

**American Medical Response of Connecticut, Inc. and
Adam Cummings and Shannon Smith.** Cases
34–CA–013051 and 34–CA–065800

June 28, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On November 20, 2012, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent, American Medical Response of Connecticut, Inc., filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief.

The National Labor Relations Board¹ has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,² findings,³ and conclusions,⁴ modify the remedy,⁵ and adopt the recommended Order as modified and set forth in full below.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its procedures to require that employees check their vehi-

cles' oil and coolants and complete a checklist certifying that they had inspected the vehicle. The judge also found that the Respondent violated Section 8(a)(3) and (1) by discharging Union Steward Adam Cummings because of his union and other concerted, protected activities. For the reasons that follow, we agree with the judge that the Respondent's implementation of the new procedures and its discharge of Cummings violated the Act.⁶

I. THE VEHICLE INSPECTION REQUIREMENT

The Respondent provides ambulance and medical transportation services. From 2008 to 2011, the National Emergency Medical Services Association (NEMSA) represented the emergency medical technicians (EMTs) and paramedics in the Respondent's Greater Hartford Division. The Respondent and the Union executed a collective-bargaining agreement on April 2, 2009. As envisioned by the collective-bargaining agreement, the Respondent and the Union thereafter met to discuss the Respondent's Standard Operating Procedures. On February 23, 2010, the Respondent sent the Union a draft⁷ of the Standard Operating Procedures. Section 2.22 of that draft specified that employees were to check their vehicle's oil level, start the vehicle, and complete a vehicle checklist at the start of each shift. The Respondent asked that the Union advise it if anything in the draft Standard Operating Procedures needed to be corrected. The Union did not respond to this request.

For more than 1 year after sending the draft, the Respondent did nothing to implement section 2.22. Then, on April 6, 2011,⁸ it circulated a new vehicle checklist. The new checklist required employees to check fluid levels under the vehicle's hood, check the operability of safety lights, check the operability of vehicle equipment, and record any existing damage to the vehicle. On April 8, employees received a memo advising that they were to begin using the new inspection sheet at the start of each shift. In May, the Respondent issued warnings to 116 employees for failing to turn in the vehicle checklist. The Respondent issued another 50 warnings in June.

The judge found that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing its start-of-shift policies because he found no evidence that NEMSA had

¹ The Respondent contends that the Board does not have a valid quorum under *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted 81 USLW 3629, 1774240 (U.S. June 24, 2013). For the reasons stated in *Bloomingtondale's, Inc.*, 359 NLRB No. 113 (2013), these arguments are rejected.

² The Respondent has excepted to the judge's denial of its motion to dismiss pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971). We affirm the judge's ruling. Deferral to a contractual grievance and arbitration procedure is inappropriate where the interests of charging parties are in apparent conflict with the interests of the union and its officials, as well as with the interests of the respondent. *Kansas Meat Packers*, 198 NLRB 543, 543 (1972). Here, Charging Party Adam Cummings filed an unfair labor practice charge against the Union, the National Emergency Medical Services Association (NEMSA), which was settled prior to the start of the hearing. Additionally, un rebutted testimony and documentary evidence establish the strong hostility of NEMSA Representative Toby Sparks towards Cummings. Therefore, "considerations of elemental fairness" bar application of the Board's *Collyer* deferral policy to the present case. *General Motors Corp.*, 218 NLRB 472, 476 (1975), enfd. mem. 535 F.2d 1246 (3d Cir. 1976).

³ 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

⁴ The judge's conclusions of law state, among other things, that the Respondent violated Sec. 8(a)(5) and (1) by discharging Adam Cummings. Because there is neither an allegation nor a contention that Cummings' discharge violated Sec. 8(a)(5), we shall delete the judge's inadvertent reference to Sec. 8(a)(5).

⁵ As described in the amended remedy section set forth below, we shall modify the judge's order to conform to our standard remedial language and to comply with our recent decision in *Latino Express, Inc.*, 359 NLRB 518 (2012).

⁶ As explained below, we find it unnecessary to pass on the judge's finding that the Cummings discharge violated Sec. 8(a)(3) of the Act, in addition to Sec. 8(a)(1).

There are no exceptions to the judge's finding that the Respondent did not violate Sec. 8(a)(3) and (1) by failing to transfer Field Operations Supervisor Shannon Smith to the bargaining unit as a full-time paramedic.

⁷ In its brief, the Respondent refers to this document as a "final draft."

⁸ All dates are in 2011, unless otherwise specified.

ever agreed to adopt the Standard Operating Procedures, including section 2.22. On exception, the Respondent contends that it did not unlawfully implement the Standard Operating Procedures, including the vehicle inspection requirement, because they were agreed to or, alternatively, because the Union waived its right to bargain over them. We find the Respondent's contentions are without merit.

It is undisputed that the Respondent did not begin enforcing section 2.22 until April 2011, approximately 14 months after it gave the draft of the Standard Operating Procedures to the Union. It is also undisputed that between February 2010 and April 2011, not all employees were checking their vehicles' fluid levels at the start of each shift or completing a checklist, and no employees were disciplined for their failure to do so. It was only after it circulated the new checklist in April 2011 that the Respondent began enforcing its start-of-shift procedures and issuing discipline for employees' failure to comply with the procedures. Thus, even assuming that section 2.22 was properly adopted in February 2010, as the Respondent contends, the facts show that on April 8, 2011, the Respondent unilaterally changed its practice from no enforcement to strict enforcement of these start-of-shift procedures.

Such a change in enforcement must be bargained over. See, e.g., *Vanguard Fire & Security Systems*, 345 NLRB 1016, 1017 (2005), *enfd.* 468 F.3d 952 (6th Cir. 2006). In *Vanguard*, the respondent started billing employees for charges incurred when they exceeded their allotted cell phone minutes in December 2002. Although the respondent had a written policy, promulgated in December 2001, requiring employees to pay overages, the Board found that the respondent unlawfully began enforcing the requirement, after a year of nonenforcement, without first bargaining with the union. *Id.* Here, as in *Vanguard*, the Respondent never enforced its policy in the 14 months between its purported adoption and the promulgation of the new checklist in April 2011.⁹ The Respondent never told employees during this lengthy period to complete these procedures and never disciplined an employee for failing to do so, even though (according to the Respondent) employees were supposed to be completing them daily upon completion of each shift. Therefore, the Respondent's implementation of the start-of-shift procedures changed the status quo of employees' daily work life in a markedly apparent way, and the Respondent had

⁹ In view of this lack of enforcement over the 14-month period, we find it unnecessary to pass on either the Respondent's contention that the Union agreed to this change in February 2010 or the judge's contrary finding.

a duty to bargain about that change before implementing it on April 8.¹⁰

The Respondent alternatively contends that it was privileged to implement the start-of-shift procedures as it did because the Union waived its right to bargain about them. This contention is without merit. Under the Board's long settled "clear and unmistakable waiver" standard, the burden is on the party asserting waiver to establish that the parties "unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term." *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). The Respondent did not meet this heavy burden.

The record shows that the Respondent first circulated its new vehicle checklist to its supervisors and field training officers on April 1. Before April 1, the Respondent gave no indication that it would start requiring employees to check fluid levels or the operability of the vehicle's systems at the start of each shift. The Respondent circulated the final draft of its vehicle checklist on April 6, and employees were told to start checking the vehicle and completing the checklist when they arrived for work on April 8. It was only later on April 8, after employees had been told to check their vehicles and complete the checklist, that the Respondent emailed the memo that accompanied the new vehicle checklist to the Union's representative.

Under these facts, the Respondent failed to provide the Union with adequate notice of its plan to change the start-of-shift procedures. "[A]n employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals." *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001) (quoting *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir. 1964)). Here, the Respondent did not notify the Union until April 8, after the change had already been implemented earlier that day. This communication was nothing more than an in-

¹⁰ The Respondent has not excepted to the judge's finding that the Respondent's change to the start-of-shift procedures was a material, substantial, and significant change to employees' terms and conditions of employment. In any event, we find that it was such a change: The Respondent did not merely introduce a new way of monitoring compliance with existing procedures. See, e.g., *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327, 327 (1976) (respondent did not violate Sec. 8(a)(5) by installing timeclocks to more dependably monitor its longstanding rule that employees record their in and out times). Rather, the Respondent interposed a new ground for discipline and discharge of its employees. See *Pratt Industries*, 358 NLRB 413, 421 (2012); *Goya Foods of Florida*, 351 NLRB 94, 96 (2007), *enfd. mem.* 309 Fed. Appx. 422 (D.C. Cir. 2009).

formational notice about a *fait accompli*. See *Pontiac Osteopathic Hospital*, supra.

The Respondent argues that the Union received sufficient notice on April 1, when it emailed a draft of the vehicle checklist to the field training officers, who are bargaining unit members. “Notification to unit employees, however, is not equivalent to providing notice to their collective-bargaining representative.” *Bridon Cordage, Inc.*, 329 NLRB 258, 259 (1999). In these circumstances, the Respondent did not afford the Union an opportunity for bargaining before implementing the new start-of-shift procedures, and the Union therefore could not have waived its right to bargain about that change.

In sum, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally tightening its previously lax—indeed, nonexistent—enforcement of the start-of-shift procedures and imposing discipline as part of that enforcement, without giving the Union notice and an opportunity to bargain.

II. ADAM CUMMINGS’ DISCHARGE

Like other employees, EMT and Union Steward Adam Cummings learned that the Respondent would be requiring employees to complete the new start-of-shift procedures when he arrived for work on April 8. Cummings emailed General Manager Sean Piendel to ask about the new policy and to express his concern that the new procedures would require untrained employees to go under vehicles’ hoods to check fluid levels. On April 11, Cummings and Union Steward Bree Eichler sent emails to Piendel and HR Director Robert Zagami about the start-of-shift procedures. Cummings stressed that he and other employees in his hire class had never been trained on how to check fluid levels, that it was not safe for employees to check fluid levels, and that the Respondent needed to provide training before asking employees to complete these procedures. Cummings added that until training was provided, he would “be advising the employees to have a mechanic check the trucks to protect the equipment and the employees.” Piendel responded, “Am I to understand that you are initiating a concerted job action against AMR?” Piendel instructed Cummings to respond, and Cummings replied, “Have at it if you feel that is [what] my response entailed” Piendel replied that he had asked for a yes or no answer, but that Cummings had not given him one. Cummings then replied that he felt he had made his concerns and intentions quite clear, but that he hoped the Respondent would meet and confer with the Union on this matter.

After this exchange, Cummings returned to his normal EMT shift. As explained above, the Respondent warned 116 employees in May and 50 employees in June for failing to turn in the vehicle checklist. On May 12,

NEMSA Representative Toby Sparks sent Piendel a letter disavowing NEMSA’s involvement in any “Bad Faith charge” Cummings potentially faced. On June 1, after he returned from a vacation, Cummings attended a disciplinary meeting with Piendel, Zagami, and HR employee Kelly Gauthier. At the meeting, Zagami asked Cummings to explain the NEMSA letter. Cummings said that he could not explain the letter, and the Respondent would have to ask Sparks about it. At the end of the meeting, the Respondent placed Cummings on administrative leave and, on June 3, discharged him for violating section 17.01 of the collective-bargaining agreement, the section prohibiting strikes, slowdowns, and other concerted work stoppages.

In these circumstances, involving discharge for alleged misconduct while acting in the capacity of a union steward, the Supreme Court’s decision in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), provides the analytical framework to be followed. See, e.g., *Roadway Express, Inc.*, 355 NLRB 197, 204, 215 (2010), *enfd.* 427 Fed. Appx. 838 (11th Cir. 2011). Under that framework, when the credited evidence establishes that an employer has discharged an employee for conduct during the course of protected activity, the burden shifts to the employer to prove that it acted with an honest belief that the employee had engaged in misconduct. When the employer has established such a good-faith belief, the burden shifts back to the General Counsel. At this point, if the General Counsel proves that the asserted misconduct did not, in fact, occur, the discharge will be found to violate Section 8(a)(1). *Id.*; *Accurate Wire Harness*, 335 NLRB 1096, 1097 (2001), *enfd.* 86 Fed. Appx. 815 (6th Cir. 2003).

Applying this framework, we find that Cummings’ discharge violated Section 8(a)(1) of the Act.

There is no dispute that Cummings was engaged in protected activity when he told Piendel that he would be advising employees to have a mechanic check fluid levels in the ambulances. Cummings, as a union steward, expressed his disagreement with the Respondent’s start-of-shift procedures, conveyed his concerns about employee safety, and requested that the Respondent meet with the Union about this matter. Cummings’ steward activity in this regard “embodies the essence of protected concerted activities.” *General Motors Corp.*, 218 NLRB 472, 477 (1975). Therefore, we find that the record shows that Cummings was discharged for his conduct during the course of his protected activity. See, e.g., *Pepsi-Cola Co.*, 330 NLRB 474, 474–475 (2000) (steward was engaged in protected activity of holding a union meeting when he allegedly advised employees to boycott an employer meeting in violation of the parties’ no-strike provision). The burden, therefore, shifts to the Respond-

ent to establish that it held an honest belief that Cummings engaged in misconduct.

The Respondent contends that it had an honest belief that Cummings, the shop steward, initiated a contractually prohibited work stoppage. We find it unnecessary to pass on the Respondent's contention because, even assuming it held an honest belief about Cummings' conduct, and the burden thus shifted to the Acting General Counsel to establish that Cummings did not actually initiate a work stoppage, the Acting General Counsel met that burden.¹¹ The Acting General Counsel presented six employees at the hearing who testified that Cummings never told them, or any other employee to their knowledge, not to fill out the vehicle checklist or otherwise comply with the start-of-shift procedures. No witness, including those testifying for the Respondent, contradicted these employees, and the judge implicitly credited their testimony, as he found no evidence that Cummings ever urged an employee not to perform any work function. Further, Cummings himself testified that he never told an employee not to fill out the checklist or check the fluid levels; rather, he told employees that the Union was grieving the issue and that they should comply with the procedures in the meantime. In contrast, the Respondent presented no testimony that Cummings had told employees to boycott the vehicle checklist, refuse to check the fluid levels, or ignore any of the other procedures.

The Respondent contends that its belief that Cummings incited a work stoppage is confirmed by the issuance of 166 warnings for failing to turn in vehicle checklists in May and June. But, as found by the judge, some employees' completed checklists were discarded by one of the Respondent's clerical employees. Further, the record shows that other employees were disciplined for failing to turn in checklists on days when they did not even work. Finally, some employees testified that they forgot to comply with the new requirement. In these circumstances, the low completion rate of vehicle checklists does not support a finding that Cummings orchestrated a work action.

Finally, we accord no probative weight to the May 12 letter from Sparks to Piendel, which disavowed NEMSA's involvement in any bad-faith charge facing Cummings. The Respondent admits that it did not rely on the letter when forming its conclusion that Cummings incited a work stoppage. Moreover, the letter itself does

¹¹ See, e.g., *Augusta Bakery Corp.*, 298 NLRB 58, 58 (1990), enf. 957 F.2d 1467 (7th Cir. 1992) (assuming without deciding that respondent held an honest belief that employees engaged in strike misconduct).

not even reference a work action—it only refers to a potential “Bad Faith charge.”

Given the Acting General Counsel's evidence that Cummings did not incite a work action, and the almost complete lack of evidence to the contrary, we find that, even assuming the Respondent honestly believed that Cummings incited a work stoppage in the course of his duties as shop steward, the Acting General Counsel met his burden, under *Burnup & Sims*, supra, of showing that Cummings did not engage in the purported misconduct. Therefore, we find, in agreement with the judge, that the Respondent violated Section 8(a)(1) by discharging Cummings. We find it unnecessary to determine whether the Respondent also violated Section 8(a)(3) because such a finding would not affect the remedy. See, e.g., *Roadway Express Inc.*, 355 NLRB at 204 (citing *Burnup & Sims*, 379 U.S. at 22).

AMENDED CONCLUSIONS OF LAW

1. Replace the judge's Conclusion of Law 2 with the following paragraph

“2. By discharging Adam Cummings because of his protected activity as union steward, the Respondent has violated Section 8(a)(1) of the Act.”

2. Delete the judge's Conclusion of Law 3, and renumber the subsequent paragraphs.

AMENDED REMEDY

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

Specifically, having found that the Respondent unilaterally changed its policies regarding the checking of oil and coolants and filling out daily checklists, and disciplined employees pursuant to those changes, we shall order it to rescind the unilateral changes and to rescind all discipline issued pursuant thereto.

Having found that the Respondent has violated Section 8(a)(1) by discharging Adam Cummings, we shall order it to offer him reinstatement and to make him whole for any loss of earnings and other benefits suffered as a result of its unlawful action against him.¹² The backpay due shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate pre-

¹² The Respondent contends that Adam Cummings is ineligible for reinstatement and backpay because of a Facebook comment he posted after his discharge. The comment, on another employee's Facebook photo, stated that things will not change at the Respondent until it replaces its management team, and it included Cummings' customary Facebook avatar, which showed him holding a gun. Contrary to the Respondent, we do not construe Cummings' Facebook comment as a threat of violence, and thus find that it provides no basis to render him ineligible for reinstatement and backpay.

scribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In addition, in accordance with our recent decision in *Latino Express, Inc.*, 359 NLRB No. 44 (2012), we shall order the Respondent to reimburse Cummings in an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against him. Further, we shall order the Respondent to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, American Medical Response of Connecticut, Inc., West Hartford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees concerning start-of-shift procedures without first notifying the employees' collective-bargaining representative and giving it an opportunity to bargain.

(b) Warning or otherwise disciplining unit employees pursuant to its unlawful unilateral changes.

(c) Discharging employees because of their protected activity as union steward.

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

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

(a) Rescind the unilateral changes it has made to the terms and conditions of employment of unit employees concerning start-of-shift procedures.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings issued to its unit employees pursuant to the unlawful unilateral changes found herein, and within 3 days thereafter notify those employees in writing that this has been done and that the discipline will not be used against them in any way.

(c) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the collective-bargaining representative of employees in the following bargaining unit:

All full-time and regular part-time emergency medical technicians (EMTs) and paramedics employed by the Employer at or out of its West Hartford, Enfield, Putnam, and Rockville, Connecticut facilities.

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

(e) Make Adam Cummings whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the amended remedy section of this decision.

(f) Compensate Adam Cummings for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

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

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

(i) Within 14 days after service by the Region, post at its West Hartford, Connecticut facility copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respond-

¹³ 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."

ent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 April 8, 2011.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 1 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.

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 change your terms and conditions of employment concerning start-of-shift procedures without first notifying your collective-bargaining representative and giving it an opportunity to bargain.

WE WILL NOT warn you or otherwise discipline you pursuant to our unlawful unilateral changes.

WE WILL NOT discharge you because of your protected activity as a union steward.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the unilateral changes we made to the terms and conditions of employment for our unit employees concerning start-of-shift procedures.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warnings issued to unit employees pursuant to the unlawful unilateral change in your terms and conditions of employment, and WE WILL, within 3 days thereafter, notify those employees in writing that this has been done and that the warnings will not be used against them in any way.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the exclusive collective-bargaining representative of our employees in the following bargaining unit:

All full-time and regular part-time emergency medical technicians (EMTs) and paramedics employed by us at or out of its West Hartford, Enfield, Putnam, and Rockville, Connecticut facilities.

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

WE WILL make Adam Cummings whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate Adam Cummings for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL, file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

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

AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC.

Jennifer Dease, Esq. and *Claire T. Sellers, Esq.*, for the General Counsel.

Edward F. O'Donnell, Jr., Esq. and *Meredith G. Diette, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Hartford, Connecticut, on 8 days in April, May, and July 2012. The charge and the amended charges in Case 34-CA-013051 were filed by Adam Cummings on July 20, September 19, and October 31, 2011. The charge in Case 34-CB-067936 was filed by Cummings on October 31, 2011. The charge in Case 34-CA-065800 was filed by Shannon Smith¹ on September 29, 2011. A consolidated complaint was issued on December 30, 2011, and alleged as follows:

¹ Prior to the hearing, a settlement was executed by the National Emergency Medical Services Association, (NEMSA), in Case 34-CB-067936. That case was severed and the caption is hereby amended to reflect this fact.

1. That on or about April 8, 2011, the Employer began requiring employees to perform the following tasks.

(a) Complete and submit vehicle checkoff sheets on a daily basis.

(b) Check, maintain, and add to the engine oil and coolant levels of the Employer's vehicles.

2. That between April 8 and June 3, 2011, Cummings as the Union's shop steward complained to the Employer about the foregoing actions.

3. That on or about May 11 and June 10, 2011, the Employer disciplined employees because they allegedly failed to perform the tasks described above.

4. That on June 3, 2011, the Employer discharged Cummings because of his union and protected concerted activity. It also is alleged that the Employer violated Section 8(a)(3) of the National Labor Relations Act (the Act) by acceding to the Union's attempt to cause his discharge because of his internal union activities.

5. That on September 9, 2011, the Respondent accepted Smith's resignation of her position as a "Field Operations Supervisor" and refused her request to be reassigned to her former job in the unit as a paramedic. It is contended that the Respondent's motivation was because of her past activities as a shop steward for District 1199.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following²

FINDINGS OF FACT

I. JURISDICTION

The parties agree and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED VIOLATIONS

A. *The Company's Operations*

The Respondent (AMR) is a nationwide provider of ambulance and medical transportation services. The facility involved in the present case is located in West Hartford and it is part of the Respondent's Greater Hartford Division. The Division provides services in an area encompassing Hartford, West Hartford, Windsor, Newington, and Bloomfield, Connecticut. There are about 300 employees who report to the West Hartford facility, mainly consisting of paramedics and emergency medical technicians also known as EMTs. The facility has a garage with a head mechanic and three to five other mechanics who service the vehicles. The vehicles consist of about 30 to

40 ambulances, 30 wheelchair transport vehicles, and about 15 SUVs that are called "fly cars" and which are used by paramedics to go to a scene when needed. Typically but not always, an ambulance or a wheelchair vehicle will have a two-person complement, usually consisting of an EMT and a paramedic. A fly car will have a one-person crew. It should be noted that in more recent years, the Company has begun to use gasoline vehicles instead of diesel powered vehicles. The newer vehicles use more oil than the older diesel models and therefore need to be checked more often for oil levels. Ambulances are used on a 24-hour basis and when one crew finishes another takes over.

The general manager of the West Hartford facility is Sean Piendel. Under him are a group of field operations supervisors who schedule and deal with the EMTs and paramedics who are assigned to their respective shifts. At the time of these events, the supervisors were Duane Drouin, Chris Chaplin, Chris Handel, Jason Kane, and Henley Solomon. Shannon Smith, one of the Charging Parties, was also a field operations supervisor until September 22, 2011. In her case, the General Counsel alleges that when she chose to give up her supervisory position in September, the Respondent refused to allow her to resume her previous job as a paramedic because of her prior union activities.

The Company has a human resources department and its director for Connecticut is Robert Zagami. Also, an actor in this case was Kelly Gauthier who is employed in the human resources department.

The Company and its employees in the Hartford area have had a somewhat unique history of collective bargaining. Before 2002, these employees were represented by the Greater Hartford Emergency Medical Technician Association (GHEMTA).³ However, in 2002 another union, New England Health Care Employees Union, District 1199, took over from GHEMTA. This new relationship didn't last very long since a third union, NEMSA, won a Board-conducted election in 2008. Two of the Company's employees, James Gambone and Jim Misericola, were that Union's representatives until they left the Company's employ. At that point their union functions were taken over by an individual named Toby Sparks. Finally, in September 2011, still another union, Local 559, Teamsters, filed an election petition and it was certified on November 1, 2011.

At the time that the events in this case occurred, the collective-bargaining agreement in effect was between the Company and NEMSA. This contract was executed on April 2, 2009, and contains a number of provisions that are relevant to various issues in this case. (These will be described in the context of the particular issue to which a provision is relevant.) After ratification, the parties continued to meet to resolve certain issues as to how the Company's standard operating procedure (SOP) was to be interpreted and/or implemented in light of the collective-bargaining agreement. Such meetings were held in the autumn of 2009 and the winter of 2010. During these meetings the parties discussed the checklist policies set forth in the standard operating procedure. In this regard, the Company contends that

² At the hearing I denied the Respondent's motion to defer, pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971), the 8(a)(1) and (3) allegations concerning Cummings. This argument was again raised in the Respondent's brief. I reiterate my ruling because the grievance involving Cummings was filed by a labor organization that no longer represents him or any of the other employees in the bargaining unit. That union having been replaced, there is no assurance that it would adequately represent Cummings in an arbitration proceeding. Moreover, there was evidence of animus by that union against Cummings relating to his activity in its internal affairs.

³ The Respondent recognized GHEMTA when it took over the operations of a predecessor company.

a new checklist was emailed to Union Representative Gambone on February 23, 2010, and that the Union agreed to changes which included a provision at section 2.22 entitled "Start of Shift Procedures" that required employees to:

Report to the vehicle and complete a "Vehicle Inspection" sheet and include it in the daily paperwork. Ensure that the vehicle is ready to respond by checking the oil level and starting the vehicle. Any vehicle failures shall be promptly reported to the Operations Supervisor.

However, contrary to the Respondent's contention, the evidence does not establish that this was, in fact, agreed to by NEMSA. At best, the evidence shows that the SOP was emailed as an attachment to Gambone who did not respond. There was no testimony by any witness that would show that Gambone or anyone else representing NEMSA ever agreed to the proposed new SOP or the checklist procedure described above. Gambone was not called as a witness and although Piendel testified that he was told by his superior, Zagami, that the Union agreed to the new SOP, Zagami was not called as a witness in this proceeding. There is in fact, no document, email or other memorandum indicating that the Union assented to the proposed standard operating procedure and I find that it did not.

B. Prior NLRB Cases

In *American Medical Response of Connecticut, Inc.*, 356 NLRB No. 155 (2011), the Board approved the judge's findings that the Respondent violated Section 8(a)(1), (3), and (5) by:

1. Threatening employees with the loss of annual pay increases because they engaged in union activities.
2. Engaging in surveillance of employees' union activities.
3. Prohibiting employees from possessing union materials on company time and property.
4. Prohibiting employees from using a bulletin board to post union-related items.
5. Prohibiting employees from wearing a union pin.
6. Discriminatorily refusing to allow an employee to attend a company meeting on paid time.
7. Unilaterally and without notice to or bargaining with the Union, failing to pay eligible bargaining unit employees upgrade pay, tuition reimbursement payments, and recertification payments.
8. Unilaterally and without notice to or bargaining with the Union, failing to post the biannual shift bid for bargaining unit employees.
9. Unilaterally and without notice to or bargaining with the Union, failing to grant EMTs, paramedics, and drivers a scheduled annual wage increase.

In *American Medical Response of Connecticut Inc.*, JD(NY)-15-11, I concluded in a case not yet decided by the Board, that the Respondent violated Section 8(a)(1) by soliciting employees to file a decertification petition and that it violated Section 8(a)(5) of the Act by unilaterally changing a policy regarding outside employment.

C. The Alleged Unilateral Change Involving Vehicle Checklists and Daily Checks of Oil and Coolant

Over the years, the Company has utilized checklists in relation to the operation of its vehicles. For ambulances, there is a checklist that sets forth the medical supplies that are supposed to be in the vehicle at all times. Employees when they take over an ambulance, have always been required to utilize this checklist and make sure that they have the right supplies for their shift.

During the period from about 1996 to 2001, the Company also used a document called a pretrip inspection ambulance service driver checklist. With this list, the ambulance crew was supposed to check off, *inter alia*, that they inspected the vehicle's exterior, checked oil levels, windshield washer fluid, and engine coolant. The testimony was that this checklist was used during that period of time and was then discontinued. There was a variety of testimony given by employees. Some testified that they checked the oil and coolant on a regular basis as a matter of course. Others testified that they did not do this but left it to the mechanics who inspected the vehicles on a regular schedule. Still others testified that they checked the oil when the engine started to sound bad. In all cases, the testimony was that since 2001, they did not check oil and coolant on a daily basis and that no employees were ever required to document that they did so or were disciplined for failing to do so.

Before 2010, the ambulances were diesel powered. The Company then started to buy as replacements, gasoline powered ambulances which use more oil. The testimony was that in a gasoline powered engine, as opposed to a diesel engine, the lack of oil can result in a catastrophic engine failure. There is no question but that with a gasoline powered vehicle, it is necessary to check the oil on a more frequent basis.

In an email dated January 24, 2011, the Respondent advised fleet managers about excessive oil consumption in the Ford V10 6.8L gasoline engines. The email states: "It is very important to check oil levels daily. A low oil level in a gasoline engine can be more damaging than a diesel."

By email dated April 1, 2011, from Duane Drouin to the field supervisors and field training officers, he attached a new proposed "pretrip inspection" form and asked for their feedback. This form is somewhat similar to the form used before 2001 and has a space for employees to indicate whether the oil and coolant levels are low or full.

By email dated April 6, 2011, Drouin sent a new checklist to the supervisors. He stated: "Please start utilizing them asap. We will need to work on tracking them. We have had 2 situations this past week with vehicles extremely low on oil. We don't need to blow another engine . . . 913 and 903 both were found to be 4+ quarts low."

When employees arrived at work on April 8, 2011, they were advised that they had to use the new checklists on a daily basis. Soon thereafter, a notice was posted that perhaps for emphasis, had a picture of the grim reaper with the caption, "Don't let him catch us off guard." The remainder of the notice read in pertinent part:

There have been some questions raised regarding the check sheets. The check sheets are not new to us. There have been many different versions over the years they have been redesigned and updated.

We are requiring one for each shift worked. This is important to our operations due to the fact that we have discovered several vehicles very low on oil. We cannot afford to damage another engine needlessly.

There has been an increase in unknown damage to the vehicles and we will use these forms to protect employees from being held responsible for damage that isn't caused by them.⁴

Checklists are required for every vehicle used and are to be completed at the beginning of each shift or as soon as otherwise possible and turned in by the end of the shift. The process of completing this/these forms (s) provides an orderly process to check the vehicle's readiness, equipment location and to ensure adequate medical supplies. Both members of an ambulance crew are responsible for and must work together in completing the check. A full description of any vehicle problem is required to properly diagnose the problem. Unsafe conditions should be reported to the Supervisor immediately and an incident report filed.

On April 19, 2011, Adam Cummings, a shop steward, filed a written grievance alleging that the implementation of the new checklist violated the collective-bargaining agreement because it was done without giving the employees and the Union proper notice. The contract requires that during the life of the Agreement, the Company must notify the Union of any proposed additions, deletions, or modifications to existing operational policies, procedures, and work rules.

During the period from May 9 to 11, 2011 (about 1 month after the policy was first implemented), the Company issued formal disciplinary warnings to 116 unit employees for failing to turn in the checklists on various dates in April and early May. Thereafter, on June 10, 2011, the Respondent issued disciplinary warnings to 50 employees for not turning in checklists during the period from May 21 to 29. In some cases, the employees acknowledged that they had not turned in the checklists on the dates alleged, whereas others denied that they had failed to do so. In this regard, some employees testified that they had received a warning for dates that they were not even working whereas others contested the warnings stating that they had, in fact, turned in the checklists. There also was some credible testimony that during the first 2 months, the procedure for collecting the checklists was chaotic and that some were even disposed of by a person in the billing department because the employees were inserting them into folders that were used for another purpose. In either case, the evidence establishes that the policy of requiring the employees to document and check the oil and coolant levels on a daily basis was being enforced by means of disciplinary measures.

⁴ I am assuming that this remark relates to the part of the form where employees can show dents to the vehicle.

The issue here, is not whether the requirement that employees check oil and coolant levels on a daily basis and confirm doing so by submitting a checklist, is a good, bad, or indifferent idea. (As one of the General Counsel's witnesses testified, such a rule is probably a good idea.) Rather, the issue is whether this requirement constitutes a material change in the employees' terms and conditions of employment; whether the Union has waived its right to bargain about the change; and whether under Section 8(a)(5) of the Act, the Company must first notify the Union about it and afford an opportunity to bargain before its implementation.

In my opinion, the evidence shows that since 2002, the Company has not required its employees to check the fuel and/or coolant levels on vehicles on a daily basis and has similarly not required them to document that they did so. It therefore is my opinion that the requirements that were put into effect on April 8, 2011, constituted a unilateral change in employees' terms and conditions of employment. I also conclude that this change was sufficiently material as to require the Company to first notify and bargain with the Union before implementation. See *Carbonex Coal Co.*, 262 NLRB 1306, 1313 (1982) (change in shift schedule affecting three employees); *Mitchellace, Inc.*, 321 NLRB 191, 195 (1996) (change in hours held to be nontrivial change in shift starting times); *Blue Circle Cement Co.*, 319 NLRB 954 (1995) (change in start times); *Carpenters Local 1031*, 321 NLRB 30 (1996) (change requiring employee to work one-half hour more per day).

I also conclude that the Respondent has not demonstrated that the Union waived its right to bargain over this change. Its assertion that after the contract was ratified, the Union nevertheless agreed to a new standard operating procedure allowing the Company to require these procedures and checklists was not, in my opinion, supported by any competent evidence.

Inasmuch as I conclude that the unilaterally implemented requirements that employees check fuel and coolants on a daily basis and turn in checklists was unlawfully implemented, it follows that any disciplines issued to employees for failing to follow these procedures would also be unlawful. *Randolph Children's Home*, 309 NLRB 341 (1992). I therefore conclude that the disciplines issued to employees from May 9 to 11, 2011, and on June 10, 2011, violate Section 8(a)(1) of the Act.

D. The Discharge of Adam Cummings

The General Counsel contends that the Respondent discharged Cummings because of his activity as a union shop steward, particularly in relation to his concerted actions in protesting and filing a grievance about the unilateral change described above. Alternatively or concurrently, the General Counsel contends that the Respondent discharged Cummings at the behest of his Union because of his internal union activities. (As previously noted, a complaint had been issued against NEMSA but it agreed to a settlement and that charge was severed from the instant cases.)

The Company's defense is that after the change was instituted, Cummings in an email urged employees to protest the change by engaging in a work stoppage which, in conjunction with the contractual grievance/arbitration provisions, is prohibited by a no-strike clause in the collective-bargaining agree-

ment. (Art. 17 of the contract.) If the Company is correct in its contention that Cummings instigated a work stoppage, even in the context of a concerted protest over the unilateral changes, then this would, in my opinion, be a sufficient defense under either of the General Counsel's two theories. For if Cummings did instigate a contractually prohibited work stoppage, this action would not be protected under the Act and would have been an independent and valid reason to discharge him even if the Union had asked for his discharge for reasons relating to Cumming's internal union activities. In *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939), the Court ruled that where striking employees violate or repudiate the provisions of a collective-bargaining agreement, the Act does not prohibit an employer from discharging them. And in *Chrysler Corp.*, 232 NLRB 466 (1977), the Board upheld the discharge of a union steward for his leadership of an unauthorized work stoppage violating the agreement's no-strike clause. On the other hand, if his communications are not construed as an incitement to engage in a work stoppage, they would then constitute legitimate union activity and also would be construed as protected concerted activity. In such circumstances, it would be concluded that Cummings' discharge would violate Section 8(a)(1) and (3) of the Act.

On April 8, Cummings as a union shop steward, sent an email to Sean Piendel with copies to the Bree Eichler, the chief steward, and to two other union stewards. This expressed concern about the requirement that crews check the oil and coolant levels. He also asked if this was a new policy and requested more information about it.

Piendel responded via email and referred to the standard operating procedure, implicitly claiming that the Union had agreed to the reinstatement of a vehicle checklist policy. Piendel also stated that supervisors had been told to advise employees that if they didn't know how to check oil and coolant levels, they should seek out the maintenance department for a demonstration. Human Resource Director Zagami was copied on this email.

With respect to the claim that the Company had the right to implement the procedure pursuant to the standard operating procedure, Toby Sparks, a newly appointed union business agent, sent an email to the stewards stating his belief that the Company had the right to implement these rules. However, I have already concluded that the evidence shows that the standard operating procedure, relied on by the Respondent, was never actually agreed to by the Union. As such, I conclude that the email from Sparks (who did not testify), was mistaken at best.⁵

On April 10, Cummings spoke to Chris Chaplin, a field operations supervisor, and said that he was concerned that employees could get hurt when the engine was hot if they were not familiar with the different types of ambulance engines. (Since there is almost an immediate turnaround of crews when an ambulance comes back to the yard, the engines are hot most of the time.)

On April 11, Zagami sent an email telling Cummings that he should have reviewed the manuals before making any accusa-

tions. About 20 minutes later, Eichler sent a response to all of the persons in the chain, repeating Cummings safety concern and stating that vehicle checklists and fluid checks had never been previously enforced. She also stated that some employees were not skilled in checking engine fluids. Finally, she stated that in accordance with article 15 of the collective-bargaining agreement, a notice of implementation should have been posted for 30 days and that safety classes should be set up to deal with this issue.

Cummings then entered the email chain and stated that the checklist policy had not been enforced during his 6 years at the Company. Although stating that he was aware that checking the engine fluids was important, he asked that a meeting be set up between the Company and either himself or Eichler to discuss the need for employee training.

In response, Piendel sent an email to Eichler with copies to the others and stated that if employees were uncomfortable checking engine fluids, they should see a supervisor or a mechanic for proper guidance. At the same time, Piendel asserted that employees, as part of their regular training, had already received training.

Eichler replied that the Union's priority was to ensure safety and stated that requiring employees to check engine fluids had not been enforced during the 8 years that she had been employed. She stated that the regular training that she had received did not include matters "under the hood" of the vehicles. She, like Cummings, also asked for a meeting with management.

Soon thereafter, another steward, Dennis, sent an email into the chain, stating, in substance, that the new gasoline powered ambulances used a lot of oil; that the supervisors were not able to assist the crews in how to check the oil; and that on some vehicles it was difficult to see the fluid reservoir levels.

Later on April 11, Piendel replied to Dennis and stated that he wanted to know which ambulance crews operating the gasoline powered ambulances did not know how to check the engine fluids.

In response, Cummings sent an email into the chain, stating that he was driving one of the newer ambulances and had never received any training about how to check the fluids. In this escalating set of email messages, Cummings also wrote the following statement:

I can assure you that my hire class had no training what so ever in regards to checking anything under the hood. What you have asked the employees to do is among other things not safe. You need to provide everyone with the proper training before asking anyone to do these tasks. Until then, I will be advising the employees to have a mechanic check the trucks to protect the equipment and the employees.

Piendel responded by stating:

Am I to understand that you are initiating a concerted job action against AMR? Please respond and based on your response, I will take the necessary action immediately!

About 15 minutes later, Cummings replied to Piendel and made the following statement:

⁵ The General Counsel has a more sinister theory about why Sparks sent this email.

Have at it if you feel that is [what] my response entailed, and you feel that is a more appropriate response than meeting with the union about this situation.

Piendel then sent an email to Cummings, with copies to the others, wherein he stated that he had asked Cummings for a yes or no answer and that Cummings had not given him one.

Cummings response was as follows:

I feel that I have made my concerns and intentions quite clear. I also think that it is clear that the other stewards feel as I do. Do with that knowledge as you will. I should hope that you will meet with the union and confer on this matter.

As previously noted, the Company issued disciplinary warnings to 116 employees who it contends did not fill out and file the vehicle checklists during the period from April 9 to early May. Additionally, on June 10, 2011, the Respondent issued disciplinary warnings to 50 employees for allegedly not turning in checklists during the period from May 21 to 29.

On May 12, 2011, Union Representative Toby Sparks sent a letter to the Company purporting to disavow an unauthorized work stoppage which he implied was instigated by Cummings. The Company thereupon requested that this letter be posted at the facility and Chief Steward Eichler refused to do so.

On June 1, Cummings, accompanied by Eichler, was called to a meeting with Piendel, Zagami, and Gauthier. At this meeting, Cummings was confronted with the May 12 Sparks letter and asked if he could explain the contents. Cummings replied that he didn't write the letter and that he did not instigate a work stoppage. The company representatives did not confront Cummings with any other evidence that he had been responsible for a work stoppage other than the assertions made by Sparks.⁶

The evidence does not show that any employees were ever advised or solicited by Cummings or any other shop steward to not do the oil and coolant checks or to refuse to turn in the checklists. To the contrary, the evidence presented at this hearing was that there were (a) some employees who simply forgot to submit the checklists; (b) some employees who did submit checklists which were either lost or discarded by office personnel; and (c) some employees who were given warnings for not turning in checklists on days that they were not actually working. The Respondent did not produce a single person who testified that Cummings ever asked him or her either to not check oil and coolant levels or to refuse to turn in the checklists. On the other hand, the General Counsel produced multiple witnesses who testified that they were never told by Cummings to refuse to do these tasks.

On June 3, 2011, the Company sent Cummings a letter stating that he was being terminated because he violated section

⁶ There is in fact no evidence, apart from the April 8 and 11 email chains, to show that Sparks had any knowledge of or made any inquiries of unit employees as to whether Cummings had instigated any kind of work stoppage. On June 2, Anthony Calhoun wrote to Sparks and stated that Cummings had not incited a work stoppage and that any claim that he had done so was false. And since Sparks was not called to testify, he did not provide the basis for his assertion in his May 12 letter that a work stoppage had occurred.

17.01 of the collective-bargaining agreement. Basically, it is the Respondent's assertion that it fired Cummings because he instigated a work stoppage in violation of the no-strike clause in the contract.

Shannon Smith testified that upon her return to full duty in early June 2011, she had a conversation with Duane Drouin about Cummings. According to her credible testimony, she asked Drouin if it was true that he got Cummings fired, whereupon Drouin responded by saying: "Well it takes a little bit more time to set the smart ones up."

In my opinion, the evidence does not support the Respondent's contention that Cummings incited a work stoppage. The only evidence that might arguably support such a conclusion is emails from Cummings on April 11, where he notified Piendel that he would advise employees "to have a mechanic check the trucks to protect the equipment and the employees." And although Cummings avoided a direct response to Piendel's email asking if he was initiating a concerted job action, there is nothing in any of these emails, which in my opinion, can reasonably be described as a call for employees to engage in a work stoppage of any kind. In my opinion, Cummings' initial remarks about advising employees to see a mechanic were basically consistent with Piendel's previous email to Eichler stating that if an employee didn't know how to check the oil or fluids, he or she should ask a mechanic for a demonstration. In my opinion, the email chains on April 8 and 11, show an escalating form of exasperation by representatives of both parties and demonstrates how a relatively small matter can blow up into a large misunderstanding.⁷

The Respondent asserts that it decided to discharge Cummings because of his alleged instigation of a work stoppage as evidence by his emails on April 11 and because of what it perceived to be the refusal of employees to turn in the checklists in April and May 2011. There was, however, no evidence that Cummings ever actually urged any employees to engage in a work stoppage. Nor was there any evidence that Cummings urged or solicited any employees to not perform any of their work functions, including the new and unilaterally established rules requiring daily oil and coolant checks and the submission of checklists. And because his April emails related to his contentions, *inter alia*, that the rules were not adopted in accordance with the notice provisions of the collective-bargaining agreement, his communications, as a shop steward, to management and to the other shop stewards must be construed both as union activity and protected concerted activity. *Interboro Contractors*, 157 NLRB 1295 (1966), *enfd.* 497 F.2d 679 (6th Cir. 1986). As such, a subjective belief that Cummings was inciting a work stoppage is insufficient to constitute a defense where, as here, that belief is not supported by the objective facts. See *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

I therefore conclude that the Respondent violated Section 8(a)(1) and (3) by discharging Cummings because of his union and protected concerted activities. Having reached this conclusion, it is unnecessary for me to address the alternative theory

⁷ This may have been exaggerated because all of the communications were conducted by email and there were no meetings where people could sit down together and discuss the issue, face-to-face.

that the Company's discharge of Cummings was violative of the Act because it was the result of unlawful actions of the Union to cause Cummings' discharge in violation of Section 8(b)(2) of the Act.

E. The Refusal to put Shannon Smith Back into the Bargaining Unit as a Full-Time Paramedic

Shannon Smith began her employment as an EMT in 1996 with the Company's predecessor. In 1998 she became a paramedic and in 2002 she became a shop steward for GHEMTA, the union that then represented the EMTs and paramedics. When Local 1199 replaced GHEMTA, Smith became a delegate for that union. From all accounts, she was a diligent, aggressive, intelligent, and fair minded union representative who effectively acted as the bargaining unit's chief steward. She participated in contract negotiations and handled employee complaints mainly with Piendel. According to Smith, she and Piendel were usually able to come to an agreement on grievances and that she therefore did not have to file many formal grievances with the Union. Testimony revealed that while she was aggressive in her dealings with management, she also would tell employees when their grievances did not have merit.

In July 2008, Local 1199 was voted out and NEMSA was voted in. When that happened, Smith decided that she did not want to support NEMSA and chose not to continue as a union representative. From that date, Smith has had no connection with union activities and has played no role either in internal union affairs or in representing employees in their dealings with management.

In May 2010, Smith was offered and accepted a position as a field operations supervisor and acted in that capacity until she finally sought to give up that position and return to being a paramedic in September 2011. Again, from all accounts, Smith seems to have been an effective supervisor. In that position, she was paid a salary and was no longer in the bargaining unit. Prior to her decision to return to the unit, she was among eight other supervisors.

On September 9, 2011, Smith sent an email to Piendel stating that she was resigning as a supervisor and asked that she be transferred back to a full-time paramedic position. One of the reasons she did this was because the Company had ceased paying bonuses to the supervisors and she felt that she could make more money, with overtime, as a paramedic. Piendel responded that he was disappointed with her decision.

The General Counsel showed that over the years, it was not unusual for people who were field operations supervisors to ask for and be transferred back to their former positions either as EMTs or paramedics. In this regard, she provided evidence of numerous such transactions since 2006.

However, as of September 2011, there were no full-time paramedic positions open in this region. In this regard, the local managers do not have discretion to determine the number of paramedic or EMT positions; that being a matter determined by the Company's corporate office. Moreover, in April 2011, the Respondent lost an account with the Windsor Volunteer Ambulance Service and this resulted in the loss of five paramedic positions that were transferred to other operations.

In the meantime, the Company had already allowed for several EMTs to train to become paramedics before Smith sent her June letter. In this regard, the process by which an EMT becomes a paramedic involves the completion of a course of instruction at a College and then an apprenticeship type of program which is undertaken by the Employer and has to be successfully completed. The evidence shows that once agreeing to embark on an apprenticeship program (called precepting), the Company essentially makes a commitment to promote that person to a paramedic position, if the program is successfully completed *and* if a position is available at the time of completion. This involves a substantial investment in a person who is being trained and if he or she successfully completes the program, the Company will reimburse for a portion of the college course work. The record shows that when an individual named Roper completed his precepting, he was offered and accepted a position as a paramedic after September 2011. Another individual, named Kashetta also successfully completed his precepting, but was only offered a part-time paramedic position in January 2012.

In my opinion, the General Counsel has not made out, pursuant to *Wright Line*,⁸ a prima facie case regarding the Respondent's failure to transfer Supervisor Smith back into a unit job because of her prior union activities.⁹ Although the evidence shows that Smith was a very active Local 1199 delegate, her union activities ceased in 2008. Moreover, in 2010 she was offered and accepted a supervisory position and in that job, she seems to have brought the same intelligence and zeal as when she was a union delegate. There was, in my opinion, little or no reason for the Company to be concerned about her past union activities, which were long past.¹⁰ Moreover, Smith was not involved in any activities on behalf of Local 559 Teamsters and there is no evidence that the Company believed that she was involved with that labor organization.

Although the evidence showed that it was usual for the Company to agree to transfer supervisors back into unit jobs when asked, the facts in the present case tend to show that at the time that Smith asked to be transferred (in September 2011), there were, except for the precepting employees, no immediate prospect for full-time paramedic positions to be open in the foreseeable future. And except for Roper and Kashetta, no new paramedics were employed after September 2011. (As noted above, in Kashetta's case, he was only given a part-time schedule, much to his chagrin).

⁸ *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

⁹ The Respondent contends that as a supervisor, any alleged discharge of Smith must be dismissed pursuant to the Board's decision in *Parker-Robb Chevrolet*, 262 NLRB 402, 403 (1982), affd. *Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983). The General Counsel disagrees and asserts that the violation here is analogous to a refusal to hire an employee because of his or her union activities.

¹⁰ I don't place any weight on the testimony that Smith was described by Druin as "a pain in the butt" in connection with her past role as a delegate for District 1199. This was, in my opinion, too remote in time.

I must say that I was impressed with Smith as a witness and as a person, and I suspect that the Company lost a valuable employee when it chose not to transfer her back into the bargaining unit. But based on the evidence in this case, this does not mean that I can conclude that her separation from the Company was motivated by illegal reasons. I therefore conclude that in this respect, the Respondent has demonstrated that it had a legitimate reason for accepting Smith's resignation and for not transferring her back to the position of a full-time paramedic. In this regard, I shall therefore recommend that this aspect of the complaint be dismissed.

CONCLUSIONS OF LAW

1. By unilaterally changing its policies regarding the checking of oil and coolants and the requirement that employees fill out daily checklists, the Respondent has violated Section 8(a)(1) and (5) of the Act.

2. By discharging Adam Cummings because of his union and protected concerted activities, the Respondent has violated Section 8(a)(1) and (3) of the Act.

3. By discharging Adam Cummings because of his union and protected concerted activities, the Respondent has violated Section 8(a)(1) and (5) of the Act.¹¹

¹¹ The Respondent contends that post discharge conduct by Cummings requires a finding that he should forfeit the right to reinstatement and backpay. This consists of a comment made by Cummings on another person's face book page that stated, next to Cummings' own face book profile picture of him aiming a rifle: "Until AMR gets rid of the management team up to and including Zagombi, nothing will change. Only crews and patients will suffer." In my opinion, the Respondent reads far too much into this picture and comment and I do not construe his statements with his profile picture as constituting a threat of vio-

4. The Respondent has not violated the Act in other manner encompassed by the complaint.

5. The aforesaid violations affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.¹²

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.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).
[Recommended Order omitted from publication.]

lence. In *C-Town*, 281 NLRB 458 (1986), a case involving an ethnic slur, The Board concluded that the misconduct was not sufficient to deny reinstatement and backpay. The Board stated:

[N]ot every impropriety deprives the offending employee of the protection of the Act. The Board looks at the nature of the misconduct and denies reinstatement in those flagrant cases "in which the misconduct is violent or of such character as to render the employees unfit for further service.

¹² In its Brief, the Respondent contends that this case should be dismissed because the Board, as currently constituted, does not have a legitimate forum. This is way beyond the scope of my job description and until it is found otherwise at the appropriate appellate level, I will assume that the Board has the authority to act.