Durham School Services, L.P. *and* Freight, Construction and General Drivers, Warehousemen & Helpers–Teamsters Union Local No. 287, a/w International Brotherhood of Teamsters, Change To Win. Cases 32–CA–077078 and 32–RC–066466

April 25, 2014

DECISION, ORDER, AND DIRECTION OF THIRD ELECTION

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, JOHNSON, AND SCHIFFER

On February 11, 2013, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The Charging Party filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below and to adopt his recommended Order as modified and set forth in full below.

We adopt the judge's factual finding that the Respondent discharged employee Helen Cheesman.[2] For the reasons stated by the judge, we further adopt his finding that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating Cheesman because of her union activities and to discourage her from voting in the March 9, 2012 representation election.[3] We find it unnecessary to pass on the judge's further findings that the Respondent violated the Act by informing Cheesman of her termination because such findings would not materially affect the remedy.[4] Turning to the representation case, we also adopt the judge's finding that the Respondent's objectionable conduct requires setting aside the results of the March 9 election. We do so based on Cheesman's discharge and on the Respondent's maintenance of objectionable off-duty access and social networking policies.[5]

AMENDED REMEDY

Section 10(c) of the Act gives the Board "broad, discretionary" authority to remedy unfair labor practices. See, e.g., *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263 (1969). This includes the statutory authority to order a respondent to post or otherwise furnish an appropriate notice to employees (or, if the respondent is a labor organization, to members) setting forth their rights under Section 7 of the Act and the respondent's readiness to fulfill the remedial obligations imposed by the Board's order. See, e.g., *NLRB v. Express Publishing Co.*, 312 U.S. 426, 438 (1941); *J. Picini Flooring*, 356 NLRB 11, 11 (2010). It also necessarily includes the power to modify the standard notice language. The Board has done so previously to better effectuate the policies of the Act. See *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176–177 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

In its cross-exceptions, the Charging Party Union asks that we modify the current standard notice to inform employees that a copy of the Board's full decision and order is available on the Board's website. This request has merit. As currently worded, the notice refers to actions the respondent must undertake within a specified number of days "from the date of the Board's Order." Yet the notice does not tell employees how to access that order. Making the Board's decisions and orders more readily

[1] 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.

[2] Although ultimately concluding that Cheesman was discharged, the judge expressed some uncertainty as to whether she was in fact discharged or merely told as much. But the judge found that General Manager Ron Mahler terminated Cheesman on March 6, 2012, and the Respondent does not except to that finding.

[3] We agree with the judge that the termination of Cheesman was unlawful under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). We find it unnecessary to pass on the judge's recitation of the *Wright Line* standard.

[4] There are no exceptions to the judge's findings that Cheesman was reinstated on March 21 and did not lose any income, seniority, or other benefits as a result of her discharge. Thus, we adopt the judge's recommendation to omit any make-whole remedy for Cheesman.

[5] For the reasons stated by the judge, we find objectionable the provision of the Respondent's social networking policy requiring that employees' contacts with parents, school representatives and school officials be "appropriate," and the provision subjecting employees to investigation and possible discipline for publicly sharing "unfavorable . . . information related to the company or any of its employees." We find it unnecessary to decide whether any other provision in that policy also is objectionable.

The judge mistakenly stated that the Respondent's off-duty access rule violated the second prong of the test articulated in *Tri-County Medical Center, Inc.,* 222 NLRB 1089 (1976), because it limited access to the exterior premises as well as the interior premises. This reasoning would be consistent with a violation of the first prong of the test, rather than the second, and we affirm his finding on that basis.

Members Miscimarra and Johnson join their colleagues in setting aside the election, but do so based solely on Cheesman's unlawful discharge. They do not reach or join in the findings of the majority or the judge regarding the Respondent's off-duty access and social networking policies.

accessible to employees will facilitate a better understanding of what the respondent did, why it was unlawful, and why the Board granted (or denied) particular remedies.

Accordingly, we shall revise the notice in this case, and our standard notice language in future cases, to include a hyperlink to a copy of the decision on the Board's website. Even if employees cannot use the hyperlink, it will give them an electronic address where they can obtain a copy of the decision. For those employees who do not have access to or do not wish to use a computer to obtain an electronic copy of the decision, the notice also will provide an address to which they may write, and a telephone number which they may call, to obtain a printed copy of the decision from the Board's Executive Secretary.

ORDER

The National Labor Relations Board orders that the Respondent, Durham School Services, L.P., Campbell, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against its employees because they engaged in union or other protected concerted activity or to discourage them from voting in a representation election.

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

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

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

(b) Within 14 days after service by the Region, post at its Campbell, California facility copies of the attached notice marked "Appendix." [6] Copies of the notice, on forms provided by the Regional Director for Region 32, 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 Respondent 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 March 6, 2012.

(c) 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.

DIRECTION OF THIRD ELECTION

A third election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Third Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.,* 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by the Freight, Construction and General Drivers, Warehousemen & Helpers-Teamsters Union Local No. 287.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of

[6] 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."

all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Third Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

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 benfit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in union or other protected concerted activity or to discourage you from voting n a representation election.

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

DURHAM SCHOOL SERVICES, L.P.

The Board's decision can be found at www.nlrb.gov/case/32-CA-077078 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

D. Criss Parker, Esq., for the General Counsel.
David A. Rosenfeld, Esq., and *Sarah Wright-Schreiberg, Esq.,* of Alameda, California, for the Union/Petitioner.
Stephen M. Astor, Esq., and *Keith A. Sharp, Esq.,* of Pasadena, California, for the Respondent/Employer.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Oakland, California, on September 18, 2012. This case was tried following the issuance of a complaint and notice of hearing (the complaint) by the Regional Director for Region 32 of the National Labor Relations Board (the Board) on June 28, 2012. The complaint was based on an unfair labor practice charge in Case 32–CA–077078 filed on March 20, 2012, by Freight, Construction and General Drivers, Warehousemen & Helpers-Teamsters Union Local No. 287, a/w International Brotherhood of Teamsters, Change to Win (the Union or the Petitioner). It is alleged in the complaint that Durham School Services, L.P. (the Respondent, the Employer, the Company, or Durham) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.[1]

Pursuant to a representation petition filed by the Petitioner in Case 32–RC–066466 on October 11, 2011, and a Stipulated Election Agreement thereafter executed by the parties and approved by the Regional Director on October 27, 2011, an election by secret ballot was conducted on November 18, 2011, among a unit of the Employer's employees. The Petitioner received a majority of the valid votes counted in the November 18, 2011 election. However, the Employer filed timely objections and, on February 7, 2012,[2] an administrative law judge of the National Labor Relations Board issued a Report on Objections recommending that the results of the first election be set aside and a rerun election held. The parties thereafter agreed to set aside the results of the first election and to hold a rerun election.

At the conclusion of the rerun election, which was held on March 9, the tally of ballots indicated that the six challenged ballots were sufficient to affect the results of the election. On May 24, the Regional Director approved the parties' stipulation on challenged ballots, and, after two resolved challenges were

[1] All pleadings reflect the complaint and answer as those documents were finally amended at the hearing.

[2] All dates hereinafter refer to 2012, unless otherwise indicated.

opened and counted on May 30, a revised tally of ballots was prepared and made available to the parties, which showed that of approximately 115 eligible voters, 108 cast ballots, of which 52 were cast for the Petitioner and 54 were cast against the Petitioner. There were 2 challenged ballots, a number insufficient to affect the results of the election.

On March 16, the Petitioner filed timely objections to the results of the election. On July 5, the Regional Director issued a report and recommendation on objections, order consolidating cases and notice of hearing. (GC Exh. 1(f).) In his report, the Regional Director set for hearing the Petitioner's objections number 2, 3, 4, and 6, plus certain parts of objection number 5. As the Regional Director found that those objections raised material issues of fact and credibility, which could best be resolved at a hearing, and that certain of those objections raised matters also alleged in the complaint, he determined that the purposes of the Act would best be effectuated and unnecessary cost or delay avoided by considering jointly the unfair labor practice allegations in the complaint and the Petitioner's objections. He therefore ordered that these matters be consolidated for purposes of hearing, ruling, and decision, by an administrative law judge. Accordingly, I heard the issues relating to the Petitioner's objections at the same time as I heard the unfair labor practice allegations in this combined matter.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel, counsel for the Respondent, and counsel for the Union, and my observation of the demeanor of the witnesses,[3] I now make the following finding s of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that at all times material here, the Respondent has been a California corporation with an office and place of business in Campbell, California, where it has been engaged in providing school and other transportation services. Further, I find that in the 12 months immediately preceding the issuance of the complaint, the Respondent, in the course and conduct of its business operations just described, derived gross revenues in excess of $250,000; and during the same period of time, purchased and received goods valued in excess of $5000, which originated outside the State of California.

Accordingly, I conclude that the Respondent is now, and at all material time here has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that at all times material here, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES AND ALLEGED OBJECTIONABLE CONDUCT

A. Background Facts and the Dispute

The Employer operates a fleet of buses, which transport children to and from various schools in the Santa Clara County, California metropolitan area. Some of the children have disabilities. The Employer employs school bus drivers and other employees at its Campbell, California location. The drivers are responsible for the safe transportation of the children over routes serving the various schools. The Employer's fleet of buses includes small 20-passenger vehicles with hydraulic brakes, and relatively fewer large 87-passenger buses with air brakes.

It is undisputed that all school bus drivers in the State of California must be certified by the California Highway Patrol (CHP) in order to drive a school bus. A certification lasts for 5 years, and it expires on the driver's birthday. If a driver's certification expires, then that driver is no longer qualified to drive any school bus in the State, until such time as the certification has been renewed. The goal for each driver is to have the certification renewed before the date of expiration, so that there is no lapse in certification.

In order to have a certification renewed, a driver must attend 10 hours of classroom instruction, must pass a written exam administered by CHP, must pass a pretrip inspection test administered by CHP, and finally must pass a driving test also administered by CHP. If a person fails the driving test 3 consecutive times, there is hiatus before the test can be taken again.

The Employer assists both prospective drivers in obtaining their initial certification, and those current or former employee drivers who are attempting to renew their certification. Carmon Lavallee is the Employer's State certified trainer. She is responsible for assisting the Employer's drivers who are attempting to get recertified. She ensures that they attend the mandatory safety classes, receive driver training, and are scheduled for their CHP tests. Lavalle contacts CHP in order to schedule the drivers for their exams. The Employer pays for its drivers to attend the recertification training. Lavalle's immediate supervisor is Steve Raaymakers, safety and training supervisor.

Helen Cheesman has worked for the Employer as a school bus driver for approximately 5 years. She testified that the Union's organizing campaign began in the summer of 2011. According to Cheesman, she was very active in that campaign. Cheesman handed out prounion flyers outside the entrance to the Employer's bus yard 3–4 times a week, over a 3–4 month period. Some of these flyers contained Cheesman's name and picture. The handbilling occurred within 50 feet of the dispatchers' office and close to the offices of the other managers, where, according to Cheesman, she was frequently observed by those managers. Chessman testified that additionally she posted prounion flyers on the bulletin board at work, went to union

[3] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Co.,* 369 NLRB 404, 408 (1962). Where witnesses have testified in contradiction to the findings here, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

meetings, and was vocal in her support for the Union when conversing with fellow employees. It is the General Counsel's contention that Cheesman was a very active union supporter, which contention is not denied by the Employer.

Cheesman's certification to drive a bus was scheduled to expire on her birthday, March 1, 2012. For some time she had been in the process of going through the steps of having her certification renewed. Cheesman had taken the requisite 10 hours of classroom instruction, had passed the written exam, and had passed the pretrip inspection test. However, she had twice failed the driving test. Apparently, the difficulty in passing the driving test was the result of being tested on the larger 87 passenger bus with air brakes, rather than the smaller 20 passenger bus with hydraulic brakes that she was used to driving. As the Employer used both types of buses, being certified on the larger bus with air brakes would make Cheesman a more valuable and versatile employee.

In July 2011, Ron Mahler became the interim general manager of the Respondent's Campbell facility, and on about September 17, 2011, became the general manager. The previous general manager was Dave Burgess. Mahler's immediate subordinate is Sharon Romo, operations manager.

It is undisputed that under Burgess' management, when a driver's certification expired, because it had not been renewed, the Employer did not terminate or "separate" the employee from the Company. While the employee could no longer drive a school bus, and, so, generally did not report for work and was not paid, the expectation was that as soon as that employee could get recertified, he or she would resume bus driving duties. This was the past practice under the Burgess administration, and a number of employee witnesses testified that after being recertified, they were almost immediately put back on bus driving duties for the Employer. Further, it is uncontested that at no time were these drives terminated or "separated" from their employment, and they did not have to complete any paperwork in order to return to their duties.

However, it is the Employer's contention that the past practice changed when Mahler became general manager. According to Mahler's testimony, when a driver's certification expires, and, as that employee can no longer drive a school bus, within a short period of time,[4] if that driver is not recertified, the employee is terminated or "separated" from the Company. Yet, it must be noted that even under Mahler's administration at least one driver, Vanessa Pena was treated in the fashion of the old system. Her certification lapsed on February 10, 2012, but she was not terminated or "separated." Instead, after she obtained her recertification approximately 1 week later, she was immediately put back to work as a bus driver, without having to fill out reemployment paperwork.

The Employer contends that because of the circumstances surrounding Cheesman's lapse in certification, that she was actually terminated or "separated" from her employment as of March 6. Mahler testified that Cheesman was being uncommunicative following her lapse of certification on March 1, and did not seem to be making progress towards recertification.

The facts establish that Cheesman twice failed the driving portion of her recertification test, once in late January 2012 and a second time in mid-February 2012. It is undisputed that Cheesman was having difficulty finding the opportunity to practice her driving on the larger buses of which there was a limited number at the Campbell yard, and because of a shortage of trainers qualified on those buses. In any event, on March 3, 2012, there was a telephone conversation between Carmina Lavallee and Cheesman, during which Lavallee indicated that she had scheduled Cheesman for another CHP driving test on March 5. Lavallee then asked Cheesman if she was ready to take the test. Cheesman responded that she was not ready, as she had not received additional training on the larger bus since failing the driving test for the second time. According to Cheesman, Lavallee then said, "Okay, I'll reschedule it for you." Further, Cheesman testified that the decision to postpone her driving test was "mutual" on her and Lavallee's part. While Lavallee testified that Cheesman had initiated the call and it was Cheesman who asked to have the test cancelled as Cheesman was not ready and did not want to "blow her last shot," Lavallee acknowledged that "[she] agreed with [Cheesman]." It was Lavallee who then contacted CHP to cancel the March 5 test.[5]

To the extent that there is a variance in the testimony between Cheesman and Lavallee, I credit Cheesman. In general, I found her to be a credible witness. She testified in a matter of fact, straight forward way, without exaggeration or embellishment. While she is obviously personally interested in the outcome of this proceeding, I did not get the sense that she was altering the facts to fit her claim. Her testimony had the "ring of authenticity" to it and was inherently probable. Specifically regarding her conversation with Lavallee, Cheesman's testimony seems more reasonable. Lavallee was trying to be helpful to Cheesman in her quest to be recertified. After all, it was to the benefit of both Cheesman and the Employer for Cheesman to get recertified, and, accordingly, be able to once again drive a school bus. To that end, Lavallee was likely to have readily agreed with Cheesman that the CHP driving test should be cancelled once Lavallee learned that Cheesman did not feel ready to take the test. Failing the driving test for a third time would have meant a long hiatus before Cheesman could retake the test. Therefore, I conclude that Lavallee, as the Employer's agent[6] for purposes of arranging for its employees to take CHP

[4] The Employer never specified what "grace period" Mahler gave to drivers whose certification had expired. However, it seemed that Mahler was suggesting this was a matter of just days, and might vary depending on the circumstances in each case.

[5] It is undisputed that regular employees do not have the ability or authority to directly contact CHP and schedule a driving test. Lavallee does have that ability and authority, and she is the person responsible for the Employer to schedule driving tests with CHP's for the employees.

[6] The employees would reasonably assume that Lavallee spoke for the Employer regarding the training and testing of bus drivers as this was apparently her primary function. The drivers interacted directly with Lavallee as the Employer's representative concerning these matters. Accordingly, I conclude, despite the Respondent's denial, that Lavallee was an agent of the Employer within the meaning of Sec. 2(13) of the Act, as alleged in complaint paragraph 5(b).

driving tests, found it acceptable for Cheesman to have her test rescheduled.

Ron Mahler testified that on March 6 he decided to terminate Cheesman, after he learned that her appointment with CHP to take her driving test had been cancelled. While not all that clear from his testimony, Mahler appears to be contending that he was willing to allow Cheesman to remain as an employee as long as she was making progress towards obtaining her recertification. However, once her test appointment was cancelled, he decided to no longer do so and he "separated" her from the Employer. To that end, he filled out a "Work Separation Form," which was signed by Mahler on March 6 and placed in Cheesman's personnel fine. The form indicates that Cheesman is being involuntarily separated because she is "No Longer Qualified," presumably as a bus driver, but is "Rehireable." It is significant to note that Cheesman did not sign the form. (E. Exh. 3.) Mahler acknowledges that Cheesman did not learn of her termination until March 9. However, he contends that this was her own fault as she was uncommunicative.

While the Respondent does not claim that Mahler's alleged new policy of terminating drivers whose certification had expired was announced to the employees as a whole, or to Cheesman individually, it contends that the new policy was applied to at least two employees in addition to Cheesman, namely Harold Andrews and Celestine Sharp. Regarding current bus driver Andrews, he testified that after his certification lapsed in January 2012, he received a termination letter, subsequently to be rehired after his certification was renewed. However, on cross-examination, Andrews almost literally "fell apart." He admitted that he was "not totally clear on a lot of things at that first couple of weeks after my termination. I did speak with Ron [Mahler] orally. . . in fact, to be totally honest, [it] may not have been a letter, it may have been verbal, but, regardless, I knew without a certification, I'd go unemployed." Further, he testified that at the time "[his] world had caved in," and he looked back at that period of time with confusion. It should also be noted that counsel for the Respondent never produced a written termination letter for Andrews.

I do not find Andrews credible or his testimony probative. Not only did he admit his confusion regarding the events surrounding his alleged termination and testified inconsistently, but his demeanor while testifying was very unusual. He seemed visibly angry, hostile, and upset with counsel for the General Counsel and counsel for the Union. He was so upset in fact that the undersigned found it necessary to ask him to "calm down." Accordingly, I do not believe that the credible evidence establishes that the Employer issued a termination letter or document to driver Andrews at the time that his certification lapsed.

Router/Driver[7] Celestine Sharp testified that her certification lapsed on March 11, 2012. This was 10 days after Cheesman's certification lapsed. According to Sharp, at the time her certification lapsed, she was told by Mahler that she was being "separated" from the Company because she had been hired as a driver and without a valid certification she could no longer perform that duty. However, on cross-examination she admitted that she never received any type of written termination notice or letter. After she renewed her certification, she returned to work.

Counsel for the General Counsel and counsel for the Union objected to the receipt of Sharp's testimony regarding her "separation" from the Company on the basis that it occurred after Cheesman was allegedly separated and was not relevant to show the Employer's past practice. In his posthearing brief, counsel for the General Counsel further argues that the Employer's action in allegedly separating Sharp was simply designed to "cover its tracks," as it could assume that Cheesman's alleged termination would likely result in litigation. While I allowed the testimony to be given, upon further reflection, I conclude that as the Employer's action in allegedly separating Sharp occurred after the date on which Cheesman was allegedly terminated, that testimony is entitled to only minimal weight in attempting to serve as evidence of the Employer's past practice.

According to Mahler, on March 8, 2 days after separating Cheesman, he tried to call her three times to inform her that she had been terminated. He testified that he called the only phone number currently on record with the Employer. For some reason, Mahler called that number three times in very close succession. He never really coherently explains why he placed those calls so closely together. In any event, the first two times he called he received no answer, but left a voice mail message asking Cheesman to call him. On the third attempt, a man answered the phone who identified himself as Cheesman's son, and who took a message to have Cheesman call Mahler. However, Mahler never received a call back from Cheesman.

Cheesman testified that she had changed her mobile phone number sometime earlier in the year upon obtaining a new phone, having given her old phone to her ex-husband. She admits that she did not formally notify the Employer of her change in phone numbers, failing to update the information on the Employer's records. However, she claims that both Carmina Lavallee and at least one of the Employer's dispatchers had her new phone number, as they called her using that number. Further, she testified that she was never told that she needed to remain in contact with Mahler after her certification lapsed. According to Cheesman, she remained in regular contact with Lavallee, which the Employer does not dispute. Lavalle and Cheesman remained in phone contact as Lavallee attempted to arrange additional training for Cheesman on the larger bus and to arrange for her to take the CHP driving test. Cheesman denies ever receiving any message from Mahler to call him.

I fail to see the significance of Mahler's alleged efforts to contact Cheesman, or her alleged failure to keep in contact with Mahler and failure to update her phone records with the Employer. Mahler knew on March 6 that Cheesman had cancelled her CHP driving test, having been so informed by Lavallee. He allegedly decided that day to terminate Cheesman, and filled out, signed, and dated the separation form placed in Cheesman's file. (E. Exh. 3.) As the decision was allegedly already made, what difference did it make that 2 days later Mahler attempted to call Cheesman, left a message, but did not hear back from her? Whether Cheesman was uncommunicative or

[7] A router/driver works at arranging and staffing the various bus routes and also drives as necessary.

not, the deed had, according to Mahler, already been done. He had allegedly terminated Cheesman, which termination was unrelated to her failure to keep in contact with Mahler.

The union election was scheduled for March 9. Cheesman went to the Campbell facility on that date, apparently for two purposes, specifically to get her paystub for her regular biweekly Friday paycheck and for the purpose of voting in the representation election. Normally she picks up her paystub from the payroll department, which is near the upstairs lounge. However, as this area was reserved for purposes of the election that day, Cheesman instead had to obtain her paystub from Ron Mahler. Cheesman testified that when she entered Mahler's office, he told her that she was no longer employed by Durham. She asked him why, and he allegedly responded that it was because her certification had expired. According to Cheesman, she argued that there had been other employees previously whose certifications had expired and who were thereafter not told that they were no longer employed. Mahler allegedly responded that "this is a new policy," and that the old policy had "changed." Further, he is alleged to have told her that as soon as she passed her certification that she could return to work. It is important to note that at no time did Cheesman ever receive a written termination notice.

Mahler tells a significantly different version of this conversation. He testified that Cheesman entered his office on the day of the election and had a conversation with Steve Raaymakers, the safety and training supervisor. Mahler specifically testified that he had no conversation with Cheesman that day about her having been terminated from the Company. However, Raaymakers' testimony was not much support for Mahler, as Raaymakers could barely recall even being in Mahler's office on the day of the election, and he could not recall any conversation that he had with Cheesman on that day.

In my opinion, Mahler's version of the events in his office on March 9 is simply not credible. Mahler contends that a day earlier he had been so anxious to tell Cheesman that she had been terminated that he tried to call her three times, leaving a voice mail message as well as a message with her son to have her return his call. If this was so, why would Mahler not have used the opportunity of having Cheesman in his office to inform her that she had been fired? It is not logical that Mahler would have remained silent in view of the fact that, as far as he knew, she still was not aware of her discharge.

For the reasons that I stated earlier, I found Cheesman to be credible. I continue to do so regarding her conversation with Mahler. Her version of this incident is much more reasonable. She testified that Mahler informed her that she had been fired. I believe that he did so, and, in fact, was anxious to do so as he hoped to cause her not to vote in the election which was in progress.

In any event, Mahler was unsuccessful in dissuading Cheesman from voting. According to Cheesman, she went directly to the voting area where she encountered the company observer, Ferdinand "Dino" Torres. The Board Agent conducting the election apparently informed Cheesman that her vote was being challenged by the company observer. Torres was a fellow bus driver known to Cheesman. She asked him why he was challenging her right to vote, and either Torres or the Board Agent, it is not entirely clear which one, replied that it was because she no longer worked for Durham. Torres' version of these events is similar except that he testified that after Cheesman was told that her vote was being challenged by the Company, she responded to Torres, "So, we're no longer friends anymore." In addition to Cheesman, Torres, and the Board Agent, also presents and in close proximity at the time of this conversation were the union observer, Rosie, and the next voter in line, Lupe Rodriguez, both of whom are bus drivers.

After voting by challenged ballot, Cheesman proceeded to the company yard where there were approximately six drivers congregated. She told them that Mahler had informed her that she was no longer employed by Durham because her certification had expired, and she asked whether any of them had ever been told such a thing. Several of the drives spoke up and remarked that they had had their certifications lapse and were never informed that for that reason they were being discharged. According to Cheesman, at the time that she was having these conversations, employees were still voting in the representation election. After a while, she left and returned home.

The day following the election, March 10, Lavallee called Cheesman to inform her that Lavallee had arranged for Cheesman to receive training on the larger bus from a certified trainer, Kristy Urbina, in a neighboring school district. Cheesman attended several training sessions with Urbina, which training was fully paid for by the Employer. The last training session was also attended by Lavallee, following which the consensus was that Cheesman was ready to take her driving test. Subsequently, Lavallee arranged with CHP for Cheesman to take her driving test.

On March 20, 2012, Cheesman retook and passed her CHP driving test. Urbina was on the bus at the time, and as Cheesman was still driving the bus, it was Urbina who actually called Mahler to inform him that Cheesman had passed. Urbina informed Cheesman that Mahler had said that Cheesman should report for work the very next day, March 21. The next day she reported for work as directed. When she showed up, Steve Raaymakers instructed her to fill out a "New Hire/Rehire Form." (E. Exh. 4.) She did not have to fill out a new W-4 form, or any tax related documents, which documents Mahler testified are not generally required of rehired employees. However, it is important to note that during the hearing the Employer did not offer any evidence that any other driver whose certification had lapsed was required upon recertification to fill out this "New Hire/Rehire Form."

When Cheesman resumed working it was at the same rate of pay that she previously earned. Also, she incurred no loss in seniority. No evidence was offered by the Employer to show that any driver whose certification lapsed was reduced in pay or seniority at the time the driver was recertified and returned to work. Cheesman has remained as a driver through at least the date of the hearing.

Finally, it should be pointed out that although Cheesman was allegedly fired by Mahler on March 6, she was not immediately paid for her work performed as of that date, and was not advised of her medical insurance rights under COBRA. These are requirements under California law, which an Employer must satisfy regarding terminated employees.

B. Legal Analysis and Conclusions Regarding the Termination of Helen Cheesman

It is alleged in complaint paragraphs 6, 7, 8, and 9 that the Respondent terminated Cheesman, and informed her of that termination, because of her union activity and in order to disenfranchise her from voting in the representation election, all in violation of Section 8(a)(1) and (3) of the Act. Under the General Counsel's theory of this case, the termination of Cheesman was allegedly a sham or a ruse. However, whether Cheesman was actually fired or merely told that she had been terminated would not change the legal issues involved in the case. Of course, the Respondent takes the position that it fired Cheesman for lawful reasons, namely the lapse of her bus driver certification, unrelated to any union activity that she may have engaged in and unrelated to the representation election.

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Corp.,* 462 U.S. 393 (1983).

In the matter before me, I conclude that the General Counsel has made a prima facie showing that Cheesman's union activity was a motivating factor in the Respondent's decision to terminate her, or, at a minimum, to at least inform her that she had been terminated. In *Tracker Marine, LLC,* 337 NLRB 644 (2002), the Board affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework established in *Wright Line.* Under the framework, the judge held that the General Counsel must establish four elements by a preponderance of evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the Respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employees protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. However, more recently the Board has stated that, "Board cases typically do not include [the fourth element] as an independent element." *Wal-Mart Stores, Inc.,* 352 NLRB 815, fn. 5 (2008) (citing *Gelita USA, Inc.,* 352 NLRB 406, 407 fn. 2 (2008)); *SFO Good-Nite Inn, LLC,* 352 NLRB 268, 269 (2008); also see *Praxair Distribution, Inc.,* 357 NLRB 1048 fn. 2 (2011). In any event, to rebut the presumption, the Respondent bears the burden of showing the same action would have taken place even in the absence of protected conduct. See *Manno Electric, Inc.,* 321 NLRB 278, 280 fn.12 (1996); *Farmer Bros., Co.,* 303 NLRB 638, 649 (1991).

As I have already found in the fact section of this decision, Cheesman engaged in significant union activities. Further, it is clear that those union activities were well known to the Respondent's management. Cheesman handed out pro-union flyers outside the entrance to the Employer's bus yard 3–4 times a week, over a 3–4 month period. Some of these flyers contained Cheesman's name and picture. The handbilling occurred within 50 feet of the dispatchers' office and close to the offices of the other managers, where, according to Cheesman's credible testimony, she was frequently observed by those managers. Cheesman further testified that additionally she posted pro-union flyers on the bulletin board at work, went to union meetings, and was vocal in her support for the Union when conversing with fellow employees. During his testimony, General Manager Mahler never denied that he knew that Cheesman was an active union supporter.

Of course, there is no question that terminating Cheesman, and/or informing her that she had been terminated constituted an adverse employment action. While it is true that once Cheesman's certification lapsed she could no longer drive a school bus for Durham, she certainly could have continued to be employed by the Employer in some other capacity, had the Employer chosen to do so. Instead, Mahler chose to terminate Cheesman on March 6 (E. Exh. 3), and to inform her on March 9 that she had been so terminated.

Mahler's action in terminating Cheesman on March 6, 3 days before the representation election, and in informing her of the termination on March 9, the very day of the election, was, in my opinion, intended to prevent her from voting in that election. Mahler would certainly have perceived her as a vote in favor of union representation. The original election had been close, and preventing Cheesman from voting might well have been enough to cause the Union to lose the rerun election. Further, informing Cheesman on the very day of the election that she had been terminated would serve to not only chill her union activity but that of other employees who were inclined to vote for the Union. The timing of Mahler's action is certainly highly suspect and ties that action directly to Cheesman's union activity and to her support for the Union.

Accordingly, I believe that counsel for the General Counsel has presented all the elements necessary to establish a prima facie case that the Respondent was motivated to terminate Cheesman and inform her that she had been terminated, at least in part, because of her union activity. The burden now shifts to the Respondent to show that it would have taken the same disciplinary action against Cheesman absent her union activity. *Senior Citizen Coordinating Counsel of Riverbay Community,* 330 NLRB 1100 (2000); *Regal Recycling, Inc.,* 329 NLRB 355 (1999). The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Co., Inc.,* 310 NLRB 865, 871 (1993). I am of the view that the Respondent has failed to meet this burden. The Respondent's reasons for terminating Cheesman appear to be a pretext.

The Respondent contends that it has a past practice of terminating or "separating" bus drivers whose certifications have lapsed. However, the evidence shows otherwise. As was noted

above in the fact section of this decision, under the administration of the previous general manager, Dave Burgess, when a driver's certification expired because it had not been renewed, the Employer did not terminate the employee. While the employee could no longer drive a school bus, and, so, generally did not report for work and was not paid, the expectation was that as soon as that employee could get recertified, he or she would resume bus driving duties. The Respondent does not deny that this was the past practice under Burgess. Never the less, it contends that the practice changed under the Mahler administration. However, the probative, credible evidence is to the contrary.

In the case of one bus driver, Vanessa Pena, whose certification lapsed on February 10, 2012, only 18 days before Cheesman's lapsed, she was treated exactly the same way as drivers had always been treated in the past, despite the fact that Mahler was now the general manager. Pena was not terminated or "separated." Instead, after she obtained her recertification approximately 1 week later, she was immediately put back to work as a bus driver, without having to fill out reemployment paperwork.

The Respondent holds out the treatment of Harold Andrews in January 2012, as an example of a driver whose certification lapsed and who was treated under the "new system," and allegedly terminated. However, as noted earlier, I found Andrews not to be a credible witness who was so confused as to be unable to recall whether he was ever notified that he was terminated.

Another example offered by the Respondent was that of Celestine Sharp who testified that she was terminated on March 11, 2012, because her certification lapsed. However, as I indicated above, I am of the belief that her example is entitled to little evidentiary weight since her "separation" occurred after that of Cheesman. In my view, this was merely an attempt on the part of Mahler to "cover his tracts" and make it appear that Cheesman was not being treated disparately under the alleged new system.

Finally, Mahler's contentions that Cheesman's alleged failure to diligently pursue her recertification and to keep in contact with him served as a justification for her termination are simply false. The facts show conclusively that Cheesman did diligently pursue her recertification. She was in regular contact with Carmina Lavallee, the Employer's State Certified Trainer, who had mutually agreed with Cheesman that the CHP driving test scheduled for March 5 should be cancelled as Cheesman had not had the opportunity to be adequately trained on a large bus. Lavallee was actively seeking additional training for Cheesman, who was anxious to be trained and accepted training from certified trainer Kristy Urbina as soon as it became available. Cheesman had never been told to keep in direct contact with Mahler. Further, there is no credible evidence that his inability to reach her by phone was intentional on her part, or anything more than confusion over Cheesman's current phone number.

The credible evidence does show that Mahler treated Cheesman in a disparate fashion, terminating her only 5 days after her certification lapsed, rather than first giving her a fair opportunity to get recertified. The Respondent's arguments to the contrary are nothing more than a pretext for the true reason for her termination, namely because of Cheesman's union activity, and in an effort to keep her from voting in the representation election, and also in an effort to restrain other employees from engaging in union activity.

As I find that the Respondent's defense is a pretext, it is, therefore, appropriate to infer that the Respondent's true motive in terminating Cheesman was unlawful. *Williams Contracting, Inc.,* 309 NLRB 433 fn. 2 (1992); *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982); *Shattuck Deann Mining Corp., v. NLRB,* 326 F.2d 466, 470 (9th Cir. 1966). I find that the real motive behind the Respondent's conduct in terminating Cheesman and in informing her of the termination was in retaliation for her union activity and in order to prevent her from voting in the representation election, and in order to interfere with, restrain, and coerce other employees from engaging in union activity.

Accordingly, I find that by terminating Cheesman on March 6, 2012, and by informing her on March 9, 2012, that she was terminated the Respondent has violated Section 8(a)(3) and (1) of the Act, as alleged in complaint paragraphs 6, 7, and 9; and has violated Section 8(a)(1) of the Act as alleged in complaint paragraphs 6, 7, and 8.

C. The Legal Analysis and Conclusions Regarding the Objections

As reflected in the Regional Director's Report and Recommendations on Objections, Order Consolidating Cases and Notice of Hearing (GC Exh. 1(f)), there are a number of objections to the election referred to the undersigned for resolution,[8] some of which are identical to or concomitant with the unfair labor practices alleged in the complaint. Where the objections are identical to or concomitant with the unfair labor practices, the issues will not be restated, but only the conclusions previously reached.

Objections Number 2 and 3

Objection number 2 reads as follows: "The Employer terminated an employee on account of her union and or protected activity."

Objection number 3 reads as follows: "The Employer changed its policy with respect to drivers who have issues with respect to their certificates during the critical preelection period."

These two objections are, for all practical purposes, identical to the unfair labor practice charges addressed above. As was discussed above at some length, I have concluded that the Employer terminated Helen Cheesman on March 6 and informed her of that termination on March 9 because of her union activity, and in order to prevent her from voting in the representation election, and in order to restrain other employees from supporting the Union and from voting in the election. Further, I concluded that the Employer, as a pretext for terminating Cheesman, allegedly changed its policy regarding bus drivers whose driving certification lapsed.

[8] Certain other numbered objections were overruled by the Regional Director without being referred to the undersigned.

As I have concluded that this conduct on the part of the Employer constituted unfair labor practices in violation of Section 8(a)(1) and (3) the Act, I must conclude that said conduct also constituted objectionable conduct as it interfered with the laboratory conditions of the election. Accordingly, I find merit to objections number 2 and 3.

Objections Number 4 and 6

Objection number 4 reads as follows: "The Employer interfered with the election by terminating an employee in the presence of other workers who were voting and or terminated the employee when the employee was voting which interfered with the laboratory conditions."

Objection number 6 reads as follows: "The Employer interfered with laboratory conditions by influencing employees in the voting by engaging in coercive conduct."

As I have discussed earlier, when Cheesman entered Mahler's office on March 9 to get her paystub, the election was in progress. It was at that time that Mahler first informed Cheesman that she had been terminated. That information was relayed to her a second time shortly thereafter when she went to vote in the election. Upon approaching the Board Agent conducting the election, she learned that her right to vote was being challenged[9] by company observer Ferdinand "Dino" Torres because allegedly she was no longer an employee of Durham. This information was told to Cheesman with other potential voters present, specifically, Torres, union observer Rosie Miranda, and Lupe Rodriguez, who was waiting in line to vote. Additionally, while the election was still in progress, Cheesman explained to approximately 6 drivers congregated in the company yard that she had been terminated because her certification had lapsed. She engaged these eligible voters in conversation about the circumstances surrounding her termination and whether they knew of any similar situation where a driver whose certification lapsed had been terminated. They did not.

Cheesman was a leading union supporter. Certainly Cheesman being informed in the presence of other potential voters in the polling area that she was no longer a Durham employee would reasonably have had a coercive effect on those potential voters. Similarly, different potential voters present in the company yard while voting was still in progress were informed by Cheesman herself that she had been terminated, which news would reasonably also have had a coercive effect on the way they voted, or even whether they voted at all. The fact that Cheesman herself "spread the word" regarding her termination did not detract from the coercive effect of the Employer's actions. Word of the termination of a leading union supporter on the day of the election for what was at best a specious reason was bound to have been circulated through the ranks of the potential voters no matter its source.

As noted, I have concluded that Cheesman's termination constituted an unfair labor practice. However, even assuming, arguendo, that her termination was a legitimate response to her certification having lapsed, under the Respondent's alleged "new policy" she would have had a reasonable expectation of reinstatement as soon as her certification was renewed. Therefore, she should have been eligible to vote in the election. Under those circumstances, the Employer's challenge of Cheesman's ballot also constituted an attempt to restrain and coerce Cheesman and other potential voters in the exercise of their Section 7 rights.[10]

In any event, I find that the Employer's conduct in informing Cheesman of her termination on the very day of the election and in the vicinity or presence of other potential voters to constitute conduct which interfered with the laboratory conditions of the election. Accordingly, I find merit to objections number 4 and 6.

Objection Number 5

Objection number 5 reads as follows: "The Employer maintained unlawful rules which interfered with the election."

In the Regional Director's report and recommendation on Objections he finds that only a portion of objection number 5 merits consideration at a hearing. He concludes that the Employer's rules regarding "off-duty employee solicitation" and "social networking" raises material issues of fact or law as would warrant a hearing.

On page 12 of the Employer's Employee Handbook under the heading "Solicitation," number 5, appears the following language: "Off-duty employees should not enter (except for legitimate business reasons) any Company facility not open to the general public and are prohibited from interfering or causing a disturbance with an on-duty employee's performance of his/her work duties." (U. Exh. 1, p. 12.) In my view, the maintenance of this rule was unlawful and could have reasonably affected the results of the election.

In *Jurys Boston Hotel,* 356 NLRB 927 (2001), the Board held that the maintenance of an invalid rule, there pertaining to solicitation, "loitering" (access), and the wearing of union emblems and buttons, constituted objectionable conduct during the election period. Further, the Board held that the election, decided by a single vote, must be set aside, since the election "might well have been affected by the rules at issue," which rules had a reasonable tendency to chill or otherwise interfere with the prounion campaign activities of employees during the election period. Id., 928–932. In any event, the Board has long held that "whether an election should be invalidated based on alleged misconduct does not turn on election results [even a large margin of victory] but rather upon an analysis of the character and circumstances of the alleged objectionable conduct." *Freund Baking,* 336 NLRB 847 fn. 5 (2001) (case citations omitted).

In the matter at hand, the rule in question prohibits off-duty employee access, "except for legitimate business reasons." However, the Board held in *Tri-County Medical Center, Inc.,* 222 NLRB 1089, 1089 (1976), that a rule restricting employees' off-duty access to the employer's premises is valid only if it "(1) limits access solely with respect to the interior of the

[9] Cheesman's challenged ballot was one of two nondeterminative ballots in this case.

[10] See *Oahu Refuse Collection, Inc.,* 212 NLRB 224 (1974), where the Board found that the employer violated Sec. 8(a)(1) and (3) of the Act when it delayed reinstating a previously discharged employee until after the date of a representation election, so as to prevent the union supporter from voting in the election or having his vote counted.

[employer's premises] and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the [employer's premises] *for any purposes* and not just to those employees engaging in union activity." (emphasis added by the undersigned). Also in accord see *Sodexo America LLC,* 358 NLRB 668 (2012). As the rule is conjunctive, all 3 prongs must be met.

The Employer's rule in the instant matter states that employees "should not enter (except for legitimate business reasons) any Company facility not open to the general public." This rule fails to meet the third *Tri-County* prong because it does not prohibit off-duty access for any purposes, but, rather, only, in the Employer's opinion, for those purposes which are not "legitimate business reasons." Therefore, the off duty access rule is facially invalid under the *Tri-County* three-prong test.

Further, regarding the second *Tri-County* prong, the Employer's off-duty access rule also improperly prohibits off-duty employees from accessing outside nonworking areas of the property. During the hearing, Ron Mahler testified that at the Employer's facility there is a picnic table or picnic area outside where the employees can eat. However, the Employer's written rule prohibits off-duty employees from entering any nonpublic area of the facility, which would seem to include the picnic area. Of course, the picnic area is clearly a nonworking area since the employees are able to spend time there eating and talking, rather than working. The Employer offered no legitimate business reason why employees should be prohibited from access to the picnic area and, in fact, they do spend off-duty time there. Accordingly, the Employer's off-duty access rule is also facially invalid under the second *Tri-County* prong.

For the reasons stated above, I conclude that the maintenance of the Employer's off-duty access rule had a reasonable tendency to chill or otherwise interfere with the prounion campaign activities of employees during the election period. *Jurys Boston Hotel,* supra. Accordingly, I find merit to this portion of objection number 5.

In the Employer's 2010 Handbook Addendum can be found its "Social Networking Policy." (U. Exh. 2, p. 2–3.) Under the subheading "Social Networking Websites," among other language it states that, "It is also recommended that the employees of . . . Durham School Services . . . limit contact with parents or school officials, and keep all contact appropriate. Inappropriate communication with students, parents, or school representatives will be grounds for immediate dismissal." Further, under the subheading "Interaction with Co-workers," among other language it states that, "communication with coworkers should be kept professional and respectful, even outside of work hours." Continuing under the heading of "Expectations of Privacy," the addendum states that, "Employees who publicly share unfavorable written, audio or video information related to the company or any of its employees or customers should not have any expectation of privacy, and may be subject to investigation and possibly discipline"

The Regional Director notes in his Report and Recommendation on Objections that the Petitioner claims in its objections that these rules are overbroad because they limit the interaction of employees with each other and with parents and public officials who use the Employer's services. More specifically, in his post-hearing brief, counsel for the Union characterizes the Employer's policy as "outrageously overbroad."

In determining whether the existence of specific work rules violates the Act, and, by analogy, is objectionable, the Board has held that, "the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir 1999). Further, where 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." Id. See also, *Blue Cross-Blue Shield of Alabama,* 225 NLRB 1217, 1220 (1976).

The Board has further refined the above standard in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), by creating a two-step inquiry for determining whether the maintenance of a rule violates the Act. First, if the rule expressly restricts Section 7 activity, it is clearly unlawful. If the rule does not, it will none the less violate the Act upon a showing that: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.,* at 647; See *Northwestern Land Services, Ltd.,* 325 NLRB 744 (2009) (applying the Board's standard in *Lutheran Heritage Village Livonia,* supra at 647).

Further, the Board has held that "[t]he test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Double D Construction Group, Inc.,* 339 NLRB 303, 304 (2003). Even if a rule is ambiguous, any ambiguity in a work rule that may restrict protected concerted conduct "must be construed against the [employer] as the promulgator of the rule." *Ark Las Vegas Restaurant,* 343 NLRB 1281, 1282 (2004) (an ambiguity in a "no-loitering "rule construed against the employer). See also *Norris/O'Bannon,* 307 NLRB 1236, 1245 (1992).

Under the Board's case law, several provisions in the Employer's "Social Networking Policy" are unlawful as they "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel,* 326 NLRB at 825. While the policy does not explicitly restrict Section 7 protected activity, it contains no limiting language whatsoever, and is so overbroad that it could reasonably be construed as extending to Section 7 activity. *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647.

Advising employees to "limit contact with parents or school officials," and to "keep all contact appropriate," as well as saying that "communication with coworkers should be kept professional and respectful, even outside work hours," and warning that "employees who publicly share unfavorable . . . information related to the company or any of its employees or customers . . . may be subject to investigation and possibly discipline" without indicating what the Employer considers appropriate or inappropriate conduct, or what is considered professional and respectful, or what constitutes unfavorable information is, in my view, unreasonably broad and vague. Employees could reasonably interpret this policy language as

restraining them in their Section 7 right to communicate freely with fellow employees and others regarding work issues and for their mutual aid and protection. *Double D Construction Group,* supra. Further, to the extent that the policy is ambiguous or vague, it must be construed against the Employer, as the promulgator of the rule. *Ark Las Vegas Restaurant,* supra.

While I conclude that the Social Networking Policy in question is on its face coercive of Section 7 rights, it should be noted that during the hearing General Manager Mahler testified that employees who violated the policy would be subject to discipline. However, no evidence was offered as to any specific instances of such discipline. In any event, the mere maintenance of the policy language would have a reasonable tendency to chill or otherwise interfere with, restrain, and coerce the pro-union campaign activities of employees during the election period. *Jurys Boston Hotel,* supra. Accordingly, I find merit to this portion of Objection number 5.

Recommendation on Election

In summary, I have found merit in objections number 2 and 3, whereby the Employer terminated Helen Cheesman and informed her of that termination because of her union activity, and in order to prevent her from voting in the representation election, and in order to restrain employees from supporting the Union and from voting in the election. Further, I concluded that the Employer, as a pretext for terminating Cheesman, allegedly changed its policy regarding bus drivers whose driving certifications lapsed. I also found merit in objections number 4 and 6, whereby the Employer's conduct in informing Cheesman of her termination on the very day of the election and in the vicinity or presence of other potential voters interfered with the laboratory conditions of the election. Finally, I found merit to that portion of objection number 5, whereby the Employer maintained rules on "off-duty solicitation" and "social networking" that restrained and coerced employees in the exercise of their Section 7 activity during the election period.

I have also found merit to the unfair labor practice allegations in complaint paragraphs 6, 7, and 9 that the Employer violated Section 8(a)(3) and (1) of the Act and in complaint paragraphs 6, 7, and 8 that the Employer violated Section 8(a)(1) of the Act, whereby it terminated Cheesman and informed her of the termination on the day of the election and in the presence and vicinity of potential voters because of her union activity and in an effort to dissuade employees from voting in the election. In so finding, I concluded that the Employer's conduct occurred during the "critical period" between the filing of the representation petition and the election.

It is well settled that conduct during the critical period that creates an atmosphere rendering improbable a free choice warrants invalidating an election. See *General Shoe Corp.,* 77 NLRB 124 (1948). Such conduct is sufficient if it creates an atmosphere calculated to prevent a free and untrammeled choice by the employees. As the Board stated, "In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." Id., at 127.

I have found that the Respondent has committed significant unfair labor practices during the critical period, some occurring on the very day of the election, which unfair labor practices also constituted objectionable conduct. The Board has traditionally held that conduct violative of Section 8(a)(1) and (3) of the Act is also conduct which interferes with the exercise of a free and untrammeled choice in an election. As such, it serves as a basis for invalidating an election. According to the Board, conduct which is violative of Section 8(a)(1) and (3) of the Act is "a fortiori conduct which interferes with the exercise of a free and untrammeled choice in an election." *Playskool Mfg. Co.,* 140 NLRB 1417 (1963); see also *IRIS USA, Inc.,* 336 NLRB 1013 (2001); *Diamond Walnut Growers, Inc.,* 326 NLRB 28 (1988). Further, the Board has held that this is also so "because the test of conduct which may interfere with the 'laboratory conditions' for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1)." *Dal-Tex Optical Co.,* 137 NLRB 1782 (1962). See also *Overnite Transportation Co.,* 158 NLRB 879 (1966); *Excelsior Underwear,* 156 NLRB 1236 (1966).

However, not all unfair labor practice conduct will warrant setting aside an election. In *Caron International,* 246 NLRB 1120 (1979), the Board rejected a per se approach to the fortiori language of *Playskool.* Instead, the Board said that the test was an objective one, that being whether the conduct has a tendency to interfere with employees' free choice. *Hopkins Nursing Care Center,* 309 NLRB 958 (1992). See also *Recycle America,* 310 NLRB 629 (1993) (where the Board found that the unfair labor practices were not sufficient to set aside the election).

The Board weighs a number of factors in determining whether 8(a)(1) violations of the Act, and presumably separate objectionable conduct as well, are sufficient to warrant setting aside an election. In the face of unfair labor practices and meritorious objections, the Board may still decline to overturn the results of an election where it concludes that the violations and/or conduct are de minimis. *Bon Appetit Management Co.,* 334 NLRB 1042 (2001); *Caron International, Inc.,* 246 NLRB 1120 (1979). Still, 8(a)(1) violations fall within the de minimis exception only when these violations "are such that it is virtually impossible to conclude that they could have affected the results of the election." *Super Thrift Markets,* 233 NLRB 409, 409 (1977), cited in *Sea Breeze Health Care Center,* 331 NLRB 1131 (2000).

In determining whether the misconduct could have affected the results of the election, the Board considers "the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors." *Clark Equipment Co.,* 278 NLRB 498, 505 (1986); *Avis Rent-a-Car,* 280 NLRB 580, 581 (1986); *Chicago Metallic Corp.,* 273 NLRB 1677, 1704 (1985). Regarding those factors, several are of particular importance in considering those objections and unfair labor practices before me that I have determined to have merit. This was an extremely close election, with the vote being 54 cast against the Petitioner and 52 votes cast for the Petitioner.[11] The Board has

[11] Two challenged ballots were insufficient to affect the results of the election.

held that in a close election the objectionable and/or unlawful conduct need not be as severe or have affected as many employees in order to warrant setting aside the election. The narrowness of the vote in an election is a relevant consideration. *Robert Orr-Sysco Food Services,* 338 NLRB 614 (2002); *Cambridge Tool & Mfg. Co.,* 316 NLRB 716 (1995); also see *Avis Rent-a-Car,* supra.

In the matter before me, not only was the election very close, but the Employer's unfair labor practices and objectionable conduct were particularly egregious. I have found that the improper conduct was committed during the critical period, and, in fact, some on the actual day of the election. On March 6, only 3 days before the election, the Employer terminated Helen Cheesman, a very active union supporter. However, Cheesman did not become aware of her termination until she was so informed by General Manager Mahler, who was the highest official at the Employer's facility. Cheesman was literally on her way to vote when she stopped by Mahler's office and received the news of her termination. Further, when she subsequently arrived at the polling place she was again informed of her termination when alerted that her ballot was being challenged by the Employer's observer allegedly because she was no longer an employee of Durham. Not only was this news conveyed to Cheesman in the presence of other potential voters, but shortly thereafter, while the polls remained open, other potential voters learned that Cheesman had been terminated when she asked a group of drivers congregated in the company yard whether they had ever heard of any driver being terminated because his/her certification had lapsed. They had not.

I have concluded that Cheesman's termination was unlawful, and, in fact, that the alleged change in the Employer's policy on drivers with lapsed certifications was nothing more than a pretext intended to be used to justify Cheesman's termination. The news that a strong union supporter had been terminated for a reason that employees knew, based on past practice, was highly suspect could reasonably have caused potential voters to either not vote or to change their intended election choice. Further, the Employer's maintenance of rules that contained overly broad, discriminatory, and improper language regarding off-duty employee access to the company facility and social networking policies, which rules were in effect during the critical period, had a reasonable tendency to chill or otherwise interfere with pro-union campaign activities of employees.

These were significant unfair labor practices and objectionable conduct, which would clearly have had a tendency to seriously inhibit the employees' willingness to engage in union activity, and would likely have created an atmosphere unconductive to a free and untrammeled choice by the employees. The Employer's conduct destroyed the laboratory conditions required by the Board.

Based on the above, I conclude that the objectionable conduct and unfair labor practices engaged in by the Employer have tended to interfere with the free and fair choice of a determinative number of voting unit employees. Accordingly, as the election results do not reflect the employees' free and fair choice, I recommend that the election be set aside and that this proceeding be remanded to the Regional Director for Region 32 for the purpose of conducting a rerun election.

CONCLUSIONS OF LAW

1. The Respondent, Durham School Services, L.P., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Freight, Construction and General Drivers, Warehousemen & Helpers-Teamsters Union Local No. 287, a/w International Brotherhood of Teamsters, Change to Win, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent has violated Section 8(a)(3) and (1) of the Act.

(a) Discharging its employee Helen Cheesman because she engaged in union activity and to discourage her from voting in the representation election;

(b) Orally informing Helen Cheesman that she had been discharged in order to discourage her from voting in the representation election and from engaging in union activity.

4. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act.

(a) Orally informing Helen Cheesman that she had been discharged in order to discourage other employees from voting in the representation election and from engaging in union activity.

5. The above unfair labor practices 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.[12]

The Respondent shall be required to post a notice that assures its employee that it will respect their rights under the Act. In addition to physically posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring,* 356 NLRB 11 (2010).

Further, as indicated above, I have found that the Respondent engaged in both objectionable conduct and unfair labor practices affecting the results of the election in Case 32–RC–066466. I recommend, therefore, that the election in this case held on March 9, 2012, be set aside, that a new election be held at a date and time to be determined in the discretion of the Regional Director for Region 32, and that the Regional Director include in the Notice of Election the following language.

NOTICE TO ALL VOTERS

The election held on March 9, 2012, was set aside because the

[12] Since Helen Cheesman did not actually lose any income, seniority, or other fringe benefits during the period of time that she was listed as terminated on the Respondent's books and records, as her certification to drive a school bus had lapsed, no back pay or other make whole remedy is required. Also, although the objections to the election raised by the Union, and found to have merit, included the claim that certain provisions in the Respondent's Employee Handbook and Addendum were overly broad and discriminatory, no language revision remedy is being ordered here, as no similar unfair labor practice allegation has been made.

National Labor Relations Board found that certain conduct of the Employer interfered with the employees' free exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this Notice of Election. All eligible voters should understand that the National Labor Relations Act gives them the right to cast ballots as they see fit and protects them in the exercise of this right free from interference by any of the parties.[13]

[Recommended Order omitted from publication.]

[13] *Lufkin Rule Co.,* 147 NLRB 341 (1964).