

**Relco Locomotives, Inc. and Brotherhood of Railroad Signalmen.** Cases 18–CA–019175, 18–CA–019350, 18–CA–019367, and 18–CA–019499

April 12, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On March 28, 2011, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions<sup>1</sup> and briefs, and has decided to affirm the judge’s rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order as modified.<sup>3</sup> Below, we briefly set forth our rationale for adopting the judge’s findings that the Respondent’s discharges of employees Jeffery Smith, Ron Dixon, and Timothy Kraber were unlawful under *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).<sup>4</sup> We also address issues related to the unlawful discharge of employee Dane See.

<sup>1</sup> We deny the Acting General Counsel’s request to strike the Respondent’s exceptions because they fail to meet the specificity requirements of Sec. 102.46(b) of the Board’s Rules and Regulations. Although the Respondent’s exceptions do not fully satisfy Sec. 102.46, we find that they are not so deficient as to warrant striking. Further, it does not appear that the Acting General Counsel has been prejudiced by the shortcomings in the exceptions, given that he has filed an answering brief fully addressing them. See *Postal Service*, 339 NLRB 400, 400 fn. 1 (2003).

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

<sup>3</sup> The judge correctly found that the Respondent violated Sec. 8(a)(1) by maintaining, and coercing employees to sign, an initial and revised nondisclosure agreement. The Respondent asserts that it rescinded all such agreements, but the judge made no such finding and no evidence in the record confirms that assertion. We will therefore add a rescission requirement to the judge’s recommended Order.

In adopting the judge’s finding that both the initial and revised versions of the nondisclosure agreement are unlawful, Member Hayes finds only that they were overbroad because they limit discussion of wage and benefit information. He does not pass on the lawfulness of any of the other restrictions in the nondisclosure agreement.

<sup>4</sup> Contrary to the suggestion in the judge’s statement of the *Wright Line* standard, there is no requirement that the Acting General Counsel show, as an element of his initial burden, that there was a nexus between the Respondent’s union animus and the specific actions it took against the discriminatees. See *Mesker Door*, 357 NLRB 591, 592 fn. 5 (2011).

1. In affirming the judge’s findings that the Respondent’s discharges of employees Smith and Dixon were unlawful, we emphasize that the credited evidence establishes that the Respondent’s asserted reasons for both discharges—safety violations and absenteeism for Smith and insubordination for Dixon—were pretexts designed to mask the Respondent’s true motivation, the employees’ union activity. This evidence provides strong support for the General Counsel’s required initial showing under *Wright Line*, supra, as well as precluding any *Wright Line* defense. See, e.g., *Approved Electric*, 356 NLRB 238, 240 (2010) (pretext evidence may be used to show discriminatory motivation); *Austal USA, LLC*, 356 NLRB 363, 364 (2010) (if proffered reason for discharge is pretextual, employer necessarily fails to establish *Wright Line* defense). The Respondent’s animus toward the employees’ union activity is further supported by the credited evidence that Chief Operations Officer Mark Bachman, at the end of a meeting in which he urged employees to reject the Union, invited questions but then immediately told Smith to “shut up and sit down” when he asked whether Bachman would agree to discuss unionization of the Respondent’s employees.<sup>5</sup> In sum, the record fully supports the judge’s findings that the Respondent discharged Smith and Dixon in retaliation for their union activity.

2. The judge correctly found that the Respondent unlawfully discharged employee Timothy Kraber because of his protected concerted activity in connection with a dispute related to employee uniforms. We agree with the judge that the Respondent’s asserted justification for Kraber’s discharge, absenteeism, was pretextual, supporting a finding of unlawful motivation and precluding a *Wright Line* defense. See *Approved Electric*, supra; *Austal USA*, supra. The timing and sequence of relevant events also demonstrate the Respondent’s unlawful motive. The Respondent did not discharge Kraber immediately when he purportedly exceeded his permissible absence points. For 11 days, the Respondent sat on its knowledge that it allegedly had grounds to terminate Kraber. Only after Kraber openly engaged in protected concerted activity did the Respondent discharge him, acting just 5 days after he spoke up about the uniform issue at the meeting with Doug Bachman. Moreover, as found by the judge, employee Dane See was unlawfully discharged for engaging in the same protected concerted activity only 1 day before Kraber was discharged.

3. The Respondent acknowledged at the hearing that employee See had not committed the misconduct for

<sup>5</sup> Unlike the judge, however, we find it unnecessary to rely on the Respondent’s antiunion campaign as “background” evidence of unlawful animus.

which he had purportedly been discharged and accordingly offered him reinstatement (with no backpay). The only disputed issue with respect to See was whether the conduct for which he actually was fired (contesting the fee the Respondent was charging employees for having their work uniforms cleaned) was concerted and protected activity under Section 7 of the Act. The judge correctly found that it was, and consequently that See's discharge was retaliatory. The Respondent asserts in its exceptions that See is not eligible for remedial backpay because he became a full-time student after his discharge. We leave this issue to the compliance stage of this proceeding.

#### ORDER

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

1. Insert the following as paragraph 2(e), and reletter the following paragraphs accordingly.

“(e) Rescind all nondisclosure agreements or any other rules that prohibit employees from engaging in union or concerted activities protected by Section 7 of the Act, and notify employees in writing that it has done so.”

2. Substitute the attached notice for that of the administrative law judge.

#### 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 terminate any employee for engaging in activities on behalf of the Brotherhood of Railroad Signalmen or other concerted activities protected under Section 7 of the Act.

WE WILL NOT maintain a nondisclosure agreement or any other requirement that prohibits employees from engaging in union or concerted activities protected by Section 7 of the Act.

WE WILL NOT require you to sign a nondisclosure agreement or abide by any rule that limits your right to engage in union or concerted activities protected by Section 7 of the Act.

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

WE WILL, within 14 days from the date of the Board's Order, offer Jeffery Smith, Ronald Dixon, Dane See, and Timothy Kraber full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they previously enjoyed.

WE WILL make Jeffery Smith, Ronald Dixon, Dane See, and Timothy Kraber whole for any loss of earnings and other benefits suffered by them as a result of their unlawful discharges, together with interest compounded daily.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful termination of Jeffery Smith on June 12, 2009, Ronald Dixon on September 21, 2009, Dane See on March 8, 2010, and Timothy Kraber on March 9, 2010, and WE WILL, within 3 days thereafter, notify each of these employees in writing that this action has been taken and that any evidence of their unlawful terminations will not be used against them in any future personnel actions.

WE WILL rescind all nondisclosure agreements and any other rules that prohibit employees from engaging in protected union or concerted activities, and WE WILL notify employees in writing that we have done so.

RELCO LOCOMOTIVES, INC.

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

*Michael Klupchak, Esq.*, with *Amber L. Stefankiewicz, Esq.* (*Laner, Muchin, Dombrow, Becker, Levin, and Tomlinberg, Ltd*), on the brief, for Relco Locomotives, Inc.

*William L. Phillips, General Counsel*, for the Brotherhood of Railroad Signalmen.

#### DECISION

#### STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. I heard this matter from September 14 through 16, 2010, at Albia, Iowa, based on the Order Further Consolidating Cases and Consolidated Complaint (the complaint) issued by the Regional Director for Region 18 of the National Labor Relations Board (NLRB or the Board) on August 19, 2010. The complaint is

based on unfair labor practice charges filed by the Brotherhood of Railroad Signalmen (the Charging Party, the Union, or BRS) in Case 18–CA–019175 on October 5, 2009, and amended November 2, 2009, and January 22, 2010; Case 18–CA–019350 filed on April 9, 2010, Case 18–CA–019367 filed April 27, 2010, and Case 18–CA–019499 filed July 28, 2010. Relco Locomotives, Inc. (Respondent or Relco) filed a timely answer denying the complaint’s substantive allegations.

The case presents these issues: (1) whether Relco violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining an unlawful nondisclosure agreement and coercing its employees to sign; (2) whether Relco violated Section 8(a)(1) by discharging Dane See and Timothy Kraber for their activities relating to Relco’s payroll deduction to pay for uniform maintenance by an outside vendor; and (3) whether Relco violated Section 8(a)(3) and (1) of the Act by discharging Kraber, Jeffery Smith, and Ron Dixon for their union activities.

After careful consideration of the entire record,<sup>1</sup> and the various arguments set out in the posthearing briefs filed on behalf of the Acting General Counsel (AGC) and Respondent, I find that Respondent violated the Act as alleged based on the following

## FINDINGS OF FACT

### I. JURISDICTION

Relco Locomotives, Inc., an Illinois corporation, with an office and place of business in Albia, Iowa, is engaged in repairing, rebuilding, and manufacturing locomotives and railcars. In the course of its business operations during the calendar year preceding the issuance of the complaint, Respondent purchased and received at its Albia facility goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of Iowa, and it sold and shipped goods and materials valued in excess of \$50,000 from that location directly to customers located outside the State of Iowa. Relco admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Relco also admits, and I find, the BRS is a labor organization within the meaning of Section 2(5) of the Act.<sup>2</sup>

### II. ALLEGED UNFAIR LABOR PRACTICES

#### A. *Credibility*

The key aspects of my factual findings below related to the discharges of employees Smith, Dixon, and Kraber incorporate

<sup>1</sup> At the hearing I took under advisement Respondent’s request to strike the “Fact Finding Worksheet for Misconduct” contained in GC Exh. 31 and R. Exh. 2. I now grant that request as these documents appear to be mental notes and work product of officials at the Iowa Workforce Development Commission who considered the unemployment insurance claims of Jeffery Smith and Ronald Dixon. As such, I find that they are not a part of the public record involving those claims and, therefore, they are not admissible without further foundation.

<sup>2</sup> Most employees represented by the BRS work under agreements governed by the Railway Labor Act. However, the BRS also represents employees within the meaning of the Act who work at locomotive repair facilities operated by certain railway companies and other employees engaged in the manufacture of railway crossing signals.

the credibility determinations I have made after carefully considering the record in its entirety.<sup>3</sup> The testimony about aspects of these three cases contain sharp conflicts. Evidence contradicting the findings set out below has been considered but has not been credited.

My credibility resolutions have been informed by my consideration of a witness’ opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; the impact of bias on the witness’ testimony; the quality of the witness’ recollection; testimonial consistency; the presence or absence of corroboration; the strength of rebuttal evidence, if any; the inherent probabilities; reasonable inferences available from the record as a whole; the weight of the evidence; and witness demeanor while testifying. More detailed discussions of specific credibility resolutions appear below in those situations that I perceived to be of particular significance.

Suffice it to say at this point that I found key elements of the testimony given by Respondent’s witnesses Mark Bachman, David Crall, and Cliff Benboe that conflict with the testimony of employee witnesses unworthy of belief. Particular portions of their testimony are analyzed in greater detail below where it became necessary to resolve credibility in order to make rational judgments about important events and motives. In virtually all of the significant instances, reliable documentary evidence failed to support accounts provided by Respondent’s witnesses. Crall in particular fared poorly. Counsel for the Charging Party’s cross-examination of Crall about the alleged illegibility of a doctor’s excuse Kraber provided after an absence from work for medical treatment looked in some respects like the climactic moments of a Perry Mason drama rather than an NLRB hearing. Similarly, I found Crall’s strained effort to reconcile the content of Smith’s termination letter with the reason he advanced at the hearing for firing that employee particularly unsuccessful.

Counsel for the AGC called two employee witnesses, Jonathan Graber and Richard Purdun, whose lack of veracity about key events also posed critical credibility problems. Graber vehemently opposed efforts to unionize the plant. For reasons detailed below, I ultimately concluded that Graber’s antiunion hostility led to him to become an information conduit from the plant floor to the top management. To a lesser extent, Purdun also provided management with information concerning the union drive. He admitted providing management with a copy of his NLRB investigatory affidavit (insisting all the while he testified that he had not read it before signing it) that contained the names of employees active in the union organizing drive, notably Smith and Dixon. He also unnecessarily denigrated Smith’s personal qualities to the degree that it appeared his primary purpose was to ingratiate himself to the Company’s management rather than truthfully answer counsels’ questions.

Respondent’s evidence concerning Smith’s conviction of a crime has been considered in assessing that witness’ credibility. As will be evident below, my conclusions in Smith’s case are based on evidence that is either undisputed or substantially

<sup>3</sup> There is little dispute about the facts relating to Dane See’s discharge and the nondisclosure agreement.

corroborated, plus documentary evidence consistent with the testimony he provided in this case.

Respondent also adduced evidence from Crall that Kraber made threatening remarks to him following his termination and argues that Kraber's testimony should not be credited for this reason. Even assuming that Crall's account on this point is true, which I do not, the threats do not go to matters underlying the motive for Kraber's discharge.

#### *B. Introduction*

Relco's corporate headquarters is located in Lisle, Illinois. Mark Bachman is the chief operations officer and his brother, Doug Bachman, is the chief administrative officer.<sup>4</sup> Together, the two brothers own and operate Relco. The Albia facility, located in south central Iowa, is a Relco's only manufacturing facility. The Albia location sprawls across 100 acres and contains approximately 3 miles of rail track. Five or six buildings, adding up to approximately 200,000 square feet capable of housing up to 27 locomotives are located on the property.

Relco's Albia facility operates 7 days a week and employs a total of about 100 production workers working on four different shifts. This case involves employees assigned to the day shift, Monday through Friday. Before the start of a shift each morning, management meets with the employees to discuss the day's work priorities, safety issues, and other ordinary workplace matters. Employees of outside contractors working at the facility may also be included in the morning meeting. Generally, the meetings last 10 to 15 minutes and are presided over by Operations Manager David Crall or Fabrication Supervisor Cliff Benboe.

Relco maintains an employee manual that it periodically revises. The manual contains most of Relco's employment policies, and its rules and regulations, including its attendance policy. However, safety rules included in the handbook are not all inclusive as safety procedures vary depending on the particular tasks an employee performs. New editions of the manual are promptly distributed to all employees. The most recent version of the handbook became effective January 1, 2009.

The Relco manual contains Company's detailed attendance policy. Under that policy, an employee is assessed a specific number of points each time he leaves work early, calls in late, calls to take off an entire day, or for being later or absent without calling to plant unless the absence is excused in advance or a medical excuse is provided. A rolling 12-month record is maintained for each employee.

Employees are instructed to notify the Company of a tardiness or absence from work by calling an automated "call-off" voice mail system. A secretary listens to the messages each day and notes the time of the call as well as the stated reason for the absence or late arrival. If an employee leaves early, the supervisor reports the circumstances to the clerical staff so that points, if any, may be correctly assessed. Based on information received from the voice mail system or a supervisor, the clerk allocates the prescribed number of points to the employee's

<sup>4</sup> Throughout this decision the use of the Bachman name refers to Mark Bachman. Doug Bachman's involvement was limited to the issue about the cost of uniform maintenance.

record based on the point schedule contained in the employee manual. The Company terminates workers if they accumulate 12 or more points in a 12-month period.

Most employees discharged at Relco during the relevant time period occurred because they accumulated too many attendance points. Over the 2-year period from mid-2008 through mid-2010, 33 employees were terminated for that reason. (R. Exh. 5.)

In addition to the attendance policy, Relco maintains a progressive discipline system but its handbook lists certain exceptions that can result in immediate termination, including insubordination, theft, and dishonesty. Between June 2008 and January 2010, five employees were terminated for offenses that resulted in their immediate discharge. One was discharged following his arrest for stealing company property and the property of a railroad. Two were terminated for walking off the job and never returning. One, a probationary employee, was discharged for his inability to perform assigned work. The fifth was terminated for "lack of job safety and poor job performance" not otherwise explained. (R. Exhs. 6 and 7; Tr. 417-418.)

#### *C. The BRS Organizing Drive*

As of the date of the hearing, the employees were not represented by a labor organization. Jeffery Smith, a welder in Relco's fabrication department from January 2008 until his termination on June 12, 2009, initiated the BRS organizing drive. In early 2009, Smith made several unsuccessful attempts to meet with Bachman pursuant to an "open door" policy for the purpose of discussing the attendance point system and a pay increase that Smith thought overdue. His effort included the preparation of a lengthy letter outlining his grievances related to these subjects that he gave to the paint shop supervisor for delivery to Bachman.

In the midst of his growing dissatisfaction over his failure to gain an audience with Bachman, Smith made a fluke discovery of a BRS insignia inside a locomotive where he happened to be working. After researching the organization on line, Smith wrote an email on March 2, 2009, to that union inquiring about representation. BRS organizer Mark Ciurej responded the following day with some basic information about the BRS. He requested Smith's telephone number in order to make personal contact and raised the possibility of coming to Albia in the near future to speak with the Relco employees.

Ciurej's response and the subsequent telephone contacts between Smith and Ciurej prompted Smith to begin discussing unionization with other employees at the plant on almost a daily basis. Smith enlisted others, including Ronald Dixon, to help in these preliminary efforts. He regularly passed along the information he learned from other workers to Ciurej during their numerous telephone conversations throughout this period.

By April Ciurej, who lives in Virginia, became satisfied through his contacts with Smith that there was sufficient interest among the Relco employees to warrant meeting with interested employees in person. To this end, Smith arranged for the use of a meeting room at his church where Ciurej could speak with interested Relco workers. After Smith arranged the location, he prepared 50 or 60 small sheets of paper announcing the

location of the meeting with Ciurej on April 10 that he and others distributed around the plant.

Ciurej spoke at the April 10 meeting largely about the union organizing process. He also distributed informational literature addressing that subject and employee representation by the BRS. Ciurej solicited and obtained signed BRS authorization cards<sup>5</sup> from nearly all, if not all, of the workers present and provided additional BRS cards to them so they could solicit signatures from their fellow workers who had not attended the meeting.

Following the initial meeting with Ciurej, Smith solicited employees to sign BRS cards on a daily basis before and after work, during breaks, and, apparently, even during working time. He kept a ready supply available at all times in his toolbox or in his pockets. He also distributed union literature and copies of a union-provided CD to workers in the parking lot after work. Several employees corroborated Smith's testimony that he was very active and persistent in attempting to organize the Relco employees.

Dixon joined Smith's unionization efforts early on and attended the two meetings conducted by Ciurej in April and May. After the first union meeting, Dixon began distributing BRS cards and solicited employees to sign up for the organizing effort. Usually, he kept cards in his pockets at work so that they would be readily available. In June, after Smith's termination, Dixon became the principal employee organizer and soon came to be regarded by the other production workers as the leading union activist. He kept soliciting employees to sign BRS cards up to the day of his termination on September 21.

Timothy Kraber first learned of the organizing effort from Smith and Dixon. He previously belonged to the UAW when he worked at a nearby John Deere plant. He went to the first union meeting conducted by Ciurej and signed a BRS authorization at that time. He also took blank BRS authorizations to use in soliciting other employees at the plant. Kraber confirmed that Smith and Dixon engaged in similar solicitation activities around this time.

Kraber made no effort to conceal his prouion sympathies. He often wore his UAW T-shirts beneath his work shirt that he removed when he became uncomfortably warm while working at the plant. When Bachman spoke to employees about unionization on May 15, Kraber openly argued that the Company would not "be able to change the rules as they go" if the employees had a union. Following Dixon's termination, Kraber became the leading union activist at the plant.

One of the first employees Smith solicited to sign a BRS card was Jonathan Graber, a fellow worker with whom he frequently rode to work. Graber, who strongly opposed unions, repeatedly rebuffed Smith's solicitations. Dixon also solicited Graber early on without success. Graber told each of them that he thought they were a "damn fool" for trying to unionize. Smith finally relented after Graber told him that he was adamantly opposed to unionizing and did not want to discuss it anymore.

<sup>5</sup> The BRS authorization form, referred to at the hearing as an A "card" or "cards," was, in fact, printed on a standard 8-1/2 x 11 sheet of paper. Below, they are called "BRS cards."

Sometime in May, within a day or two of this firm disavowal, Graber informed Smith that he had told Bachman about the union organizing efforts at Relco when he ran into Bachman at a local car wash. Graber admittedly asked Bachman "if he heard about any of the union activities, and he already—he told yes he already did." Graber said he asked Bachman about his awareness of the organizing "[b]ecause I believed that he needed to know what guys were doing inside the shop." (Tr. 312–313.) Although Graber made it clear to Bachman that he had nothing to do with the union organizing, he denied that he named any of the employees who were involved because "I believe it is not his business to know. I mean if the guys want to do what they want to do, they can." (Tr. 313.)

Later in May or early June, Graber asked Supervisor Dragen Yankovic what he thought about the ongoing union activity. In the course of their ensuing discussion, Graber told Yankovic that a "couple of guys" were trying to bring the union in. He admitted that his couple-of-guys statement referred to Smith and Dixon but he denied that he named any names when speaking with Yankovic.<sup>6</sup>

Graber also admitted asking Lead Supervisor Jeff Dalman some time in July if he had heard any rumors about a union but he did not pursue the subject further after Dalman said he had not. As this exchange purportedly occurred a month or two after Bachman's hour long talk to employees about unionization, I put little or no stock in Graber's account of this exchange.

Meanwhile, Smith's reports to Ciurej about the growing interest in the Union and the number of BRS card signers, led the two men to make arrangements for a second meeting between Ciurej and interested workers. After Smith spoke to a number of workers about a convenient date for a second meeting, Ciurej agreed to return to Albia on the evening of May 15, and Smith made arrangements to have the meeting at the same location. Once arranged, Smith, Dixon, and others began informing employees about the May 15 union meeting.

On the morning of May 15, a few days after Graber spoke to him at the car wash, Bachman presided over the daily safety meeting where he spoke for an hour or longer about unionization. Before beginning, Bachman requested that the unionized electricians employed by an outside contractor leave the meeting. Bachman then told the Relco employees that he knew about the interest of some workers had in union representation

<sup>6</sup> Graber described Yankovic as a "contract" employee at the time of this conversation who became a Relco supervisor in July, a month or so later. Respondent adduced no evidence in support of Graber's "contract employee" claim or the date on which he became a supervisor. On the contrary, its answer to the operative complaint states that it did not "contest (the) allegation" that, "at all material times," all of the individuals named in the complaint par. 4, including Yankovic, were supervisors and agents within the meaning of the Act. However, the answer also avers that Respondent had "no personal knowledge upon which to base an admission or denial of this allegation." As I find this latter assertion as to a matter so peculiarly within Respondent's knowledge frivolous and wholly inconsistent with the earlier assertion that it would not contest the allegation, Respondent's answer to complaint par. 4 has been treated as an unqualified admission as to Yankovic's supervisory status at the time.

and said that the union representation was a choice for the workers to make. Bachman went on to say that based on his experience with unions elsewhere, his ability to reward good workers with raises or other opportunities for advancement that were not provided for in the union contract would be limited. Bachman also told the workers that Relco was at “zero profitability at that point” and that costs would go up if the Company had to pay union scale. If that happened, Bachman said he would have to lay off employees in order to keep costs at the current level. At the end of his talk, Bachman invited questions. Smith rose to ask whether Bachman would agree to a discussion with employees about unionization and Bachman promptly told him to “shut up and sit down.”

Ciurej mailed a 5-page letter to some of the plant employees dated July 1. It addressed Bachman’s talk to the employees at the morning meeting on May 15, and went into great detail about the organizing process and the benefits to employees from being organized. Near the end of July Bachman apparently held another meeting with employees to address “the Union’s letter that you received.” (GC Exh. 25.)

Bachman also responded further in his own letter dated August 28. This letter sought to remind employees of “the many positive things associated with our Company” and went on to detail a few of them before expressing the “hope” that employees recognized and appreciated these “positive items.” He then implored employees not to “fall for the union’s hollow promises.” The letter continues with a series of bullet point paragraphs that warn employees they could lose what they already have through the bargaining process, that asserts the Union’s primary objective is to obtain employee dues money, that argues the signing of a union authorization card would be “a *huge mistake*,” and that urges employees not to “upset the apple cart in these challenging economic times.” The third bullet point paragraph begins with the following:

Keep in mind that if a union were to somehow get in here, our entire extremely generous wage and benefit package, that all of you already enjoy, would be negotiated between the Company and the union. *The chalkboard could in essence be completely erased and all of these great benefits and wages you already have could be talked about for the first time between the parties.* [GC Exh. 25. Emphasis mine.]

In mid-September, Ciurej returned to Albia and handbilled outside the Relco facilities. He distributed packets of explanatory materials and BRS cards to employees when they left work. Graber told Bachman about Ciurej’s plan to handbill at the plant 2 or 3 days in advance. He claimed to have been on an errand for another purpose in the vicinity of Bachman’s office so he “stuck (his) head in (Bachman’s) office” and told him that he had “heard a rumor that (the union agent’s) was going to be here passing out material.” Graber felt it proper to alert Bachman about this coming union event because, as the head of the Company, Graber “figured . . . he should know what’s going on.”

#### D. The Work Uniform Issue

In early 2009, Relco, citing the economic downturn, began charging employees for the uniform cleaning service provided

by Cintas, its uniform vendor. It collected for this expense by deducting \$36 per month (\$18 per bimonthly paycheck) from the employees’ pay. Although some evidence indicates that employees were disgruntled over this deduction, no serious issue arose over the matter until early 2010. By this time, Kraber had learned from the Cintas delivery driver servicing the plant that Cintas purportedly charged Relco about \$2 a week less than the amount deducted from employee pay.

Questions about the amount Cintas actually charged Relco became a significant issue at a morning meeting late January or the first part of February 2010 when Crall asked the employees if they wanted to keep their work uniforms. This inquiry first led to a discussion about the different types of uniforms available. Kraber then asked Crall what Cintas charged Relco for cleaning the uniforms and whether the charge to employees was for just the cleaning of the uniforms or for other cleaning services such as rags and the like. He told Crall during the meeting that he had learned from the Cintas driver that Cintas charged less for cleaning the uniforms than the amount deducted from employee pay. Kraber also brought up the fact that employees had not signed any type of paperwork before Relco began deducting this expense from their pay. Crall professed not to know the amount of the cleaning charge but promised to find out and get back to the employees.

On March 4, 5 days before Kraber’s termination, Doug Bachman came to Albia and spoke to employees at a midday meeting about the uniforms. He also brought forms for employees to sign authorizing the payroll deduction Relco had been making for the uniform cleaning service. Again Kraber asked about the amount Cintas charged Relco for cleaning uniforms but Doug Bachman claimed to be unable to provide an answer. Kraber then suggested that employees vote to keep the uniform arrangement as is until Relco provided the employees with the cost information. The employees voted in favor of Kraber’s suggestion.

The atmosphere at this meeting became heated. Tom Shipp, a leadman in the engine repair shop, said he was “pissed, (m)ad as hell . . . knowing we was getting ripped off by them.” Shipp also said that Doug Bachman “got pretty mad, pretty red in the face.” (Tr. 647–648.) Although Shipp claimed to have had the leading role in this exchange, he acknowledged that Kraber too was quite vocal about the uniform maintenance charge. Later that day, Dane See had three or four telephone and email exchanges with a Cintas customer service representative about the cost of maintaining the Relco uniforms. The Cintas representative sent their email exchanges to the Company on March 4. (GC Exh. 16.)

In early April, Doug Bachman announced at a second meeting with employees that the biweekly uniform maintenance payroll deduction would be reduced to \$15 per week, an amount in line with that reported to Kraber by the Cintas driver. By that time, Relco had discharged Kraber and See, and Bachman had called Shipp to his office to question him about his attitude at the first meeting between the employees and his brother.

*E. Relevant Evidence Concerning the Discharges*

1. *Jeffery Smith.* The workweek beginning Monday, June 8, 2009, was Smith's last week of employment at Relco. His termination at the end of the week ostensibly resulted from his failure to comply with a requirement that workers wear steel-toed boots at work on the plant floor. A policy to this effect is contained in the employee manual. However, Smith and several of the AGC's witnesses recounted instances where this policy was not always enforced strictly and that at times employees were required to work only in their stocking feet on and around newly painted surfaces to avoid scratches. Respondent's witnesses denied that was a common practice. However, Respondent acknowledged that for one particular project, a "locomotive motel," employees were required to remove their boots to prevent scratching the surfaces.

In the period leading up to, and during, his final week, Smith was assigned to strip steel plate from a locomotive frame, a task performed with the use of a cutting torch. While engaged in this work, the sparks caused by the cutting torch often burned the laces on Smith's boots. After finally burning them to the point where they could no longer be tied, Smith used zip-ties in place of boot laces to secure his boots.

Finally, on Monday, June 8, Smith burned the stitches that secure the sole of the boot. As a result the sole separated from the boot to the point where sparks entered and burned his foot. To remedy the problem, Smith sealed his boots with duct tape wound around the body of the boot. Fabrication Supervisor Benboe noticed the duct tape and zip-ties later that day and told Smith that he needed to get a new pair of boots because his boots were not safe. Smith, who had already spent the company's \$25 annual boot allowance, told Benboe that he could not afford a new pair of boots at that time but Benboe insisted that Smith deal with his boot problem.

Beginning on Tuesday and continuing until Thursday morning, Smith wore different boots to work that did not have the steel insert covering the toes. If any supervisor noticed his noncompliant boots on Tuesday or Wednesday, no one said anything to him about it. Shortly after the Thursday morning meeting, Benboe noticed the different look of Smith's boots and asked if they were steel-toed. Smith told him they were. Later, around 9:30 a.m., Benboe noticed Smith's boots were smoldering from the flying sparks. When Benboe approached Smith and pressed on one of his boots with a hammer, he determined that his boots had no steel toes. He immediately sent Smith to the breakroom with instructions to wait there for him.

Later, Benboe and Operations Manager Crall arrived and met with Smith in the breakroom. They told Smith that he would have to get a new pair of steel-toed boots before he could return to work. Smith told the two supervisors that he could not purchase a new pair of boots until 10 the next morning when his wife received her paycheck. Smith, whose absenteeism point total was at the maximum allowed before discharge, also asserts that he asked Benboe and Crall whether the time off the rest of the day and the next morning until he purchased new boots would count against his attendance record. He claims that they assured him that it would not. Both Crall and Benboe denied that Smith inquired about his attendance points at all, or

that they told him he would not be penalized under the attendance policy.

At the end of their meeting, Benboe escorted Smith to put his tools away and then out of the plant. En route they passed Richard Purdun, who offered to loan Smith his extra pair of boots after he learned about the situation. Smith declined Purdun's offer because of the difference in their shoe sizes. Later, Benboe prepared an incident report showing that he knew Smith likely would not be returning to work before 10 a.m. on June 12. (R. Exh. 22.) This report also states that Benboe instructed Smith to speak with him before clocking into work because "he was not sure how all of this would affect his job." However, no evidence shows that Benboe reported Smith's involuntary departure that Thursday to the attendance clerk as would normally be the case.

That evening Smith's mother-in-law provided him with the money to purchase a new pair of boots. The following morning as he was about to telephone Benboe concerning the unexpected development with his new boots, he found a message on his telephone answering machine from Benboe instructing Smith to call him before returning to work. When Smith called the plant, Benboe told him to come in for a meeting at 10 that morning.

Smith went to the plant at the appointed time and met with Benboe and Crall who informed him that after they had spoken with Bachman, a decision had been made to terminate him for a gross safety violation, namely, his failure to wear steel-toed boots. Benboe gave him a signed letter bearing his signature. It states that his "employment at (Relco) ended on June 12, 2009, as a direct result of violations of safety procedures and company policies." The letter does not refer directly to Smith's attendance record and Smith credibly claimed that neither Benboe nor Crall mentioned his attendance record at this brief termination meeting.

By Crall's account, the decision to fire Smith came about early on June 12. Right after the 7 a.m. shift began, Benboe told him that Smith had not reported to work at the starting time and had not called the attendance answering machine. Shortly thereafter, attendance clerk Anna Hoffman reported to him "that the points for Mr. Smith had exceeded the allowable 12." (Tr. 536.) Crall went on to testify as follows:

Q. Okay. And so once you were told that, what did you do next?

A. I instructed Anna to put a letter of dismissal together.

Q. Now, who made the decision to terminate Jeff Smith that morning?

A. I did.

Q. And what was the reason for your decision?

A. Points.

Q. Okay. Was there any consideration of the incidents that had happened the prior day regarding him not having safety boots and telling Mr. Benboe that he was wearing boots when he wasn't?

A. The only consideration for that was the fact that I was aware of it and final decision on those items was

pending. We had not made a decision on what we were going to do about those.

(Tr. 537.) For reasons set forth in the analysis section below, I credit Smith's account of what occurred at his discharge meeting with Crall and Benboe on June 12.<sup>7</sup>

2. *Ronald Dixon.* Ron Dixon worked in Relco's fabrication department as a fabricator during two separate periods, the most recent of which ran from December 22, 2008, through September 21, 2009.

On September 21, about a week after Ciurej's handbilling at the plant that month, Dixon was assigned to install rain guards and spark arresters on the top of a new locomotive. Dixon had never performed these tasks until the previous week so, according to Dixon, Benboe spent considerable time working with him to demonstrate the proper method to perform this work. In addition, Benboe complimented him for his performance on this task.<sup>8</sup>

Just as Dixon prepared to climb atop of the locomotive on September 21, an employee approached to ask him for a BRS card, a common occurrence Dixon experienced after he became the leading employee organizer following Smith's discharge. Dixon told the employee he would give him a card at the break. No evidence shows that any supervisor or manager overheard this brief exchange or ever came to know about it.

Regardless, Dixon, using the locomotive's step rails located at the back of the locomotive cab, climbed atop to perform his assigned work.<sup>9</sup> Use of these step rails would have been the usual means for employees get to the top of a locomotive when they need to do work of this type.<sup>10</sup> According to Dixon, whose height is approximately 5' 7," his initial task consisted of kneeling on top of a rain deflector ring to steady it while fastening its bolts to the locomotive body with a coworker's assistance from inside the locomotive body.

Meanwhile, Bachman and his management staff were meeting in an upstairs conference room. The room has a large window overlooking the shop floor. Bachman claimed that he observed Dixon from the conference room window on top of the locomotive with his feet hanging over the edge, a work

<sup>7</sup> There is also a dispute as to Smith's attire when he arrived at the plant on the morning of June 12. Smith claims that he went to the plant dressed for work wearing his new steel-toed boots. Witnesses predisposed toward Respondent's position, claimed that Smith arrived dressed in shorts and flip flops. I credit Smith. Having purchased new boot the previous evening at some considerable inconvenience and having been given no outright indication that he would be discharged that morning, I find the "shorts and flip-flop" story to be a fabrication.

<sup>8</sup> Benboe claims he only inspected the finished product. I find Dixon's account far more probable in view of the undisputed fact that he had never performed this type of work before.

<sup>9</sup> At the time, the locomotive was parked in a space surrounded on three sides by an elevated plant walkway at the level of the locomotive's walkway. R. Exhs. 9(c) & (h); GC Exh. 27, attachment J.

<sup>10</sup> Even Crall agreed when questioned on this point by an Iowa administrative law judge during Dixon's unemployment compensation hearing. GC Exh. 5, p. 5. In addition, Mark Baugher, a Relco fabricator since March 2007, said that he used the step rails at the front or back of the locomotive when assigned work to work on top of a locomotive. Tr. 354-355.

position he considered to be very unsafe because the possibility of a fall. A diagram prepared by Crall for use in Dixon's postdischarge unemployment compensation hearing depicts a figure atop a locomotive body as claimed by Bachman in describing Dixon at work during his initial observation. (GC Exh. 12.) Purportedly, Bachman instructed Benboe to get Dixon off the locomotive. Both Crall and Benboe indicate that Benboe was not at the conference and that Crall relayed all instructions from the conference room to Benboe on the plant floor via radio.

Regardless, all agree that Benboe approached Dixon. Benboe testified as follows about his instruction to Dixon at that time:

Q. Okay. And what did you say to him at that time?

A. I told him he either had to position himself to the center of the locomotive or position a ladder to work from.

Q. Okay. Did you give him any specific directions where to put a ladder?

A. No. [Tr. 609.]

Dixon, who vehemently denied that he ever had his feet dangling off the edge as depicted in Crall's diagram, told Benboe that he could not reach the installation at the center of the locomotive from a ladder. Bachman asserted that Dixon could have worked from a ladder in this instance but there is no evidence that Benboe quibbled with Dixon when he said he could not. Instead, Benboe told him to put up a ladder for fall protection and then left the area to return to what he had been doing.

Fabricator Mark Baugher said he observed Dixon working on top of the locomotive from time to time that morning but he never saw him with his feet dangling off the edge. Baugher, an experienced fabricator, said he some times uses a ladder positioned as Dixon installed the ladder that morning for fall protection to fill bolt holes in the side of a locomotive body. Both Baugher and Anthony Gilland, a former fabricator, claimed they never saw a ladder positioned so that the upper portion rested on the train body, as depicted on the left side of Crall's diagram. (GC Exh. 12.)

Dixon climbed down from the locomotive, checked out a ladder, and set it up in the manner he thought intended when Benboe referred to fall protection, i.e., with the bottom against the locomotive body leaning outward resting the rail of the locomotive's walkway with top of the ladder angled away from the body. Installed this way the ladder would serve only to break his fall if Dixon slipped from the top. Dixon then went back to his assigned work.

Bachman claims he saw Dixon some 20 minutes later with his feet hanging off the opposite side of the locomotive and called Benboe over the radio to "get him down off that locomotive now." Benboe returned to Dixon's work area and instructed him to go to the breakroom. When he arrived in the breakroom, Benboe and General Foreman Jeff Dahlman were present. Benboe told Dixon he was discharged for insubordination. Shocked, Dixon responded, "You've got to be kidding." After Benboe assured him he was not, Dixon argued that he could not have been hanging off the car, and asked Benboe to review his work area with him to show that he had complied

with Benboe's directive. Benboe refused and escorted him from the building.

3. *Dane See*. Dane See worked for Respondent as a fabricator. When he began in January 2009, Respondent paid for the cost of cleaning and maintaining employee uniforms. However, as discussed above, Relco soon began passing that cost onto the employees.

As with others at the plant, See eventually began to question the amount of the uniform servicing charge. He discussed his concerns with other employees and asked management what Cintas charged Relco for the uniforms, but was never given an answer. He too participated in the morning meeting with Crall during which uniforms were discussed.

Dissatisfied with the lack of information provided by Relco, See contacted Cintas directly to ascertain the amount Cintas charged Relco. See spoke to a Cintas customer service representative and was told that Cintas charged Relco \$6.20 per week per uniform for cleaning and maintenance. See asked the customer service agent to send an email to him containing that information. The representative followed up by emailing See with a copy to Relco explaining that she may have misled him in quoting the price of \$6.20. See emailed the representative back one time and had no further contact with anyone from Cintas.

When See returned to work on Monday, March 8, he discussed what he had learned from the Cintas representative with a few employees during the morning meeting. After the meeting, Benboe and Crall confronted See about his contact with the Cintas representative. They gave him a termination letter that stated he was being discharged for "inappropriate interaction with a vendor." (GC Exh. 18.)

Following See's discharge, Respondent claimed that See had harassed the Cintas representative through repeated phone calls. However, before the closing of the hearing, Respondent discovered that the Cintas representative had confused See for another employee and had concluded that See had not in fact harassed anyone. Accordingly, Respondent altered its position stating that it intended to offer reemployment to See.

4. *Timothy Kraber*. Timothy Kraber worked for Relco on two different occasions as a welder and fabricator. His first employment period ran from January to July 2007, when he quit because he had not been given a 90-day review, a prerequisite for a pay increase. In March 2008, Benboe contacted him about returning to work which he agreed to do after negotiating a higher pay rate.

Near the end of 2009, a running dialogue developed between Kraber, who apparently developed some type of a back problem, and his supervisors about his attendance record. The relevant portion began in December 2009 when Crall called Kraber to his office and spoke with him about his attendance points. Kraber told Crall that his report was inaccurate because it reflected points for days when he had submitted written medical excuses. Crall agreed to look into the matter and get back to Kraber after the holidays.

Around the same time Bachman prepared a memo to employees addressing the acceptable medical releases, which, he said, was posted on the employee bulletin board located adjacent to the entrance to the employee breakroom. This memo,

dated December 4, 2009, stated that the only acceptable medical release following an injury or illness must be provided by a medical doctor "that practices in the field of injury or illness." The memo states further, "While it has been discovered that some employee [sic] have turned in 'Chiropractic' releases in the past, the Employee Handbook clearly states . . . that 'you will not receive any points when you return to work if you bring in a valid doctor's excuse. . . ." (R. Exh 3; emphasis in the original.) Kraber, who had been credited with excused absences in the past based on notes from his chiropractors who had treated him, denied that he saw this memo.

Kraber missed work on January 19 and 20, 2010, because of back pain. He received treatment from a chiropractor on both days. At the end of the second treatment session, the chiropractor referred Kraber to a medical doctor for further treatment. The following day, Kraber sought treatment from the medical doctor and missed work until January 26 because of his back problem. When he returned to work, Kraber provided the Company with a note from the chiropractor for the first 2 days and a note from the medical doctor covering the period from January 21 through 25.

In another conference around February 1, Benboe and Crall informed Kraber that he had 15 attendance points, well over the limit. Kraber again disputed their report, arguing that it failed to account for the medical releases he had provided to the Company. During the ensuing discussion, the two supervisors informed Kraber that the chiropractor's note provided for his absences on January 19 and 20 would not be suitable because of the recent policy change. Kraber testily responded that he would "beat" them on an unemployment claim and that he "wouldn't be dealing with this" if they had a union. He was then allowed to return to work.

Later that day, Kraber complained to Paint Department Supervisor Curt Peterson about the new policy on chiropractors' releases. He told Peterson that, if employees had a union, Relco would not be able to change a policy in such a manner and that he planned on hunting a new job. Peterson promised to look into Kraber's attendance problem and fix it if he could.

A few days later, Peterson told Kraber that he had discussed his attendance record with Benboe and they agreed that his point total should be reduced to 10. Then, displaying a copy of his attendance record and pointing at two dates (January 19 and 20) circled in red, Peterson told Kraber that even those four points would be removed if Kraber's medical doctor provided a note for those days.

Kraber promptly called his physician, Dr. Alejandro Curiel, to request that he fax a note to Peterson to cover his absences on January 19 and 20. Dr. Curiel agreed to do so. Later that day, Peterson told Kraber that he received Dr. Curiel's note but he could not read it. Peterson asked Kraber to get a legible note from Dr. Curiel. Again acting promptly, Kraber called the doctor's office to request another note. When Kraber double-checked on his request later that afternoon, he learned from a nurse with Dr. Curiel's office that they had telephoned Peterson directly about the earlier note.

The following morning Peterson confirmed to Kraber, in the presence of Jammie McKim, one of Kraber's coworkers, that he had spoken to a nurse from Dr. Curiel's office. Peterson

assured Kraber that the doctor's note would suffice and that the points on his attendance record for January 19 and 20 would be removed. McKim corroborated Kraber's account.

On the second day of the hearing, Respondent's counsel represented that Peterson would deny that this conversation occurred. (Tr. 470.) The next day Respondent reported that Peterson, who no longer works for the Company, failed to appear in compliance with the subpoena it had served on him. Respondent did not represent that it intended to request that the Board seek enforcement of the Peterson subpoena.

However, in a position letter submitted by Respondent during the investigation, which appears to have been prepared while Peterson remained in Respondent's employ, Respondent denied that Peterson ever agreed not to charge Kraber for the points assessed for his absences on January 19 and 20. (R. Exh. 18.) Although this letter states that Peterson told Kraber about a call he received from "some person saying that she was from (the doctor's) office . . . to tell him what the note . . . purportedly said," it further asserts that Peterson still insisted that Kraber needed to obtain a legible note from the doctor. The position letter also suggests that Crall and Bachman never became aware of the allegedly illegible note until on or about March 18 (9 days after Kraber's discharge) when they questioned Peterson about the existence and whereabouts of Dr. Curiel's note. Bachman and Crall testified to this effect at the hearing. Respondent did not adduce any evidence from Benboe concerning Kraber's attendance issues.

On Friday, February 26, 2010, the Relco attendance clerk assessed Kraber two points for missing work. In a telephone call later that day, Crall reported to Bachman that Kraber had "pointed out." Bachman told Crall that he wanted to personally review Kraber's record before any termination action. Although Bachman returned from vacation sometime between Sunday, February 28, and Tuesday, March 2, he left again on March 2, this time on a business trip, and did not return until Friday, March 5. He reviewed Kraber's attendance record on Monday, March 8, and approved his termination.

Meanwhile, Kraber returned to work on Monday, March 1, and continued to work until Tuesday, March 9, when Benboe told Kraber after the morning meeting that he had accumulated 12 points again. Obviously surprised, Kraber told Benboe that Peterson had assured him that the points assessed for January 19 and 20 would be removed. Benboe responded that the decision was final, implying that it would not be reconsidered. Benboe escorted Kraber to retrieve his tool box and out of the plant.

That night Kraber called Peterson at home to ask why he had not removed the points as he had promised. Peterson told Kraber that he just had not had the time but he would speak to management the following morning. The next morning, Kraber returned to the plant to relinquish his uniforms. While there Kraber asked Crall whether Peterson had spoken to him about the questioned points for January 19 and 20. Crall said he had not. Kraber reiterated that he had given Peterson his doctor's note. Crall assured Kraber that he would speak with Peterson and get back to him after looking into it. After Crall failed to contact Kraber, he called Crall to follow up. Crall told Kraber

that Bachman would not reconsider Kraber's termination because he could not read Dr. Curiel's note.

#### *F. Relevant Evidence Regarding Relco's Nondisclosure Agreement*

Historically, Relco has required employees to sign a nondisclosure agreement during the hiring process. By early July 2010, it revised that agreement and distributed copies at the morning meeting on July 10, 2010. Benboe instructed employees to sign the revised agreement and return it to him. He also warned that those who failed to do so would have to "go upstairs" to speak with Bachman.

For purposes of this proceeding, the pertinent part of the revised agreement (and its predecessor) barred employees from disclosing to any third-party information concerning "compensation, payments, correspondence, job history, reimbursements, and personnel records" without authorization from "Relco's Chief Legal Officer or Chief Administrative Officer." (GC Exh. 22; R. Exh. 19, sec. II,B,2.) The revised edition included a new provision that barred employees from contacting, among others, any of Relco's vendors as happened in connection with the dispute over the cost of uniform maintenance. (GC Exh. 22, sec. II,A,6.) The revised agreement also eliminated an employee's right to recover litigation costs and attorney fees if he or she prevailed in an enforcement action brought by Relco. (R. Exh. 19, sec. II,F.)

Despite Benboe's warning at the July 10 meeting, some employees chose not sign the agreement. A week or two later, Benboe discussed the agreement at another morning meeting. This time he read the names of the employees who had not yet signed the agreement and again warned that if they persisted in refusing to sign, they would sent to Bachman. A few employees still abstained from signing the agreement. No evidence shows that Benboe's threat about sending employees to Bachman was ever implemented, or that those who refused to sign were disciplined in any other manner.

In its brief, Relco claims that it rescinded the nondisclosure agreement by way of a memo to employee memo August 12, 2010. A document stating as much was marked for identification as General Counsel's Exhibit 23 during the testimony of Charles Newton, a witness called by the counsel for AGC. When questioned about the memo by counsel for the AGC and counsel for Respondent, Newton denied that he had ever seen the document. (Tr. 346-347, 351.) No other witness provided a foundation for the proper admission of General Counsel's Exhibit 23. Hence, the transcript specifically notes that this document was not offered and was not received. (Tr. 328.) However, General Counsel's Exhibit 23 was included in the General Counsel's exhibit file and is marked as having been received. Be that as it may, I find that this document has been erroneously marked as received and included in the exhibit file.

#### *G. Further Findings and Conclusions*

##### 1. The discharges

In pertinent part, Section 7 of the Act protects the right of employees "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities

for the purpose of collective bargaining or other mutual aid or protection.” Section 8(a)(1) provides that it is an unfair labor practice for an employer to “interfere with, restrain, or coerce” employees who exercise their Section 7 rights while Section 8(a)(3) provides that it is an unfair labor practice for an employer to discriminate against an employee “in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.”

Ordinarily, an employer may discharge an employee “for good cause, bad cause, or no cause at all, without violating the Act as long as his motivation is not antiunion discrimination and the discharge does not punish activities protected by the Act.” *L’eggs Products v. NLRB*, 619 F.2d 1337, 1341 (9th Cir. 1980). But an employer violates the Act by firing an employee for engaging in protected activities, be they union activities or protected concerted activities not involving a union, when there is no legitimate reason for the discharge, or the reasons offered are only pretexts. *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1550 (10th Cir. 1996), enfg. 317 NLRB 1140 (1995). In cases of this type the General Counsel must prove that the employee’s termination resulted from an unlawful motivation. *NLRB v. Klauw*, 523 F.2d 410, 413 (9th Cir. 1975). In evaluating allegations of unlawful termination, the ultimate “determination which the Board must make is one of fact—what was the actual motive of the discharge?” *Santa Fe Drilling Co. v. NLRB*, 416 F.2d 725, 729 (9th Cir. 1969).

Most often a trier of fact must determine the true motive underlying an adverse action from circumstantial evidence. *New Breed Leasing v. NLRB*, 111 F.3d 1460, 1465 (9th Cir. 1977). Employers rarely admit that they take adverse actions against employees for reasons unlawful under the Act. Accordingly, where the trier of fact finds that the stated motive for a discharge is false, he or she may infer another motive, “one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference.” *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

The Board uses a causation test to determine the motive for an adverse action that it first adopted in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The Supreme Court later approved that test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). As refined over the years, the *Wright Line* test requires initially that the AGC to persuade that a substantial or motivating factor for the employer’s challenged decision was prohibited by the Act. If the AGC meets that burden, the burden of persuasion then shifts to the employer to prove that it would have taken the same action even if the employee had not engaged in protected activity. See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), and the cases cited there.

To carry his burden, the AGC must establish by either direct or circumstantial evidence that (1) the employee engaged in a protected activity, (2) the employer knew of that activity, and (3) the employer took adverse action against the employee motivated in substantial part by the her/his protected activity. *FPC Moldings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enfg.

314 NLRB 1169 (1994) (citations omitted). If the AGC succeeds in proving these elements, the employer then must show as an affirmative defense that the same action would have been taken against the employee even absent the protected conduct. The mere showing that a legitimate reason existed for imposing the adverse action is insufficient to satisfy the employer’s burden. *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991).

However, a “*Wright Line* analysis is not appropriate where the conduct for which the employer claims to have disciplined the employee was protected activity.” *St. Joseph’s Hospital*, 337 NLRB 94, 95 (2001). See also *Saia Motor Freight Line*, 333 NLRB 784, 785 (2001), and the cases cited there. In this case, I have concluded that the *Wright Line* analysis applies in determining the outcome of the Smith, Dixon, and Kraber terminations and that *St. Joseph’s Hospital* governs the analytical approach in Dane See’s case.

1. *Jeffery Smith*. The AGC argues that he has satisfied the elements necessary to establish a basis for inferring that Smith’s discharge resulted from an antiunion motive largely because the proffered reasons advanced by Respondent “are riddled with inconsistencies.” Most particularly, the AGC claims that Relco did a complete about face as to the reason for Smith’s termination.

Respondent argues that the evidence is insufficient to establish that Relco: (1) knew of Smith’s union activities, (2) harbored any animus toward the employees for engaging in protected activities, and (3) terminated Smith for any reason other than his violation of the company’s legitimate attendance policy. Respondent argues at some length that Smith is not a credible witness because his testimony conflicts with “four other credible witnesses” who lacked a motive for fabricating their testimony, namely, Benboe, Crall, Graber, and Purdun.

I find that the AGC met the requisite burden of proof required by *Wright Line* as to Smith. Smith initiated the union organizing drive and did all he could to insure its success. He made the initial contact with BRS organizer Ciurej, provided Ciurej with regular reports about the atmosphere for organizing at the Relco plant, arranged for the location of the meetings between Ciurej and interested employees, persistently solicited employees to attend union meetings and sign BRS cards, and generally promoted the organizing cause. From the time of his initial contact with Ciurej in March 2009 until his termination in mid-June, Smith unquestionably served as the leading employee organizer at the Relco plant.

Contrary to Respondent’s contention, an employer’s anti-union campaign, while lawful, may be treated as background evidence of union animus. *Healthcare Employees Union*, 441 F.3d 670, 681 (9th Cir. 2006), citing *Tim Foley Plumbing Service*, 337 NLRB 328 (2001). Here, the evidence surrounding Respondent’s antiunion campaign amply demonstrates Respondent’s animus toward unionization. Clearly, Respondent actively opposed unionization. Shortly after Graber told Bachman about the union organizing at the car wash, the chief operating officer conducted a lengthy meeting to reiterate the benefits provided to them by the company and to call attention to disadvantages that would flow from unionization. Although no one claims that Bachman’s appearance at the morning meet-

ing was unusual, his presence together with the unusual length of that morning meeting and the exclusion of the unionized subcontractor employees certainly signals the gravity of the subject matter to the company and, no doubt, to the employees. Bachman's caution to employees that the company's precarious profitably picture could be adversely affected by unionization, whether lawful or not, amounted to a message designed to cause employees to be fearful of the ongoing organizing efforts.

A similar message came after Smith's discharge in Bachman's August 28 letter. In my judgment, the previously quoted "chalkboard" reference is tantamount to a bargain-from-scratch threat that the Board and the courts routinely find unlawful. At the very least, this statement vividly demonstrates Respondent's deliberate choice to engage in "brinkmanship" where the line between what the writer intended and the reader understood would become easily but impossibly blurred. *NLRB v. Gissel Packing Co.*, 395 U.S. 595, 619-620 (1969). Regardless, I find it sufficient by itself to reject Respondent's protracted arguments in its brief about the absence of evidence establishing Respondent's union animus.

I further find that Respondent knew of Smith's pronoun sympathies prior to his termination. Smith's corroborated claim that he made an effort at the May 15 meeting to engage Bachman in a dialogue about unionization detracts considerably from the veracity of Bachman's assertion that he did not learn of Smith's pronoun activities and sympathies until well after his discharge.

The element of knowledge as to a specific employee may also be inferred from circumstantial evidence. *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162 (D.C. Cir. 1993) (knowledge may be shown by circumstantial evidence from which a reasonable inference may be drawn); *Kajima Engineering & Construction*, 331 NLRB 1604 (2000) (knowledge may be reasonably inferred from a showing that the employer knew generally of the ongoing union activity, harbored animus toward that activity, discharged an employee close in time to the start of the activity, and advanced pretextual reasons for the employee's termination).

Despite Bachman's denial that he knew about Smith's involvement with the BRS organizing drive before he was fired, the circumstantial evidence here strongly supports an inference otherwise. Ample evidence shows that Smith openly solicited employees in and around the plant and that many employees knew of Smith's leading role. Additionally, Bachman clearly knew about the organizing campaign prior to Smith's discharge as he conducted a lengthy meeting about the subject 3 to 4 weeks before Smith was fired. These facts provide a substantial basis for inferring the Relco managers knew that Smith was a strong promoter for the BRS. *NLRB v. Hospital San Pablo, Inc.*, 207 F.3d 67, 74 (1st Cir. 2000) (an employee's extensive activity at the workplace made it "reasonable to believe that someone dropped a hint, if not more, to management" about the employee's union activities).

Here, the evidence points to more than just "someone" who provided the company with critical information about the union activists. It points to Jonathan Graber and to a lesser extent to Richard Purdun. Graber's admissions about conversations he initiated with Bachman at critical times in this case provide strong

support for an inference that he served as an informant about the union campaign and its leading participants. I find Graber's claim that he carefully avoided disclosing the names of the employee organizers to management unbelievable. Even though he refused to discuss unionization with his fellow employees, Graber went out of his way to initiate discussions about union activities at the plant with Bachman and other supervisors. On at least two occasions, Graber went to Bachman with information about the organizing drive, and he admittedly initiated conversations with Dalman and Yankovic.

Apart from his own self-serving assertions, nothing in the record supports his claim that he zealously guarded the identities of the union activists when speaking to management. Instead, there is considerable evidence to suggest that he most likely did not. This evidence includes his own extreme anti-union hostility, his considerable aggravation at the solicitations by both Smith and Dixon, and his solicitousness toward Bachman about the organizing. These factors, along with the fact that Graber appears to have had a meteoric progression to a coveted position with the company while the events of this case unfolded, all support the conclusion I have reached about his informant's role. Finally, Graber's guarded demeanor while testifying about his reports to Bachman and the supervisors convinced me that, contrary to his assertions, willingly he named names when talking to management about the union organizing. Hence, I find ample evidence to support the conclusion that Respondent knew of Smith's leading role with the union organizing campaign before his termination.

A trier of fact may consider a respondent's explanation for discharging an employee in judging whether the AGC met his burden of persuasion. *Holo-Krome Co. v. NLRB*, 954 F.2d 108, 113 (2d Cir. 1990). I find Respondent's explanation for discharging Smith is not truthful. The "failure to mention to an employee an asserted reason for adverse action at the time the action is taken can indicate a discriminatory motive." *Royal Development Co. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983). Here, Respondent's supervisors provided one reason to Smith when they fired him on June 12, and a completely different reason when they testified at the hearing. The documentary evidence generated by both sides provides strong support for Smith's version of the subjects discussed during his meetings with Crall and Benboe on June 11 and 12, and provides correspondingly compelling basis for inferring that Respondent acted with a discriminatory motive when it terminated Smith.

I do not credit the glib denials by Crall and Benboe that Smith failed to ask about the effect on his attendance record that might result from his involuntary dismissal from work on June 11 and his probable late arrival on June 12. As his brooding letter to Bachman indicates, Smith harbored considerable dissatisfaction with the attendance policy because of its impact on his ability to gain a wage rate review. That, coupled with his inability to gain an audience with Bachman to discuss that matter motivated him to pursue union representation in the first place.

This background together with Smith's awareness that his attendance point total was at the limit makes it highly improbable that he would have passively left the June 11 meeting without addressing the attendance question. Additionally, Smith's cred-

ible claim that Crall and Benboe made no reference to his attendance record when they discharged him at the June 12 meeting supports a conclusion that they, in effect, waived the attendance points the previous day. Accordingly, I credit Smith's claim that he received an assurance from those two supervisors that he would not be penalized with attendance points while he sought new boots on June 11 and 12. Additional support for this conclusion is found in the fact that Benboe did not report Smith's early departure to the attendance clerk on June 11 as would have ordinarily happened.

Moreover, Smith's dismissal letter provides corroboration for his story that Crall and Benboe told him at the June 12 meeting that he was being terminated for a "gross" safety violation. The letter states as much. (GC Exh. 8.) Respondent even made a similar contention when contested Smith's claim for unemployment benefits. (GC Exh. 31.)

By contrast, I am unable to credit Crall's assertion at the hearing that the decision to terminate Smith resulted from his excessive attendance points. As already noted, Smith's termination letter is completely inconsistent with Crall's claim. It is unlike numerous other standard dismissal letters used by the company when dismissing employees based on the attendance policy. The other 33 such dismissal letters in evidence stand in stark contrast to the tenor and tone of the letter issued to Smith.<sup>11</sup> Crall's effort to explain away this obvious inconsistency, which ended with his assertion that the reference to "company policies" in Smith's discharge letter really refers to his absenteeism, is not at all convincing or credible. Thus, Crall testified:

Q. Why does that letter not have a specific reference to attendance policy, if you know?

A. This is the only instance that I have ever been involved in that had other pending violations that happened simultaneous to the attendance policy, and I must surmise that at the point that this was written I wanted to keep track that there were other pending violations that had not been assessed.

Q. But did you—what decision was ever made, if any, regarding the incidents that happened the other day regarding safety shoes and the statements Mr. Smith made?

A. No decision was ever made. It was never needed to be made. He took himself out from absenteeism. [Tr. 539.]

For these reasons, I find Respondent's defense that it terminated Smith, the initiator of the union drive, based on its attendance policy is simply an afterthought and untruthful. Having concluded that Respondent's defense is a pretext, it necessarily follows that Respondent failed to meet its *Wright Line* burden in Smith's case. *Frank Black Mechanical Services*, 271

<sup>11</sup> See R. Exh. 5. Unlike Smith's termination letter, each of these 33 letters advised the employee with very straight forward language that their employment "has ended as a result of your absenteeism" or some nearly identical variant of those words. I find it likely that the attendance clerk would have prepared a similar letter pursuant to Crall's terse instruction to her if his account of Smith's termination were, in fact, truthful.

NLRB 1302 (1984). Hence, I find that Respondent violated the Act as alleged by discharging Smith on June 12.

2. *Ronald Dixon*. The AGC contends that Dixon became the leader of the union organizing effort following Smith's discharge and that Dixon himself was fired about an hour after he provided an employee a BRS card to sign. As with Smith, the AGC argues that Dixon's termination for insubordination is a pretext designed to mask Respondent's animus toward Dixon's union activities.

Respondent argues that it never knew about Dixon's union activities and that there is no evidence of animus toward employee union activity. Respondent's contends that it terminated Dixon for cause, i.e., insubordination. Respondent argues that its work rules permit immediate termination for that reason.

I find ample evidence that Dixon became the leading union advocate following Smith's discharge and that the organizing drive was undergoing a revitalization around the time of Dixon's discharge as reflected by Ciurej's visit to the Albia area in September, a week or so before Dixon's termination.

Dixon also solicited Graber to join the union cause and elicited the same type of hostile rebuke that Smith received. My discussion above concerning Graber's central role as a conduit to management concerning the on-going union activities supports the conclusion I have reached that Respondent knew of Dixon's role as the leading union advocate. The fact that Graber went to Bachman about the Ciurej's plans for handbilling in September, 2 or 3 days before it occurred, shows that he continued to keep Bachman abreast of significant organizing events. My conclusion that Graber's assertion that he never identified leading employee organizers to Bachman about the organizing drive is not truthful provides a rational basis for inferring, as I have done, that Relco's management knew about Dixon's leadership role in the union drive around the time of his discharge.<sup>12</sup>

Respondent's argument that there is no evidence of animus lacks merit. In addition to my discussion above in connection with Smith's termination, it is my conclusion that, by the time of Dixon's discharge, Respondent had already violated the Act by discharging Smith.

Finally, I have concluded that the explanation advanced for Dixon's termination is a pretext for several reasons. First, even assuming that Dixon had his feet hanging off the edge as claimed, which I seriously doubt, Benboe's initial admonishment (get a ladder or stay in the center) as well as his failure to monitor compliance or provide any other routine supervisory oversight detracts considerably from the claimed seriousness of the incident. Second, there is no evidence at all showing that Benboe reported to the decisionmakers in this instance that Dixon had acted in an insubordinate manner. Third, the subsequent claim that Dixon should have been working from the top of a ladder is inconsistent with the explanation during the Iowa hearing that he would have gotten to this work area by going up

<sup>12</sup> I have not relied on an employee's request to Dixon for a BRS card about an hour prior to this termination as a specific basis for inferring motive based primarily on timing as argued by the Acting General Counsel because the evidence is insufficient to establish that Respondent knew about that specific incident.

the back of the locomotive using the built-in steps. Fourth, the evidence does not support Bachman's accusation that employees ordinarily use a harness or other safety devices he enumerated when working on top of a locomotive. Fifth, the claim that Dixon had been insubordinate is not supportable where it appears that he got a ladder as instructed by Benboe. And sixth, his conduct, if true, appears entirely out of proportion with those other instances where Respondent bypassed the progressive disciplinary system and discharged the employee immediately.

Having concluded that Respondent's explanation for Dixon's discharge is a pretext, I have concluded that it violated Section 8(a)(1) and (3) as alleged by discharging him on September 21, 2009.

3. *Dane See*. Even though Respondent admits that it fired See after learning that he had spoken with a Cintas agent because it mistakenly believed that he engaged in misconduct when doing so, it now concedes that no misconduct occurred.<sup>13</sup> Regardless, Respondent argues that the evidence of See's individual conversations with the Cintas representative is insufficient to establish that he was engaged in any concerted activity at the time that would make his termination unlawful under the Act.

Respondent contends that See acted alone when he contacted the Cintas representative and that the evidence fails to establish that any other employee or any group of employees appointed or authorized him to contact Cintas on behalf of the group. Even assuming, Respondent argues, that employees engaged in concerted activity when they spoke out at the two meetings with management over the uniform issue, the protected character of that activity did not extend to See's later exchanges with the Cintas agent. The AGC disagrees.

See's case rises or falls on the question of whether his contact with the uniform vendor amounted to a continuation of the concerted activity that occurred at the two employee meetings. The *Meyers* litigation<sup>14</sup> produced the Board's current view as to the meaning of the statutory term "concerted activities." In *Meyers I*, the Board explained that "concerted activities" as used in Section 7 requires that an employee's activity must be engaged in with or on the authority of other employees, and not solely by and on behalf of an individual employee. 268 NLRB at 497. In *Meyers II*, the Board said its *Meyers I* definition encompasses those circumstances where an individual employee seeks to initiate or to induce or to prepare for group action, as well as the conduct of an individual employee who brings "truly group complaints" to the attention of management. 281 NLRB at 887. The intervening Supreme Court decision in the

<sup>13</sup> This concession occurred at the outset of the third day of hearing. Accordingly, Respondent asserted that See would be offered immediate reinstatement. I have received no indication that Respondent has fully resolved See's case to the satisfaction of the AGC.

<sup>14</sup> *Myers Industries*, 268 NLRB 493 (1984) (*Meyers I*); remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985); *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

*City Disposal* case<sup>15</sup> obviously influenced a part of this clarification. As *Meyers II* notes, the five majority justices and the four dissenting justices in *City Disposal* agreed that concerted activity also encompassed "individual employee activity in which the employee acts as a representative of at least one other employee." Id. at 885.

A individual conversation such as See's may constitute concerted activity although it involves only a speaker and a listener if the speaker sought to initiate, induce, or prepare for group action, or if the speaker's words had some relation to group action in the interest of the employees. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). Concerted activity can include concerns expressed by an individual that are the logical outgrowth of concerns expressed by the group. *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992). Even in the absence of an express announcement about the object of a single employee's activity, the Board may infer from the circumstances whether or not the activity was concerted. *Whittaker Corp.*, 289 NLRB 993, 993-994 (1988).

I find in agreement with the AGC that See's engaged in concerted activity by contacting the Cintas customer service representative in early March 2010. The actual charge to Relco for the uniform maintenance service was clearly the most serious unresolved question that grew out of the two meetings management had with the employees on this subject. For that reason, See's efforts to learn the actual cost by contacting Cintas directly was clearly an outgrowth and continuation of the concerted activity that started at the meetings. Therefore, in agreement with the AGC, I find See's case controlled by the outcomes in *Every Woman's Place*, 282 NLRB 413 (1986), enf. mem. 833 F.2d 1012 (6th Cir. 1987) (an employee's call to the Department of Labor constituted concerted activity because it was the logical outgrowth of earlier group activity), and *Salisbury Hotel*, 283 NLRB 685 (1987) (an employee's call to the Department of Labor constituted concerted activity under the logical outgrowth theory even though no other employees knew about or authorized the employee to make the call). Accordingly, I find Respondent violated Section 8(a)(1) of the Act by discharging Dane See on March 5, 2010, because he contacted the Cintas representative about the uniform service cost.

4. *Timothy Kraber*. As Respondent asserts that it terminated Kraber because of his attendance record rather than his leading role in the uniform dispute or his union activities and sympathies, the *Wright Line* causation test applies in his case.

Respondent clearly knew of Kraber's role in the uniform dispute as he pressed Crall to disclose the cost of the uniform service at the first meeting on that subject and blocked Doug Bachman's efforts to bypass the cost subject at the second meeting. He earlier sought the cost information from the Cintas service driver directly and announced at the second meeting that he had been told the actual cost to Relco was less than it was charging the employees through the payroll deduction.

Whether Kraber actually accused Relco of ripping off its employees as Shipp claims he did, his disclosures at the second

<sup>15</sup> *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984) (holding that an individual invoking a collectively bargained right is engaged in concerted activity within the meaning of Sec. 7).

meeting about the information he had received from the Cintas service driver suggested as much. The hostility on the part of several employees at this meeting was matched by Doug Bachman's apparent anger at this implied claim. Therefore, I find an ample basis exists to infer that Kraber's termination, which followed soon after the Doug Bachman meeting, resulted from his challenge that Relco disclose to its employees precisely what its vendor had been charging for the uniform maintenance service. This conclusion is further supported by Respondent's discharge of See just a few days before Kraber.

I reject Respondent's claim that it discharged Kraber for exceeding the allowable number of attendance points. I find Respondent deliberately refused to remove the attendance points for January 19 and 20 primarily to get rid of a known union sympathizer after he took a leading role in protesting the company's charge for the uniform maintenance service. The weakness of Respondent's case as to Kraber's attendance is hard to overstate. It is no coincidence that Respondent discharged two employees within a week of each other after it became apparent following the heated meeting with Doug Bachman that they were independently investigating Cintas' actual charge to Relco for the uniform maintenance service.

The claim that Relco refused to honor Dr. Curiel's medical excuse provided by Kraber for January 19 and 20, because it was unreadable is simply a sham. Respondent's further argument based on Crall's testimony that it did not even know of Dr. Curiel's note until well after Kraber's discharge is also untrue. The undisputed evidence shows that Peterson assured Kraber in front of McKim that he had spoken to Dr. Curiel's nurse and the note would be acceptable. Respondent's assertion in its brief that Peterson's assurance to Kraber about the sufficiency of Dr. Curiel's note "would have been . . . likely to be disregarded by Bachman" because Peterson was not Kraber's supervisor ignores the undisputed fact that Peterson pursued the whole matter only after speaking with Benboe, Kraber's supervisor. Even though it may well be true that Bachman ultimately made the decisions relevant to the attendance policy, I find the arguments concerning Peterson's lack of authority only compounded the appearance of bad faith and double dealing so evident here.

Having concluded that the Respondent's defense to the discharge of Kraber is a pretext, I find that evidence merits the inference that his termination resulted from his leading role in the flap over the charge to employees for uniform maintenance. As that activity was concerted in nature and protected by the Act, I find Respondent violated Section 8(a)(1) by discharging Kraber for his protected concerted activities. In view of this conclusion, I find it unnecessary to consider the allegation that Kraber's discharge also violated Section 8(a)(3) of the Act.

## 2. The nondisclosure agreement

The AGC argues that the very maintenance of the nondisclosure agreement is unlawful because it explicitly restricts employees from exercising their Section 7 rights. He further argues that Benboe's pressure on employees to sign the unlawful agreement also violated the Act and that Respondent's claimed rescission of the agreement is not effective to cure these violations.

Respondent disputes the AGC's claim that its nondisclosure agreement violated the Act. However, relying on General Counsel's Exhibit 23, it also asserts that it withdrew the agreement in August and, as no employee suffered any adverse impact for refusing to sign it, the issue is moot, or at least a de minimis violation that does not warrant a remedial order.

I find the nondisclosure agreement is invalid and unlawful on its face. In determining whether a rule or policy violates the Act, it is necessary to balance the employer's right to implement rules of conduct in order to maintain discipline with the right of employees to engage in Section 7 activity. Even in the absence of a specific prohibition of participation in Section 7 activities, a rule may still be unlawful if employees would reasonably understand the language to prohibit Section 7 activity. *Longs Drug Stores California, Inc.*, 347 NLRB 500, 500-501 (2006); *Lutheran Heritage*, 343 NLRB at 646. As the Board stated in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998):

In determining whether the mere maintenance of rules . . . violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement.

See *NLRB v. Vanguard Tours*, 981 F.2d 62, 67 (2d Cir. 1992) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 fn. 10 (1945)). Additionally, "in determining whether a challenged rule is unlawful, the Board must . . . give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper inference with employee rights." *Lutheran Heritage*, 343 NLRB at 646.

In *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004), the Board held a communication rule unlawful on its face where it threatened discipline against any employee who disclosed confidential information that included "disciplinary information, grievance/complaint information, performance evaluations, salary information, salary grade, types of pay increases and termination data for employees who have left the company."<sup>16</sup> Based on the foregoing precedent, I find both editions of Respondent's nondisclosure agreement violated the Act because of the prohibitions against disclosing matters pertaining to compensation and other personnel matters. I find the July 2010 edition unlawful for the further reason that it prohibits unauthorized employee contacts with customers and vendors.

As discussed before, General Counsel's Exhibit 23 on which Respondent fashions its argument that the agreement has been

<sup>16</sup> See also *Jewish Home for the Elderly of Fairfield City*, 343 NLRB 1069 (2004) (finding the employee confidentiality rule was unlawful on its face when it specifically prohibited discussion of wages, merit increases, performance evaluations, and other benefits); *Regional Medical Center at Memphis*, 343 NLRB 346 (2004) (finding the employer rule unlawful when it explicitly prohibited disclosure of information relating to employee discipline, performance evaluations, and other personal information); *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999) (finding the rule to be unlawful when it specifically prohibits employees from discussing confidential information of fellow employees among themselves).

rescinded is not properly in evidence. But even if it had been properly received, I would still reject its argument that the issue would be rendered moot or de minimis based on: (1) evidence showing that Respondent has maintained an unlawful nondisclosure agreement for a considerable period; (2) the notice only withdraws the July 2010 edition of the nondisclosure agreement; (3) the alleged posting of the rescission notice on the employee bulletin board is insufficient publication in view of the emphasis put on this subject by Benboe at the two July meetings; and (4) the rescission notice contains no clear repudiation of the unlawful portions of the nondisclosure agreement. See, e.g., *Passavant Memorial Area Hospital*, 237 NLRB 138–139 (1978), and the cases cited there.

The General Counsel has separately alleged that Benboe's threats to send employees to Bachman for refusing to sign the revised edition (presumably they already had signed the earlier edition) and reading the names of those who had not signed amounts to unlawful coercion. I agree. Benboe's conduct at the July meeting amounts to unlawful coercion within the meaning of Section 8(a)(1) in as much as sought to compel employees to sign an unlawful agreement. *Heck's, Inc.*, 293 NLRB 1111, 1119–1120 (1989).

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Brotherhood of Railway Signalmen is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging Jeffery Smith and Ronald Dixon on June 12 and September 21, 2009, respectively, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.
4. By discharging Dane See and Timothy Kraber on March 8 and 9, 2010, respectively; by maintaining an overly broad nondisclosure agreement; and by insisting that employees sign its overly broad nondisclosure agreement, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
5. The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

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

Because Relco violated Section 8(a)(1) and (3) of the Act when it discharged Jeffery Smith on June 12, 2009, and Ronald Dixon on September 21, 2009, and that it violated Section 8(a)(1) of the Act when it discharged employees Dane See on March 8, 2010, and Timothy Kraber on March 9, 2010, my recommended order provides for their full reinstatement to their former positions. The recommended order also requires that Relco make each of these four employees whole for any loss of earnings and other benefits they suffered between the date of their discharge and the date Relco tenders a proper offer of reinstatement to them. Backpay, if any, shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with

interest compounded on a daily basis as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010).

My recommended order also requires Respondent to expunge from its records any reference to terminations of Smith, Dixon, See, and Kraber, and to notify each of them in writing that this action has been taken, and that any evidence related to their unlawful terminations will not be considered in any future personnel action affecting them. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

Finally, my recommended order requires Respondent to post the standard hard copy notice to employees attached here as "Appendix" and post the notice electronically as provided in *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>17</sup>

#### ORDER

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

1. Cease and desist from

(a) Terminating any employee for engaging in activities on behalf of the Brotherhood of Railway Signalmen or other concerted activities protected by Section 7 of the Act.

(b) Maintaining a nondisclosure agreement or any other rule that prohibits employees from engaging in union or concerted activities protected by Section 7 of the Act.

(c) Requiring employees to sign a nondisclosure agreement or abide by any rule limiting their right to engage in union or concerted activities protected by Section 7 of the Act.

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

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

(a) Within 14 days from the date of this Order, offer Jeffery Smith, Ronald Dixon, Dane See, and Timothy Kraber full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they previously enjoyed.

(b) Make Jeffery Smith, Ronald Dixon, Dane See, and Timothy Kraber whole in the manner set forth in the remedy section of this decision, together with interest compounded on a daily basis, for any loss of earnings and other benefits suffered by them as a result of their unlawful discharges.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful termination of Jeffery Smith on June 12, 2009, Ronald Dixon on September 21, 2009, Dane See on March 8, 2010, and Timothy Kraber on March 9, 2010, and notify each of them in writing that this action has been taken and any evidence of their unlawful terminations will not be used against them in any future personnel actions.

<sup>17</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

(e) Within 14 days after service by the Region, post at its facilities in Albia, Iowa, copies of the attached notice marked "Appendix."<sup>18</sup> Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in con-

spicuous places including all places where notices to employees [employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 12, 2009.

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

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<sup>18</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."