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Brink's, Inc. and Federation of Armored¹ Car Workers. Case 29–CA–097556

June 25, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA,
AND SCHIFFER

On November 25, 2013, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel 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 and briefs, and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order.

¹ We correct the spelling of the name of the Charging Party appearing in the judge's decision.

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

³ We agree with the judge that the General Counsel failed to show that the Respondent's decision to discharge employee Marvin Francis was motivated by his union activity, in part because there was insufficient evidence that the Respondent knew of Francis's union activity when it decided to discharge him. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* on other grounds 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, 399–403 (1983). In this case, the record does not contain direct evidence of knowledge. Of course, the Board may infer employer knowledge of an employee's union activities based on circumstantial evidence, including the employer's demonstrated knowledge of general union activity, the timing of the adverse action in relation to the employee's protected activity, the pretextual reasons for the discharge asserted by the employer, and the employer's demonstrated union animus. See, e.g., *Kajima Engineering & Construction, Inc.*, 331 NLRB 1604, 1604 (2000) (citing *Greco & Haines, Inc.*, 306 NLRB 634 (1992)); see also *NLRB v. Long Island Airport Limousine Service Corp.*, 468 F.2d 292, 294–295 (2d Cir. 1972). We agree with the judge, however, that no such inference is warranted here.

In adopting the judge's dismissal of the complaint, we disavow the judge's statement in sec. II,F,2,c of her decision that because there is no evidence establishing any independent violations of Sec. 8(a)(1), there is no direct evidence of antiunion animus on the Respondent's part. To the contrary, it is well established that conduct that exhibits animus but that is not independently alleged or found to violate the Act may nevertheless be used to shed light on the motive for other conduct that is alleged to be unlawful. *Kanawha Stone Co.*, 334 NLRB 235, 235 fn. 2 (2001) (citing *Meritor Automotive, Inc.*, 328 NLRB 813, 813 fn. 4

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. June 25, 2014

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Mathew Jackson, Esq. and *Kimberly Walters, Esq.*, for the General Counsel.

J. Howard Daniel, Esq. and *John T. Merrell, Esq.*, of Greenville, South Carolina, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Brooklyn, New York, on July 16, 17, August 26, and September 10, 11, and 12, 2013. The Federation of Armored Car Workers (the Union) filed the charge on

(1999)) (disavowing judge's suggestion that because there is no evidence establishing an independent violation of Sec. 8(a)(1), there can be no direct evidence of antiunion animus). We also do not rely on the statements in sec. II,F,3 of the judge's decision that in order to find that the Respondent's stated reason for Francis' termination was pretextual, she would need to find a number of specific facts to be true. Finally, the judge stated that former supervisor, Tracy Williams, did not know about Francis' union activity until January 3, 2013, Francis' last day of work before his suspension. Williams actually testified that she learned of Francis' union activity during his suspension, which would have been sometime between January 3 and his discharge some 2 weeks later. This error does not affect our decision. The record shows, and the General Counsel does not dispute, that the Respondent decided to terminate Francis on December 26, 2012, which would have been prior to Williams' learning of Francis' union activity in either case.

Unlike his colleagues, Member Miscimarra agrees with the judge's statement that, absent evidence of any independent violations of Sec. 8(a)(1), there is no direct evidence of antiunion animus on the Respondent's part. In this regard, Member Miscimarra agrees with Chairman Hurtgen's separate opinion in *Kanawha Stone Co.*, supra at 238 & fn. 8, which emphasized that employer statements are protected by Sec. 8(c) and "shall not constitute or be evidence of any unfair labor practice" if they neither threaten nor promise, but merely express a preference that employees remain unrepresented. Additionally, Member Miscimarra agrees with the judge's statements that she would have to make implausible findings to conclude that the Respondent's stated reason for discharging Francis was pretextual.

January 18, 2013, and the Acting¹ General Counsel issued the complaint on April 11, 2013. An amendment to the complaint issued on April 26, 2013.²

The complaint, as amended on April 26, 2013, alleges that Brink's Inc. (Respondent) suspended employee Marvin Francis (Francis) on January 3, 2013, and then terminated Francis on January 16, 2013, because he formed the Union and engaged in concerted activities. The amended complaint further alleges that since January 16, 2013, Respondent has unlawfully failed to reinstate Francis or to offer him reinstatement to his former job. Respondent filed a timely answer and amended answer.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation, with a main office and place of business in Coppell, Texas, and an office and place of business in Brooklyn, New York, has been engaged in the business of providing cash management logistics solutions and secure transportation services of cash and other valuables to banks, retailers, and other commercial and government agencies in the United States and abroad. During the year preceding the issuance of the complaint, Respondent provided services in excess of \$50,000 to customers located outside the State of New York. Respondent admits, and I find that Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act).

In its initial answer, Respondent denied that the Union is a labor organization. By joint exhibit, however, Respondent stipulated that the Union filed a representation petition on January 15, 2013, seeking to represent its full-time and part-time security officers and employees. The representation election was conducted on February 21, 2013, and a majority of votes were not cast for the Union.³ The Regional Director for Region 29 of the National Labor Relations Board (the Board) issued a certification of results of election on March 7, 2013. On the first day of the hearing in this matter, Respondent amended its answer to admit the Union's labor organization status. Accordingly, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

¹ Although Acting General Counsel Lafe E. Soloman issued this complaint, General Counsel Richard F. Griffin, Jr. was subsequently confirmed and serves in this capacity as of the date of this decision. Accordingly, the prosecuting entity of the Agency is herein referenced as the General Counsel.

² A second amendment to the complaint that was offered and received on August 26, 2013, added remedy language that had been inadvertently omitted from the original complaint and the amended complaint.

³ Out of a total of 160 valid votes counted and unchallenged, 24 votes were cast for the Union.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Respondent's management and corporate composition

Brink's is the parent company for Brink's Inc. (Respondent) and Brink's Global Services (BGS). For purposes of this proceeding, Respondent's Brooklyn, New York facility and BGS's John F. Kennedy (JFK) Airport facility are the only relevant facilities. Respondent's Brooklyn facility is one of 23 branches operating in the northeast region of the country and it is the site of the alleged unfair labor practices. Respondent has a total of approximately 7000 employees for its entire operation. During the relevant time period, Michael Foreman (Foreman) served as Respondent's strategic market director for the Brooklyn facility. In that capacity, Foreman was responsible for all of Respondent's functions within the metro New York area, including sales and operations. Foreman reported to Bill Vechiarella; Respondent's regional vice president for the northeastern market. During the same time period, Garth Young (Young) reported to Foreman and served as the senior manager for route logistics. This area of responsibility is also referenced as Cash-In-Transit or CIT; the department that facilitates the actual pickup and delivery of cash and valuables that are also known as liabilities. Bryan Rosenthal held the position of senior human resources director and he worked primarily at Respondent's Brooklyn facility.

Brink's Global Services (BGS) is a global division and subsidiary of the Brinks Company. BGS's president is located in London, England, and it has approximately 60,000 employees who serve customers on a global level; often transporting foreign currency as well as other cash and valuables internationally. Tony Turrado is in charge of the BGS facility at JFK. The CEO for the Brinks Company is responsible for managing both Respondent and BGS.

2. Labor relations history

As referenced above, the Union sought to represent all of the employees working as security officers and guards at Respondent's Brooklyn facility as well as employees working at BGS's JFK facility. In elections that were held in February 2013, a majority of eligible voters did not select the Union as their bargaining representative. Employees working as mechanics at the Brooklyn facility are represented by a labor organization and at the time of the hearing in this matter, there was a collective-bargaining agreement in existence covering these employees.

3. Respondent's operation

The CIT function of Respondent's operation involves the physical transfer of cash, involving the United States Federal Reserve, various banking institutions, and retail customers using armored trucks. The CIT department services automatic teller machines (ATMs) and computerized safes known as CompuSafes. Typically, there is a driver and a messenger in each truck. If the truck is transporting more than \$5 million, there is a security regulation that mandates that the truck have

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two messengers. The primary duty of the driver is to get the truck safely to and from the facility to each stop. The main messenger on each route is in charge of the route. The second messenger on the truck is commonly referred to as a guard; however, he performs the same basic messenger duties. There are approximately 210 employees working at Respondent's Brooklyn facility and approximately 156 employees work as drivers or messengers.

From its Brooklyn facility, Respondent services approximately 250 ATMs each day. When the messenger arrives at the designated ATM and after deactivating the ATM's alarm, the messenger can obtain a receipt that documents the amount of cash contained in the machine based on the transactions from the previous servicing of the machine. The cash is contained in separate cassettes based on the denomination of the bills. The messenger removes the cash from the machine and seals it in a bag with the corresponding receipt for transport back to the facility. The messenger then loads the ATM with new cash and resets the machine for operation. If the denomination of the bills becomes mixed and placed in the wrong cassettes, the error is termed a cross-load.

CompuSafes are electronic safes that are leased by Respondent to retail customers to hold excess cash beyond the amount of cash normally maintained in the customer's cash register. During the course of the day, the retail customer's employees log into the safe to deposit cash. At the end of the day, the safe generates an email to Respondent and to the customer's bank documenting the amount of cash deposited into the safe on that particular day. The bank then gives the customer generated credit for the amount of the deposit. When Respondent's messenger services the safe, the messenger obtains a receipt from the safe showing the amount of cash collected each day; including a record of the specific denominations of the cash collected, as well as, the time the cash was deposited in the machine. The cash is maintained in the safe in two cassettes. The messenger removes the cassettes containing the cash from the machine and replaces them with empty cassettes. Each truck maintains empty cassettes for the messengers to use in servicing the CompuSafes.

When the trucks return to the facility from the assigned route, the messenger gives all the cash and paperwork to the vault clerk who validates everything picked up by the trucks. The sealed bags and cassettes are moved to the cash room where they are unlocked under camera, counted, and validated. There are over 300 cameras in Respondent's facility. A "variance" is the term used to describe the difference between the amount shown on the receipts for the ATMs or safes and the actual amount of money counted in the cash room. When a variance is discovered in the cash room, a second count is conducted in the presence of a supervisor. If there is still a difference between the receipts and the cash, the variance is reported to the reconciliation department.

Jessica Rosario testified during the underlying proceeding and she is one of three reconciliation clerks who deal with identified variances. The reconciliation clerks review various records to determine whether there is a true loss. These records include the SL1 forms completed by the messenger for each

stop on their route. The SL1 forms are contained in each bag of cash the messenger is expected to load into an ATM. Based on the receipts generated by the machine, the messenger uses the form to record the amount of cash believed to have been removed from a machine. The messenger servicing the machine is identified on the SL1 form by a preprinted listing of the messenger's name or a handwritten listing of the messenger's name. In investigating a variance, the clerks also review the guide sheets that are completed by the drivers for the route in question. In addition to other information that must be completed about the particular route, the guide sheet identifies the individuals who serve as the driver, messenger, and guard for that specific route.

Foreman testified that a variance occurs when the records are out of balance and a true loss is the amount that Respondent must pay a customer for cash that is missing. Rosario testified that when Respondent determines that a true shortage has occurred, the reconciliation clerk contacts the customer, informs management, and gathers all the relevant data related to the loss. She testified that in investigating variances, she looks at the crew composition on the day that the loss was discovered, as well as, the crew composition on the previous date of service for the machine in question. She explained that a messenger on either crew could have caused the loss in issue. She also testified that when she reviews the SL1's in her investigation of a loss, she cannot make any changes on the form to mark through any messenger's preprinted name or to add another employee's name to the form.

B. Marvin Francis' Employment with Respondent

1. Francis' employment history

Marvin Francis began working for Respondent in January 2008. Other than 2 to 3 days during 2012, he worked exclusively at Respondent's Brooklyn, New York facility. When he began his employment, Francis worked as an ATM technician. The ATM technicians are responsible for servicing both the ATMs, as well as CompuSafes. While Francis was waiting to qualify to carry a weapon, he also worked as a driver for the armored vehicle. Once Francis received his weapon and on or about May 2008, Francis began working as an ATM messenger for Respondent. As a messenger, Francis' job was to transport cash or currency to and from the Respondent's facility to its customers. During the remainder of Francis' employment, Francis occasionally worked as a driver if he were needed. He estimated that on the average he served as a driver four times during the month.

2. Francis' daily duties as a messenger

Francis testified in detail concerning his normal routine as a messenger. At the beginning of his shift, he checked to determine his assignment on the armored truck for that particular day. If he were designated as the messenger, he retrieved what he described as the "cage"; a unit that contains the cash to be delivered, information about the route, and the paperwork associated with that route. The paperwork includes a guide sheet, a "D" sheet or delivery sheet, an "H" sheet, and a pick list. The pick sheet contains information about the cash bags; including the quantity of cash and the bag seal number. The delivery

sheet will show the priority for servicing the customers. When the messenger is at the customer's site, the customer will sign the delivery sheet to show their receipt of the cash or "liabilities" delivered by the messenger. The "H" sheet reflects liabilities that are to be held over for delivery to a certain date or time for a customer. The purpose of the D and H sheets is to record all items picked up during the route and returned to the branch. When the crew returns to the branch, the messenger gives the D and H sheets to a vault clerk, who verifies that each item recorded on the D and H sheets has been returned to the branch. Young testified that Respondent's standard procedure is for the messenger to fill out the D sheet while the crew is at the customer's location.

One of the more significant documents discussed by various witnesses in the trial is the guide sheet. This document contains specific information about the employees assigned to a particular route and about their route schedule. Francis testified that the driver usually completes the guide sheet by listing the employees who are designated as messenger, driver, and second messenger/guard. Francis testified that the guide sheet accurately describes who is on the route. The guide sheet contains a section to record the beginning and ending mileage for the truck and the time that the truck leaves and returns to the Brooklyn facility. The customers' names, addresses, and telephone numbers are preprinted on the guide sheet, in addition to any specific guide notes for specific customers. A typical guide note would direct the employees on the truck to contact the customer 10 minutes in advance of arrival. The guide sheet shows the time that the messenger clocks in and out, as well as when the route crew arrive and leave the customer's location.

All of the cash that is to be taken from the facility to the various customers will be maintained in the cage. Francis testified that the cash is in individual plastic bags that are labeled for each customer. The cash is also stored in bags and each bag is sealed with the customer's name, location, and the amount. The messenger is responsible for checking off the cash listed on the pick sheet and then putting the cash into the truck. After removing the cash from the cage, the messenger must also verify that he has the correct keys needed to open each customer's safe or equipment. Francis explained that each route has radios, customer keys, and truck keys that are kept in a pouch and maintained in the cage. After loading the truck, the messenger gives the guide sheet to the driver who will complete a portion of the guide sheet. Once the messenger again verifies the keys necessary for the deliveries, the truck can leave the facility for the designated route.

At one time the trucks were staffed with a messenger, guard, and driver, however, at an undetermined date in 2011 or 2012, the guard position was eliminated and Respondent began scheduling two messengers rather than a guard and a messenger. One of the messengers is designated as the lead messenger for that route.

3. Francis' involvement with the 2011 loss

In July 2011, Respondent received notice of a \$31,000 variance from Hess, one of Respondent's customers. The customer reported that their records showed that Respondent's employees

picked up \$31,000 from their CompuSafe; however, there was no record that it was credited to Hess' account.

As referenced above, the CompuSafe is a computer operated safe that is leased by Respondent to some of its retail customers. When the customer deposits money into the safe, the cash is secured and recorded. At the end of the business day, the safe sends Respondent and the customer a report concerning the amount of money deposited and the customer's bank will give the customer credit based on the money deposited into the safe. When the safe's cassettes are full, Respondent sends a crew to remove the cassettes and replace them with empty cassettes.

On July 16, 2011, Hess contacted Respondent to report that one of its safes was full and would not accept any more cash. Hess requested an unscheduled pick up of the cash in the machine. Marvin Francis was contacted on route 901 and instructed to make the emergency pickup. The guide sheet for July 16, 2011, shows that the Hess pickup was handwritten at the bottom of the form, showing the arrival and departure times for the stop as 12:20 and 12:27 p.m. respectively. The form also showed that one item was picked up during the stop. Francis' name is handwritten at the top of the form showing him to be the messenger on the route. Foreman testified that when questioned about the variance, Francis did not deny that he was the messenger on the route that day.

Messengers returning to the facility submit a form identified as a holdover sheet to the vault clerk documenting the items from the route customers that were either brought back to the facility or taken from the customer's facility to a third location such as a bank or financial institution. The form is preprinted with the pickup and delivery locations. Foreman testified that it is the messenger's responsibility to complete the form and submit it to the vault clerk upon return to the facility. The vault clerk then validates the information contained on the form. The holdover form for July 16, 2011, contains the preprinted route stops for route number 901; however, the Hess emergency stop was not added to the form. Young testified that he spoke with Francis about the omission of the stop on what is identified as a "D" sheet. Young testified that Francis told him that he had forgotten to complete all the paperwork on the stop.

There is no dispute that Francis made the Hess pick up and that he did not complete the documentation showing that he was returning approximately \$31,000 from Hess to the facility. Francis testified that he made the pick up at Hess and returned to the branch facility at approximately 5 p.m. He remained at the facility for about 1-1/2 hours checking off the items that he brought back to the facility. At approximately 6:30 p.m., a supervisor asked him to go out for another pickup. Francis went out for the additional pickup and left the liabilities on the truck from the route containing the Hess pick up. Foreman testified that because there are always empty cassettes on the trucks, the vault clerk would not have known to look on the truck for the Hess deposit if the messenger did not log the pickup on the proper forms.

Respondent did not learn that the Hess cassettes were missing until Hess contacted Respondent to report that their account needed to be credited for the money removed from the safe on July 16. When questioned, Francis acknowledged that he had forgotten to record the pickup of the Hess CompuSafe on the D

and H sheets while he was on the run. Foreman asked Michael Buckley; Respondent's security manager for the Northeast to investigate the \$31,000 variance. Prior to working for Respondent, Michael Buckley was a special agent with the Federal Bureau of Investigation (FBI) for 32 years. His work with the FBI primarily involved criminal investigations, organized crime, and bank robberies. As the regional security manager for Respondent, Buckley is responsible for investigating internal and external losses and promoting the safety of the facilities. Buckley's geographic area of responsibility includes the northeast region; which includes not only the Brooklyn facility, but also 22 other branch facilities in the northeast. Buckley estimated that he conducts hundreds of investigations for Respondent each year.

Buckley reviewed the documentation, spoke with management, reviewed video footage, and conducted a series of interviews. At the conclusion of his investigation he was not able to determine what actually happened to the missing money. He could only conclude that the money was left on the truck and never checked in with the vault clerk. He recommended to Foreman that the money was lost because of carelessness.

Based on Buckley's report, Foreman made the decision to terminate Francis. Foreman testified that he directed the human resources department to draft a letter of termination for Francis with an effective date of termination of September 9, 2011. The letter was drafted and signed by Senior Operations Manager Garth Young. Before the letter issued however, Young appealed to Foreman to give Francis a second chance rather than terminating him. Young told Foreman that because the company had primarily determined that the missing cash was due to an error rather than theft, he wanted to give Francis another chance. Foreman agreed and Francis was not terminated for the July 16, 2011 loss.

Young later talked with Francis and told him that a decision had been made to terminate him; however, he was not going to follow through with the termination. Young told Francis that he had put his ass on the line for him. Francis testified that he understood what Young meant when he said this and he understood that Young had saved his job.

4. Francis' work on the casino route

One of the routes on which Francis worked was route 14, or the "Casino Route." This route serviced ATMs at one location; the Resorts World Casino in New York. The ATMs are owned by Global Cash Access; one of Respondent's customers. Francis testified that when he worked the casino route, he normally worked with employees Anthony Maysonet (Maysonet), Jerry Lewis (Lewis), Chrispolo Olivera (Olivera), and Ruben Corchado (Corchado). There are usually 24 to 30 ATM machines that are serviced on this route.

On a general route, the driver stays with the truck and serves as a guard, while the messengers are outside the truck. The casino route was set up by Young and Foreman to specifically serve the casino customers. Young testified that the casino wanted Respondent to service the ATMs in such a way that would not disturb their business and that weapons wouldn't be exposed to the general public. The route crew typically starts the route very early in the morning and the crew will call the

casino security checkpoint before arriving. Unlike other customers, the casino can provide a secure place for the truck to be parked and the driver does not have to remain with the truck for security. The casino security guard accompanies Respondent's employees at all times while they are in the casino. At the customer's instructions, the crew takes the cash obtained from the ATMs and delivers it directly to Bank of America.

Before servicing the casino ATMs, the messengers verify that they have the correct cash bags for the specific ATM terminals. The bags are labeled with the total amount of cash, as well as, the specific denominations of the enclosed bills. The messenger is able to gain entry to the ATM terminal by using a designated settlement card and specific keys for the terminal. The messengers use a very detailed process for documenting the amount of cash that is contained in the ATM at the time of the messenger's entry to the machine, as well as the amount of cash that is retrieved from the machine and then added to the machine. The messenger does this by a series of receipts obtained at the various steps of the process. During the time that the messenger services the machine, the driver is present and stands guard. The casino's security guard is also present. If there is a second messenger on the route, he will assist the lead messenger. Young testified that because the driver is with the messengers at the casino ATMs, he will complete the paperwork at the machine. He may also break off the straps for the cash and pass it to the messenger.

For each ATM that is serviced on a route, there is a separate SL1 form. Two days in advance of the run, the form is pre-printed with the date, the ATM identification number, the run number, the address of the ATM, and often the name of the driver and the messenger who is expected to be assigned to that particular run. The form is actually printed, however, before the actual route assignment is made for a particular day. Francis testified that at the time the ATM is serviced, the messenger will write his name if it is not already on the form. If another messenger's name is on the form, the messenger will cross that name out and write his own name. The messenger uses the SL1 to document the cash received from the machine and the cash added to the machine, as well as, the appropriate seal numbers. When the cash is returned to the facility, the cash amount is verified and documented by the employees in the cash processing department.

C. Respondent's Basis for Terminating Francis

1. Background

Foreman testified that when Hurricane Sandy hit the New York area on or about October 30, 2012, Respondent's operations were changed. He explained that the storm was an extremely stressful time on the city as well as on Respondent's employees and customers. He recalled that Respondent had not even known where some of its employees were during the storm and its aftermath. Employees who might otherwise have been able to come to work had difficulty finding gas to get to work and Respondent purchased two 250-gallon gas tanks in order to distribute gas each day to its employees. Respondent flew in 19 people from its operations across the country as a response team to run the day-to-day operations. Foreman re-

called that although he only lived 2 miles from the facility, he stayed in the dispatch office of the facility night and day for 4 days during the storm period. Foreman testified that for the entire month of November, Respondent's total focus was to service, deliver, process, or pack cash to get it out to its customers.

2. Respondent's response to the variances

BAMS is the acronym for Respondent's computer system that tracks all of the ATMs serviced by Respondent. The system keeps a record of all cash added or removed from the machines, as well as, the denominations of the cash. The system also reports any overages or shortages. Each morning, BAMS sends a daily email to designated individuals identifying any variances over \$500 that have been identified by the system. On December 6, 2012, the BAMS system generated an email identifying all of the open variances that exceeded \$500. In addition to being sent to Garth Young, the email was sent to reconciliation clerks Jessica Rosario and Trisha Comeau. The email also went to Scott Kaliski, who was an ATM manager who had been brought into the facility during the aftermath of the storm to assist with the operation of the facility. Tracy Williams, the manager of route logistics also received a copy of the email, as well as Michael Foreman. Upon receiving the email, Foreman replied to Rosario, Comeau, and Young telling them, "I need to understand what is a true shortage." Foreman testified that he knew that Respondent's operation was behind because of the hurricane and he didn't want to carry any losses or variances into the next business year. Three days later, Rosario responded by email listing the variances and identifying those variances that had been closed and those that continued as a "true" variance. Thirteen open losses remained; seven relating to Global Cash Access, four for TD Bank, one for First Republic Bank, and one for Citibank.

On December 18, 2012, Respondent's regional controller for the northeast, Bryan Henry, sent an email to Respondent's vice president of operations for the northeast, Bill Vechiarella. Henry also copied various directors throughout the northeast operations, including Foreman. Henry reported that there were 122 open preliminary loss reports (PLRs) with a value of \$395,583.62. He added, "Please review. Any open PLRs as of 12/31/12 will be accrued." Foreman testified that the Company's goal at the end of the year is for all directors to identify which claims are true losses and to pay those losses before going into the next calendar year. After he received the email from Henry, Foreman sent an email to Young, Rosario, and Comeau with the following directive: "Garth, We need your focus in ATM claims ASAP." Later that same day Vechiarella responded to Henry's email by an email to the various directors. Vechiarella responded: "TEAM, this is nuts. No way can we accrue this. We need these resolved."

Foreman testified that when he reviewed the report that Rosario sent him on December 9, 2012, he noticed that there were some very large variances for Global Cash Access that amounted to almost \$40,000 and that he considered such losses to be substantial. He asked Rosario to put together a chart so that he could understand the losses occurring at the casino. Rosario testified that when Foreman asked him to prepare the spread-

sheet concerning the casino losses, he did not ask her to focus on any particular messenger. Using the folders that she maintains concerning ongoing losses, Rosario prepared a spreadsheet for the losses related to Global Cash Access. The spreadsheet included details concerning six losses that occurred between March 2 and November 16, 2012. Four of the losses amounting to \$27,400, identified Francis as the messenger responsible for the route on the date of the loss or on the day prior to the loss. Two of the losses totaling \$19,500 that are identified on the spreadsheet reflected that Francis was the messenger on both the day of the loss and on the day prior to the loss.

On December 26, 2012, Foreman sent a copy of the spreadsheet to Senior Human Resources Director Bryan Rosenthal and to Vechiarella. Foreman pointed out that on September 7, 2012, Francis cross-loaded \$100 bills in a \$20-bill cassette, resulting in a shortage of \$15,520. Foreman added that Francis was the same messenger who had lost a CompuSafe deposit the previous year causing a loss of \$31,000. Foreman stated that based on the shortages at the casino, the cross-load, Francis' past losses, and his being late several days with an attitude of "I don't care if I'm late," he had lost confidence in Francis' ability to perform his job. Foreman also added that Francis had been on vacation all week and there had been no shortages. Foreman directed Rosenthal to prepare a termination letter to be given to Francis when he returned from his vacation. Foreman copied Regional Security Manager Michael Buckley in his email to Rosenthal.

3. Buckley's investigation of the losses

Buckley testified that he had been scheduled to come to the Brooklyn facility in early January 2013 to address a report of a possible armed attack on one of Respondent's trucks. When Buckley read Foreman's email of December 26, 2012, that discussed the losses and Francis' involvement, he responded by offering to assist in the investigation. On December 28, 2012, Buckley sent an email to Foreman and Rosenthal telling them that he wanted to weigh in on Foreman's December 26, 2012 email and to relay some facts of past history concerning Francis. Buckley told them that he had read the various emails and he offered his assistance in the investigation. He told them that he would like to review the history of the casino shortages and thereafter interview the messengers involved, particularly Francis. He went on to explain that he had interviewed Francis in the past concerning the July 2011 loss. He explained that after his 2011 extensive video review and his interviews, he had not been able to determine if Francis had stolen or not stolen the missing cash. On the same day, Vechiarella responded to Buckley's email and asked if Respondent could suspend Francis pending investigation. Rosenthal responded that Francis could be removed from the schedule until Buckley could interview him.

Buckley recalled that the first day that he had been at the Brooklyn facility in January 2013; he spent all day investigating the matter of the possible armed attack. He told Foreman that before he could begin any interviews concerning the casino losses, he needed to review all the documentation on the investigation. He told Foreman that if the documentation could be

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collected, he could review it before interviewing Francis on January 3.

Francis had been on vacation since December 17 and he expected to return to work on December 31. He testified that although he attempted to reach the dispatch office on December 30 and 31, 2012, no one answered the telephone. Because one of the offices known as the Tarot office usually has the work schedule for the following workday, he also telephoned the Tarot office to ask about when he was scheduled to return to work. He was told that he was not on the schedule. After another unsuccessful call to the dispatch office on January 2, he telephoned Supervisor Tracy Williams and asked about the date that he was next scheduled to work. She suggested that he come to the facility during scheduled working hours. Francis testified that he reported to the facility at 6:30 a.m. on January 3 and found that he was scheduled for a special assignment at 10 a.m.

When Buckley arrived at the facility, he discovered that Francis had arrived at the facility early in the morning and he had been waiting since that time. Even though he didn't have all the documentation that he would have preferred, Buckley decided to go ahead and talk with Francis rather than having Francis wait longer. Using a copy of the spreadsheet prepared by Rosario, Buckley interviewed Francis. Buckley recalled that when he talked with Francis about the various losses listed on the spreadsheet, Francis asked why he was being questioned about these losses when no one had ever mentioned them to him before. Buckley recalled that Francis also told him that he (Francis) had previously initiated a conversation with reconciliation clerk Cameau about the casino losses. Francis asserted to Buckley that Cameau told him that she had already reviewed all of the variances and they had balanced out and that he should not worry about them. Buckley testified that Francis told him that Cameau had assured him that there were no issues with the Global Cash ATMs. After meeting with Buckley, Francis telephoned the Union's attorney and told him about his meeting with Buckley.

After speaking with Francis, Buckley interviewed Cameau and asked about her conversation with Francis concerning the Global ATMs. Cameau told Buckley that she recalled speaking with Francis about the Global ATM losses, but she denied that she ever told him that there were no issues with the losses. Cameau told Buckley that she had told Francis that she didn't usually handle the Global ATM shortages and that Rosario usually handled those shortages. Buckley testified that he also spoke with Rosario on January 3. Rosario told him that she had spoken with Francis and employee Ruben Corchado concerning the issue of the cross-load on their route.

Young testified that he had spoken with Francis and all the messengers about the casino losses in 2012 because the losses were frequent and significant. Young described Francis' response as "a little nonchalant to say the least." Buckley also spoke with Young on January 3. Buckley testified that Young told him that he had spoken with Francis many times about the losses. Buckley further recalled that Young mentioned that when he had spoken with Francis, Francis had a nonchalant attitude about the issues discussed.

At 6:09 p.m. on January 3, Buckley sent an email to Rosenthal, Vechiarella, and Foreman concerning his investigation of the ATM shortages. He confirmed that he had spoken with Francis, Cameau, Rosario, and Young and he recounted the information provided by each individual. Buckley also added that his other contacts that day contradicted the information given to him by Francis that morning. Buckley further noted that he felt that Francis was being misleading and evasive during the interview. Buckley added that he was providing the information for whatever action that was deemed appropriate.

4. The Union's letter

At 7:35 p.m. on January 3, 2013, David I. Cann (Cann); the Union's attorney, faxed a letter to Respondent's Brooklyn facility. The letter was addressed to Foreman and informed him that his law firm represented the Union. Cann stated that the Union was engaged in an organizing campaign at several of Respondent's facilities in the New York metropolitan area. Cann included in the letter that employees Frank Esammason, Al White, Marvin Francis, and Frank Cangemi had formed a committee for the purpose of organizing a labor union and engaging in collective bargaining. Cann further stated in the letter that any retaliation against Francis or any members of the committee was prohibited by law and would result in charges with the National Labor Relations Board.

Buckley returned to his office in Boston on January 4, 2013. Buckley noted in his records that he spoke with Foreman at approximately 5:30 p.m. on January 4. Foreman told him that after Buckley had left the facility the previous day, Foreman had received a faxed letter from an attorney representing the Union and advising Respondent to stop harassing certain individuals. Francis was named as one of the individuals listed in the letter. Buckley testified that this was the first time that he had heard that Francis was involved with the Union. In his notes, Buckley documented that he told Foreman that during his conversation with Francis on January 3, neither the word "union" nor any other activity concerning union campaigns was ever mentioned.

5. Respondent's decision to terminate Francis

Buckley recalled that he returned to the Brooklyn facility sometime between January 10 and 15. Over the course of several days, Buckley reviewed all the paperwork concerning the losses and he also spoke at length with Rosario. He testified that he did so because he didn't consider himself an expert in understanding the ATM documentation and he needed Rosario to explain the ATM operation. Rosario explained to him that the preprinted SL1's are not always accurate and often the assignments are changed after the forms are printed. Buckley testified that after his research, he concluded that Francis was the common denominator in the loss issues. He said that based on that conclusion, as well as on Francis' lack of candor and misleading comments on January 3, he concluded that Francis was not being truthful. He told Foreman that he didn't see how Respondent could have confidence in Francis in his continued functions at Respondent's facility. Foreman testified that based on Buckley's investigation, he decided to terminate Francis. Foreman denied that he had any knowledge of Francis' in-

volvement with the Union prior to getting the faxed letter on the evening of January 3.

By letter dated January 16, 2013, Foreman notified Francis of his termination. In the letter, Foreman told Francis that he had been the messenger responsible for an ATM cross-load which had resulted in a loss over \$13,000. Foreman also explained that there were three other ATM shortages in 2012 for a total loss of over \$10,000 occurring from machines that Francis was assigned. Foreman stated that as a result of these findings, he had lost confidence in Francis' ability to discharge the duties of his position in a manner consistent with the level of performance, proficiency, and care expected by Brink's.

6. Rosario's spreadsheet and the losses associated with Francis

a. The June 1, 2012 loss

One of the losses shown on Rosario's chart was a June 1, 2012 loss for \$2900 at Global Cash Access for ATM 22 (x022nyrw). The SL1 for this ATM for May 28, 2012, shows Olivera and Maysonet's names preprinted as the driver and the messenger respectively. The guide sheet for May 28, 2012, for the casino route contains the handwritten names of the employees who serviced the route. Maysonet is written into the space for the messenger, the name Olivera is written into the space for the driver, and Francis is the name written into the line designating the guard. Because the guard serves as a second messenger, Rosario testified that either Maysonet or Francis could have serviced the ATM on May 28. Francis testified that he did not complete any of the information that is included on the May 28, 2012 guide sheet.

The SL1 for this same ATM for June 1, 2012, shows that Olivera's name is preprinted as the driver and Maysonet's name is preprinted as the messenger. Maysonet's name, however, is marked through and Francis' name is handwritten on the form. Francis testified that he did not write his name in the section identifying him as the messenger and he does not know who did so. He contends that he did not complete anything contained on the SL1 for June 1, 2012. The SL1 also reflects that the lead messenger documented a shortage for the ATM of \$2900. The guide sheet for June 1, 2012, contains the handwritten names for the messenger, driver, and guard for route 14. The name of the messenger is handwritten as Jerry L. This individual is identified in the record as Jerry Lewis. The driver is designated as Olivera, and the guard is designated as Francis. Francis denies that he serviced Global ATM X022NY on May 28, 2012, or on June 1, 2012.

Francis denies that he wrote anything on the guide sheet or SL1 for either May 28 or June 1 and he denies that he was on the route either day. The guide sheet for May 28 reflects, however, that Francis was the second messenger and both the SL1 and the guide sheet for June 1 reflect that Francis was a messenger on the route. Rosario testified that when she prepared the spreadsheet on casino losses for Foreman, she listed Francis as the messenger on the date of the loss and noted that either Francis or Maysonet was the messenger on the day before the loss was discovered.

b. The September 7, 2012 loss

The largest of the losses included on Rosario's spreadsheet was a loss of \$15,520 at ATM 12 (x012nyrw) on September 7, 2012. Rosario testified that the loss resulted when \$100 notes were erroneously loaded into a \$20 cassette, causing the machine to over dispense to customers. Global Cash Access demanded a reimbursement of \$13,000 because of the cross-load. Rosario testified that when a cross-load occurs, she looks to the crew that serviced the ATM on the date prior to the loss because that would have been the crew who made the error in loading the cash into the ATM.

The SL1 for Global ATM 12 for September 3, 2012, contains the names of the driver and messenger preprinted on the form. Olivera's name is preprinted as the driver and Maysonet's name is preprinted as the messenger. The guide sheet for route 14 on September 3, 2012, shows the handwritten names of the messenger, driver, and guard. Francis is shown as the messenger, Jamal B. is handwritten as the driver, and Kevin Gordon (Gordon) is shown as the guard. Rosario testified that even though Maysonet's name had been preprinted on the SL1 for September 3, 2012, the guide sheet reflects that Maysonet did not service the ATM on September 3. Francis testified that because he was familiar with the location of the ATMs on this route, he took charge as the lead messenger and that he took responsibility for servicing the upper part of the machine and Kevin Gordon serviced the bottom half, including servicing the cash for the machine. Francis denied that he ever handled the cash that was removed or put into the Global ATM 12 on September 3, 2012. Francis admitted, however, that he did not know whether Gordon was qualified to service the ATMs. He also admitted that neither Gordon nor Jamal usually worked the casino route.

The SL1 for ATM 12 for September 7, 2012, contains the preprinted name for the driver and messenger. Olivera's name is preprinted as the driver and Maysonet's name is preprinted as the messenger. Maysonet's name, however, is marked through and Francis' name is handwritten in the space designating the messenger. Francis denies that he wrote his name on the SL1 or that he completed any portion of the SL1 for September 7. Furthermore, he denies that he serviced this particular ATM on that date.

Rosario testified that when she prepared the spreadsheet she listed Francis as the messenger on both the date of the loss and the date before the loss. She explained that she did so because she relied on the guide sheet as the more accurate document for the date before the loss. She also relied on the fact that the SL1 form for the day of the loss reflected that Maysonet's name had been marked through and Francis' name was handwritten in substitution for Maysonet's preprinted name.

c. The October 8, 2012 loss

Global Cash Access reported a shortage of \$3980 for a loss that occurred between October 5 and 9, 2012, for ATM 12 (x012nyrw) and demanded reimburse. The SL1 for this ATM for October 5, 2012, contains the preprinted names of the driver as Olivera and the preprinted name of Maysonet as the messenger. Maysonet's name, however, is marked through and Francis' name is handwritten in the section designating the messenger.

ger. Rosario concluded that because Francis' name was handwritten on the SL1, Francis was the person who physically loaded the ATM on that date. Francis denies that he wrote his name on this document or that he completed any portion of the document. Furthermore, Francis denies that he serviced Global ATM 12 on October 5, 2012. The guide sheet for October 5, 2012, for route 14 contains the handwritten names for the messenger, driver, and guard. Francis is shown as the messenger, Olivera and Francis are both listed as the driver, and D. Natal is listed as the guard. Francis recalls that he completed the guide sheet for October 5, 2012. He testified that he listed both he and Olivera as drivers because he drove part of the route. Francis was asked to compare the guide sheet for October 5 and the SL1 for ATM 12 for October 5, 2012, and to clarify who was the messenger who serviced the ATM. Francis asserted that he did not service the ATM because his name on the SL1 was not his handwriting. Francis further asserted that a driver never handles the cash, and thus Natal must have been the messenger who handled the cash and serviced the ATM. Rosario testified that when she compared the writing on the SL1 and the guide sheet for October 5, she concluded that Francis was the messenger.

The SL1 for ATM12 for October 8, 2012, contains the preprinted names of Olivera as the driver and Maysonet as the messenger. The document also reflects that the messenger documented a shortage of \$3980 when the ATM was serviced. Francis denies that he serviced this ATM on October 8. The guide sheet for October 8 shows Maysonet as the messenger and Corchado as the guard. Robinson is shown as the driver.

d. The November 16, 2012 loss

The SL1 for Global ATM 18 (xo18nyrw) for November 12, 2012, contains the preprinted names of Olivera as the driver and Maysonet as the messenger. Maysonet's name, however, is marked through and Francis name is handwritten into the space designated for the messenger. Francis acknowledges that he wrote his own name as messenger on this form and he was the individual who serviced the ATM.

The SL1 for ATM 18 for November 16, 2012, contains the preprinted name of Olivera as the driver and Maysonet as the messenger. Maysonet's name is marked through and Corchado's name is handwritten into the space designated as the messenger. The form also reflects that the messenger documented a shortage of \$4660 at the time the ATM was serviced. Francis denied that he serviced the ATM on November 16, 2012. Based on her review of the documents, Rosario determined that Francis was the messenger responsible for servicing the ATM in question on the date prior to the date of the \$4660 variance.

D. Francis' Involvement with the Union

1. Frank Esammason's role with the Union

Frank Esammason (Esammason) was first employed with Respondent in October 1994 where he worked at Respondent's Brooklyn facility. In 2006, he transferred to BGS' JFK Airport facility. Esammason currently works as a messenger/carrier. In 2012 and during the early part of 2013, Esammason's job required him to stop at the Brooklyn facility approximately 5

days a week. He picked up money or valuables that were to be transported to the JFK facility. He usually arrived at the Brooklyn facility between 5 and 5:30 p.m. and he spent no more than 10 to 15 minutes at the facility.

Esammason and fellow BGS employee Al White were the employees of BGS who created the Union. Esammason testified that first began thinking about starting a union in June 2012 and he shared his ideas with White in July 2012. Esammason recalled that he attended a meeting at the JFK facility in September 2012 that was conducted by JFK Branch Manager Tony Turrado. He also recalled that the regional or general manager for BGS and a regional human resource manager for BGS were present at the meeting. He could recall only that their first names were Dominic and Lesley. He recalled that Dominic introduced himself as Turrado's superior. Employee complaints and issues were discussed during the meeting. Dominic also mentioned that there were rumors about union organizing at the facility. Esammason asserts that he told Dominic that employees were looking into organizing a union because of the employee complaints and issues involving wages and pensions. In response to Esammason's statement, Dominic stated that employees had the right to do so. He also recalled that Lesley stated that she dealt with different unions in her job and she also said that the employees had a right to organize. Esammason recalled that Turrado had simply listened and did not have anything in particular to add.

Esammason testified that in late November or early December, he went to the Brooklyn facility with White and other co-workers and tried to speak with Respondent's employees outside the entrance gate. He estimated that they did so between 5 and 7 a.m. Esammason recalled that on one occasion when he was standing outside the gate, he saw Foreman and Human Resource Manager Brian Rosenthal. Rosenthal approached him and asked how he was doing. He also told Esammason that he could not block the gate. Esammason told him that he was not blocking the gate and Rosenthal said nothing further. Esammason asserts that he continued to distribute union literature after the exchange. Esammason testified that Francis joined him in the parking lot approximately an hour after the conversation with Rosenthal. Esammason did not testify as to how long Francis remained in the parking lot or whether any other management officials were present during the time that Francis came to the parking lot. Esammason asserts that he continued to distribute union literature in the parking lot outside the Brooklyn facility twice a week until the February 2013 election.

Esammason testified that he first began talking with Francis about the Union in June or July 2012. He estimated that within 2 weeks of first talking with White about the Union, he spoke with Francis every day and that he saw Francis at the Brooklyn facility two to three times a week. Francis, however, testified that he first began talking with Esammason about the Union in September and October of 2012. Francis testified that they not only spoke by telephone and text, but that they also met in person at a restaurant in Queens New York. Employee Al White, another employee at the JFK facility, and Attorney David Cann were also present during some of the meetings at the restaurant.

Francis recalled that there were a total of 3 or 4 of these meetings that occurred during a period of time between October and December 2012. Francis also recalled that another employee of the Brooklyn facility also attended. He did not specify how many meetings that this employee attended and he could only recall that his first name is Frank.

Francis testified that he usually saw Esammason approximately once a week when Esammason came to the Brooklyn facility to make deliveries. He recalled that when he spoke with Esammason, he did so while on the platform as well as in the restroom. The platform is the area where the trucks back in for loading or unloading. During the morning hours, supervisors and messengers are the individuals who are primarily on the platform. Messengers and night loaders are the individuals who are primarily on the platform during the afternoons. Security cameras are located directly above the platform. Francis asserted that each time he saw him, Esammason asked about the status of the organizing. He recalled that when he spoke with Esammason on the platform, he only spoke for 1 to 3 minutes and simply greeted him and exchanged a few words.

Francis also testified that he first saw Esammason distributing union flyers on 10th Street outside the facility and near the parking lot "in or around October." Francis asserted that between October and December, he helped Esammason distribute union flyers in this area three to five times. Francis testified that there were times when he did this in the morning between 6 and 8 a.m. and other times after work and between 5:30 to 7:30 p.m. On cross-examination, Francis admitted that he did not recall the dates when he distributed union literature and that his earlier testimony had been only an estimate as to how many times he had distributed union literature. He acknowledged that he had no recall of any specific dates other than January 17, 2013, and after his suspension.

Francis asserted that before he began talking with Esammason about the Union, he seldom saw Young outside on the platform area in the afternoon. He acknowledged, however, that Young's office and the platform are on the same level and that there is a window in Young's office giving a view of the platform. He asserted that in October 2012 and while he was on the platform talking with Esammason one afternoon, Young told him to stop socializing and go ahead and check off his route and go home. Francis also recalled that there were other times when he spoke with Esammason on the platform and Young stopped and asked Francis and Esammason if they needed any help with anything. Francis further asserted there were occasions when Young stared at him from a distance of 25 to 30 feet. Francis testified that he saw Young look at him in this way every time that Esammason came to the facility. Francis also testified that before there was any discussion about the Union, he had been friends with Young. He asserted that after he became involved with the Union, Young no longer offered him a ride home from work and that Young looked at him differently.

Francis testified that even before there was any discussion of the Union, he had been friends with Esammason and that he occasionally spoke with Esammason when he visited the Brooklyn facility. Francis also asserted that before he began having discussions with Esammason about the Union, he never

saw Forman on the platform in the afternoons. Francis asserted that after he began talking with Esammason about the Union, Forman's presence "was very evident." He estimated that after he began talking with Esammason about the Union, he observed either Forman or Young on the platform each afternoon. Esammason also testified that after his meeting with Turrado in September 2012, he observed Foreman on the platform more often than before. Esammason testified, however, that Foreman was never close enough to overhear any conversations that he had with Francis.

2. Francis' contact with other employees

Francis testified that he began talking with other employees about the Union in September or October 2012. He did not give any specific names, but asserted that he talked about the Union with truckers, night loaders, as well as, employees in the cash processing department. He testified that he did so on the platform, as well as in the breakroom, the parking lot, and the locker room. He recalled that he approached employees individually and primarily after working hours. He estimated that spoke with a total of approximately 80 employees.

Esammason testified that he first gave Francis union authorization cards to distribute in mid-October and that Francis returned the signed cards to him within a week to 2 weeks. Esammason asserted that after he gave the union cards to Francis, he saw Foreman more frequently when he visited the Brooklyn facility. Francis, however, testified that Esammason first gave him union cards to distribute in November 2012 and he began immediately distributing the cards to employees. Francis acknowledged that in the affidavit given to the Board, he testified that Esammason gave him approximately 100 union cards on November 30, 2012. Francis' union authorization card is dated December 1, 2012; however, he did not sign the card on December 1. He asserted that he did not immediately sign a card and that Esammason reminded him in a meeting that he had not as yet signed a card. Francis testified that he wrote December 1, 2012, on the card because he estimated that this is the date that he "should" have signed the card.

Francis testified that he gave union cards to employees in the gym and on the platform; areas that were covered by the facility cameras. He also recalled that he gave employees union cards in the male locker room, the breakroom, and the parking lot. Francis testified that the Tarot office at the facility contains the live feed from cameras filming areas in the parking lot, the front of the building, the lobby area, the locker room, and the computer room. Respondent stipulated that Forman has been in and out of the Tarot office every day since he worked at the Brooklyn facility and particularly during the month of November. Respondent further stipulated that after Hurricane Sandy, Forman was in the Tarot office virtually every hour because of the effects of the hurricane on the facility.

Francis testified that he collected approximately 50 union authorization cards from other employees over a period of approximately 2 months between October and December. He recalled that on December 15, 2012, employee Tameka Grant saw him talking with another employee about signing a union card. During the conversation, some of the union cards fell to the floor. Francis testified that Grant picked up one of the cards

and he pulled it from her hand. He recalled that Grant told him, "Ooh, I'm telling. You're going to get in trouble." Francis testified that he had picked up the cards that had fallen and he made his way to the bathroom with his "heart pounding."

Francis asserts that at the time of this conversation, Grant worked as Young's assistant during the week and as a dispatcher on Saturday's. Francis testified that her work area was near to Young's and he believed that they were friends.

Francis was on vacation from December 17 until December 31, 2012. Francis testified that twice during this period, he went to the Brooklyn facility with Esammason and stood outside the facility and handed out union materials to individuals coming to work. He estimated that they did so between 6 and 7 to 7:30 a.m. Esammason recalled, however, that in late November or early December Francis assisted him in contacting employees outside the facility and during the morning between 5 and 7 a.m. Esammason estimated that prior to the filing of the petition, Francis assisted him in the parking lot at least twice a week.

3. Tracy Williams' testimony concerning the losses

Tracy Williams (Williams) first began working for Respondent in March 2000 as a processing teller in the currency room. She progressed to the position of assistant supervisor and then to the position of cash room supervisor. In December 2011, Williams transferred to the CIT department where she worked as a route logistics manager. Williams testified that she was the immediate supervisor for 16 employees and assisted with the management of 40 to 42 employees over the course of a workday.

Williams was terminated from her employment in May 2013. She was told that she was terminated because Respondent had lost confidence in her ability to perform her job and to resolve employee conflicts. Williams contended, however, that she believed that she was terminated because of a disagreement with employee Tamika Grant; who was a friend of Young.

Williams testified that in December 2012, she became aware that Respondent was looking into shortages that were attributed to Francis. Jessica Rosario asked Williams to help her look for SL1 forms that reflected shortages associated with Francis. Williams testified that she understood that they were looking for the forms because a casino customer had a large variance. Williams testified that although Rosario had found some of the documents relating to Francis and the losses, she (Williams) found an additional four documents on her own. She recalled that the losses associated with Francis were "pretty large" as well as other smaller amounts. Williams also recalled that as they were sorting out the SL1's associated with the shortages, "the amount [they] kept accruing."

4. Williams' testimony concerning Francis' union activity

Williams testified that she first began hearing rumors about union organizing in October and she also heard rumors that BGS employees Esammason and White were involved with the organizing. Williams began attending daily managers' meetings in October 2012. She recalled that in November there were daily discussions about the Union during the managers' meetings.

Williams testified that on an unspecified date in January, and after Francis' suspension, she happened to see Francis outside the facility at approximately 5 a.m. She saw him standing by the gate entrance with another man but she didn't know what he was doing. She recalled that she made a comment to Young "Wow, that's a bold move. The guy is actually forming a union against the company." Young responded, "Yeah, I know. Francis has a lot of nerve doing something like that after everything I've done for him."

When Williams was asked on direct examination when she first heard about Francis' connection to the Union, she testified that it had been the end of November or December. She acknowledged, however, that in the sworn affidavit given during the Board's investigation, she testified that she did not officially learn of Francis' involvement with the Union until after his discharge. She explained that by "official" she did not hear any mention of Francis' union activity from Forman or Young until after Francis' discharge. She admitted that she had no knowledge of Francis' union activity before his discharge.

E. Respondent's Discipline of Other Employees

Respondent asserts that its termination of Francis is consistent with its past practice in terminating other employees for similar reasons. In October 2010, Respondent terminated R. Mendoza because of a repeated loss of liability. Respondent determined that Mendoza was the messenger responsible for the safekeeping and security of three customer shipments on August 27, September 8 and 15, 2010, which all resulted in shortages for a total of \$14,860. In January 2011, Respondent terminated the employment of A. Serrano after an investigation that showed that Serrano was the messenger responsible for a high number of ATM shortages during the 2010 calendar year. In April 2012, Respondent terminated J. Diaz after he was identified as the messenger responsible for a series of customer claims and losses. Buckley testified that he was involved in the investigations involving both Mendoza and Serrano and he made recommendations to Foreman concerning his investigation. He also recalled that during the course of his investigation, he reviewed spreadsheets containing information on losses similar to those he reviewed in January 2013.

Records introduced during the hearing also reflect that on February 11, 2010, Respondent terminated employee P. Gallardo for ATM cash shortages totaling \$2751 and on January 13, 2012, Respondent terminated employee C. Thomas for shortages totaling \$3960.

F. Analysis and Discussion

1. Legal authority

Counsel for the General Counsel asserts that Respondent terminated Marvin Francis because of his activities in support of the Union. Respondent contends, however, that because Francis was associated with various and specific losses, it lost confidence in his ability to perform his job and therefore he was terminated. Respondent asserts that it had no knowledge that Francis was involved in union activity before a decision was made to terminate him. Because the Respondent's motive is an integral factor in determining the lawfulness of Francis' discharge, it is necessary to use what has come to be known as a

*Wright Line*⁴ analysis. The *Wright Line* analysis is based on the legal principle that an employer's motivation must be established as a precondition to finding an 8(a)(3) violation. *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). In its decision in *Wright Line*, the Board stated that it would first require the General Counsel to make an initial "showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line*, above at 1089.

Under *Wright Line*, the General Counsel must establish certain elements by a preponderance of the evidence. The General Counsel must show the existence of activity protected by the Act and that the respondent was aware that the employee had engaged in such protected activity. In addition to showing that the employee in question suffered an adverse employment action, there must be some showing that the employer bore animus toward the employee's protected activity. *Praxair Distribution*, 357 NLRB No. 91, slip op. at 1 fn. 2 (2011); *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 4 (2011). Specifically, the General Counsel must show that the protected activities were a substantial or motivating factor in the decision to take the adverse employment action. *North Hills Office Services*, 346 NLRB 1099, 1100 (2006). In effect, proving the established elements of the *Wright Line* analysis creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *Manno Electric*, 321 NLRB 278, 281 (1996). If the evidence establishes that the reasons given for the discipline are pretextual, either in that they are false or not relied on, the employer has failed to show that it would have taken the same action absent the protected conduct, and there is no need to perform the second part of the *Wright Line* analysis. *Golden State Foods Corp.*, 340 NLRB 382 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981). Furthermore, an employer cannot carry its *Wright Line* burden by showing that it had a legitimate reason for the action, but must "persuade" that the action would have taken place even absent the protected conduct. *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

2. Analysis of the *Wright Line* components

a. Whether Francis engaged in union activity

There is no dispute that Francis signed a union authorization card that is dated December 1, 2012, authorizing the Union to represent him for the purposes of collective bargaining to improve wages, benefits, and working conditions. Francis also asserts that he collected union authorization cards from other employees and that he assisted Esammason in distributing union materials to employees outside Respondent's facility. Clearly, by signing the union authorization card, Francis engaged in an activity in support of the Union and in an activity that is protected by Section 7 of the Act. Although no employ-

ees were submitted to support his assertions, I also credit his testimony that he talked with other employees about signing cards. In this respect, he also engaged in union activity. As discussed below, however, Francis' alleged open solicitation of support for the Union outside the Respondent's facility and his alleged visible assistance to Esammason is not as clear from the record evidence as the General Counsel maintains.

b. Whether Respondent knew of Francis' union activity prior to January 3, 2013

On January 3, 2013, the Union's attorney faxed a letter to Respondent, notifying Respondent that Francis was involved in organizational activities. Clearly, as of this date, Respondent was on notice that Francis was engaged in protected activity and Respondent's actions thereafter would bear the scrutiny beyond the second prong of the *Wright Line* analysis. The General Counsel asserts, however, that even prior to January 3, 2013, Respondent would have known that Francis was engaged in union activity. As outlined in my discussion below, I am not convinced that Respondent would have known about Francis' union activity prior to January 3, 2013.

There is no doubt that even prior to January 3, 2013, Respondent was probably aware that Esammason was involved in organizing for the Union. Esammason testified that as early as September 2012, he informed management at the BGS JFK facility that he was looking into organizing a union. Although Respondent may have known that Esammason was involved in union organizing, the evidence is not as clear with respect to Francis. There is no dispute that even before he became involved in the union organizing, Esammason's job took him to the Brooklyn facility approximately 5 days a week. Admittedly, his contact with the Brooklyn branch employees during these visits was limited to no longer than 10 to 15 minutes. There is no evidence that this practice changed after he began union organizing. Although Francis and Esammason contends that they saw Foreman and Young more often on the docks in the late afternoon after Esammason became involved in the Union, there is no evidence that Esammason spoke more with Francis than with other employees when he was there for the brief period of 10 to 15 minutes or that Foreman or Young overheard any comments that were exchanged between Esammason and Francis. Francis testified that when he and Esammason spoke, they only did so for 1 to 3 minutes and there was only a brief exchange of words.

Esammason testified that in late November or early December, he and Al White went to Respondent's Brooklyn facility and tried to talk with employees outside the facility gate during the early morning hours. He estimated that they did so approximately twice a week until the election in February 2013. He recalled that on one occasion, Rosenthal saw him and told him that he could not block the gate. Rosenthal did not dispute that he had this conversation with Esammason. This is the only conversation that is alleged to have occurred between Esammason and any of the management officials of the Brooklyn facility with regard to his union activity. Esammason also testified that approximately an hour after he had the conversation with Rosenthal, Francis came out to the parking lot and joined him. There is no evidence that Rosenthal or any other

⁴ *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 889 (1st. Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983).

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management official observed Francis in doing so. Initially Francis estimated that between October and December, he distributed union materials outside the gate of Respondent's facility two to five times. He later testified, however, that he did not know when he first distributed union materials outside the facility. He testified that the only date that he knew with certainty was January 17, 2013, and after his discharge. Esammason testified that Francis assisted him in distributing union literature outside the facility approximately twice a week until after the election. Based on the conflicting testimony between Esammason and Francis and the lack of corroborating evidence, I do not find Esammason's testimony to be credible with respect to Francis' alleged assistance to Esammason in distributing union literature. Based on the record as a whole, it is more likely that Esammason exaggerated the extent to which Francis attempted to assist him in organizing efforts.

Both Esammason and Francis testified concerning the time period when the Brooklyn employees were solicited to sign union authorization cards and the extent to which Francis was involved in that solicitation. Esammason testified that he first gave Francis union cards to distribute in mid-October and that Francis returned the cards to him within 2 weeks. Francis, however, initially testified that he collected 50 union cards from employees between October and December 2012. In direct contrast to Esammason's testimony, Francis later testified that Esammason gave him the union cards in November 2012. In the affidavit given by Francis to the Board during the investigation, Francis testified that Esammason gave him 100 union cards to distribute on November 30, 2012. Francis finally testified that he could not recall the time period when he began distributing union cards.

There is no dispute that Francis dated his own union authorization card with a December 1, 2012 date. During cross-examination, Respondent's counsel asked Francis why he signed his own card on December 1 and yet he asserted that he had solicited others to sign cards in October 2012. Francis contended that his signing the card with a date of December 1 was only after Esammason reminded him that he had not signed a card as yet. Francis asserted that he put the December 1, 2012 date on the card because he was estimating that this was the date that he "should" have signed the card. Francis does not deny that he signed the union card sometime after December 1, 2012. Esammason denied, however, that he ever suggested to Francis that he should backdate the card to a date earlier than when he signed it. Thus, Francis contends that he solicited employees to sign union cards as early as October and yet he acknowledges that he did not receive the union authorization cards from Esammason until November 30, 2012, and that he did not sign his own union card until sometime after December 1, 2012. Furthermore, Esammason's testimony that Francis returned 50 signed cards to Esammason during the latter 2 weeks of October is directly contradicted by Francis. Ironically, Respondent subpoenaed the Union's signed authorization cards during the course of this proceeding and the General Counsel opposed the production. After hearing the parties' arguments, I granted the General Counsel's motion to quash the subpoena and therefore there is no documentary evidence to

substantiate when the employees signed union cards. Furthermore, there is no evidence to support either Esammason's testimony or Francis' testimony or to credibly establish when Francis actually signed his own union card or when he solicited others to do so.

In the posthearing brief, the General Counsel acknowledges that there are discrepancies between Francis and Esammason concerning the dates on which they engaged in certain union activity. The General Counsel asserts, however, that such differences are minor and that their testimony was consistent on critical issues. Contrary to the General Counsel's assertion, however, I find the differences far more significant. In order to effectively argue that the Respondent would have reasonably known about Francis' union activity prior to January 3, 2013, the evidence must demonstrate that Francis was actively involved in union activity prior to that date. Esammason asserts that Francis solicited and collected union authorization cards during the last 2 weeks in October while Francis contends that he did not receive any union cards until November 30, 2012. Francis never identified when he actually signed his own union card. He simply asserts that he backdated the card to December 1, 2012, because he thought that was the date that he "should" have signed it. Thus, based on the testimony of Francis and Esammason, there is no clear evidence to show when Francis solicited employees to sign union cards or when he assisted Esammason in distributing union materials. January 17, 2013, is the only date that Francis can recall with certainty as a date when he distributed union materials to employees outside the facility. In light of the conflicting testimony of Francis and Esammason, there is in fact no credible evidence to actually demonstrate that Francis signed a union card prior to the Union's letter of January 3.

As discussed above, Francis estimated that he assisted Esammason in distributing union materials outside the facility two to five times during the period between October and December 2012. Esammason testified that Francis helped him distribute union literature twice a week in the parking lot and that he did so until the election. Francis also testified that on December 15, 2012, employee Tameka Grant saw him talking with another employee about signing a union card. Francis asserts that during the conversation, he accidentally dropped the cards and Grant picked up one of the cards and commented on the fact that it was a union card. Francis testified that because Grant sometimes worked as Young's assistant, he had been nervous that Grant had seen him with the cards. He recalled that when he was able to collect the cards that he had dropped, he immediately headed for the bathroom with his heart pounding. I note, however, that his testimony concerning his nervousness about Grant seeing the union cards conflicts with his assertion that he openly distributed union materials to employees during the period from October to December. If he had actively and openly distributed the union materials as he and Esammason asserts, it should not have been a matter of concern on December 15, 2012, that an employee might tell Young that he was handing out union authorization cards.

In asserting that Respondent had knowledge of Francis' union activity prior to January 3, 2013, the General Counsel also

relies on Francis' testimony concerning his conversation with fellow employee Ruben Corchado. Francis testified that on an unspecified date, he approached Corchado about signing a union authorization card. Corchado told Francis that he didn't believe that a union was going to work and he declined the card. Following his conversation with Corchado, Francis went to Young's office to get a new pair of pants because his uniform pants had ripped. The new pair of pants that Young gave him did not fit and he had to ask for another pair of pants from Young. In the interim of trying on the pants, Francis observed Corchado speaking with Young. He did not overhear their conversation. When Francis asked Young for the second pair of pants, Young tossed them to him rather than handing them to Francis. After trying on the second pair of pants, Francis approached Corchado and said, "You told them, didn't you?" Corchado just laughed and said that he did not know what Francis was talking about. Francis testified that Corchado never said anything further. Young denied that Corchado or any other employee ever told him that Francis was involved in union organizing. Although Francis apparently believed that Corchado talked with Young about his solicitation to sign the union card, there is nothing more than Francis' speculation to support this assertion.

The record evidence that puts Respondent's knowledge most in question was presented through the testimony of Tracy Williams, a former supervisor who was presented by the General Counsel. After having served as a member of Respondent's management team, Williams was terminated in May 2013. Based on her testimony, it is apparent that she does not believe that her termination was justified. Williams testified that she first began hearing rumors about union organizing as early as October 2012. She testified that during November 2012, there were daily discussions about the Union during the management meetings that she attended. It is reasonable that management would have had these discussions at that time as Esammason had already proclaimed his union organizational activities to the management officials at the JFK facility and he may have been soliciting employees outside Respondent's premises.

Although Williams initially testified that she learned of Francis' union activity "around December" she later admitted that in a sworn affidavit to the Board she had testified that she had heard about Francis' connection to the Union only after she sent Francis' resume in for a new position as a tech in January. Thus, in her sworn affidavit to the Board during the investigation, as well as in her sworn testimony at the hearing, Williams admitted that she had not known that Francis was involved with the union organizing until after his discharge. She testified that she had not heard any mention of Francis' union activity from either Foreman or Young. I find Williams' testimony to be far more credible than Francis and Esammason in this regard and to credibly contradict their testimony concerning the timing of Francis' assistance to Esammason in distributing union literature outside Respondent's facility.

Based on her testimony, it is apparent that Williams believed that her termination was not justified. A terminated employee having this opinion might not normally feel any obligation of loyalty to his or her former employer. It is reasonable that she might have welcomed the opportunity to present testimony

adverse to the Respondent's position. The fact that her testimony supports the Respondent's position gives her testimony more credibility. If management officials discussed the union organizing each day in their management meetings during the months after October 2012, it is plausible that they would have also discussed any employees who were thought to be involved in the organizing. If Francis' name was not mentioned, it is most likely because he was not known to be associated with the organizing effort. Thus, Williams' testimony supports a finding that Respondent was not aware of Francis' support for the Union prior to January 3, 2013.

Accordingly, I do not doubt that Francis believes that he engaged in activities in support of the Union's organizing efforts. At some undetermined point in time, he signed a card and he demonstrated his support for the Union outside the facility on January 17, 2013, after his suspension. The record demonstrates, however, that prior to January 3, 2013, Francis was not an open and visible supporter of the Union. There is simply a lack of credible evidence to show that Foreman knew about Francis' support for the Union when he notified management on December 26, 2012, that he wanted to terminate Francis for the associated losses. Furthermore, there is no evidence that Foreman or other management officials knew about Francis' union activity when Foreman asked Rosario to prepare the spreadsheet on the casino losses in followup to her earlier email outlining the true variances for him on December 9, 2012.

c. Whether Respondent demonstrated the requisite animus to meet the Wright Line analysis

There is no evidence establishing any independent violations of Section 8(a)(1) of the Act; thus there is no direct evidence of animus. Accordingly, to make a finding of animus, I must infer animus from the circumstances surrounding the treatment of Francis. Under the framework of *Wright Line*, the burden of proof rests with the General Counsel to establish animus. In *New Otani Hotel & Garden*, 325 NLRB 928 fn. 2 (1998), the Board noted that an inference of unlawful motivation may be "drawn from evidence of blatantly disparate treatment." The Board has also found that in the absence of direct evidence, animus may be inferred from the record as a whole. *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), enf. 976 F.2d 744 (11th Cir. 1992).

While Board precedent allows a finding of animus to rest on indirect evidence in appropriate cases such as *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), there are also Board decisions that have shown instances when drawing such an inference is inappropriate. An example may be found in the Board's decision in *J. O. Mory, Inc.*, 326 NLRB 604 (1998). In that case, the Board reversed a judge's finding of unlawful motivation based upon an instance in which the respondent employer departed from its customary, and facially valid, hiring practices.

The General Counsel asserts that the timing of the investigation of the casino losses and Francis' involvement with the losses is suspect as it occurs during the period of Francis' alleged union activity. The total record, however, shows that during December and the last month of the calendar year, the BAMS system generated a report showing the existing vari-

ances at the Brooklyn facility. Foreman followed up by asking Rosario to determine the true variances and losses. Within 12 days, Respondent's regional controller also alerted Respondent's directors in the northeast region that there were 122 PLRS with a value of \$395,583.62 and that any losses remaining as of December 31 would be accrued; which would have resulted in Respondent's absorption of the losses for the year. In response to Foreman's directive, Rosario prepared a spreadsheet identifying the messengers who were associated with the Global Cash Access losses. The results reflected that Francis was associated with four of the six losses. While it is coincidental that Respondent's investigation of these losses occurred at a time when Francis alleges to have been actively involved in union organizational efforts, the coincidence raises only a suspicion. As the Board has long recognized, "mere suspicion cannot substitute for proof" of unlawful motivation. *Frierson Bldg. Supply Co.*, 328 NLRB 1023, 1024 (1999); *Lasell Junior College*, 230 NLRB 1076 fn. 1 (1977).

The General Counsel asserts that the timing of Francis' termination, coming months after the incidents for which he was allegedly disciplined further establishes animus and unlawful motive. Respondent contends that any lag in time between the losses in question and Francis' eventual termination was justifiable in light of customer practices and the operational difficulties the Brooklyn branch experienced as a result of Hurricane Sandy. Rosario testified that after a loss at a Global ATM, Global typically takes 4 to 6 months to try to recoup any funds from customers that were overpaid. Respondent also submitted various letters and correspondence with Global to show that the joint attempt to resolve variances often covered a span of months before final resolution. Rosario further testified that her work was also delayed by a month because of the hurricane's disruption of the Brooklyn operation.

Although Respondent considered Francis' involvement in a loss that occurred as early as June 2012, there were also losses in October, and November; losses that occurred just prior to the disruption of the storm and in the aftermath of the storm. More significantly, however, the record reflects that Respondent's focus on the losses in early December 2012 was triggered by the automated BAMS report, the informational email from Respondent's regional controller, and perhaps more importantly the directive from Respondent's vice president of operations. Thus, because of the extenuating circumstances of the storm and the end of the year analysis of losses, I don't find suspicious timing in Respondent's attention to losses in December 2012.

The General Counsel also asserts that animus may be shown when Rosenthal asked Esammason to not block the entrance to the facility on one single occasion. While the General Counsel argues that this was a thinly disguised effort to intimidate Esammason and to disrupt his organizing activity at the Brooklyn branch, this statement is the only statement that is alleged to have been made to Esammason by Rosenthal or any other management official of Respondent. Esammason asserts that he continued to hand out union literature until the date of the election and there is no evidence that he was prevented from doing so.

The General Counsel also submits that Respondent's animus is evidenced by the fact that Respondent conducted a campaign in response to the Union's organizing efforts. Although Tracy Williams testified that Respondent conducted "speak out" meetings with employees prior to the election, she did not attend the meetings. Esammason testified that after the petition was filed, BGS conducted meetings with employees to give their opinion on the Union. He recalled that BGS told the employees that the Union was just a startup union and was not a reputable union. He also recalled that BGS management told employees that the law firm representing the Union also dealt with the transit authority workers who had been involved in a May 2006. There is no evidence that either BGS or Respondent made any statements to employees during their respective election campaigns that are alleged to be independent violations of the Act. While I have no doubt that Respondent conducted a vigorous campaign to counteract the Union's organizing efforts, there is no evidence that Respondent engaged in aggressive and unlawful conduct that would constitute the level of animosity that is alleged by the General Counsel.

Francis did not testify that any management official made any statement to him that related to the Union or involved any animus toward the Union. Tracy Williams is the only witness who provided any testimony concerning a manager's statement about Francis. She testified that in January 2013, she observed Francis outside the facility with other individuals. Although she did not identify a specific date, her total testimony indicates that Francis was distributing union literature after his suspension or discharge. Williams recalled that she made the statement, "Wow, that's a bold move. The guy is actually forming a union against the company." She recalled that Young had been standing near her and he responded, "Yeah, I know. Francis has a lot of nerve doing something like that after everything I've done for him." While Young's statement is certainly indicative of animus toward Francis, the record also reflects that this statement was also made after Foreman's decision to terminate Francis and after the Union's January 3, 2013 letter announcing Francis' involvement with the Union.⁵ Furthermore, there is no evidence that Yong had any role in the decision to suspend and terminate Francis. The decision was initially made by Foreman on December 26, 2012, and then finalized by Foreman on January 16, 2013, after the completion of Buckley's investigation. Thus, Young's statement to Williams in January 2013 does not establish that Foreman's decision to terminate Francis on December 26, 2012, was based on animus for union activity.

d. Continuation of the Wright Line analysis

As discussed above, I do not find that all components of the *Wright Line* analysis have been met to establish that Respondent was unlawfully motivated in its decision to suspend and to

⁵ Francis testified that after he began to support the Union and before the Union's letter of January 3, 2013, he believed that Young stared at him and was less friendly with him. There is no evidence, however, that Young made any statement to Francis during this time to indicate knowledge of or animus for his union activity. Thus, the alleged animus based on Young's demeanor is only speculation that cannot sustain a finding of animus.

terminate Francis. For the foregoing reasons, I do not find that there is sufficient evidence to substantiate that Francis' union support was known to the Respondent prior to January 3, 2013. Additionally, even if there was credible evidence of the Respondent's knowledge, the evidence of animus is marginal. Assuming, however, that the requisite elements of knowledge and animus have been demonstrated, I nevertheless find sufficient evidence to show that Respondent would have terminated Francis in the absence of protected activity.

e. Respondent's treatment of other employees involved with losses

The General Counsel takes the position that Respondent has terminated Francis for his association with losses and yet has not terminated other employees for similar conduct. Respondent's handbook provides that "loss or mis-delivery" of customer shipments due to negligence or failure to abide by company rules, regulations, policies, and procedures may result in disciplinary action up to and including discharge. Respondent not only asserts that it has terminated employees for similar losses, but it maintains that since January 2011 until the present, Francis has been associated with a greater dollar amount in losses than any other employees.

In response to a subpoena from the General Counsel, Respondent prepared a summary of all ATM and CompuSafe losses paid by Respondent from January 2011 until the time of the July 2013 trial. The parties stipulate that during this time period, there were 367 losses. For each loss, the summary lists a number of identifying factors including the customer's name, date of loss, amount of loss, and the employee associated with the loss. The summary reflects that during this period of time, Francis is listed as associated with six separate losses. Respondent admits that the summary reflects that there are other employees who have had more losses. One other employee identified as Espinal is reflected on the summary as associated with 16 losses. I note, however, that for 14 of the identified losses, the loss is associated with one or more other employees. For those incidents where only Espinal is associated with the loss, the loss amounts are \$200 and \$210 respectively.

In the posthearing brief, the General Counsel submits that the dollar amounts of the casino losses for which Francis was terminated were also similar in value to the losses associated with other employees whom Respondent did not discipline. Counsel for the General Counsel points out that the losses associated with Francis was \$2900 for June 1; \$13,000 for September 7; \$3980 for October 8; and \$5000 for November 16. Counsel submits that Respondent's summary reflects that employees "D. Tavares" and "L. Paulino" were jointly associated with a loss of \$9900; Maysonet was associated with a loss of \$8875; and J. Lewis was associated with a loss of \$4120. The General Counsel also contends that even though there was a total of 367 losses between January 1, 2011, and the date of the trial, Respondent terminated only two other employees in connection with their losses other than Francis. The record also reflects that Respondent terminated three other employees on February 11, 2010, October 19, 2010, and January 13, 2012, in connection with losses at the Brooklyn branch.

There is no evidence that Respondent has a practice in which an employee is disciplined or discharged after reaching a specific threshold amount of associated losses. Respondent asserts that it terminated R. Mendoza on October 19, 2010, after it was determined that he was the messenger connected with three losses totaling \$14,860. Respondent also submits that it terminated A. Serrano on January 5, 2011, after it was determined that he was the messenger associated with a high frequency of ATM shortages during the calendar year 2010 and totaling \$20,200. Furthermore, Respondent points out that on April 9, 2012, Respondent terminated J. Diaz because he was determined to have been associated with losses of \$6420. As evidence by the records submitted by the General Counsel, there have been other employees who have been associated with a large number of individual losses who have not been disciplined or discharged. Thus, there is no pattern or uniformity in Respondent's treatment of employees with respect to associated losses. There is however, one difference between Francis and any of the other employees advanced by the General Counsel in the argument that Respondent treated Francis disparately. The record reflects that in July 2011, Francis was clearly associated with a loss of \$31,000. While Respondent's investigation did not determine that Francis took the missing cash or purposely diverted it, he was nevertheless the messenger who took possession of the cash and who subsequently failed to complete the necessary paperwork to secure the cash. But for Young's intervention, Foreman would have terminated Francis at that time. He was, however, given a second chance. After a loss of this magnitude in 2011, Francis was again associated with losses totaling approximately \$24,540 between June 1 and November 16, 2012. Thus, Respondent submits that between January 1, 2011, and the date of his discharge, Francis was associated with losses of \$51,896 in comparison to the next closest messenger; R. Espinal who was associated with a total of \$21,920 in losses.

3. Final conclusions

As I have indicated above, I do not doubt that Marvin Francis supported the Union or that he wanted to assist Esammason in his organizing efforts at the Brooklyn facility. There is simply an insufficiency of evidence to demonstrate that he did so in a way that garnered Respondent's knowledge or that triggered his discharge because of his union support. Furthermore, it is simply not plausible that the basis for his termination was pretextual. In order to do so, I would need to find that Foreman's request to Rosario for a status report on losses was not prompted by the BAMS report of December 6, 2012, and was made solely to target Francis. Further, I would need to find that Rosario's spreadsheet was erroneous and that it was prepared for the purpose of focusing only on Francis' losses. Rosario credibly testified that Foreman did not request that she focus her investigation on any particular messenger. She reported to Foreman that as of December 9, 2012, 13 open losses remained and 7 of those losses related to Global Access Cash. In order to find a pretext, I would also have conclude that the December 18, 2012 email from Respondent's regional controller concerning the open PLR's of almost \$400,000 and Vice President Vechiarella's directive to resolve the potentially accruing PLR's

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was either of no significance to Respondent or were generated solely to target Francis for his losses. I have no reason to conclude that this correspondence was inconsequential, invalid, or discriminatorily based.

The record contains a myriad of evidence concerning the various SL1 forms and guide sheets that pertained to the four losses associated with Francis. Rosario testified in detail how she conducted her investigation of the losses and how she came to conclude that Francis was associated with these losses. Generally, she found Francis to be the messenger who participated in the servicing of the ATMs on the day before the losses or the day when the losses were established. She did so based on her finding that Francis' name was either preprinted on the documents or was handwritten on the documents. During his testimony, Francis contended that he was not responsible for the losses. He either contended that someone else had written his name on the documents or that he had not been on the routes in question. I don't find Francis' testimony to be wholly convincing with respect to these denials. As an example, Francis denies that he serviced the ATM on the day of the September 7, 2012 loss; however, he acknowledges that he was on the route for this ATM on the previous day that it was serviced. He confirmed that he worked the route with two other employees who did not normally work on the casino route. He denies responsibility for the loss as he claims that he only serviced the top of the ATM in question and that fellow employee K. Gordon serviced the bottom of the machine. He acknowledged, however, that he didn't know if Gordon was even qualified to service the ATM.

When Buckley interviewed Francis on January 3, 2013, he concluded that Francis was evasive and misleading and this report was given to Foreman. Francis' testimony concerning his involvement with the losses was not persuasive or convincing. Francis denies his involvement in several of the losses by contending that someone else wrote his name on the SL1s or guide sheets in question. Inasmuch as Francis also testified that the driver often completes part of the documentation rather than the messengers, the absence of Francis' handwriting is not of great consequence. Specifically, Francis testified that it is common for drivers to complete the guide sheets. Thus, while Francis may not have written his name on some of the relevant guide sheets, the driver on the route may have done so. Thus, it was irrelevant whether Francis or someone else on the crew inserted his name on the guide sheet and it was not inappropriate for Rosario to rely on the guide sheets in preparing her spreadsheet.

As I discussed with the parties over the course of the hearing, the crux of the issue is not whether Francis caused the particular losses, but whether Respondent believed that he was responsible or associated with the losses and terminated him

because of this belief. There is no indication that Foreman or any other manager made any independent analysis of the various loss documents to determine the extent to which Francis was involved. Buckley even testified that he could not look at the documents and determine their significance. He testified that he met with Rosario in order that she could explain the documents and her analysis to him. Thus, both Foreman and Buckley relied on the information provided by Rosario. She is, therefore, a critical witness in my analysis of the evidence and in making the associated credibility determinations.

I found Rosario to be a credible witness. She is not a member of management and she is one of three reconciliation clerks; whose job involves the analysis of variances and losses. There was nothing in the record to indicate that Rosario had any animus toward Francis or any reason to single him out. Williams, who assisted Rosario in her analysis, and who was also called as a witness for the General Counsel, acknowledged that some of the losses associated with Francis were "pretty large." Even though Williams helped Rosario to locate the loss documents associated with Francis, she did not testify that she was aware that Rosario was doing so for a discriminatory purpose. As Williams was a member of management at this time, it is reasonable that she would have known if the loss analysis related to Francis was associated with his union activity or for any other discriminatory purpose. Accordingly, there is simply insufficient evidence to establish that Respondent's reason for terminating Francis was pretextual or for reasons other than those asserted.

For the reasons and rationale as set forth above, I do not find that Marvin Francis was suspended on January 3, 2013, and terminated on January 16, 2013, because he engaged in protected activity.

CONCLUSION OF LAW

The General Counsel has failed to prove by a preponderance of the evidence that Respondent violated the Act in suspending and terminating Marvin Francis. Thus, the Respondent is not shown to have violated the Act as alleged in the complaint. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The complaint is dismissed.

Dated, Washington, D.C. November 25, 2013

⁶ 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 by Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.