

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

SAN GABRIEL TRANSIT, INC.

and

Case 21-CA-39559

ANGEL REYES RUIZ, an Individual

and

Case 21-CA-39573

ELMA LURANCI ORDOÑEZ, an Individual

Irma Hernandez, Esq., for the General Counsel
Erick J. Becker, CEO, American Consulting Group,
for Respondent, Mission Viejo, California.

DECISION

I. Statement of the Case

LANA PARKE, Administrative Law Judge. Pursuant to charges filed by individuals Angel Reyes Ruiz (Reyes) and Elma Luranci Ordonez (Ordonez), the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued the Order consolidating cases, consolidated complaint and notice of hearing (the complaint) on February 18, 2011.¹ The complaint alleges that San Gabriel Transit, Inc. (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).² This matter was tried in Los Angeles on May 9 and 10, 2011.

II. Issues

- A. Did the Respondent violate Section 8(a)(3) and (1) of the Act by discharging Reyes Ruiz on September 22.

¹ All dates herein are 2010 unless otherwise specified.

² At the hearing, the General Counsel amended the complaint to correct a misdate and a misspelling and to add the names of Road Supervisors Eduardo Dominguez and Eugene Estrada as agents of Respondent within the meaning of Sec. 2(13) of the Act, which allegation was admitted by Respondent.

- B. Did the Respondent violate Section 8(a)(1) of the Act by the following conduct: threatening an employee with unspecified reprisals; threatening an employee with job loss; polling and/or interrogating employees about their sympathies for the Wholesale Delivery Drivers, General Truck Drivers, Chauffeurs, Sales and Industrial Allied Workers, Teamsters Local 848 (the Union).

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III. Jurisdiction

At all material times, Respondent, a California corporation with its principal offices located at 3650 Rockwell Avenue, El Monte, California (the facility) has engaged in the business of providing transportation services. During the 12-month period ending July 15, a representative period, Respondent, in conducting its business operations derived gross revenues in excess of \$1 million and purchased and received at the facility goods and materials valued in excess of \$50,000 directly from points outside the State of California. I find that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

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IV. Findings of Fact

Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony regarding events occurring during the period of time relevant to these proceedings.³ On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by General Counsel and Respondent, I find the following events occurred in the circumstances described below during the period relevant to these proceedings:

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A. Respondent's Business

Under contract with Access Services, a California-mandated public paratransit service for functionally disabled individuals in Los Angeles County, California, Respondent provides transportation services in Los Angeles County for individuals eligible for paratransit under the Americans with Disabilities Act. In 2010, Respondent employed about 187 drivers to transport Access-eligible riders. Riders may pay the transportation fare with coupons issued by Access, tokens from the County Metropolitan Transit Authority (MTA), or cash. Each Access coupon is worth \$2.25 and is good for one trip of up to 19.9 miles. Any trip over that distance requires an additional fare of \$.75, usually paid with a Zone Coupon. Access coupons are issued in books of 10. Each book is identified with a number unique to the specific coupon book, and the coupons, in addition to the book number, bear, seriatim, the letters A through J. The numbering and lettering system permits ownership identification of each coupon. Riders may purchase coupon books from Access or receive them from Regional Centers.⁴

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³ Counsel for the General Counsel's unopposed posthearing motion to correct the transcript is granted. The motion and corrections are received as ALJ Exh. 1.

⁴ Regional Centers are nonprofit agencies that contract with the government to provide a variety of services to the disabled, including in addition to transportation, job placement and living arrangements. Regional Centers may provide coupon books to eligible riders without cost.

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Respondent utilized a computerized dispatch system to route drivers, who were given a daily route showing designated pickup and drop-off locations for each passenger (client) on an in-vehicle monitor known as a Mobile Data Terminal. At each pickup, the client paid the driver the fare by coupon, MTA token, or cash, all of which each driver put into a fare bag. Drivers filled out a "driver's trip log" each day, in which the driver hand-wrote each client's name, whether a client was a no-show, the number of passengers that paid a fare, and the amount paid by the passengers. Drivers were not required to document passengers' payment methods or coupon numbers/letters.

At the end of each shift, all drivers turned in their fare bags containing the coupons and/or tokens collected during the shift. Each driver retained all collected cash. Respondent—by reviewing each driver's trip log, computerized trip sheet, and turned-in coupons/tokens—ascertained the amount of cash each driver had collected and retained. That cash amount was thereafter deducted from the driver's subsequent paycheck.

In order to avoid paycheck deductions for collected cash, some drivers purchased coupons from clients or from coworkers (whom clients occasionally tipped with coupons).⁵ Drivers then placed the purchased coupons in the fare bag, exchanging them for cash collections. Drivers were not disciplined for buying coupons, although Respondent's general manager told employees she thought it was a bad idea.

At all material times, the following individuals held the positions set forth and were supervisors of Respondent within the meaning of Section 2(11) of the Act, and/or agents of Respondent within the meaning of Section 2(13) of the Act:

Stacey Murphy (Murphy)	General Manager
Corey Barratt (Barratt)	Supervisor
Petros Keshishian (Keshishian)	Manager
Devin Bahariance (Bahariance) ⁶	Operations Manager/Supervisor

At all material times, the following individuals in the positions set forth were agents of Respondent within the meaning of Section 2(13) of the Act:

Eduardo Dominguez (Dominguez)	Road Supervisor
Eugene Estrada (Estrada)	road supervisor
David Acosta (Acosta)	labor consultant
Hector Barcenias (Barcenias)	labor consultant
Patrick Lopez (Lopez)	labor consultant

B. Respondent's Knowledge of Union Activities

In about March, the Union started an organizing campaign among Respondent's drivers, which culminated in a Board-conducted election among 193 eligible drivers on August 12 and 13. Respondent received 11 more votes than the Union; certification of election results issued September 13.

⁵ There is no evidence as to whether coupon holders who sold their coupons generally sold them for a discounted rate or if the coupons they sold had been furnished to them at no cost.

⁶ The name of Devin Bahariance appears as correctly stated at the hearing.

During the campaign, Reyes, a driver of about 8 years, solicited authorization cards from coworkers, obtaining 70-75 signed authorization cards from coworkers.⁷ Sometime in July as Reyes was making a scheduled pickup, Dominguez asked him if he was gathering signatures on cards, which Reyes denied. Later that same month, on Reyes' day off, Estrada spoke to Reyes in a grocery parking lot near a regular pickup location and accused him of trying to gather more signatures, saying that what Reyes was doing was not good. For nearly 6 weeks in July and August during work hours at the facility, Reyes openly wore a union pin and sticker on his shirt.

C. Alleged Violations of Section 8(a)(1) of the Act

1. Alleged Statements to Ordonez

Ordonez worked for Respondent for about 5 years until her termination on September 17. During the union campaign, she frequently distributed flyers to fellow drivers entering the facility. After Ordonez completed her shift on July 21, Bahariance gave her a written warning for not coming to work the previous day, which Ordonez refused to sign. According to Ordonez, the following transpired: Bahariance told Ordonez, "You draw a line between the employees and the company by going to [the] Union." Bahariance added that because employees had gone to the Union, they were no longer Respondent's friends; they were its enemies.

At that point, Keshishian entered the office. Ordonez told him Bahariance had given her a warning. Keshishian asked Bahariance to leave. After he left, Keshishian told Ordonez that management was stressed because of the Union. Keshishian said employees had drawn a line, built a wall between the Respondent and the drivers, and stabbed Respondent in the back by going to the Union. He told Ordonez she would be in trouble if she were late by 10 minutes but assured her that if she ever got written up for being only 2 to 5 minutes late, she could go to him, and he would take care of it. When Ordonez told Keshishian the Union could help her, Keshishian told her that as soon as the "union thing" is done, things were going to change; the Company was going to hire new people.

Both Bahariance and Keshishian testified about their July 21 interaction with Ordonez. According to Bahariance, he only mentioned the Union to Ordonez when he told her that if the Union came in, it might result in the Union "passing" attendance rules with a point system, which would mean Ordonez would no longer have a job because of her attendance problems. Keshishian denied discussing anything about the Union with Ordonez. I found Ordonez to be a straightforward and candid witness.⁸ After considering the demeanor of the witnesses, I accept Ordonez' account of her conversations with Bahariance and Keshishian on July 21.

2. Alleged polling of employees

During the union campaign, Respondent's labor consultants, Acosta, Barcenas, and Lopez (collectively the consultants) conducted employee meetings at the facility. About 2-3

⁷ Reyes gathered some signatures at the facility but gathered most when drivers' paths crossed while route driving.

⁸ Respondent contends that Ordonez' termination by Respondent resulted in a bias against Respondent demonstrable in her testimony. Although Ordonez' testimony suffered from some of the hesitations and misunderstandings frequently attendant to translation, I saw no signs of bias.

weeks before the election, Ordonez attended one such meeting in the training room, along with about 11 other employees. Lopez and Barcenas sat at a table located in the front of the training room. On the table was a basket containing red plastic bracelets with "no to union" printed on them and a stack of purple flyers.

5 At the end of the meeting, Lopez invited employees to take the bracelets, saying the bracelets were free and if employees wanted, they were free to get one. As employees left the meeting, Lopez and Barcenas remained seated at the table with the bracelets and flyers. Ordonez was the second person to walk out of the room. She took neither a bracelet nor a flyer. She did not see any other employee take a bracelet although she saw the employee leaving
10 ahead of her take a flyer. While Ordonez was exiting the training room, Lopez and Barcenas remained seated behind the bracelet basket.

C. The Discharge of Reyes

15 On September 20, Reyes' assigned route included transportation of passenger Jocelyn Yan (Yan) from a South Pasadena grocery market to her home in San Gabriel. Yan paid the fare with an Access coupon. During the ride, Yan offered to sell Reyes two coupon books—of 10 tickets each—that she had at her home. Each book had a face value of \$22.50. Reyes said he had only \$18 in cash, and Yan agreed to accept that amount. When they arrived at her
20 home, Yan and Reyes completed the transaction. According to Reyes, he did not count the coupons in the booklets Yan gave him because at that price he could not lose out if there were fewer than 10 coupons in each booklet.

25 Shortly after selling the two coupon books to Reyes, Yan called Respondent's dispatch office to ask that the books be returned to her. Dispatch transferred the call to Murphy, to whom Yan repeated the request. Dispatch informed Reyes of Yan's request. Reyes returned the two coupon books to Yan that afternoon and retrieved his \$18. Neither Yan nor Reyes counted the coupons inside the booklets during the exchange. According to Reyes he took no coupons from the booklets while they were in his possession but returned them to Yan in the same condition
30 as he had obtained them.

35 A short time later, Murphy telephoned Yan to find out if the books had been returned. Yan said they had but complained that the first and last coupons from one of the books were missing. Yan gave Murphy the indentifying numbers of the coupon book along with the letters of each missing coupon (B43878A and B43878J). Murphy contacted the Los Angeles Regional Center to determine whether coupons B43878A and B43878J had been issued to Yan and found they had been. At some point, Murphy checked Reyes' electronic trip sheet to ascertain that he had been dispatched for only one trip with Yan.

40 When Reyes returned to the yard on September 20, Murphy and Barratt met him and asked him to turn over all coupons he had. Reyes gave the supervisors all the coupons he had collected that day.

45 According to Reyes, after turning over the coupons to Murphy, he parked his vehicle, turned in his keys, and left the facility without any further conversation with management about Yan's coupons. According to Murphy, the following occurred: after Reyes turned over his fare bag to her and Barratt, Murphy told him to meet with her in her office when he had completed his post-route duties. While waiting for Reyes, Murphy and Barratt examined Reyes' coupons and found coupons bearing the numbers/letters B43877J, B43878A, and B43878J, the last two of which matched the numbers/letters of the coupons Yan complained were missing from one of the books Reyes returned to her. Murphy contacted Frances Gutierrez of the Los Angeles

Regional Center and, giving her the three coupon numbers/letters, asked to whom they had been issued. Frances Gutierrez said all three of the coupons had been issued to Yan.

When Reyes joined Murphy and Barratt in Murphy's office a short time later, he acknowledged that he had bought and then returned two coupon books to Yan that day. 5
 Murphy told Reyes that Yan complained he had stolen two of her coupons. Reyes denied taking her coupons. Murphy asked Reyes to explain his possession of three coupons from Yan who had taken only one trip that day, two of which were from a coupon book he had returned to Yan that day. Reyes said maybe he had bought two coupons from a driver that morning but could not remember.⁹ When Murphy asked how another driver would have coupons from the Yan 10
 coupon book, Reyes said that maybe he, Reyes, had found the coupons in the back of the vehicle. Murphy told Reyes they would discuss the situation again the following morning.¹⁰

Where Reyes' testimony conflicts with Murphy's, I credit Murphy. Reyes manner and demeanor did not inspire confidence in his testimony. I found Reyes to be vague in much of his 15
 testimony and difficult to pin down, as, for example when testifying about whether he had told Murphy on September 20 that he had purchased coupons from a coworker. Moreover, as noted below, he was demonstrably mistaken in contending he had received no complaints in his employment.

Following her interview with Reyes, Murphy decided to terminate him for theft of Yan's 20
 coupons. On September 22, after finishing his route, Reyes was directed to go to Respondent's office where he met with Murphy and Barrett. They told Reyes he was being discharged for stealing coupons. Murphy gave him a discharge notice titled "Notice of Change in Relationship" and his final paycheck.

Reyes protested that Respondent was firing him because he was the leader of the union 25
 organization effort, pointing out that in his years of employment, he had never had any complaints or accidents.¹¹ Murphy denied the accusation, repeating that his discharge was because he had stolen two coupons.

At the hearing, Reyes denied that he had stolen any of Yan's coupons. Respondent had 30
 never discharged any other driver for theft, but there was no evidence such a disciplinary issue had ever before arisen among the drivers. A supervisor had been fired for arranging for another employee to be paid for hours not worked and splitting the money. Respondent has a progressive disciplinary policy, which, according to the employee handbook, may at Respondent's discretion, be exercised "to ensure a fair method of disciplining employees, 35
 [which] when followed...is intended to give employees advance notice, whenever possible, of

⁹ Barratt confirmed that Reyes said he had bought the coupons from another driver but said that Reyes did not answer when Barratt asked who the driver was.

¹⁰ Where Reyes' testimony conflicts with Murphy's, I credit Murphy. Reyes manner and demeanor did not inspire confidence in his testimony. I found Reyes to be vague in much of his 40
 testimony and difficult to pin down, as, for example when testifying about whether he had told Murphy on September 20 that he had purchased coupons from a coworker. Moreover, he was demonstrably mistaken in contending he had received no complaints in his employment.

¹¹ In making this claim, Reyes was apparently mistaken. His May evaluation marked him below 45
 average as to complaints and included a comment that he had many complaints on file, although most were old and he had improved in that area.

problems with their conduct or performance in order to provide them an opportunity to correct any problems."

V. Discussion

5 A. Independent Violations of Section 8(a)(1) of the Act

1. Statements to Ordonez

10 The complaint alleges that Bahariance and Keshishian separately threatened an employee with unspecified reprisals, and that Keshishian also threatened an employee with job loss, all in violation of Section 8(a)(1) of the Act. General Counsel argues that Respondent threatened Ordonez when Bahariance told her that employees had drawn a line between themselves and the Company by their prounion activities and that Respondent and employees were no longer friends but enemies. General Counsel also argues that Respondent threatened Ordonez when Keshishian told her that by going to the Union employees had drawn a line and built a wall between themselves and Respondent and had stabbed Respondent in the back. Finally, General Counsel argues that Keshishian impliedly threatened Ordonez with job loss by telling her the company was going to hire new people when the "union thing" was over. Respondent does not dispute that the above statements, if made, were unlawful; rather Respondent submits that Ordonez should not be believed. As explained above, I have credited 20 Ordonez' testimony.

It is unlawful under Section 8(a)(1) of the Act for an employer to "interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. In deciding whether a statement is threatening or coercive, the Board applies the objective standard of whether the remark would reasonably tend to interfere with the free exercise of protected employee rights. If it would, it is unlawful.¹² 25

Viewed objectively, Bahariance's statements to Ordonez implied a threat of harm to employees who had, by their union support, created a line of enmity between themselves and Respondent. The only reasonable construction to place on Bahariance's statements was that employees, as "enemies" of the Company, faced future reprisals. Such a threat, albeit of unspecified consequences, had a reasonable tendency to interfere with, restrain, or coerce the employees in the exercise of protected rights and violated Section 8(a)(1) of the Act. Keshishian's statements to Ordonez developed the same concept, i.e., that union activities created a dividing wall between disloyal employees and their betrayed employer, and likewise violated Section 8(a)(1) of the Act. 35

As to Keshishian's response to Ordonez' hope that the Union could help her, his forewarning that when union activity was past Respondent would hire new people, could only have been understood as an implied threat of future job loss for union supporters. This implied threat also reasonably tended to interfere with, restrain, or coerce employees in their protected rights and violated Section 8(a)(1) of the Act. 40

¹² *Kenmore Electric Co.*, 355 NLRB No. 173, slip op. at 4 (2010); *Joseph Chevrolet*, 343 NLRB 7, 9 (2004), enfd. 162 Fed. Appx. 541 (6th Cir. 2006). (Citations omitted) *Southdown Care Center* 308 NLRB 225, 227 (1992); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998); *Miami Systems Corp.*, 320 NLRB 71, 71 fn. 4 (1995), affd. in relevant part 111 F.3d 1284 (6th Cir. 1997). 45

2. Alleged polling of employees

5 The complaint alleges that in mid-July Respondent's labor consultants, Lopez, Barcenas, and Acosta polled or interrogated employees about their sympathies and support for the Union. The allegation rests on the facts that following a meeting with employees, Lopez invited employees to take antiunion bracelets available on a table at which two of the consultants sat.

10 Relying on *Austal USA*,¹³ General Counsel contends that since, in order to exit the meeting, employees had to walk by the table where both bracelets and consultants were positioned, the consultants could readily observe who took a bracelet and who did not. In those circumstances, General Counsel argues, Respondent unlawfully pressured employees to "make an observable choice that demonstrate[d] their support for or rejection of the union." *Id.*

15 Respondent argues that in the absence of evidence that the consultants directly offered bracelets to employees or made coercive statements, General Counsel has not proved the consultants engaged in unlawful polling or interrogation.

20 Employers may make antiunion paraphernalia available to employees at a central location provided that supervisors are uninvolved in the distribution process and there is no other coercive conduct in connection with the distribution. See *Circuit City Stores*, 324 NLRB 147, 147 (1997); *Barton Nelson, Inc.*, 318 NLRB 712 (1995); *Gonzales Packing Co.*, 304 NLRB 805, 815 (1991). Employers may not create situations in which employees are forced to disclose their union sentiments. *Lott's Electric Co.*, 293 NLRB 297, 303–304 (1989), *enfd. mem.* 891 F.2d 281 (3rd Cir. 1989). Thus, employers may not distribute campaign paraphernalia in a manner that pressures employees to make an observable choice demonstrating their support for or rejection of the union. *A. O. Smith Automotive Products Co.*, 315 NLRB 994, 994 (1994).
25 The question is whether in the circumstances of this case, the consultants' bracelet proffer falls within the Board's permissible scenario or its impermissible one.

30 The factual foundations of Board cases in which the issue has been addressed are instructive: In *A. O. Smith*, *supra* at 994 and 997, a supervisor directly and individually offered employees "vote-no" buttons while another supervisor proffered "vote-no" shirts and caps to individual employees as they worked. The Board found that by having its supervisors directly offer employees antiunion paraphernalia, the employer effectively put employees in a position of having to accept or reject the employer's proffer and thereby make an observable choice that would reveal something about their union sentiments. In *Circuit City*, *supra*, the store manager
35 individually distributed to unit members vote-no mugs, many of which were personally inscribed with the employee's name. The Board concluded employees would reasonably believe that a refusal to accept the mug would be construed as a rejection of the employer's position in the campaign. In *Barton Nelson, Inc.*, *supra* at 712, supervisors directly distributed antiunion hats to unit employees. The Board explained the impropriety was not in making the hats available, but when "supervisors approach individual employees and solicit them to wear antiunion or
40 proemployer paraphernalia, the employees are forced to make an observable choice that demonstrates their support for or rejection of the union." In *Gonzales Packing Co.*, *supra* at 805, a supervisor violated Section 8(a)(1) by visiting eligible voters at their work stations to ask if they wanted a "NO" sticker. In *Galen Hospital Alaska, Inc.* 327 NLRB 876, 876 (1999), a supervisor placed a plastic bag containing "Vote No" buttons on a counter in an employee break/office area. The supervisor told nearby unit employees the buttons were available and,
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¹³ 356 NLRB No. 65, slip op. at p.53 (2010), citing *Circuit City Stores*, 324 NLRB 147, 147 (1997).

after a brief period, returned to her adjacent office. Since the supervisor did not solicit any employee to take a “Vote No” button or engage in collateral coercive conduct but simply made buttons available to employees, “no employees were put in the position of having to make an observable choice demonstrating their support for, or rejection of, the Union.”

5 After considering all the circumstances of the alleged polling herein, I find the consultants’ conduct falls more within the purview of *Galen Hospital* than of *A. O. Smith, Circuit City, Barton Nelson, or Gonzales*. Here, Respondent’s consultants, not its supervisors, made campaign paraphernalia available to employees. Although employees undoubtedly knew the consultants could, and probably would, report whether employees took the bracelets, it is
10 unlikely employees would view the consultants as having the direct employment impact that supervisors have. Even assuming employees perceived the consultants as proxies for their supervisors, Lopez’ conduct does not rise to the level of that found unlawful in *A. O. Smith, Circuit City, Barton Nelson, and Gonzales*. At the end of the consultants’ meeting with employees, Lopez merely told employees generally that they were free to take a bracelet from the basket on the table if they wanted one. Lopez made no direct overtures to any employee and engaged in no collateral coercive conduct.¹⁴ Accordingly, I find Respondent did not violate the Act as alleged in this regard.

B. The Discharge of Reyes

20 General Counsel contends that Respondent terminated Reyes for engaging in union activities and that its claimed basis—coupon theft—was pretextual. Respondent argues that General Counsel has not shown the requisite knowledge and animosity to establish a prima facie case, or, in the alternative, that Respondent met its burden of proving that Reyes would have been terminated even in the absence of union activity.

25 In termination cases turning on employer motivation, the Board applies an analytical framework that assigns the General Counsel the initial burden of showing that union activity was a motivating or substantial factor in an adverse employment action. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The elements required to support such a showing are the employee’s union activity, employer
30 knowledge of the activity, and employer animus toward the activity. If the General Counsel meets the initial burden, the burden of proof then shifts to the employer to show, as an affirmative defense, that it would have taken the same action even in the absence of the employee’s protected activity. *Wright Line* at 1089; *Alton H. Piester, LLC*, 353 NLRB 369 (2008).

35 While Respondent agrees that Reyes engaged in union activities, Respondent denies that Murphy, upon whose decision Reyes was terminated, knew of it. It is clear that Respondent’s road supervisors, admitted agents, knew of Reyes’ union activities. Respondent’s agents’ knowledge is imputed to Respondent in the absence of evidence that the agents did not pass on the information to higher officials, which evidence is not present here.¹⁵
40 See *State Plaza, Inc.*, 347 NLRB 755, 756–757 (2006). As to the existence of union animus,

¹⁴ Respondent points out that the consultants may or may not have remained in positions to observe if employees other than Ordonez and the employee who exited before her chose to take bracelets. For purposes of this discussion, I have assumed that Lopez and Barcenas remained seated behind the bracelet
45 basket during the exit of all employees.

¹⁵ Murphy’s general denial of knowledge does not establish a persuasive evidentiary basis for rejecting an imputation of knowledge.

such was demonstrated by the unlawful threats Baharance and Keshishian, upper level managers, made to Ordonez.

5 General Counsel met his initial burden under *Wright Line* by showing Reyes' union activity, Respondent's knowledge of it, and Respondent's animus toward it. The burden of proof therefore shifts to Respondent to show, as an affirmative defense, that it would have taken the same action against Reyes even in the absence of his protected activity.

10 Respondent contends it discharged Reyes because he stole Access coupons from a client. In order to meet its shifted *Wright Line* burden, the Respondent "must show that it had a reasonable belief that [Reyes] committed the offense, and that it acted on that belief when it discharged [him]." *McKesson Drug Co.*, 337 NLRB 935, 936–937 fn. 7 (2002). After careful consideration of the evidence, I find Respondent had a reasonable belief that Reyes had committed an offense that merited termination.

15 There is apparently no dispute that Yan complained to the dispatcher and Murphy that Reyes had stolen two of her Access vouchers. Rather, General Counsel argues that Respondent failed to produce nonhearsay evidence to prove Reyes misappropriated Yan's vouchers. Respondent does not have to prove Reyes' guilt; Respondent only has to prove its reasonable belief that Reyes engaged in misconduct, which misconduct then triggered the discharge.¹⁶ Respondent presented credible evidence of Yan's complaint, of Murphy's investigation into that complaint, whereby she established ownership of the disputed vouchers, and of Reyes' failure to explain how the disputed vouchers came to be in his fare bag.¹⁷ Under those circumstances, it was not unreasonable for Murphy to believe that Reyes had, in fact, filched Yan's vouchers.

25 General Counsel argues that the severity of the disciplinary penalty imposed on Reyes demonstrates discriminatory motive and pretext. While termination is admittedly the harshest discipline an employer can mete, it is not the role of the administrative law judge to second guess the degree of punishment an employer thinks warranted. There is no question that an employer could reasonably view theft as a critical infraction of company rules, and General Counsel has shown no disparate disciplinary treatment.

30 After consideration of the record as a whole, I find Respondent has met its shifted burden and has established that it would have taken the same action against Reyes even in the absence of his protected activity. Accordingly, I shall dismiss those allegations of the complaint relating to the discharge of Reyes.

35 ¹⁶ I reject General Counsel's apparent argument that Murphy could not have formed a reasonable belief of Reyes' guilt without meeting personally with Yan and physically seeing the coupon booklet from which vouchers were missing. General Counsel further argues that Murphy should have explored the impropriety of Yan's conduct in attempting to sell coupon booklets. However, Yan's possible wrongdoing can neither justify nor mitigate Reyes' suspected misconduct and is therefore irrelevant.

40 ¹⁷ General Counsel criticizes Murphy's investigatory methodology. However, "it is not within the province of the Board to tell an employer how to investigate allegations of employee misconduct. The fact that an employer does not pursue an investigation in some preferred manner before imposing discipline does not establish an unlawful motive for the discipline." *Chartwells, Compass Group, USA, Inc.* 342 NLRB 1155, 1158 (2004).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by impliedly threatening employees with unspecified reprisals and job loss if they engaged in union activities or supported the Union.
4. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

Remedy

Having found Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁸

ORDER

San Gabriel Transit, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Threatening employees with unspecified reprisals for supporting the Union.
- (b) Threatening employees with job loss for supporting the Union.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days after service by the Region, post at its facility in El Monte, California, copies of the attached notice marked "Appendix" in English and in Spanish.¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 21 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its

¹⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

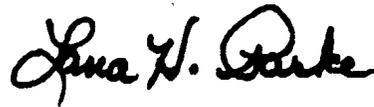
¹⁹ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

employees by such means. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since July 2011.

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

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

Dated: August 1, 2011.

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Lana H. Parke
Administrative Law Judge

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APPENDIX
NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT do anything that interferes with these rights. More particularly, **WE WILL NOT** threaten to take any adverse action against employees for supporting Wholesale Delivery Drivers, General Truck Drivers, Chauffeurs, Sales and Industrial Allied Workers, Teamsters Local 848 (the Union) or any other union. **WE WILL NOT** threaten any employee with job loss for supporting the Union or any other union. **WE WILL NOT** in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights stated above.

SAN GABRIEL TRANSIT, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

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

888 South Figueroa Street, 9th Floor
Los Angeles, California 90017-5449
Hours: 8:30 a.m. to 5 p.m.
213-894-5200.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 213-894-5229.