(f) of the Act as there was no election held or any other indication of majority support for the

[1] The transcript contains some errors which are inconsequential for the most part. However, I find it necessary to correct one error as follows:

Page	Line	change	to
453	10	race	trade

[2] In making my findings regarding the credibility of witnesses, I considered their demeanor, the content of the testimony, and the inherent probabilities based on the record as a whole. In certain instances, I credited some, but not all, of what the witness said. I note, in this regard, that "[N]othing is more common in all kinds of judicial decisions than to believe some and not all" of the witness' testimony. *Jerry Ryce Builders,* 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.,* 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939–940 (2007).

Union.[3] George Vaughn Junior (Vaughn Junior) testified that he approached the Union and asked about entering into a collective-bargaining agreement. He did so because having a collective-bargaining agreement with a union would permit the Respondent to bid on "union jobs" on which all the contractors had collective-bargaining agreements.

After the expiration of the first collective-bargaining agreement with the Union, the Respondent entered into a 2-year agreement with another union, the Congress of Independent Unions. After the expiration of that agreement, the Respondent entered into a series of 8(f) agreements with the Communication Workers of America, Local 4300. The last agreement between the Respondent and the Union was effective from January 25, 2009, to January 24, 2011 (GC Exh. 2). Article 2 of the agreement describes the unit as:

> All employees of the Company, but excluding professional employees and supervisors as defined in the National Labor Relations Act.

Article 19 of the agreement provides wage rates for two job classifications: cable foreman and wire puller.

On November 22, 2010, the Respondent notified the Union, by letter, that it wished to terminate the agreement (R. Exh.13). The Respondent adhered to the terms of the agreement through its expiration date of January 24, 2011. The Respondent's employees have been unrepresented since the expiration of the agreement.

The Alleged 8(a)(3) and (1) Discharges of Placeres and Porter and the Alleged 8(a)(1) Threat by Mark Davis

Paragraph 11(a) of the complaint alleges that on April 1, 2010, the Respondent's project coordinator, Mark Davis, threatened an employee with termination if the employee talked about the Union.

In support of this allegation, former employee Dustin Porter testified that he began working for the Respondent in January 2010 as a wire puller. Porter was terminated on April 29, 2010, and, as noted above, the Acting General Counsel alleges his termination violated Section 8(a)(3) and (1) of the Act.

According to Porter, he had been working for the Respondent for about a month and was at a jobsite in Warren, Ohio, when, during a break, an employee from another company, who was installing insulation in the building, asked him if he was in a union. Porter replied that he had no idea if there was a union at the Respondent. Travis Davis, who also worked for the Respondent and is the son of Mark Davis, was also present for this conversation.[4] Porter also recalled another one of Respondent's employees was present, but could not recall specifically who it was.

Porter testified that as he was returning to work after the break, Mark Davis, the Respondent's project coordinator, approached him and asked what he was talking about with the employees of the other contractor. Porter replied that they had asked him about the Union. Davis told Porter that he spoke about the Union to anyone again he would be fired. Porter replied that he did not know anything about the Union and returned to work. Porter testified that Michael Williams was standing nearby when Davis spoke to him.

Michael Williams also testified on behalf of the Acting General Counsel regarding this incident. According to Williams, he was present in late winter 2010 at breaktime with Travis Davis, Porter, and some employees who were spraying insulation materials, who worked for an employer from the Cleveland, Ohio area. The insulation employees asked the three Mid-West Telephone employees which union they belonged to. Williams and Porter both indicated that they did not know anything about the Union. Travis Davis replied that they were represented by CWA, Local 4300. As Porter and Williams returned to work, Mark Davis asked Porter what he was doing talking about the Union. Porter said that the employees of the insulation company asked which union they belonged to and Porter replied that he did not know anything about the Union. Williams testified that Davis told Porter that if he brought up the Union one more time, he would fire him.

Mark Davis testified that in February 2010, he was working at the Jefferson school project in Warren, Ohio, when he heard some employees talking about their wages and what union they belonged to. Davis recalled that Williams and Porter were there and that employees Ben Fannin, who is Porter's brother, and Joe Caicco may have also been present. According to Davis, he saw Porter in the hallway talking to an employee of another contractor while both employees were working. After about 2 or 3 minutes, Davis approached Porter and told him that if he was going to talk about the Union he had to do it on a break, at lunchtime, or after work. Davis testified specifically that he did not threaten Porter with termination during this conversation. Davis also claimed that he never told Vaughn Junior anything about the conversation he overheard.

I credit the mutually corroborative testimony of Porter and Williams regarding the conversation between Mark Davis and Porter. Their testimony was detailed and this portion of their testimony reflected certainty about the events. On the other hand, Davis was somewhat uncertain regarding the specific details of the conversation he had with Porter and appeared to be testifying in a manner that he felt would assist the Respondent's defense. In addition, I find the testimony of Porter and Williams to be more plausible. The record establishes that while the Respondent had a contract with the Union, the employees had very little awareness of whether a union represented them and it appears that the Respondent wanted to keep it that way. While the record establishes that prior to beginning work with the Respondent in 1992 with his friend and neighbor, Vaughn Junior, Mark Davis was a member of the United Steelworkers of America and held various leadership positions in his local union, I find that such a remote connection to a union does not support a finding that Davis would not have made such a threat. The record establishes that Mark Davis has great loyalty to the Respondent and its policies and would act in a way he believed would further those policies. Based on the credited testimony, I find that in February 2010, the Respon-

[3] Since the Respondent is engaged primarily in the building and construction industry it is privileged to enter into an agreement under Sec. 8(f). *John Deklewa & Sons*, 282 NLRB 1375, 1380 (1987), enfd. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

[4] Travis Davis did not testify at the hearing.

dent, through Mark Davis, threatened Porter with termination if he spoke about the Union again.

As a threshold issue in determining whether Mark Davis' statement violated Section 8(a)(1) I must determine whether the complaint allegation in paragraph 11(a) is supported by a timely filed charge. The charge filed by Porter in Case 8–CA–39168 on September 28, 2010, alleges that he was terminated in violation of Section 8(a)(3) and (1) and also specifically alleges that the Respondent threatened to discharge employees if they engaged in union activity (GC Exh. 1a). Accordingly, the 10(b) period regarding this charge is March 28, 2010. Since I find that the threat made by Davis occurred in February 2010, the allegation regarding the threat is outside the 10(b) period of Case 8–CA–39168. However, Placeres filed a charge in Case 8–CA–38901 on April 20, 2010, alleging that the Respondent discharged him because of his union activities. This charge also specifically alleges that the Respondent interfered, restrained, and coerced employees in the exercise of their Section 7 rights (GC Exh.1a). Thus, the question is whether the allegation contained in paragraph 11(a) of the complaint regarding the threat made by Davis is closely related to the charge filed by Placeres on April 20, 2010. In *Redd-I , Inc*., 290 NLRB 1115 (1988), the Board set forth the factors to be considered in deciding whether complaint allegations are "closely related" to a timely filed charge. In *SKC Electric, Inc*., 350 NLRB 857, 858 fn. 7 (2007), the Board summarized the three-part test in *Redd-I* as follows:

> First, the Board examines whether the untimely allegations involve the same legal theory as the timely allegations. Second, the Board considers whether the timely and untimely allegations arise from the same factual circumstances or sequence of events. Finally, the Board may consider whether the respondent would raise the same or similar defenses to both allegations.

The legal theories underlying the charge filed by Placeres in Case 8–CA–38901 and paragraph 11(a) of the complaint are very similar. As will be explained in further detail later, the theory regarding the charge filed by Placeres is that the Respondent terminated him because it did not want him to involve the Union in a dispute over his wage rate. With respect to the allegation in paragraph 11(a) of the complaint, the Acting General Counsel alleges that Davis threatened Porter with termination if he again spoke about the Union to chill any attempt to inquire about the Union or contract wage rates. I also note that the charge in Case 8–CA–38901 specifically alleged that the Respondent was interfering, coercing, and restraining its employees in the exercise of Section 7 rights. Thus, the first part of the *Redd-I* test is clearly met here.

With respect to the second factor, the threat made by Davis and the alleged discharge of Placeres are at most 2 months apart. Both paragraph 11(a) of the complaint and the charge in Case 8–CA–38901 involves allegations arising from a sequence of events that began with the threat of termination for talking about the Union and proceeds to an alleged discharge for attempting to involve the Union in a wage dispute I find that the allegations of paragraph 11(a) of the complaint and allegations of the charge in Case 8–CA–38901 involve a progression of events that satisfies the second requirement of the *Redd-I* test.

I also considered the third factor and note that the Respondent has raised similar defenses to the threat made by Davis and the alleged unlawful discharge of Placeres. In this connection, the Respondent contends that it bore no animus against the Union and therefore the claim that its supervisors and agents interfered with the Section 7 rights of its employees is not plausible. It also argues that Porter and Williams are not credible witnesses and that Placeres' testimony regarding the circumstances of his discharge is not reliable because he admitted that he may have misunderstood what Brian Singleton, one of the Respondent's supervisors, said to him at the time of his alleged discharge. Accordingly, there is some commonality regarding the defenses raised to both the threat made by Davis and the allegation that Placeres was discharged in violation of Section 8(a)(3) and (1) of the Act.

Based upon the foregoing, I find that the allegations of paragraph 11(a) of the complaint are closely related to the allegations raised by the charge in Case 8–CA–38901. Accordingly, I find, based on the credibility resolution set forth above, that the Respondent, through Mark Davis, violated Section 8(a)(1) of the Act by threatening an employee with termination if he spoke about the Union again.

Wilfredo Placeres

Paragraph 16 of the complaint alleges that the Respondent terminated Wilfredo Placeres in April 13, 2010, because he sought the assistance of the Union and engaged in concerted activities.

The Respondent first contends that the complaint allegation regarding Placeres should be dismissed based upon a non-Board adjustment it reached with Placeres, which involved reinstating him to his former job. After being reinstated, Placeres submitted a withdrawal of his charge which the Regional Director refused to approve. Counsel for the Acting General Counsel contends that I should not approve Placeres' still outstanding withdrawal request under the circumstances of this case. The Respondent further contends that if I refuse to approve the withdrawal and decide the merits of the complaint allegation regarding Placeres, it did not discharge him for any union or concerted activities he engaged in; rather the Respondent contends that Placeres voluntarily quit his employment because of a misunderstanding regarding the wage rate he was paid on a job.

Facts

Placeres testified that he has been employed by the Respondent on several occasions.[5] Placeres was first employed as a cable installer, or wire puller as it is sometimes referred to, in 2007 and quit his employment in February 2009. Pursuant to a call from Brian Singleton asking him to return to work, Placeres again began to work for the Respondent in January 2010. He testified that although he had become a member of the Union during his first round of employment with the Respondent, he did not become a member again after being rehired in 2010.

[5] Placeres testified through a Spanish interpreter.

When Placeres received a pay stub on April 9, 2010, for the period from March 21, 2010, to April 3, 2010 (GC Exh. 36), he noticed a $60 deduction from his pay. On this pay stub the deduction was listed as an MWTS fee. According to Placeres, on April 13, 2011, he called the Respondent's office from the jobsite in Hubbard, Ohio, and spoke to Jan Kovach, the office manager. Placeres said that there was money taken out of his paycheck and he needed to speak to either the Respondent's president or vice president. (Tr. 95–97.) He also asked Kovach for the telephone number of the Union. (Tr. 97, 115.) Kovach told Placeres that the phone number of the Union was posted in the estimating office (Tr. 115).

According to Placeres, he called the office again later that day and Brian Singleton answered the phone. Placeres testified that he told Singleton that he wanted to speak with the president or the vice president; Singleton replied that they had already given him the reason for the deduction. Singleton also stated that Placeres was not in the Union so that he could not call the Union.[6] Shortly afterwards Shawn Vaughn told Placeres that Singleton was going to come to the jobsite to speak to him later in the day. Placeres, who was upset by this situation, admitted that he told Vaughn that he might punch Singleton in the nose when he got there. (Tr. 110.)

At the end of the workday on April 13, 2010, Singleton arrived at the jobsite that Placeres was working on. Placeres testified that Singleton asked him what happened to him and informed him that he was fired. When Placeres asked Singleton why he was being fired, Singleton said he was "following orders from the owners." On direct examination, however, Placeres admitted that he did not know if he understood correctly what Singleton had said (Tr. 100). On cross-examination, Placeres reiterated that that he may have misunderstood what Singleton said to him because his English is "very-very minimum" and that he was upset when this conversation occurred. (Tr. 114–115.)[7]

Singleton's testimony regarding this matter is directly contradictory to that of Placeres. Singleton testified that on April 13, 2010, Vaughn Junior told him around lunchtime that Placeres was "pretty upset" because he thought he wasn't getting the proper wage rate on the job he was working on. Singleton checked with Kovach to make sure that Placeres was being paid the proper wage at the Hubbard, Ohio jobsite he was working on. Singleton determined that Placeres was being paid the proper rate. Singleton explained that on this particular prevailing wage job there was a supervisory wage and a labor wage and that there was a significant difference between the rates. Singleton indicated that there were three employees on this jobsite at the time that Placeres raised a question about his pay. Originally, Shawn Vaughn was the supervisor on the job and Placeres was the laborer. When the Respondent assigned another employee to the job, this employee had more seniority than Placeres and thus had to be paid the higher rate, because the prevailing wage rate for this jobsite required a one-to-one ratio between supervisors and laborers and if a third employee was assigned to the job they had to be paid the higher rate. The supervisory rate on this job was approximately $23 an hour and the rate that Placeres was being paid was $12.75 an hour. This was higher than Placeres' regular wage rate of $11 an hour.

Since the jobsite that Placeres was working on was close to Singleton's home, he went there on his way home to speak to Placeres. When Singleton began explaining the different wage rates on the job, Placeres said because he did not speak English well "we were taking advantage of him" (Tr. 454). Singleton told Placeres that since he was on a prevailing wage job and he was still paid more than his regular rate and that the Respondent did have a nonprevailing wage job it was working on in East Liverpool, Ohio. Placeres then said the Respondent was going to send him to the East Liverpool and he would not make a prevailing wage rate.[8] Singleton repeated that Placeres was still making more than his regular rate on the job that he was on and added that projects were slowing down and that there had been discussions of the possibility of a layoff. According to Singleton, Placeres then said, "[N]ow you're telling me I'm fired" and got in his car and left. Placeres failed to return to work at the Respondent.

Vaughn Junior testified that on April 13, 2010, Kovach had reported to him that Placeres had complained about his paycheck. Vaughn Junior determined that there had been a $60 reduction in his pay because he had been erroneously overpaid by that amount. Vaughn Junior told Singleton about this and Singleton said he would speak to Placeres about his wage rate on this job.

On April 20, 2010, Placeres filed the charge in Case 8–CA–38901 and the complaint and notice of hearing issued in that case on June 24, 2010. On September 28, 2010, Porter filed the charge in Case 8–CA–39168. On November 23, 2010, an order consolidating cases and an amended consolidated complaint issued in both cases alleging that the discharges of Placeres and Porter violated Section 8(a)(3) and (1) of the Act.

In March 2011, discussions were held between Placeres, Melanie Bordelois, counsel for the Acting General Counsel, and John Ross, an attorney for the Respondent, regarding the resolution of the charge filed by Placeres in Case 8–CA–38901. Pursuant to these discussions, the Respondent reinstated Placeres in March 2011, prior to the negotiations being finalized and the withdrawal of the charge being approved. In this connection, on March 24, 2011, Ross sent Bordelois an email indicating that he understood that as a result of the discussions between the parties, Placeers would be returned to work at the Respondent and that he would withdraw his unfair labor practice charge. Ross indicated that he had not yet received the withdrawal of the charge and asked Bordelois to advise him of the status of the matter. Bordelois replied the same day by email (R. Exh. 19) as follows:

> First, as I explained to you yesterday when we talked on the phone. Mr. Placeres and I have been playing phone tag since

[6] Singleton specifically denied that Placeres had asked him for the Union's phone number.

[7] All of Placeres' discussions with individuals at the Respondent were conducted in English.

[8] On February 19, 2009, Placeres quit his job at the Respondent because he did not want to spend his own money for gas to drive to East Liverpool, Ohio, from his home. (R. Exh. 16.)

> mid-last week. Obviously, I cannot get his withdrawal request if I don't talk to him. Second, you are forgetting that Mr. Placeres' conditions of going back without backpay included (1) that he did not have to sign anything (as Greg Hillier had told Mr. Placeres he would have to do when he called Mr.Placeres to see about his interest in coming back to work) and (2) that MWT would provide Mr. Placeres with a letter stating it would not enforce any non-compete agreements that Mr. Placeres had signed in the past. Again, without talking to Mr. Placeres, I cannot confirm that these conditions have been met. Given the number of times he has left me messages, I would say that (1) it is not his intent to avoid withdrawing the charge and (2) a lack of communication is a function of the fact that he is now working during normal business hours.
>
> Mr. Placeres is, I'm sure, very pleased to have begun work so quickly, however, I would like to point out that it was your client's decision when to put Mr. Placeres back to work, and to do so before it received notice of withdrawal.

On April 8, 2011, Mary Jo Vaughn, the Respondent's president, sent Placeres the following letter (R. Exh. 17):

> We wish to welcome you back to your employment with Mid-West Telephone Service, Inc. Hopefully, any misunderstands [sic] between you and the Company are behind us, and we will have a good relationship going forward.
>
> This is to confirm that, as we agreed, you are not bound by any "non-competition" or a "covenant not to compete" relating to your employment with MWTS.
>
> This understanding and agreement is confidential and only between you and the company and should not be disclosed to any third party.

On July 11 2011, Bordelois sent an email to Ross indicating that Placeres had told her that he was going to submit a withdrawal request (R. Exh. 18). On July 13, 2011, Placeres sent the following letter to the Region (ALJ Exh. 1):

> I, Wilfredo Placeres work for the Midwest Telephone Co. and I am writing in order to inform you that I have decided to decline the amount of money asked by the National Labor Relation Board. Instead, I am going to continue working without any other compensation. Thank you.

On July 26, 2011, Placeres submitted a withdrawal request to the Regional Director in Case 8–CA–38901. The Regional Director refused to approve the withdrawal of the charge. On September 28, 2011, Placeres sent a second letter to the Region indicating the following (ALJ Exh. 2):

> I, Wilfredo Placeres, work for Midwest Telephone Service (MTS). I spoke to Melanie Bordelois, and requested to discontinue the case against MTS. The reason for this is because I'm very happy to once again work at MTS. Unfortunately, as an American citizen, I feel compelled to participate in a trial of which I no longer wish to be a part of and in a free country such as the United States where I currently reside, I asked to waive all charges against MTS. Honestly, I do not see where the country's freedom is.

Analysis

In *Independent Stave Co.*, 287 NLRB 740 (1987), the Board set forth the factors to be considered in determining whether to give effect to a private non-Board settlement. The Board indicated that all the surrounding circumstances should be considered including, but not limited to (1) whether the parties have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the violations alleged, the risks inherent in litigation and the stage of litigation; (3) whether there has been any fraud, coercion, or duress by any party in reaching the settlement; and (4) whether the respondent has a history of violations of the Act or has breached past settlement agreements. In *Independent Stave Co*., the Board emphasized that there is an "important public interest in encouraging the parties' achievement of a mutually agreeable settlement without litigation." 287 NLRB at 742.

While there is no signed agreement between Placeres and the Respondent regarding Placeres' reinstatement, there is no question that both parties have agreed to be bound by their agreement that Placeres be reinstated to his position; the noncompetition agreement he signed would not be operative; that he would not receive any backpay and that, in exchange, Placeres would submit a withdrawal of the charge in Case 8–CA–38901. In his brief, the Acting General Counsel concedes that the parties have agreed to be bound and further agrees that there is no evidence of fraud, coercion, or duress regarding the withdrawal.

With respect to the issue of whether Placeres was subject to any coercion regarding the withdrawal, when it became clear at the hearing that the Respondent was asserting that the withdrawal request served as a basis to dismiss the portion of the complaint relating to Placeres' alleged unlawful discharge and that Placeres persisted in his desire to withdraw the charge, I questioned Placeres regarding the circumstances surrounding the submission of his withdrawal request. Under oath, Placeres testified that he freely and voluntarily agreed to be reinstated without backpay (Tr. 141–144). In this regard, Placeres indicated that he dictated his letters to the Region dated July 13, 2011, and September 28, 2011, in Spanish to his adult daughter and that she then typed both letters in English for him to sign.

In his brief, the Acting General Counsel first contends that I should not approve Placeres' withdrawal request because a union was not involved to advance his interest in arriving at the settlement. There is no indication in the record, however, that Placeres had any lack of understanding regarding what he was receiving in exchange for the withdrawal of his charge. In *Independent Stave,* supra, all of the charging parties were individuals and the union there appeared not to have had an active role in the negotiation of the adjustment. I do not find that in the instant case the lack of union representation serves as a basis to refuse to approve the withdrawal request.

The Acting General Counsel also contends that the settlement is unreasonable in light of the nature of the violations alleged the risks inherent in the litigation of Placeres' case and the stage of the litigation. The Acting General Counsel argues that the serious nature of the alleged 8(a)(3) and (1) violation regarding Placeres and that the lack of backpay weighs against approving the withdrawal. At the hearing, counsel for the Act-

ing General Counsel represented that approximately $20,000 in backpay would be owed to Placeres if it was established that his discharge was in violation of the Act. The Acting General Counsel contends that his chance of success in establishing a violation is not so low as to justify a settlement without backpay. He also contends that the withdrawal should not be approved because the private agreement between the parties was not reached until approximately 10 months after the initial complaint had issued in Placeres' case and that other charges had been filed against the Respondent during this period of time.

While the allegation that the Respondent violated Section 8(a)(3) and (1) in discharging Placeres is indeed serious, in my view, a critical factor, and perhaps the most critical factor, in deciding to settle a case are the risks inherent in litigation. Obviously, if it were ultimately determined that Placeres was discharged in violation of the Act, he would be entitled to a full remedy, including backpay. However, if it were ultimately determined that there was no violation of the Act, Placeres conceivably would risk his present position at the Respondent since he was reinstated pursuant to what the Respondent believed would be a resolution of the charge regarding his alleged unlawful discharge.

The resolution of the question of whether Placeres was discharged in violation of the Act depends upon which version of the salient facts surrounding his departure from the Respondent's employment on April 13, 2010, is credited. Placeres' admission on both direct and cross-examination that he may have misunderstood what Singleton said to him at the jobsite on April 13, 2010, greatly compromises the Acting General Counsel's position that he was in fact discharged and establishes that there is a significant risk to Placeres in reaching a decision on the merits. If I do not credit Placeres' version of this event, Singleton's testimony establishes that Placeres was not, in fact, discharged, but rather quit his employment after misunderstanding Singleton's explanation of his wage rate on the jobsite. Given this critical weakness in the Acting General Counsel's case, Placeres' reinstatement to his position, with the elimination of any prior noncompetition agreement he signed previously, appears to be a reasonable adjustment in view of the litigation risks that are present in this case. I note that in both *American Pacific Concrete Pipe Co.,* 290 NLRB 623 (1988), and *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614 (2007), the Board accepted a private resolution of a dispute between individuals and a respondent over the General Counsel's objection, finding the agreements reasonable in light of the weakness of the General Counsel's case.

I also do not agree with the Acting General Counsel's argument that the stage of the litigation weighs against approving the withdrawal. Rather, at this stage of the litigation there was an opportunity to question Placeres under oath regarding all the circumstances surrounding his withdrawal request and his testimony regarding the merits of the case has exposed a weakness in the Acting General Counsel's case.

Prior to this case there is no history of the Respondent violating the Act for failing to comply with a settlement agreement. While I find, in this decision, that the Respondent has violated the Act in certain respects, I do not believe that this is a sufficient basis to refuse to approve Placeres' withdrawal request regarding his alleged unlawful discharge. I will order an appropriate remedy, including the posting of a notice, to ameliorate the effects of the violations of the Act that the Respondent has engaged in.

After evaluating all the circumstances, and after consideration of the principles expressed in *Independent Stave* and the manner in which those principles have been applied in *American Pacific Concrete*, supra, *Hughes Christiansen Co*., 317 NLRB 633 (1995),[9] and *BP Amoco*, supra, I approve the withdrawal of the portion of the charge that Placeres filed in Case 8–CA–38901 regarding his alleged discharge and dismiss the portion of paragraph 16 of the complaint relating to Placeres.

I do not approve, however, Placeres' attempt to withdraw the entire charge in Case 8–CA–38901 because, as noted above, this charge supports the complaint allegation regarding the threat that Mark Davis made to Porter in February 2011. I find that the portion of the charge specifically alleging that the Respondent interfered with Section 7 rights involves a vindication of rights under the Act beyond those primarily belonging to Placeres and that it is not appropriate to permit a withdrawal of the entire charge under these circumstances.

Dustin Porter

Facts

Porter was hired by the Respondent in January 2010. As I found above, in February 2010, after learning of the conversation between Porter and other employees where the subject of the Union had been raised, Porter was threatened by Mark Davis that if he discussed the Union again he would be fired.

Shortly after Placeres filed the charge in Case 8–CA–38901 on April 20, 2010, he stopped by the jobsite that Porter was working on at a school in Warren, Ohio. Porter testified that Placeres arrived during the lunchbreak and Porter approached Placeres as he sat in his vehicle. Porter told Placeres that she had heard that Placeres had been fired. According to Porter, Placeres told him that he had asked the Respondent about the Union and had been fired and had then contacted the NLRB.[10] As Porter turned to walk back into the building, he noticed Andy Davis, Mark Davis' son, standing in the doorway. Porter went into the breakroom where he spoke briefly to Fannin and Williams. Porter told them that he had seen Placeres in the parking lot and had spoken to him. According to Porter, as the three employees left the breakroom, they noticed Andy Davis was standing just outside the door to the room.[11]

[9] In *Hughes Christiansen Co.*, the Board, applying the *Independent Stave* factors, approved a private adjustment between three employees and the employer which was opposed by the General Counsel and the union. The individuals had signed a waiver and release agreements in exchange for enhanced severance payments.

[10] Placeres testified that he visited the jobsite to see if an electrical company working at the site would be interested in hiring him. According to Placeres, he asked Porter about one of the employees employed by the electrical company but Porter did not know anything about him. Porter said he did not know that Placeres had quit and was looking for work. (Tr. 103–104.)

[11] Andy Davis did not testify at the hearing.

Fannin also testified regarding this incident. According to Fannin, when Porter came into the building he and Porter walked down a hallway toward where Williams was working and Porter relayed to Fannin the details of the conversation that he had with Placeres but when they observed Andy Davis in the hallway, they stopped talking about Placeres. (Tr. 295–296.)

Williams testified that when Porter came inside the building, Porter told him that he had been talking to Placeres. Williams told Porter to be careful because Andy Davis was there and it could get back to Mark Davis that Porter was talking to Placeres (Tr. 217–218).

I credit the testimony of Williams and Porter on this point as it is for the most part mutually corroborative. I do not credit Fannin's version as it was not corroborated by Porter. Even under Fannin's version of this conversation, however, there is insufficient evidence to establish that Andy Davis was in a position to overhear the details of their conversation.

The next day, April 29, Porter worked at the Jefferson school jobsite in Warren, Ohio. Fannin and Williams were also working at this site. Around lunchtime, Fannin received a message to call the Respondent's office. When Fannin called, he spoke to Vaughn Junior who instructed Fannin to send Porter to the office at 2:30 p.m. Vaughn Junior told Fannin that he was going to fire Porter. When Fannin asked why, Vaughn Junior replied that Porter had walked off the job the previous day. When Fannin explained this was not true; that Porter had informed Williams he was sick, Vaughn Junior replied he would speak to Porter about it.

When Porter arrived at the Respondent's facility Vaughn Junior handed a document to Porter (R. Exh. 6) indicating the following:

> On 4/28/2010 Mr. Dustin Porter left the job at 9:00 a.m. he did not notify the foreman or the office that he was leaving.
>
> The MWTS employee policies item:
>
> Item 5
> Anyone leaving the job site without authorization will be considered that you are quitting.
>
> Item 3
> 4/20/2010-off-failure to call into office at designated time for work schedule.
>
> Item 4
> Excessive reporting off is grounds for dismissal.
> 2/9/2010-Late
> 3/11 2010-off sick
> 3/19/2010-went home sick
> 3/20/2010-off sick
> 4/19 2010-off sick
> 4/28/2010-went home sick
>
> Upon review I, George Vaughn, Vice-President have decided to terminate your employment for the reasons listed above

According to Porter, Vaughn Junior asked him if he knew what the document was, when Porter replied, "no," Vaughn Junior informed him it was his termination paper. Porter asked Vaughn Junior why he was being fired. Vaughn Junior pointed to the document and said that Porter was not abiding by the rules regarding absences. Vaughn Junior stated that if Porter wanted to work for the Respondent, he needed to abide by the rules and he could come back in the future if he could follow those rules (Tr. 174). When Porter said he did not want to sign the document as he did not agree with it, Vaughn Junior replied that he did not care as he could fire him for anything, whether or not it was on "this paper" or not. Porter signed the document, however, and then left the facility.

Mark Davis testified that he was the supervisor at the Jefferson school jobsite on April 28, 2010. According to Davis, he was working at the other end of the building from Porter. When he arrived in the area where Porter was supposed to be working, Davis noticed that he was not present. Davis asked Fannin where Porter was and Fannin replied that he had gone home sick. Davis then called Vaughn Junior and informed him that Porter had left the jobsite without notifying him. Davis testified that Porter's absence slowed down the job on that day.

Vaughn Junior testified that Mark Davis called him on April 28, 2010, and informed him that Porter had left the jobsite without telling him. Vaughn Junior also testified that it was not acceptable for Porter to inform only Williams that he was leaving the jobsite. According to Vaughn Junior, if an employee had to leave early from a jobsite, the employee had to inform Mark Davis, Shawn Vaughn, or the office. After receiving the call from Davis, Vaughn Junior reviewed Porter's attendance record and decided to discharge him for the reasons given to Porter in the document dated April 29, 2010 (R. Exh. 6), that he gave to Porter on that date. (Tr. 639.)

Analysis

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Board established a framework for deciding cases turning on employer motivation regarding an adverse employment action taken against an employee. To prove an employer's action is discriminatorily motivated and violative of the Act, the General Counsel must first establish, by a preponderance of the evidence, an employee's protected conduct was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union activity by the employee, employer knowledge of the activity and, at times, antiunion animus on the part of the employer. If the General Counsel is able to establish a prima facie case of discriminatory motivation, the burden of persuasion shifts "to the employer to demonstrate the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. See also *Ferguson Enterprises, Inc.*, 355 NLRB 1121 (2010).

In the instant case, while Porter engaged in union and other protected concerted activity, it was not extensive. In February 2010, he engaged in a general discussion of what union the Respondent's employees belonged to with some employees of the Respondent and those of an insulation company. The only other protected activity Porter engaged in was his brief conversation with Placeres after Placeres was no longer employed by the Respondent and had filed his unfair labor practice charge.

I find that the Respondent, and particularly Vaughn Junior, had knowledge of Porter's involvement in the discussion about what union represented the Respondent's employees. I find that Mark Davis had knowledge of the conversation as I have determined that he threatened Porter with termination if Porter spoke of the Union again. I do not credit Davis' denial that he did not tell Vaughn Junior that he had overheard or been advised that Porter was speaking about the Union. In this portion of his testimony, Davis appeared to testify in a manner he felt would support the Respondent's defense.

Finding that the Respondent, and particularly Vaughn Junior, knew of Porter's conversation with Placeres is more problematic since there is no direct evidence that this conversation was observed by a statutory supervisor. The Acting General Counsel contends that since the uncontroverted testimony establishes that Andy Davis, Mark Davis's son, was in a position to observe Porter speak to Placeres and to overhear Porter's report to Fannin and Williams that he had spoken to Placeres, the knowledge of this event by the Respondent's supervisors should be inferred under the Board's small plant doctrine.

The Board's small plant doctrine provides that when employees carry out protected activities at work and the employer has a small work force, an inference may be drawn that the employer is aware of such activity. *LaGloria Oil & Gas Co*., 337 NLRB 1120, 1123 (2002), affd. mem. 71 Fed. Appx. 441 (5th Cir. 2003); *D & D Distribution Co*., 277 NLRB 909 (1985), enfd. 801 F.2d 636 (3d Cir. 1986); *Wiese Plow Welding Co*., 123 NLRB 616 (1959).

During the month of April 2010, the Respondent employed 11 unit employees. Supervisors Shawn Vaughn and Mark Davis worked on various jobsites alongside these employees. As set forth above, Porter told Fannin and Williams that he had spoken to Placeres and Andy Davis was in a position to observe Porter speak to Placeres and overhear Porter tell Fannin and Williams that he had spoken to Placeres. I agree with the Acting General Counsel's argument that the likelihood that the Respondent's supervisors, including Vaughn Junior, learned of Porter's conversation with Placeres is increased by the familial relationship between some of Respondent's supervisors and its employees. See *Rice Lake Creamery Co*., 151 NLRB 1113, 1139 fn. 67 (1965). There is further evidentiary support in this case to apply the small plant doctrine. In this regard, at a meeting Vaughn Junior held with employees on January 28, 2011, he acknowledged that because the company was small "everything that happens here sooner or later comes back to me." (GC Exh. 41, p. 10.) Accordingly, I find that the Respondent, and specifically Vaughn Junior, learned that Porter spoke to Placeres after he had filed his charge on April 20, 2010.[12]

[12] To the extent that Porter's version of the conversation conflicts with that of Placeres, I credit Porter because his recollection of the conversation appeared to more distinct. However, I am only willing to infer that Vaughn Junior knew that Porter spoke to Placeres but not that he knew the substance of this conversation. There is no evidence that Andy Davis was in a position to hear what Placeres and Porter spoke about since he was some distance away from the conversation. In addition, Porter did not relate the substance of his conversation to Williams and Fannin, but merely said he had spoken Placeres.

With respect to whether the Respondent harbors animus toward its employees exercise of union or other protected concerted rights, Davis' threat to Porter in February 2010 establishes that, while the Respondent was signatory to a union contract, it harbored antipathy to its employees assertion of rights under the contract. I also note in this regard that at the meeting held on January 28, 2011, Vaughn Junior told employees that his personal feeling was that he did not like unions and never had, even though he had belonged to different unions in his career. (GC Exh. 41, p. 11.)

In considering the Acting General Counsel's prima facie case, I note that Porter's union activity was minimal and involved only speaking briefly about a Union that he knew little about. He was certainly not a union activist. However, the timing of his discharge shortly after Vaughn Junior became aware of the fact he had spoken to Placeres after Placeres had asked for information about contacting the Union regarding his pay dispute and then filed a charge over his alleged discharge from the Respondent, at least raises an inference that a discriminatory motive may have motivated Porter's discharge. In *Toll Manufacturing Co.*, 341 NLRB 832, 833 (2004), the Board noted that the timing of a discharge shortly after an employee had engaged in union activities supported an inference that the discharge was discriminatorily motivated. On the basis of the foregoing, I find that the Acting General Counsel has established a prima facie case under *Wright Line* and the burden shifts to the Respondent to establish that it would have taken the same action against Porter regardless of his union and protected concerted activities.

The Respondent contends that Porter's poor attendance record during his brief employment with the Respondent was the basis for his discharge but that the precipitating event was his leaving the jobsite on April 28, 2010, without proper authorization. The Respondent's rule that was in existence on April 28, 2010 (R. Exh. 4) states clearly:

> 5. Anyone leaving the job site without authorization will be considered that you are quitting!!! (Emphasis in the original.)

The issue of what the Respondent considers to be appropriate "authorization" is not as clear. Mark Davis testified that employees are supposed to inform him or Vaughn Junior if it is necessary for them to leave a jobsite. Davis testified he believed that such a requirement is set forth in the Respondent's policies but that he had never personally advised any employees regarding what he or she needed to do to obtain authorization (Tr. 423–424). Vaughn Junior testified initially that before an employee could leave the jobsite he or she needed to notify Mark Davis, Shawn Vaughn, or call the office (Tr. 424). He later testified, however, that the employer would have to notify "the person on-in control of the job" (Tr. 717).

While item 5 of the Respondent's rules set forth above indicates an employee cannot leave the jobsite without authorization, it does not specifically indicate from whom such authorization must be obtained. It is clear that Porter spoke to Williams before he left the job site but did not contact Davis or the Respondent's office. There is no contention by either party that anyone acting as a foreman for the Respondent is a statutory supervisor and the record clearly establishes that such individu-

als are employees within the meaning of the Act. Nonetheless, both parties spend a significant amount of time at the hearing litigating the issue of whether Williams was a foreman at the time he gave permission to Porter to leave the jobsite.

Williams, Fannin, and Porter all testified that Williams was the foreman at the Jefferson school jobsite when Porter left that job on April 28, 2010, Williams testified in late February or March 2010, he was told by Mark Davis that he was "in charge of the job site." According to Williams, this occurred after the previous employee who had been acting in such a capacity, Travis Davis, had been discharged. (Tr. 211.) At the time of this conversation with Davis, Williams was a wire puller earning $9 an hour and he continued to be paid at that rate on that job. He was never paid at the higher foreman wage rate. Williams was never told that he had the authority to let an employee leave a jobsite (Tr. 248). Williams also acknowledged that he was aware that if he had an issue with an employee on a jobsite, he was to contact Mark Davis and let him know (Tr. 253–254).

Mark Davis denied that he informed Williams that he was the foreman at the Jefferson school job. Vaughn Junior also denied that Williams had held the position of foreman on the job both Vaughn Junior and Davis testified that Williams did not have sufficient experience and lacked the certifications necessary to be considered a foreman.

Current Respondent employee Joseph Caicco also testified regarding the authority of Williams at the Jefferson school jobsite. Caicco referred to Williams' position on that job as a foreman "in training" (Tr. 271). Caicco testified that Mark Davis was in charge of the job but that Williams was "running" the job when Davis was not present (Tr. 274). Caicco testified that when Mark Davis was present, he would assign various tasks to employees. When Davis was not present, Caicco would observe Williams on the phone and then Williams would inform employees of their assignments (Tr. 276–277).[13] Caicco testified that Williams was "green" and was not very knowledgeable about certain aspects of the job, but that he was learning.

As a current employee who was subpoenaed by the General Counsel and testified in a manner adverse to the Respondent's position, Caicco had no incentive to be untruthful. The Board has long recognized that the testimony of such an employee is unlikely to be false. *Bloomington-Normal Seating Co*., 339 NLRB 191, 193 (2003). See also *Flexisteel Industries*, 316 NLRB 745 (1995); *Federal Stainless Sink Division of Unarco*, 197 NLRB 489, 491 (1972). Accordingly, I credit Caicco's testimony over that of Mark Davis and Vaughn Junior regarding the authority that Williams possessed on the Jefferson school jobsite. Both Mark Davis and Vaughn Junior appeared to testify in a manner that would diminish any authority that Williams had on that job in order to support the Respondent's position. It is for that reason that I also credit Williams' testimony that Davis told him in late February or early March 2010, that he was "in charge of the job."

[13] While Caicco did not know who Porter spoke to before relaying assignments, I draw the reasonable inference that it was Mark Davis.

I find, based on the record as a whole, that Williams had the authority to relay instructions to employees at the Jefferson school jobsite but that his authority was limited to that. The record does not support the conclusion that Williams possessed the power to "authorize" Porter to leave the jobsite on April 28, 2010. After Porter had left the jobsite, Williams did not call the office to inform Vaughn Junior that Porter had left, claiming it was not his responsibility to do so (Tr. 249). This is hardly indicative of the sense of responsibility he would have if he was truly responsible for the jobsite. As noted above, Porter did not call the office and inform Kovach that he left the site until after 3 p.m. when his shift had ended. Thus, no notice was given to any of the Respondent's supervisors that Porter had left the job until Davis returned to the area where Porter was working and, by chance, discovered that he had left.

After considering all of the circumstances, I conclude that the Respondent acted reasonably in deciding Porter left the Jefferson school jobsite without obtaining appropriate authorization. Importantly, in this regard there is no evidence that prior to April 28, 2010, an employee had left the jobsite without notifying an acknowledged supervisor. Previously, when Porter had left a jobsite because of illness he notified Mark Davis. The only other record evidence regarding this issue is Williams' testimony that in approximately January 2010, an employee had to leave a jobsite because of a personal matter and notified Shawn Vaughn before leaving (Tr. 249). Shawn Vaughn is, of course, an admitted supervisor.

Vaughn Junior indicated that while Porter's conduct on April 28, 2010, was the precipitating event for his discharge, he considered Porter's prior attendance record in deciding to terminate him. This is consistent with the document Vaughn Junior gave Porter when he informed him that he was terminated. Porter was a probationary employee who had been hired on January 4, 2010. As I have found above, on April 28, 2010, Porter left the Jefferson school jobsite because of illness without receiving proper authorization. Prior to that he had been late once, had missed 3 days because of illness, and left work because of illness on another occasion.

Before terminating Porter, the Respondent had disciplined other employees for attendance issues. On October 24, 2008, employee Dave Smith was placed on probation for being late to work on three occasions (R. Exh. 25). On January 9, 2010, a long-term employee, Greg Hillier, was given a final warning and placed on a 60—day probation period for failing to report to work on a single day (R. Exh.27). Most importantly, on November 13, 2009, the Respondent terminated Travis Davis, Mark Davis' son, for excessive absenteeism. Davis was hired on October 19, 2009, and before the date of his termination had been absent 3 days and then left early on one occasion (R. Exh. 26). Importantly, the Acting General Counsel has produced no evidence to establish that Porter was treated disparately from any other employee who engaged in conduct similar to his. On the other hand, the Respondent discharged Travis Davis, the son of one of its supervisors, for a similarly poor attendance record. I have also considered that when Vaughn Junior discharged Porter he told him that he had violated the Respondent's attendance rules; but that if, in the future, he could abide by those rules, he was welcome to return. I believe that such an

offer of reemployment under those conditions is further support for my conclusion that the Respondent's decision was based on legitimate business related concerns rather than discriminatory motivation.

In *Septix Waste, Inc*., 346 NLRB 494 (2006), the Board indicated that in order to establish a valid *Wright Line* defense, an employer must establish that it has applied its disciplinary rules regarding the conduct at issue consistently and evenly. I find that the Respondent has met this burden with respect to the application of its disciplinary rules regarding Porter's conduct. Under the shifting burden analysis of *Wright Line*, the General Counsel must establish an unfair labor practice by a preponderous of the evidence. *Wright Line*, supra at 1088 fn.11. I find this burden has not been met with respect to the discharge of Porter. Accordingly, I conclude that the Respondent did not violate Section 8(a)(3) and (1) with respect to Porter's discharge and I shall dismiss that allegation in the complaint.

The Allegations of Discrimination Regarding Fannin and Related Alleged 8(a)(1) Conduct at the January 28, 2011 Meeting

In the complaint the Acting General Counsel alleges that the Respondent violated Section 8(a)(4), (3), and (1) of the Act by requiring Fannin to drive his own vehicle to jobsites after his recall on January 18, 2011, and by discharging him on March 10, 2011.

The complaint also alleges that on January 28, 2011, the Respondent, by Vaughn Junior violated Section 8(a)(1) by threatening an employee with unspecified adverse action and by coercively soliciting employees to form an in-house union. Finally, the complaint alleges that on January 28, 2011, the Respondent, through Mark Davis, engaged in unlawful surveillance of employees' union activities.

Facts

Fannin was hired as a wire puller by the Respondent in August 2009. He became a member of the Union in June 2010. On September 7, 2010, Fannin was laid off along with several others of the Respondent's employees. The day after his layoff, however, Vaughn Junior hired Fannin to do carpentry work at the Respondent's office. He performed such carpentry work until the beginning of October 2010.

On September 21, 2010, Fannin, Caicco, and Williams went to a general meeting held by CWA, Local 4300 in Canfield, Ohio. At the meeting, the three employees raised several issues with Union President Richard Schrader, including the fact that employees were not given information about the Union; that employees worked more than 30 days without being asked to join the Union; and that employees were terminated without representation.[14]

After the meeting, Fannin and Schrader communicated with each other through phone calls and email through December 2010, regarding employment issues at the Respondent. According to Fannin's uncontroverted testimony, he and Schrader discussed the issue of the September 2010 layoffs. Fannin volunteered to obtain information from contractors about the various jobs that the Respondent had been working on at the time the employees had been laid off. While Fannin was not able to find out much information from the contractors that he called, he passed on whatever information he had to Schrader. Fannin also communicated with Schrader about whether the Respondent's employees had been paid the proper wage rate on various prevailing wage jobs. In addition, November 2010, Fannin complained to Schrader that the Union steward, Gregg Hillier, had close ties to the Vaughn family. The Union removed Hillier as steward after this concern was raised.

On January 5, 2011, Fannin filed a charge in Case 8–CA–39297 (GC Exh. 1(o)) claiming that the Respondent was refusing to recall him from layoff in violation of Section 8(a)(3) and (1).

On approximately January 18, 2011, Fannin was recalled from layoff to work as a wire puller 3 days a week. On direct examination Fannin testified that Jan Kovach informed him of his recall and also told him that he would have to drive his own vehicle to the jobsite rather than coming to the facility to get a ride in one of the Respondent's trucks. When Fannin asked Kovach what the reason was, she replied that "they're full or something, I don't know." (Tr. 370). On cross-examination, however, when asked if Kovach had indicated a truck was available, Fannin testified as follows (Tr. 392–393):

> A. No. She told me George had instructed her to let me know I didn't need to bother coming to the shop, to go ahead and drive my own vehicle.
>
> Q. And did she say ever, or on that day?
>
> A. From that point on.
>
> Q. Is that what you understood her to say or is that what she said?
>
> A. That's what I understood her to say.
>
> Q. Okay
>
> A. I don't recall the exact words.
>
> Q. Okay. So it's—you don't recall the exact words that she said?
>
> A. Verbatim, no.

Fannin testified that prior to his layoff he would often drive to the Respondent's facility and then go to the jobsite with other employees in the company truck. He would drive his own vehicle, however, when the distance from his home to the jobsite were shorter than the drive to the shop. After his recall on January 18, 2011, until his discharge in March 2011, Fannin drove his own vehicle to jobsites, except on two occasions when he rode with Shawn Vaughn in one of the Respondent's trucks.

Fannin testified that after his recall he asked Shawn Vaughn why he was told by Kovach to drive his own vehicle and Vaughn replied he did not know. Fannin testified that after his recall he was the only one of Respondent's employees who had to drive his own vehicle to jobsites, except for Williams who worked half days during this period. Fannin also asked Brian Singleton about this issue but Singleton shrugged and walked

[14] Vaughn Junior admitted that he knew Fannin attended a union meeting in the fall of 2010. According to Vaughn Junior, Schrader called him and said that Fannin was coming to a union meeting and asked Vaughn Junior about him. Vaughn Junior testified that he told Schrader that Fannin was a "pretty good guy." (Tr. 685–686.)

away. Fannin never spoke to Vaughn Junior about getting more frequent rides in the Respondent's trucks.

The testimony of Placeres conflicts with that of Fannin regarding the use of company vehicles. Placeres testified that after his reinstatement to the Respondent in March 2011, he sometimes drove his own vehicle to the jobsite in Ashtabula and at times rode in a company vehicle (Tr. 107). It appears that employees had been driving their own vehicles to worksites for some period of time since in 2009 Placeres quit his employment because of the expense of gas money in driving to a jobsite in East Liverpool, Ohio (R. Exh. 16). I also note that the two versions of the Respondent's work rules in effect after Fannin's recall on January 18, 2011, provide that "Employees must be able to provide their own transportation to and from the jobsite." (R Exhs. 4 and 7.)

I do not credit Fannin's testimony that he was the only employee who regularly had to drive his own vehicle to jobsites after his reinstatement in January 2011. In the first instance, Fannin himself was given rides in the company truck on two occasions. I also find that Placeres' testimony that he drove his own vehicle to jobsites in Ashtabula in 2011 is credible as he had no motive to be untruthful regarding this issue. Accordingly, I find that both before and after Fannin's recall in January 2011, employees drove their own vehicles to jobsites in the regular course of the Respondent's business.

Approximately a week after Fannin's recall on January 18, 2011, Williams informed Fannin that the employees were going to have a meeting on January 28, 2011, at the Respondent's facility to discuss union representation. When Fannin arrived at the Respondent's facility that day he turned on the recorder of his cell phone in order to record the meeting.[15] Before going into the meeting, which was held in the area of the Respondent's facility referred to as the "shop" Vaughn Junior spoke to Fannin and the following exchange was recorded:

> VAUGHN JR.: Should have done this the other day, shook my hand.
>
> FANNIN: You didn't talk to me just looked at me nothing.
>
> VAUGHN JR.: Yeah, I look at you man you better be worth it man.
>
> FANNIN: I'm always worth it.
>
> VAUGHN JR.: I know, I like that. Believe it or not here is the way it works, you screw me I screw you, that's life.
>
> FANNIN: How did I screw you?
>
> VAUGHN JR.: You didn't finish my door.
>
> FANNIN: What door?
>
> VAUGHN JR.: You didn't finish the trim.
>
> FANNIN: What trim.
>
> VAUGHN JR.: The one on the inside. Let me show you something else while I got you, while I'm talking to you. I want you to look at something. When you get a chance you can just smash it down. Everybody keeps getting cut on that.
>
> FANNIN: On the pull?
>
> VAUGHN JR.: Yeah.
>
> FANNIN: Oh.
>
> VAUGHN JR.: Think about that. My daughter got up one day she had a big scratch down her leg and I went wholly shit oh yeah that's a little strange isn't it? Think about that for me. K
>
> FANNIN: Un huh.
>
> VAUGHN JR.: You work hard man that's all you need to do work hard.
>
> FANNIN: I do work hard.

Fannin went into the shop area where the other employees had assembled. The work cubicles of Shawn Vaughn and Mark Davis are located in this area and both were present during the meeting. Hillier began the meeting by stating that the employees were going to decide whether to have an independent union like the employees at another employer, Enertech, and to decide who the union officers would be (GC Exh. 41, p. 2). During the discussion that ensued, Fannin stated that it was the employee's choice to be their own union or go with another union. Caicco indicated that they could go with another union and that the "AFL–CIO would probably be interested in representing us." (GC Exh. 41, p. 3.) Caicco said that they would have to contact some of those unions but with nobody from management present at the meeting they could not make those decisions. Fannin replied that management has nothing to do with the union and that they should not even be talking about the union "in this building" (GC Exh. 41, p. 3). Later in the meeting, Fannin indicated that it sounded to him that it would take a lot of legal work in order for the employees to establish their own union. He indicated that he would feel better with an established union (GC Exh. 41, p. 6). Fannin volunteered to do more research on the matter and make phone calls to some unions and notify the other employees of what he had found out (GC Ex. 41, p. 7).

Vaughn Junior then entered the meeting and informed the employees that their collective-bargaining agreement between the Respondent and the Union was no longer in effect and that the employees were no longer represented by the Union (GC Ex. 41, p. 9). Vaughn Junior indicated that he knew the employees were discussing forming an independent union.[16] He spoke in favor of such a union stating that the employees would be able to control their own dues money (GC Ex. 41, p. 10). He also indicated he would give the employees a list of labor attorneys that they could contact regarding their efforts to form their own union.

During the meeting, Vaughn Senior asked, "Why can't we get into John's union." Hillier responded that he already "talked to them" and they didn't want anyone else in their union.[17] Vaughn Junior joined in to say that he had talked to "Mark" who was the "president" about the Respondent's em-

[15] The recording of the meeting was authenticated at the trial and introduced into evidence as GC Exh. 40. A transcript of this recording was also admitted into evidence at the hearing as GC Exh. 41.

[16] Prior this meeting Hillier had told Vaughn Junior that the employees "were shopping around for another union, or becoming our own union" (Tr. 525). Hillier told Vaughn Junior that he had spoken to employees at Intertech about how to go about forming their own union.

[17] Hillier testified that he had spoken with employees of a contractor on a jobsite that had an independent union in order to get information.

ployees joining the independent union but that the independent union felt it would be too complicated. (GC Exh. 41, p. 13.)

After the January 28, 2011 meeting Fannin began contacting various unions including the IBEW. Fannin kept Caicco and Hillier apprised of the efforts he was making in this regard. An IBEW representative contacted Fannin and they agreed that Fannin would set up a meeting so that the employees could meet with him.

Fannin testified that on Monday, March 7, 2011, he was working at a school in Ashtabula, Ohio, where the Respondent was a subcontractor of Intertech. (Tr. 355–356.) According to Fannin, he was present when Greg Hillier, who was the foreman on the job, spoke to an individual named Mark (last name unknown), who Fannin knew to be the "head foreman" of Intertech about the Respondent's employees spending more time on the jobsite (Tr. 357).

Former employee Greg Hillier testified for the Respondent pursuant to a subpoena. Hillier testified that he was on the jobsite in March 2011,[18] with Fannin, when an individual from an electrical contractor said that the Respondent needed to work more hours at the site. At the time the Respondent was only working 4 days a week at this jobsite. According to Hillier, Fannin laughed and said that he was lucky if he got 3 days a week. When the other individual asked why, Fannin said his brother (Porter) had "sued George, so George is fucking him." Hillier testified that Fannin then said that " George could go fuck himself, and he said you can tell him, I don't care, and you can tell him that I said it. (Tr. 491.)[19]

When called as an adverse witness by counsel for the Acting General Counsel pursuant to rule 611(c) of the Federal rules of evidence, Vaughn Junior testified that a couple of days before he discharged Fannin on March 10, 2011, Hillier called him in the evening and reported that Fannin had made "accusations" against Vaughn Junior and said that he could go fuck himself (Tr. 68). On direct examination, Vaughn Junior testified that Hillier called him and told him that at the jobsite in Ashtabula ,while an employee from Intertech Electric was present, Fannin had said that his brother had a lawsuit against Vaughn Junior; that Vaughn Junior was "screwing him" and that Fannin did not care if Hillier told Vaughn Junior that he could go "fuck himself." (Tr. 676–677.)

I credit the portion of Fannin's testimony that the conversation between himself, Hillier, and the Intertech foreman occurred on Monday, March 7, 2011. As I will set forth in detail, Fannin recalled with specificity the various events and the dates they occurred on during the week he was fired. In addition, when called as an adverse witness, Vaughn Junior admitted that he was notified by Hillier of what Fannin had said "a couple of days" before he was fired. On direct examination, Vaughn Junior testified otherwise, claiming that he was not notified until the day before Fannin was discharged. I find his 611(c) testimony to be more credible as it is consistent with Fannin's recollection. I find Vaughn Junior's direct testimony to be an attempt to strengthen the Respondent's defense, after realizing his earlier testimony could be problematic.

As noted above, Hillier could not recall the exact date this conversation occurred. I credit Hillier, however, with respect to the substance of what Fannin said when the Intertech foreman was present. I doubt that Hillier, who was no longer employed by the Respondent at the time of the hearing, would fabricate such testimony. I find it more plausible that Fannin would make such a statement. Fannin's brother, Porter, had filed an unfair labor practice charge against the Respondent. Fannin himself had filed an unfair labor practice charge against the Respondent and was clearly not happy with the number of hours that he was being assigned. Under these circumstances, I believe he made such a statement out of frustration with the Respondent's actions. Accordingly, I find that on March 7, 2011, Fannin told Hillier and an employee from Intertech that Vaughn Junior was fucking him and that Vaughn Junior could go fuck himself and that Hillier reported that statement to Vaughn Junior on the evening of March 7, 2011.

Fannin testified that on the morning of Wednesday, March 9, he was working at the Ashtabula, Ohio jobsite when Vaughn Junior arrived. They said hello to each other and later, at the lunch break, Vaughn Junior spoke to Fannin and the other employees about football and other general matters (Tr. 359).[20]

According to Fannin's uncontradicted testimony, at the end of the workday on March 9, he told Caicco and Hillier that the IBEW representative wanted to meet with the Respondent's employees on Friday, March 11. Both Caicco and Hillier stated that they recalled that during the meeting on January 28, Vaughn Junior had said they did not want the employees to join the IBEW. While Fannin did not recall Vaughn Junior saying that, Fannin stated that "it's not George's choice" and that if Vaughn Junior did not want the IBEW, it made him want to join it even more (Tr. 361). Hillier and Caicco finally both agreed that Fannin could tell the IBEW representative that they and the other employees would meet with him on Friday, March 11.

At the jobsite on the morning of March 10, 2011, Hillier informed Fannin that Vaughn Junior had instructed him to send Fannin home but did not tell him why. Fannin left the jobsite and when he arrived home he called Shawn Vaughn and told him what happened. Shawn Vaughn said he would try and find out something.

In the afternoon Fannin called the Respondent's office and left a voice mail for Vaughn Junior. Vaughn Junior called Fannin and told him that his services were no longer needed. When Fannin asked what for, Vaughn replied by saying "you know" (Tr. 361). When Fannin said he did not know, Vaughn Junior said "insubordination" and hung up (Tr. 366–367).[21]

[18] Hillier could not recall with further specificity when this conversation occurred.

[19] Fannin denied that he made such a statement during this conversation.

[20] Vaughn Junior admitted he was at the jobsite on March 9, and that he spoke to Fannin and Caicco about football and public employee bargaining (Tr. 67).

[21] Vaughn Junior testified that when he spoke to Fannin on the phone, he asked him what happened on the jobsite when Fannin said that Vaughn Junior could go fuck himself. Fannin said he did not know what Vaughn Junior meant. At that point, Vaughn told Fannin he was terminated for insubordination. To the extent that the testimony of Fannin and Vaughn Junior conflicts, I credit Fannin as I found his

According to Fannin, 2 days later Shawn Vaughn called Fannin and began the conversation by telling Fannin that he was "getting fucked." Shawn Vaughn told Fannin that he learned that Hillier had told Vaughn Junior that Fannin was "bad mouthing" him the previous Monday.[22]

Analysis

The Alleged 8(a)(1) Violations Occurring on January 28, 2011

Paragraph 12 of the complaint alleges that on January 28, 2011, the Respondent, by Vaughn Junior, threatened employees with unspecified adverse action in violation of Section 8(a)(1). In support of this allegation, the Acting General Counsel relies on the statement made by Vaughn Junior to Fannin as he walked into the meeting on January 28, 2011, that "you screw me, I screw you." The Acting General Counsel contends that this statement is a threat of reprisal in response to the union and protected concerted activity that Fannin had engaged in and the fact that he had filed an unfair labor charge in Case 8–CA–39297 on January 5, 2011. The Respondent contends that the statement was made only in reference to Vaughn Junior's perception that Fannin did not correctly perform the carpentry work assigned to him. I find that it is clear from Fannin's recording and the portion of the transcript of that recording or set forth above, that Vaughn Junior's statement was in reference to the carpentry work that Fannin had performed for him. In context, the statement reflects Vaughn Junior's dissatisfaction with some of the work that Fannin had performed. I find it was not a threat made in response to the union and protected concerted activity that Fannin had engaged in or the filing of his unfair labor practice charge. Accordingly, I shall dismiss paragraph 12 of the complaint.

Paragraph 13 of the complaint alleges that on January 28, 2011, the Respondent, by Mark Davis, engaged in unlawful surveillance of employees' union and/or concerted activities. The meeting was apparently arranged by Hillier since he conducted it. While the record indicates that Vaughn Junior was aware of the meeting there is no evidence to establish that he was involved in the specifics of arranging it. Mark Davis has a cubicle in the shop area where his desk and computer are located. Shawn Vaughn and Singleton also have cubicles in this area. The record establishes that Shawn Vaughn was also present during the employee meeting. While the complaint does not allege that Shawn Vaughn's attendance at the meeting was unlawful, the analysis that I apply regarding the presence of Davis at the meeting is equally applicable to that of Shawn Vaughn. For the reasons expressed herein, I find that the Respondent did not violate Section 8(a)(1) by the attendance of Davis and Shawn Vaughn at this meeting.

It is undisputed that Davis and Shawn Vaughn were present during the meeting held by the employees. According to Davis' testimony he was working at his desk when the employees began to arrive in the area.[23] Davis was not informed the meeting was going to be held and no one asked him or Shawn Vaughn to leave.

In *Hoschton Garments Co*., 279 NLRB 565, 567 (1986), the Board held that "union representatives and employees who choose to engage openly in their union activities at an employers premises should have no cause to complain that management observes them." Accord: *Sunshine Piping, Inc*., 350 NLRB 1186, 1194 (2007). In the instant case the employees chose to conduct their meeting in an area of the Respondent's facility where Mark Davis and Shawn Vaughn have had their desks during a time that they were engaged in their normal duties. The fact that Davis and Shawn Vaughn were in a position to observe the meeting is not an unfair labor practice under these conditions.

The Acting General Counsel correctly notes that the Board has held that an employer violates Section 8(a)(1) when one of its supervisors observes employees union activity conducted in a public place if the supervisor's purpose for being at the location is to observe the meeting. *Aero Corp*., 233 NLRB 401, 405 (1977), enfd. 581 F.2d 511 (5th Cir. 1978). I do not agree with the Acting General Counsel's argument, however, that the record establishes that Davis' purpose for being present at the location was to observe the meeting. There is no evidence to establish that Shawn Vaughn or Davis attended this meeting in order to specifically observe the union activity of employees. Rather, they were in their normal work areas performing regular duties when the meeting began. Accordingly, I shall dismiss paragraph 13 of the complaint.

Paragraph 14 of the complaint alleges that on January 28, 2011, the Respondent, by Vaughn Junior, coercively solicited employees to form an in-house union. After he entered the meeting held by the employees on January 28, 2011, Vaughn Junior made several statements regarding what he perceived to be the benefits of having in-house union. He stressed that if they formed an in-house union employees could keep their own dues money, knowing that the employees had expressed concerns about the dues money that they had given to the CWA, Local 4300 which they had viewed as being an ineffectual union. He indicated that he would give the employees a list of attorneys that would assist them in establishing their own union. He also revealed that he had previous discussions with the president of another in-house union regarding the possibility of his employees joining it.

Whether an employee belongs to a union and, if so, which union, is a choice that belongs to employees and the employer has no role in it. In the instant case the Respondent, through Vaughn Junior, indicated that the employees would be better off with an in-house union. He indicated he had discussed having his employees joining another in-house union and he also offered to give employees a list of attorneys that would help them establish their own union. Such conduct interferes with employees Section 7 rights to freely choose union repre-

demeanor to be more convincing and his account to be more plausible based on the record as a whole. I also note, however, that even under Vaughn Junior's version the termination was performed abruptly.

[22] I do not credit Shawn Vaughn's testimony that he never spoke with Fannin about his termination. This seems highly implausible since they had been friends for approximately 10 years and socialized outside of work.

[23] While the unit employees were not scheduled to work that day, Davis is a supervisor and there is no evidence to controvert his testimony that he was working that day.

sentation as it strongly suggests that the Respondent would look favorably only upon the choice of an in-house union. The Respondent's actions in this regard violated Section 8(a)(1) of the Act. See *Gregory Chevrolet, Inc*., 258 NLRB 233, 237 (1981); *M. O'Neil Co*., 211 NLRB 150, 157–158 (1974), enfd 514 F.2d 894 (D.C. Cir. 1975).

The Alleged Discrimination Regarding Fannin

The complaint alleges that the Respondent violated Section 8(a)(4), (3), and (1) when Fannin was required to drive his own vehicle to jobsites after his recall on January 18, 2011.

In *Wright Line,* supra at 1083, the Board indicated that in cases involving alleged violations of Section 8(a)(3) it must be determined whether an employee's employment conditions were adversely affected. In the instant case, there is a question as to whether the Respondent engaged in an adverse action with respect to Fannin driving his own vehicle to jobsites, rather than riding in a company vehicle. Fannin testified that when Kovach called him to inform him that he had been recalled as a wire puller, she told him that he should drive his own vehicle because the truck company trucks were full. On cross-examination, however, Fannin testified that he "understood" Kovach to say that Vaughn Junior had instructed her to tell him to drive his own vehicle from that point on. Fannin admitted, however that he could not recall exactly what Kovach told him. The record is clear that Vaughn Junior is the moving force with respect to the Respondent's operations and Fannin never spoke to him in order to clarify the Respondent's position. Fannin, however, did ask both Shawn Vaughn and Singleton about why he could not ride in a company truck without getting a response from either.[24] There is some doubt as to whether the Respondent actually took an adverse employment action against Fannin in this matter given the equivocal nature of Fannin's testimony about his initial conversation with Kovach. However, I find that the lack of a response from either Shawn Vaughn or Singleton when Fannin specifically asked about being allowed to ride in a company truck, establishes that the Respondent had apparently placed some limits on Fannin's riding in a company truck to jobsites sufficient to justify an analysis under *Wright Line*.

Applying a *Wright Line* analysis, I find that Fannin had attended a CWA meeting in September 2008, and that Respondent was aware of that fact, as Vaughn Junior admitted the Union had so informed him. Because of the attendance of Mark Davis and Shawn Vaughn at the January 28, 2011 meeting the Respondent also knew of Fannin's interest in having an existing union represent them, rather than forming an in-house union, and that he indicated he would begin to contact unions in order to obtain additional information. Fannin had also filed an unfair labor practice charge against the Respondent on January 5, 2011. Since the complaint allegation encompasses the time period from January 18, 2011, until Fannin's termination on April 10, 2011, is appropriate to consider the animus against employees' union activities demonstrated by Davis' February 2011 threat to Porter and Vaughn Junior's attempt to restrict his employee's selection of the union to an in-house union on January 28, 2011. Accordingly, based on the foregoing, I find that the Acting General Counsel has established a prima facie case under *Wright Line.*

An examination of the Respondent's defense under *Wright Line* reveals that Fannin was clearly not the only employee who drove his own vehicle to jobsites from January 18, 2011, to March 10, 2011. Prior to his January 2011 recall Fannin drove his own vehicle to jobsites rather than getting a ride in a company truck on some occasions. After his January 2011 recall he was given a ride in a company truck on two occasions. Williams and Placeres also drove their own vehicles to and from jobsites. In addition, Singleton credibly testified that other employees, including Allison Tucci and George Vaughn Senior drove to jobsites in their own vehicles.[25] Moreover, the Respondent had a clearly stated policy in effect indicating that employees had to be able to provide their own transportation to and from jobsites. Accordingly, I find that the Respondent has produced sufficient evidence to establish that it applied its policy regarding employee transportation to jobsites on a consistent basis. There is no credible evidence to establish that Fannin was treated disparately from any other employee regarding this matter. Accordingly, I shall dismiss this allegation in the complaint.

Fannin's Discharge

Paragraph 15 of the complaint also alleges that on or about March 10, 2011, the Respondent terminated Fannin in violation of Section 8(a)(4), (3), and (1). With respect to the Acting General Counsel's prima facie case under *Wright Line*, in addition to the factors that I have considered in the preceding section, there are additional important factos that are applicable to the analysis of his discharge. On March 9, 2011, Fannin spoke to Hillier and Caicco about the meeting that Fannin had arranged with a representative of the IBEW to meet with the Respondent's employees on Friday, March 11. Although there is no direct evidence to establish that the Respondent knew of Fannin's pivotal role in attempting to secure IBEW representation for the Respondent's employees by arranging this meeting, I draw the inference that the Respondent, and specifically Vaughn Junior, was apprised of this on the evening of March 9.

This inference is supported by the application of the small plant doctrine, which presumes the Respondent's knowledge of such activity, that I have discussed earlier in this decision. In the instant case, the application of this presumption is supported by the evidence of communication between Hillier and Vaughn Junior regarding the union representation of the employees. This was clearly established by Hillier's admission that he spoke with Vaughn Junior about the various options regarding union representation that employees were consider-

[24] Singleton denied that Fannin had asked him why he could not ride in a company truck. I credit Fannin on this point. This appeared to be a matter of sufficient importance to Fannin to ask Singleton about it. To Singleton it appeared to be a minor matter and thus I find it to be something he would not necessarily remember. Shawn Vaughn did not testify regarding this issue.

[25] I credit Singleton's testimony over Fannin's with respect to this issue. Given his position, Singleton was aware of all of the jobs that the Respondent was working on, while Fannin only knew of the individual jobs he worked on. Accordingly, I find Singleton's testimony to be more reliable on this issue.

ing prior to the January 28, 2011 meeting. Finally, I also rely on Vaughn Junior's admission that because the Respondent is a small company, sooner or later everything got back to him. With this background, the application of the small plant doctrine to find that Vaughn Junior knew of Fannin's role in arranging for employees to meet with the IBEW on March 11 is appropriate.[26]

Evidence of Vaughn Junior's animosity toward the IBEW is established by the fact that at the January 28, 2011 meeting he indicated his personal dislike of unions based on his experience as a member of two unions. Vaughn Junior testified at the hearing that one of those unions was the IBEW (Tr. 17). This evidence strengthens the Acting General Counsel's prima facie case regarding the discharge of Fannin.

Since the Acting General Counsel has established a strong prima facie case under *Wright Line* analysis, the burden of persuasion shifts to the Respondent to show that it would have discharged Fannin if he had not engaged in protected activity. In *Golden State Foods Corp*., 340 NLRB 382, 385 (2003), the Board indicated:

> However, if the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis. *Limestone Apparel Corp*., 255 NLRB 722 (1981).[27]

The Respondent contends that it discharged Fannin for his outburst regarding Vaughn Junior over what Fannin perceived to be the discriminatory treatment of his brother and himself. However, as I have found above, Fannin's statements regarding Vaughn Junior were made on Monday, March 7, 2011, and were reported to Vaughn Junior by Hillier that evening. On Wednesday, March 9, 2011, Vaughn Junior saw Fannin at a jobsite on two different occasions and, while he engaged in casual conversation with him, made no mention of what Hillier had reported to him. If Vaughn Junior was truly concerned about Fannin's alleged insubordination, I believe he would have confronted him about it on March 9. While I do not condone the language used by Fannin on March 7 regarding Vaughn Junior I note that such language appears to be commonly used both by Vaughn Junior and employees as established by the recording of the January 28, 2011 meeting. In this vein, after Fannin was discharged, Shawn Vaughn told Fannin that he was getting "fucked" because he was getting discharged for "bad mouthing" Vaughn Junior. I find this evidence further supports a finding of pretext regarding the reasons advanced for Fannin's discharge.

I find that what greatly concerned Vaughn Junior was the knowledge he gained on the evening of March 9, that Fannin had organized a meeting with the IBEW and the Respondent's employees for March 11, 2011. After learning of this, Vaughn Junior precipitously discharged him the next day for his allegedly insubordinate statements that he made on March 7. According to Fannin's credited testimony, Vaughn Junior did not confront him with the statement that he had made and did not give him an opportunity to explain it. Moreover, there is no evidence that the Respondent ever disciplined any other employee because of insubordinate conduct or profane language. I conclude that the evidence establishes that the Respondent seized on the statements that Fannin made on March 7, as a pretext to discharge him because of his union and other protected activity. Although I find that the Respondent's discharge of Fannin principally resulted from his efforts to seek IBEW representation, the fact that Fannin had a pending unfair labor practice charge, in my view, played some part in the Respondent's motivation. Accordingly, I find that the Respondent discharged Fannin in violation of Section 8(a)(4), (3), and (1) of the Act.

The Alleged Refusal to Assign Work to Williams

Paragraph 17 of the complaint alleges that the Respondent, since January 28, 2011, has refused to assign work to Michael Williams in violation of Section 8(a)(4), (3), and (1) of the Act.

Facts

Williams began his employment with the Respondent as a wire puller in December 2009. He was laid off by the Respondent on approximately September 3, 2010. During this period of employment, Williams was represented by the CWA, Local 4300 but, as I have noted earlier in this decision, was unaware of that fact as late as February 2010, because of the Union's lack of involvement with the Respondent's employees. After his layoff in September 2010, Williams attended a union meeting with Fannin and Caicco in order to find out what the Union could do for them.

While on layoff from the Respondent, Williams began working full-time for another employer, Lordstown Seating, on the 3 to 11 p.m. shift. In November 2010, Williams gave an affidavit to Region 8 of the NLRB as part of the investigation of the charge filed by Dustin Porter in Case 8–CA–39168. In December 2010, Williams informed both Fannin and Caicco that he had given the affidavit. Later Fannin informed Fannin and Caicco that he had been subpoenaed to testify at the NLRB hearing that was then scheduled for January 24, 2011.[28]

In mid-January 2011, Williams called the Respondent to find out when his W-2 for the prior year would be ready. Williams spoke to Vaughn Junior who told him that he would like to recall Williams on a part-time basis. When Williams asked where he would be working, Vaughn Junior replied it would be at a school in Ashtabula. Vaughn Junior asked Williams to

[26] I do not credit Vaughn Junior's denial that he was unaware of Fannin's role in setting up a meeting with the IBEW prior to discharging him as I find it implausible considering the record as a whole. Although the Respondent called Hillier as a witness, he did not testify regarding this issue.

[27] In *Austal USA, LLC*, 356 NLRB No. 65 (2010), the Board reiterated that a *Wright Line* analysis is applicable in cases in which there is a finding that an employer's purported justification for its action is pretextual.

[28] The hearing regarding the amended consolidated complaint that had issued in Cases 8–CA–38901 and 8–CA–39168 involving Placeres and Porter was scheduled for that date (GC Exh. 1l). On January 7, 2011, the Regional Director issued an order indefinitely postponing the hearing scheduled for January 24, 2011 (GC Exh. 1g).

come in and meet with him to discuss his schedule on Friday, January 14. Williams explained that he would have to meet with Vaughn Junior in the early afternoon so he could go to work at 3 p.m. for his full-time job. They agreed to meet at 1 p.m.

On January 14, 2011, Williams met with Vaughn Junior and Singleton. Vaughn Junior told Williams that he could work part time a few days a week. Williams indicated he could only work until noon so that he could be at his full-time job by 3 p.m. Since Monday, January 17, was Martin Luther King day, Williams was not working at Lordstown Seating and said that he could work full time on that day. Vaughn Junior said that was fine and that Singleton would let Williams know what his schedule would be after that.

After working for the Respondent for a full day on January 17, Williams called Singleton and Singleton informed him that he could work on Thursday, January 20. Williams reiterated that he could work from 7 a.m. to noon and Singleton found that acceptable. Williams called Singleton on Friday, January 21, and Singleton informed him that the Respondent had work available and asked Williams what dates were best for him. Williams replied Mondays and Thursdays but asked Singleton what days Singleton needed him. Singleton said that Tuesdays and Thursdays worked best for him. Williams replied that that was fine with him but he just needed to know so he could contact his mother-in-law in order for her to take care of his children. Williams and Singleton agreed that Williams would work on Tuesday, January 25.

On Monday, January 24, Williams was assigned to mandatory overtime at his regular job. Williams called Singleton to tell him that since he would be working into the early morning hours of Tuesday, January 25, he could not work for the Respondent on that day. Singleton told Williams to call him later in the day on January 25, to see when he would be needed again. Williams called Singleton on January 25, and Singleton told Williams he could work on Thursday, January 27.

Williams arrived at the jobsite on January 27 shortly before the 7 a.m. starting time and spoke to Hillier and Caicco. Hillier asked Williams if he was supposed to testify the previous Monday (January 24) on Porter's behalf. When Williams asked Hillier what he was talking about, Hillier replied that Caicco had told him that Williams was going to testify for Porter at the hearing. Williams told Hillier that he did not know what he was talking about. Hillier did not pursue the matter after that. Later that morning, Williams asked Caicco whether he had told Hillier that Williams was supposed to testify for Porter. Caicco admitted that he had told Hillier because he did not think that Williams would mind. Williams told Caicco that he was concerned that since Hillier had been informed, this information would get to Vaughn Junior. Williams worked from 7 a.m. to noon on January 27.

On January 28, Williams called Singleton who informed him there was no work available that week and to call the following Friday. When Williams called on Friday, February 4, Kovach informed him that there was no work available for him but that he could call back on Monday and speak to Singleton. On Monday, February 7, Williams spoke to Singleton who said that they were probably not going to need him again until the third school started in Ashtabula and that he should call on Friday to see if there was any work available.

On February 9, 2011, Williams filed a charge in Case 8–CA–39334 alleging that the Respondent was refusing to assign him work in violation of Section 8(a)(4), (3), and (1). Williams called Singleton on Friday, February 11, and the following Friday, February 18, but was told on both occasions there was no work available.

In late February or early March, Singleton called Williams and asked him if he was available to work a regular afternoon shift on a jobsite at Robinson Memorial Hospital near Canton, Ohio. Williams told Singleton that he was unable to accept the assignment because it conflicted with his regular full-time job. Singleton responded that he had forgotten about Williams' schedule.

Singleton testified that the part-time arrangement with Williams did not work out as it was difficult to use him properly. When asked at the hearing why Williams was not used in February 2011, Singleton responded as follows:

> Well, a couple of things. First of all in our business we base our jobs on man-hours. To have somebody come in, and we tried a couple of days.
>
> But to come in and work 4 hours and then having to leave where everybody else is still there another 4 hours, you may be pulling thick cables.
>
> You can't leave them in the hallway. And once you lose that—that extra manpower that you expect to—expect to be there, things did slow down, and it just didn't work out. [Tr. 461.]

According to Singleton, shortly after Williams began working part time, he discussed the matter with Vaughn Junior and Mark Davis and they concluded that Williams' part-time schedule was not working out. Singleton also testified that the Respondent had sufficient manpower on the Ashtabula job. Singleton admitted that he never told Williams that the Respondent had decided not to use him on a part-time basis when Williams kept calling back asking if the Respondent had work for him.

Vaughn Junior testified that he had no knowledge that Williams had given an affidavit or that he was going to testify on Porter's behalf at the January 24, 2011 hearing that was ultimately postponed. Vaughn Junior also testified that the Respondent determined early on that Williams' part-time schedule was not effective for the Respondent. In this regard, Vaughn Junior testified:

> And I actually told Brian, I said this is not working out, I says, but, that's just see, see where it goes. It may help. And it really didn't. [Tr. 684.]

Shawn Vaughn testified in a somewhat confusing manner regarding Williams' part-time status. When asked how Williams' schedule put a burden on the Respondent, Shawn Vaughn testified as follows.

> It just—working, they just—the duties if you do something in a certain area and you have one guy there and he stops in half a day and you don't have an extra person to get the wire there.

> You're pulling a hundred cables a day, five hundred feet. If that extra person's not there, then you might have to, you know, don't do as much that day or—or its—or you just—it's—it's off—it's just off.
>
> You have a person there, then you don't have a person there. It's like you turn your head, your like where'd the person go, and he'd left half a day. [Tr. 534–535.]

Finally, the Acting General Counsel's brief sets forth accurate calculations based upon the Respondent's records (GC Exhs. 11a–30a and 39a) showing that the Respondent's employees worked the following number of hours on the Ashtabula job site in 2011: January, 543; February, 457.53; March, 706; April, 859.22; May, 658.50; June 688.17; and July, 587.43.

Analysis

Applying the *Wright Line* factors, I note that Williams attended a union meeting in September 2010. After his recall in January 2011, there is no evidence that he engaged in union activities. More importantly in the context of this case, Williams gave an affidavit to the NLRB during the investigation of the unfair labor practice charge regarding Porter's discharge and had been subpoenaed to testify at the hearing that was originally scheduled for January 24, 2011.

With respect to the Respondent's knowledge of Williams' cooperation with the Regional Office in the investigation and litigation of Porter's case, I find that the small plant doctrine again provides a basis to infer that the Respondent had knowledge of Williams' activities in this regard. In support of the inference I draw is the fact that Caicco told Hillier that Williams had given an affidavit to the Region and that he had been subpoenaed to testify at the originally scheduled hearing. As indicated previously, during the period prior to the January 28, 2011 meeting, Hillier was discussing with Vaughn Junior the idea of establishing an in-house union. It is certainly reasonable to infer that during these discussions, Hillier relayed information he had learned regarding the involvement of Williams in Porter's case.[29] This inference is further supported by Vaughn Junior's admission that anything that happened at the Respondent gets back to him. Accordingly, I find that Vaughn Junior learned of Williams cooperation with the Regional office after he had been recalled to work but prior to the meeting held on January 28. Since Vaughn Junior admittedly knew of Fannin's attendance at the September 2010 union meeting, I draw the inference that he was also aware that Williams attended the meeting with him.

The intent violations of Section 8(a)(1) and the discharge of Fannin in violation of Section 8(a)(3) and (1) demonstrates that the Respondent harbored animus with respect to certain union activities engaged in by its employees. Vaughn Junior also admitted his personal dislike of unions. Given the evidence of the Respondent's opposition to the union activities engaged in by its employees, it is appropriate to consider such evidence in determining whether the Respondent retaliated against Williams because of other protected activities he engaged in, such as giving an affidavit during an investigation or being a potential witness at a hearing.

In order to establish a prima facie case, the General Counsel must establish that the protected activity "was a substantial or motivating factor for the employer's action." *La Gloria Oil & Gas Co*., 337 NLRB 1120, 1123 (2002). With respect to the claim that the refusal to assign Williams work was in retaliation for union activity he engaged in and violated Section 8(a)(3) and (1), I find the evidence insufficient to establish that such conduct was a substantial reason for not assigning Williams work after January 28, 2011. The only overt union activity Williams engaged was attending one union meeting in September 2010. However, the Respondent recalled Williams to work in mid-January 2011, thus establishing that his attendance at that meeting several months earlier was not something that it was concerned with. Accordingly, I shall dismiss the allegation that the Respondent's refusal to assign work to Williams violated Section 8(a)(3) and (1) of the Act. I find, however that the Acting General Counsel has clearly presented a prima facie case that the Respondent failed to assign work to Williams because of his cooperation with the Regional Office in violation of Section 8(a)(4) and (1) of the Act. The fact that his assignments stopped shortly after the Respondent learned that he had given an affidavit and was willing to testify on behalf of Porter is suspicious and such timing clearly supports the inference that the Respondent failed to assign additional work to Williams in retaliation for his activities protected under section 8(a)(4). *La Gloria Oil & Gas,* supra at 1124; *Toll Mfg. Co*., 341 NLRB 832, 833 (2004).

Having found that the Acting General Counsel has established a prima facie case with respect to the Respondent's conduct violating Section 8(a)(4) and (1) regarding Williams, I now examine the Respondent's argument that there are legitimate business reasons for its failure to assign work to him after January 27, 2011.

I do not find persuasive the Respondent's attempted explanation that Williams's part-time schedule simply did not work out for the Respondent. Vaughn Junior and Singleton have long experience in the telecommunications industry and made a point in their testimony of describing their expertise in the operation of their business. Certainly, when Vaughn Junior asked Williams to return on a part-time basis, he had a plan as to how to effectively utilize him in this capacity. Although there can be a disconnect between a plan and the manner in which it is effectuated, the amorphous explanation given by the Respondent's witnesses regarding this issue did not indicate with any specificity what the nature of the problem allegedly was. The fact that another employee may have had to be assigned a task that Williams worked on in the morning, does not seem particularly problematic, since the record establishes that employees are, at times, transferred from job to job on a daily basis. In addition to the unconvincing nature of these explanations, Singleton never told Williams that his schedule was not working out for the Respondent. Rather than telling Williams he was not being assigned work because his part-time schedule did not work for the Respondent, Singleton merely told him to keep calling to see if any work might be available. The failure to tell

[29] Although the Respondent called Hillier as a witness, he was not asked any questions regarding this issue at the hearing.

employees the asserted reason for adverse employment action has been considered by the Board in finding the action to be discriminatorily motivated. *D & F Industries, Inc*., 339 NLRB 618, 622 (2003).

With respect to Singleton's claim that the Respondent had sufficient manpower on the Ashtabula job, the Respondent's records do show a decline in the number of hours worked on the Ashtabula jobsite in February 2011, but then show significant increases in those hours from March through July 2011. According to Williams' credited testimony, Singleton told him in one of their later conversations in February 2011, that there may not be additional work for him until the third school in Ashtabula was started. However, in early March 2011, when the number of hours on the Ashtabula jobsite substantially increased, Singleton offered Williams work on an afternoon shift on another project. Singleton knew full well that Williams would not accept that offer as it conflicted with his regular full-time employment. I find that the Respondent's offer of this employment to Williams is a rather feeble attempt to defend against his claim of discrimination.

On the basis of the foregoing, I find that the reasons advanced by the Respondent for failing to assign work to Williams after January 28, 2011, are a pretext for retaliating against him for his cooperation with the Regional Office in the investigation and prosecution of Porter's case. Accordingly, I find that the Respondent refused to assign work to Williams violated Section 8(a)(4) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by

(a) threatening an employee with termination if he spoke about a union again.

(b) coercively soliciting employees to form an in-house union.

2. The Respondent has engaged in an unfair labor practice in violation of Section 8(a)(4), (3), and (1) of the Act by discharging Ben Fannin because Fannin and other employees engaged in union activities and because Fannin filed an unfair labor practice charge under the Act.

3. The Respondent has engaged in an unfair labor practice in violation of Section 8(a)(4) and (1) of the Act by refusing to assign work to Michael Williams because he gave testimony under the Act.

4. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5. The Respondent has not otherwise violated the Act.

REMEDY

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

The Respondent, having discriminatorily discharged an employee, must offer Ben Fannin reinstatement and 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 at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed *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).

The Respondent, having discriminatorily refused to assign work to an employee, must offer available work to Michael Williams, consistent with his schedule, and 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 at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

The Respondent, Mid-West Telephone Service, Inc., Girard, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge for speaking about a union.

(b) Coercively soliciting employees to form an in-house union.

(c) Discharging or otherwise discriminating against employees for engaging in union or other protected concerted activities and filing an unfair labor practice charge.

(d) Refusing to assign work to employees who have given testimony under the Act.

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

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

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

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

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

(d) Within 14 days from the date of the Board's order, offer Michael Williams available work, consistent with his schedule.

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

(e) Make Michael Williams 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.

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

(g) Within 14 days after service by the Region, post at its facility in Girard, Ohio, copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 8, 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 February 15, 2010.

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

(i) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 28, 2011

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten employees with discharge for speaking about a union.

WE WILL NOT coercively solicit employees to form an in-house union.

WE WILL NOT discharge or otherwise discriminate against employees for engaging in union or other protected concerted activities.

WE WILL NOT refuse to assign work to employees who have given testimony under the National Labor Relations Act.

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

WE WILL within 14 days from the date of the Board's order, offer Ben Fannin 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 rights or other privileges previously enjoyed.

WE WILL make whole Ben Fannin for any loss of earnings and other benefits suffered as a result of our discrimination against him, with interest.

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

WE WILL within 14 days from the date of the Board's order, offer Michael Williams available work, consistent with his schedule.

WE WILL make Michael Williams whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

MID-WEST TELEPHONE SERVICE, INC.

[31] 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."