

M.D. Miller Trucking & Topsoil, Inc. and General Teamsters Local Union No. 179, affiliated with International Brotherhood of Teamsters. Case 13–CA–104166

December 16, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON
AND SCHIFFER

On April 9, 2014, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions with a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. In addition, the General Counsel filed cross-exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.²

In affirming the judge's findings, we agree that the statements made by Marlene Miller to employee Edward McCallum, and subsequently repeated by Chad Miller to the Union, that McCallum would "get nowhere" by filing

a grievance, constituted unlawful threats of futility in violation of Section 8(a)(1). The Respondent argues that these statements did not violate the Act because Miller was simply opining on the merits of a potential grievance. We reject this argument in light of the circumstances surrounding Miller's statements: the Respondent was undermining the Union by engaging in direct dealing; Chad Miller had just unlawfully threatened loss of overtime; and McCallum had just been unlawfully discharged in a heated environment.³ Under these circumstances, an employee would reasonably conclude that it would be futile to file a grievance because the Respondent would make sure it went nowhere. The reasonableness of this conclusion is further supported by the fact that the Respondent subsequently, in effect, made sure that McCallum's grievance "went nowhere" by unlawfully refusing to reinstate him. Accordingly, we agree with the judge that Miller's statements "conveyed the impression that the contractual grievance procedure was futile," in violation of Section 8(a)(1) of the Act. *Prudential Insurance Co.*, 317 NLRB 357, 357 (1995).⁴

Further, we find that the Respondent violated the Act, as alleged in the complaint, because it refused to accept McCallum's current medical certification and required him to complete multiple medical certifications before he could return to work; we do not rely on the judge's conclusion that the Respondent's conduct amounted to an "effective termination."⁵ However, because there is no practical difference between ordering reinstatement and ordering the Respondent to accept McCallum's current medical certification, which necessitates his reinstatement—

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.

The Respondent excepts to the judge's finding that it violated Sec. 8(a)(1) by threatening loss of overtime and engaging in direct dealing. The Respondent, however, does not state, either in its exceptions or supporting brief, any grounds on which these purportedly erroneous findings should be overturned. Therefore, in accordance with Sec. 102.46(b)(2) of the Board's Rules and Regulations, we shall disregard these exceptions. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

The General Counsel excepts to the judge's conclusion that the Respondent violated only Sec. 8(a)(1) when it engaged in direct dealing, instead of Sec. 8(a)(5). Because direct dealing violates an employer's obligation to bargain in good faith, we find merit in the exception. *Permanente Medical Group, Inc.*, 332 NLRB 1143, 1144 (2000). This finding does not necessitate any changes to the judge's remedy or Order.

We further find that the judge's decision to bar the Respondent from presenting certain evidence as a sanction for the Respondent's failure to fully comply with subpoenas duces tecum from the General Counsel and the Union was not an abuse of discretion, as the subpoenas sought information relevant to the matters at issue. See *McAllister Towing & Transportation Co.*, 341 NLRB 394, 396–397 (2004), and cases cited therein, enfd. 156 Fed.Appx. 386 (2d Cir. 2005).

² We adopt the judge's remedy concerning filing a report with the Social Security Administration and lump-sum backpay, consistent with our decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

³ There are no exceptions to the judge's finding that McCallum engaged in protected conduct at the April 11 meeting.

⁴ Member Johnson respectfully disagrees with his colleagues' finding that Miller's statements about the grievance constituted unlawful threats. In his view, Miller's statements amounted to her subjective opinion about the merits of a potential grievance. Sec. 8(c) of the Act protects the right of employers and their agents to offer their opinions, provided they do not contain any threats or promises of benefits. Miller was entitled to have the view that McCallum's grievance would be meritless, and, under Sec. 8(c), she was entitled to express that view. *Sharples Coal Corp.*, 264 NLRB 818, 821 (1982).

⁵ Because we agree with the judge's finding that the Respondent's alleged reliance on the medical certifications was pretextual, we need not determine whether the judge erroneously refused to consider Federal Motor Carrier Safety Administration regulations. The issue here is the Respondent's motivation, not the substance of the regulations. See, e.g., *Southern Mail, Inc.*, 345 NLRB 644, 646–647 (2005) (finding that the employer's prior lax approach to DOT regulations undermined its post-union activity zeal in enforcing them).

Member Johnson notes that, generally, an employer's decision to send an employee for additional medical evaluation, when warranted, is not evidence of animus. In these circumstances, however, where McCallum complied with the requirement to get clearance from an FMCSA-certified doctor yet was still not reinstated, he would find the Respondent's actions to be pretextual.

ment after his successful grievance, we find it unnecessary to modify the judge's reinstatement language in the Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, M.D. Miller Trucking & Topsoil, Inc., Rockdale, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.⁶

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT terminate or otherwise discriminate against you because you object to cuts in wages or other benefits mandated by our collective-bargaining agreement with General Teamsters Local Union No. 179, affiliated with International Brotherhood of Teamsters (the Union), or file grievances pursuant to the provisions of that agreement.

WE WILL NOT bypass the Union and deal directly with you concerning your wages or other benefits, or any other mandatory subjects of bargaining.

WE WILL NOT tell you that your filing of grievances would be futile.

WE WILL NOT threaten you with loss of overtime or other benefits when you object to cuts in wages or other benefits mandated by our collective-bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice.

⁶ We shall substitute a new notice to conform with *Durham School Services*, 360 NLRB 694vcbnjmk1..mnb (2014).

WE WILL within 14 days from the date of the Board's Order, offer Edward McCallum 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 Edward McCallum whole for any loss of earnings and other benefits resulting from his unlawful termination.

WE WILL reimburse Edward McCallum 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.

WE WILL submit the appropriate documentation to the Social Security Administration (SSA) so that when backpay is paid to Edward McCallum, SSA will allocate it to the appropriate periods.

WE WILL remove from our files any reference to our unlawful termination of Edward McCallum, and WE WILL, within 3 days thereafter notify him in writing that this has been done and that the termination will not be used against him in any way.

M.D. MILLER TRUCKING & TOPSOIL, INC.

The Board's decision can be found at www.nlr.gov/case/13-CA-104166 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.



Kevin McCormick, Esq., for the General Counsel.
Alan F. Block, Esq. (Block & Landsman), for the Respondent.
Brian C. Hlavin (Baum, Sigman, Auerbach & Neuman, Ltd.),
for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This case arises out of a December 9, 2013¹ complaint and notice of hearing (the complaint) stemming from unfair labor practice charges, that General Teamsters Local Union No. 179, affiliated with

¹ All dates are in 2013, unless otherwise indicated.

International Brotherhood of Teamsters (the Union) filed against M.D. Miller Trucking & Topsoil, Inc. (the Respondent or the Company). The complaint alleges that the Respondent committed violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) involving driver Edward McCallum.

I conducted a trial in Chicago, Illinois, on February 19 and 20, 2014, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

At the conclusion of the hearing on February 20, 2014, I set Friday, March 28, 2014, as the due date for the filing of briefs. On that date, the Respondent's counsel mistakenly attempted to file his brief with Region 13. The following Monday, March 31, 2014, he filed it with the Division of Judges. In the circumstances, and in the absence of any foreseeable prejudice to the General Counsel or the Union, I will accept the Respondent's brief. However, I will not consider as evidence what it asserts are Federal Motor Carrier Safety Administration regulations, inasmuch as they were not made part of the record.

Issues

- (1) Following McCallum's discharge on April 11 for his conduct at a group meeting that day, and an April 22 grievance panel decision ordering him reinstated with backpay, did the Respondent, on and after April 22, effectively terminate his employment by requiring him to submit additional medical documentation, because (1) McCallum voiced objections at the April 11 meeting to any cuts in drivers' contractual wages or other benefits, and (2) he filed grievances on April 15, one of which was over his April 11 discharge?²
- (2) At said April 11 meeting, did President and Owner Marlene Miller (Ms. Miller) bypass the Union and deal directly with its unit employees by soliciting them to accept a cut in wages or other benefits mandated by the collective-bargaining agreement?
- (3) At the meeting, did Ms. Miller inform McCallum that it would be futile for him to file a grievance over his discharge?
- (4) At the meeting, did Supervisor Chad Miller, Ms. Miller's son, threaten McCallum with loss of overtime after McCallum objected to any cuts in wages or other benefits mandated by the collective-bargaining agreement?

Witnesses and Credibility

McCallum and Union Business Agent and Secretary-Treasurer Gregory Elsbree testified on behalf of the General Counsel. Ms. Miller, Miller, and driver Frederick Crownhart testified for the Respondent.

Credibility resolution is the key to deciding this case. For all of the following reasons, I credit the testimony of McCallum and Elsbree where it diverged from that of the Millers and Crownhart. McCallum did not appear to hesitate or equivocate when answering questions, both on direct and on cross-examination, and his testimony on direct and on cross-

² The April 11 discharge is not per se before me but is integrally connected to the April 22 termination.

examination was quite consistent. In this regard, he did not appear to attempt to minimize the effects of the multiple sclerosis with which he was diagnosed in May 2010. Moreover, Elsbree substantially corroborated him.

McCallum and Elsbree may have exaggerated Miller's use of profanity in their respective conversations with him, and I believe that McCallum did get more upset at the April 11 meeting than his testimony portrayed. However, any such exaggeration paled in comparison to the unbelievable depiction of McCallum's conduct at the April 11 meeting as described by the Millers, particularly Ms. Miller. I will specify the portions of their testimony that rang false, starting with that meeting.

Thus, Ms. Miller testified that after she suggested that drivers might take a pay cut as one of the options for helping the Company to stay financially afloat, McCallum "started yelling and screaming and swearing about his insurance. . . ."³ According to her account, after she replied that she was not talking about insurance, he kept repeating, "I'm not doing anything for this company. I don't care what happens to this company," and said, "I don't give a f—k about anybody but myself."⁴ Miller's account was similar but less detailed. I find their testimony incredulous to the point of ludicrous. I cannot believe that McCallum would have unleashed a tirade in response to her request that the drivers consider a cut in pay. If McCallum was concerned with his health insurance benefits, it makes no sense that he would have stated that he did not care what happened to the Company. The imputed statement, "I don't give a f—k about anybody but myself" sounds quite farfetched, particularly when uttered at a group meeting attended by coworkers with whom McCallum had worked for years. If this was the first time in 11 years as an employee that McCallum engaged in such egregious behavior, it would have been totally out of character; if he had sworn to her to such an extent before, it is inconceivable that she would not have fired him earlier. For reasons to be stated, driver Crownhart was not a fully credible witness. Nevertheless, nowhere in his testimony did he indicate that McCallum used any profanities, and he thus failed to corroborate the Millers' testimony that McCallum did so.

Similarly incredible was Ms. Miller's description of McCallum's conduct at the grievance hearing on April 22. She testified that he started off by "yelling" how bad a company the Respondent was, accused her of trying to take away her insurance, and "kept degrading" the Company.⁵ This undoubtedly overblown depiction further undermines my faith in the reliability of her testimony.

Both Millers testified that McCallum looked markedly ill and/or infirm when they observed him at work in 2012. Thus, Ms. Miller testified that when she observed him on a couple of occasions in the summer of 2012, "His face was very flushed. He was pulling his left leg. He had trouble moving. He was slow, very slow. He—He had physical difficulties."⁶ However, when she was asked if she ever discussed those difficulties with him, she answered, "No. I didn't want to say anything to

³ Tr. 245.

⁴ Tr. 359–360.

⁵ Tr. 363–364.

⁶ Tr. 352.

him,”⁷ without offering an explanation. Miller testified that in 2012, he frequently observed McCallum having difficulty getting in and out of the truck cab and that this problem worsened through time.

Their testimony is wholly undermined by their allowing him to continue to work throughout 2012 and then calling him back to work in 2013. In this respect, there is no evidence that either of them ever expressed a concern, or even spoke to him, about his physical condition impacting his work performance, even though Ms. Miller testified that she had many conversations with him about the treatments that he was receiving.

Ms. Miller testified that on April 11, after McCallum had been discharged and was being escorted out, she observed his truck poorly maintained, and that this would have been an additional reason for firing him. There is not a scintilla of evidence in the record that McCallum was ever reprimanded for not properly maintaining his truck in the 11 years that he was an employee. That she happened to notice such dereliction immediately after his discharge is remarkably coincidental—and wholly unbelievable. In this respect, she testified that, at the April 22 grievance hearing, she produced pictures of his alleged poor maintenance of his truck; however, no such pictures were submitted to me.

Ms. Miller claimed that McCallum had previously been directed to provide medical long forms on a regular basis, but his personnel file contained only one long form prior to 2013, for 2010. Moreover, the Respondent provided no explanation of why, prior to April 2013, it did not direct McCallum to provide an updated long form after the 2010 form expired on July 10, 2012. In this regard, the Respondent failed to call the clerical employee who maintains those records, Cathy Miller, who is Miller’s wife and Ms. Miller’s daughter-in-law. The complaint does not allege Cathy Miller as an agent, and I need not decide whether she was, because of her familial connections, an “agent.” Suffice to say, the unexplained inconsistency between these facts and Ms. Miller’s testimony further diminishes Ms. Miller’s overall credibility.

I will not detail every instance where Ms. Miller’s initial testimony differed from what was contained in her affidavit to the Region. I will cite but one example here. Ms. Miller testified, contrary to McCallum and Elsbree, that McCallum brought up his health insurance at the April 22 grievance meeting. However, it was later stipulated that in her affidavit, she said nothing about McCallum mentioning insurance.

Finally, the marked contrast in the degree of detail she provided about what was said at the April 11 meeting also weighs against her believability. Thus, she was quite detailed in describing how she opened the meeting, and her interaction with McCallum. It is uncontroverted that after that, Miller interjected, and a heated exchange ensued between him and McCallum. However, when I asked Ms. Miller what they said to each other, she conveniently professed not to recall *any* specifics. Some extraordinary circumstance might explain this dichotomy in her memory, but if one exists, it is not in the record. Accordingly, I draw an adverse inference from such contrast.

⁷ Ibid.

As noted earlier, Crownhart painted a far less egregious picture of McCallum’s conduct at the April 11 meeting than did the Millers, but he was not a fully credible witness. Thus, he testified that he listened to what Ms. Miller and McCallum said but then totally tuned out the subsequent conversation between McCallum and Miller and, therefore, could recall nothing of what they said to each other. The normal reaction would have been to listen more carefully to a heated exchange, not less so, and I am convinced that Crownhart’s professed complete lack of recall, as was the case with Ms. Miller, was not bona fide.

In making my credibility assessments, I have not had to rely on my observations of witness’ demeanor, but I am cognizant of the following. Ms. Miller was melodramatic during portions of her testimony, and her attempt to convince me that McCallum greatly upset her by his alleged profane outburst at the April 11 meeting was obvious—and unpersuasive. Both by his testimony and the reticence with which he answered questions, Crownhart struck me as a reluctant witness who was not fully forthcoming. Miller seemed uncomfortable and somewhat impatient, leading me to suspect that he might be prone to losing his temper and that he might have over reacted to what McCallum said to Ms. Miller at the meeting.

Subpoena Issues and Ruling

Both the General Counsel and the Union requested issuance of pretrial subpoena duces tecum.⁸ At no time did the Respondent make a motion to quash or clarify any portion of either. When the Respondent’s counsel attempted to show, through witness Crownhart, that a practice existed before 2013 that employees submit both medical cards and long forms, the General Counsel and the Union objected on the basis of subpoena noncompliance.

Paragraph 3 of both subpoenas requested, “Any and all documents showing communications from Respondent to Respondent’s employees regarding providing medical documentation for the period January 1, 2010, to the present.” The Respondent furnished medical documents that employees submitted during the calendar year 2013, but nothing that they submitted earlier. When I asked why pre-2013 documents were not provided, Mr. Block replied that “[i]t was just a miscommunication” and later explained, “[W]e interpreted No. 3 as any kind of shop rules . . . or regulations. . . . We admit there are no such written rules,” but he then averred that the Respondent had evidence of a pattern and practice.⁹ Since there were no rules either before or during 2013, this explanation fails to satisfactorily explain why only 2013 documents were submitted. Mr. Block’s further explanation that the 2013 documents were voluntarily submitted “[i]n an abundance of caution,”¹⁰ even though he determined that they were not required by the subpoena, flies in the face of real-world litigation and is totally unconvincing.

Paragraph 10 of both subpoenas called for production of “Any and all lists showing information regarding employee medical cards for the time period January 1, 2010 to the present.”

⁸ GC Exh. 17; CP Exh. 1.

⁹ Tr. 273, 276–277.

¹⁰ Tr. 280.

In response, the Respondent furnished medical cards and certain medical test results, both pre-2013 and 2013, only for McCallum but not for any other employees. Again, both the General Counsel and the Union objected to the Respondent's introduction of evidence pertaining to other employees, on the basis of subpoena noncompliance. Mr. Block responded that the Respondent maintains no lists and that neither subpoena asked the Respondent to provide all medical cards and long forms back to 2010. However, if that had been the Respondent's interpretation of paragraph 10, then it logically would have provided no documents in response. Yet, it produced McCallum's records. Significantly, Ms. Miller's affidavit contained a statement that Cathy Miller "maintains a sheet that says when somebody's card is expired and when they need a new one."¹¹ The Respondent offered no such lists at trial, or an explanation for why not. Taking these factors into account, I found the Respondent's explanation unpersuasive.

Based on the above, I granted the General Counsel's and Union's motions to bar the Respondent from presenting evidence of a purported practice prior to 2013 of requiring employees to submit both cards and long forms. I determined that this was an appropriate sanction for the Respondent's failure to fully produce requested documents. See *Perdue Farms*, 323 NLRB 345, 348 (1997), *affd.* in relevant part 144 F.3d 830, 833-834 (D.C. Cir. 1998), and *Packaging Techniques, Inc.*, 317 NLRB 1252, 1253 (1995). To have done otherwise would have subverted the purpose of pretrial subpoenas duces tecum by potentially jeopardizing the General Counsel's ability to present his case in a timely and orderly fashion, and risked undue prolongation of the hearing.

I must note that any claim by the Respondent that it had a "policy" prior to 2013, of requiring drivers to have on file current long forms, is refuted by the undisputed fact that McCallum's long form expired on July 10, 2012, yet the Respondent allowed him to continue to drive through the remainder of 2012, and even called him back to work in April 2013, without his submission of an updated long form.

Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, stipulations, and the thoughtful posttrial briefs that the General Counsel, the Union, and the Respondent filed, I find the following.

The Respondent's Business Operation

The Respondent, an Illinois corporation, with a principal place of business located in Plainfield, Illinois, has been engaged in the business of hauling materials by truck to and from construction sites. The Respondent has admitted Board jurisdiction as the complaint alleges, and I so find.

Marlene Miller, the Respondent's president and owner, has operated the business for about 23 years. As of April 11, it employed 11 drivers and 1 office employee (Cathy Miller, Chad Miller's wife). At all times material, Chad Miller has been the dispatcher and a supervisor. For the past 6 or so years, Respondent's sole customer has been D. Construction, a road

construction company. Ms. Miller operates out of her home in Plainfield, but the drivers work out of the Respondent's shop situated at the D. Construction site in Rockdale, Illinois. The drivers work seasonally: In spring, summer, and fall, and in early winter, depending on weather and customer needs. The operation shuts down when the weather is too cold or rainy.

At all times material, the Respondent has agreed to be bound by the collective-bargaining agreement between the Contractors Association of Will and Grundy County (the Association) and the Union. Thereby, the Respondent has agreed to recognize the Union as the exclusive bargaining representative of a unit consisting of all of the Respondent's full-time and regular part-time drivers who perform truck hauling work encompassed by article 1.4 of the collective-bargaining agreement. The most recent agreement, effective June 1, 2010, through May 31, 2012,¹² was extended. The Respondent is not an Association member.

The agreement contains no specific provisions concerning medical documentation that drivers need to submit. As far as termination, article 16.1(a) provides that no employee be discharged for any activity not interfering with proper work performance, and article 16.2 provides that an employee not be discharged without just cause. There is no progressive discipline language.

Article 6 is the grievance and arbitration provision. It provides, *inter alia*, the following: (1) a dispute that cannot be resolved between the employer and the Union shall be reduced to a written grievance; (2) if the employer is not a member of the association, the grievance shall be submitted to a joint grievance committee or panel consisting of three representatives of the employer and three representatives of the Union; and (3) a majority decision of the panel is final and binding on all parties.

McCallum's Employment Prior to April 11

The Respondent employed McCallum from April 2002 until April 11, or for approximately 11 years. He hauled construction material and debris to and from jobsites. His supervisor was dispatcher Miller. The facility never had a union steward during his employment.

In May 2010, McCallum's neurologist informed him that he had a diagnosis of multiple sclerosis (MS). He immediately informed Miller of this. Miller responded that if he needed to go to doctor's appointments, just to let him know. Thereafter, when McCallum told Miller that he had to go to a doctor's appointment or for an intravenous drug injection every 4 weeks, Miller got another driver to take his place. On the days that McCallum received the injection, he was off work for the entire day.

McCallum usually drove the same company truck every day. All of the Company's trailers were semidump trailers. On several occasions, from around May 2010 to late 2012, Miller called McCallum on the Nextel two-way radio and asked him to pull D. Construction's flatbed trailer. Each time, McCallum said that he could not get on top of the flatbed because it was stacked high with material, and the instability due to his foot could cause him to fall and get injured. Miller found someone

¹¹ *Ibid* (representation of the General Counsel, which the Respondent did not dispute).

¹² GC Exh. 2.

else to go on the flatbed, or had McCallum move an empty flatbed. Because cold weather affected his MS, McCallum requested that he be called back as late as possible, and Miller obliged him. He returned to work in 2013 on about April 1.

From 2010 to shortly before April 11, McCallum had approximately 10–15 conversations with Ms. Miller about his condition. In these casual conversations, she asked him his medications, how he felt, and his potential future treatments. Ms. Miller did not deny his testimony, which I credit, that in their last conversation, he told her that his medications were stable, the MRIs showed no changes, and his MS was stable. In at least some of the conversations, Ms. Miller talked about the medications that she herself was taking. She never said anything in any of the conversations about his ability to perform work.

I note that McCallum and Miller testified very similarly about their conversations regarding the flatbed and that McCallum and Ms. Miller's versions of their numerous conversations were also quite compatible. This was not so in regard to whether his physical condition noticeably declined as time went on.

McCallum testified that his physical condition did not change between 2010 and 2013, that he walked the same during that period,¹³ and that he never told Miller that his getting in and out of trailers was becoming more difficult. Inasmuch as the Millers continued to allow him to work, brought him back in April, and never raised to him any concerns about his ability to perform his duties, I credit him over their testimony that he showed marked deterioration between 2010 and April.

McCallum's Submission of Medical Forms Before 2013

Pursuant to Department of Transportation (DOT) regulations or rules, drivers are required to have periodic physical exams for clearance to drive. Two forms are involved. The first is a medical examination certificate signed by the doctor (medical card); the second is a detailed medical examination report for commercial driver fitness determination (long form), filled out by both the doctor and the driver. The cards are generally good for 2 years, but the period may be shorter at the apparent discretion of the doctor.¹⁴

I credit the following testimony of McCallum, which Miller did not contest and which was consistent with the fact that McCallum's personnel file prior to his April termination contained only his long form for 2010.

Throughout his employment, McCallum submitted the medical cards, which were valid for 2 years until after he was diagnosed with MS; for 6 months thereafter. When he first started in 2002, he asked Miller if he needed to submit the long form, and Miller replied no. He offered the long form again in 2004 and 2006, but they were not taken and placed in his file. In

¹³ Since April 2, he has worn a WalkAide/electronic stimulator but testified without controversy that he did not use it at work and that Miller never saw him with it.

¹⁴ This was true with regard to McCallum, after he was diagnosed with MS. See also R. Exh. 5 at 12 (card for Patrick McDonald valid for 1 year, from May 9, 2013, to May 9, 2014).

2010, after his MS diagnosis, he voluntarily submitted his 2010 long form.

The April 11 Meeting

Prior to April 11, the last group meeting that Ms. Miller held with drivers occurred in approximately 2011 and concerned safety.¹⁵

Ms. Miller called and held a meeting at the shop on the late afternoon of April 11. All the drivers who worked that day were present, along with Miller.

The Millers, Crownhart, and McCallum testified to what was said at the meeting. McCallum's description was the most detailed, and because of issues I have with the others' credibility, I credit him over their accounts, with the exception of his testimony that he spoke in a normal tone. Based on the totality of evidence and circumstances, I am convinced that he was "pretty upset" and became loud at some point during the meeting, as Crownhart described.¹⁶ However, I do not find that he unleashed a stream of profanities or made outrageous statements, as the Millers have averred.

Ms. Miller began by explaining that the Company was having economic problems and needed employees' help to reduce costs to allow the Company to stay in business. She stated that drivers could either take a pay cut or come up with other alternatives that she could not discuss. When drivers asked how much the pay cut would be, she responded that she did not know, but maybe a dollar. She did not specifically mention health insurance, but McCallum testified that he assumed that was one of the alternatives to which she was referring.

When she finished, the only person to respond was McCallum, who was rather upset and stated that he would not take a pay cut or opt out of his insurance. In response, Miller called him "a f—king jackoff" and "stupid," and stated that the new health plan would be much better than the current health plan.¹⁷ He continued to swear at McCallum, although perhaps not to the full extent that McCallum painted. He called McCallum "a real piece of s—t" and said that McCallum "would never see overtime again."¹⁸ McCallum told Miller not to speak to him in such a manner. It is undisputed that Ms. Miller then told McCallum that he was fired for insubordination.

McCallum responded that all he had done was ask Miller not to speak to him so and that he was going to the Union to file a grievance for harassment. Ms. Miller replied, "Go file a grievance. You'll get nowhere."¹⁹ McCallum responded that he would find out for himself if it would go nowhere, and she repeated her statement.

McCallum asked for a letter explaining his discharge. Although Ms. Miller said that she would give it to him, he never

¹⁵ Uncontroverted testimony of Miller at Tr. 314.

¹⁶ Tr. 289–290.

¹⁷ Tr. 36.

¹⁸ *Ibid.* McCallum's testimony was un rebutted—Miller did not specifically deny saying this, and Ms. Miller and Crownhart professed total lack of recall.

¹⁹ *Ibid.* Ms. Miller did not specifically deny making such a statement.

received one. She escorted him out to his truck to get his personal items, and he left.

McCallum's Grievances and the Committee Decisions
on April 22

On this record, the only grievance that has ever been filed, other than McCallum's, was one filed about 8 years ago by a driver discharged for turning over a truck.²⁰ Prior to April, Ms. Miller had only one or two phone conversations with Elsbree, and no face-to-face contact, in the 6 years that he was business agent.

Immediately after his discharge, McCallum went to the union hall on April 11 and met with Elsbree. As per the contractual grievance procedure, Elsbree called Miller as McCallum's direct supervisor. Elsbree described what McCallum had related and asked for the Company's side. Miller used expletives in referring to McCallum and said that he was fired for insubordination.²¹ Elsbree stated that he wanted to talk to Ms. Miller about the termination, and Miller replied that there was nothing to talk about because it was going nowhere, and they were not going to bring McCallum back to work. Elsbree told him that the next step was to reduce the grievance to writing and file it with the Contractors' Association. Miller repeated that it would go nowhere.

On April 15, the Union filed three grievances on McCallum's behalf:

- (1) That McCallum be paid 2 hours' pay for reporting on April 8, after the Respondent failed to notify him at least 2 hours before reporting time that there would be no work that day (article 8—wages).²²
- (2) That McCallum be reinstated because he was discharged without just cause (articles 8 and 16.2).²³
- (3) That the employee and the Union will not be asked to make any written or verbal agreement which may conflict with this agreement, as per article 23.1.²⁴

The grievances were referred to the Association, and a joint committee heard them at around noon on April 22 at the Association's offices. Elsbree, McCallum, and Ms. Miller were in attendance. I credit Elsbree's and McCallum's account over Ms. Miller's unbelievable testimony, where they disagreed, and find the following.

The committee members asked McCallum and Ms. Miller questions about the events surrounding McCallum's termination. After the committee deliberated, one of its members notified Ms. Miller of their decision that McCallum be reinstated with backpay. Before leaving, she gave McCallum his Nextel radio back. She understood that he was returning to work the following day.

²⁰ Testimony of Ms. Miller at Tr. 249–250.

²¹ Miller conceded that his tone with Elsbree was “elevated” and that he was “pretty aggravated” at the time. Tr. 322.

²² GC Exh. 3.

²³ GC Exh. 4.

²⁴ GC Exh. 5.

Later in the day, the Association, by email and regular mail, notified the parties that the April 8 pay and reinstatement grievances were decided in McCallum's favor (the third grievance was not), and it ordered that McCallum be reinstated, with backpay.²⁵ He was later paid a little over \$800 but never reinstated.

Events after the Committee Decision

Ms. Miller testified that after she left the grievance hearing, “I immediately ran home and asked Cathy [Miller] to pull [McCallum's] file and asked why his long form wasn't there.”²⁶ Later that day, Ms. Miller left a voice mail for McCallum, stating that he needed to furnish a copy of the long form for his last physical and that Miller would call him later with his start time. That evening, Miller called him with a start time and repeated that he had to submit the long form before he could return to work.

The next morning, McCallum delivered a long form, completed by Dr. Hassain Syed and dated March 13,²⁷ by placing it in the bin on Miller's desk at the shop. Dr. Syed stated that McCallum met the requisite standards to drive but required periodic monitoring due to his MS. Therefore, the qualification was only for 6 months, or until September 13. In the health history portion, McCallum checked “no” to all of the health history boxes. The doctor, on page 3, stated, “Pt has multiple sclerosis (indiscernible) stable condition. Minimal left food drop after exertion.”

It is unclear from Ms. Miller's testimony whether she decided that McCallum needed to obtain a second opinion sua sponte or after that was recommended by a representative of the Federal Motor Carrier Safety Administration (FMCSA). Thus, she testified that she decided to ask McCallum to get a second opinion, due to “the culmination of his appearance, . . . the culmination of his inability to do the jobs, and not being totally forthcoming on his long form”²⁸

On the other hand, she also testified that she called the FMCSA and said that she had a problem with a driver's long form. The FMCSA representative told her that the DOT would not require that doctors be FMCSA-approved until 2014 but recommended that she go to the FMCSA website and obtain an FMCSA-approved doctor to render a second opinion. When I asked her what the problem was with the long form that McCallum submitted she replied that he had not truthfully answered the questions about his medical history, in particular “neurological diseases,” rendering his certification false and invalid, and negating the medical card.

In any event, Ms. Miller found two certified doctors in the area, and she selected Dr. Shakir Moiduddin because he was closer to where McCallum resided. She paid for McCallum's visit.

On April 23, Miller initiated a series of texts that ended on May 9.²⁹ The first text stated that McCallum needed to go to a

²⁵ GC Exh. 15.

²⁶ Tr. 368.

²⁷ GC Exh. 7.

²⁸ Tr. 368.

²⁹ GC Exh. 13.

motor carrier doctor, Dr. Moiduddin, at 3 p.m. “to be given the okay to work.”³⁰

The next day, McCallum saw Dr. Moiduddin, who performed a more invasive physical exam than any that McCallum had before. Instead of providing McCallum a card and long form, Dr. Moiduddin issued a letter stating that McCallum needed a note from a neurologist stating his prognosis, medication, and compliance, and whether he was safe to drive trucks.³¹

By letter of April 25, Dr. Roumen Balabanov, McCallum’s neurologist, provided such by furnishing the results of his January 28 evaluation of McCallum.³² He stated in relevant part:

His MS was in remission at the time, but his prognosis is unknown since MS exacerbation is unpredictable. He has been receiving Tysabri intravenous therapy every 5 weeks at our clinic to manage his MS, and his medication adherence is very good. He is cleared to drive for CDL.

Apparently, Dr. Moiduddin had further communications with Dr. Balabanov, because the latter prepared two additional letters.³³ The first, dated April 29, stated that he could not clear whether McCallum could drive or not; the second, dated May 7, stated that McCallum’s MS was stable and that he was in remission clinically and by MS imaging; that his prescribed treatment was Tysabri 300 mg intravenously given monthly; and that McCallum was 100-percent compliant with his treatment plan. Dr. Balabanov further stated that although the prognosis was unpredictable, McCallum’s compliance with his treatment plan gave him the best chance of his MS remaining stable. He explained that his evaluation was a neurological exam, which did not give him the ability to comment on McCallum’s ability to safely drive a truck. He clarified that his earlier statement that McCallum was cleared to drive for CDL meant that McCallum might undergo testing to further evaluate abilities to drive safely.

After the May 7 letter from Dr. Balabanov was faxed to Dr. Moiduddin’s office, McCallum called the latter and was told that Dr. Moiduddin would not clear him.

Miller had indicated in previous texts that McCallum could not return to work until he was cleared by a certified FMCSA doctor. In light of Dr. Moiduddin’s refusal to issue him a clearance, McCallum went to the FMCSA website, where he obtained the name of the other FMCSA-certified physician in the area, James Skomurski. Dr. Skomurski administered a physical examination on May 9 and gave McCallum a card and a long form, both expiring on November 9.³⁴ On the long form, McCallum checked that he had MS as a muscular disease, and he detailed his medications. Dr. Skomurski noted a limp and left foot drop (and made one other notation, which is illegible).

On May 9, McCallum sent texts to both Ms. Miller and Miller, stating that he had received that day a DOT medical card from Dr. Skomurski, a FMCSA-registered doctor on the

FMCSA website for certified medical examiners.³⁵ The Millers never responded in any way.

The Respondent provided no evidence that it has ever required other drivers to get cards and long forms only from FMCSA-certified doctors, and Ms. Miller took no steps to determine if the doctors who cleared other drivers in or into 2013 (R. Exh. 5) were in fact certified. I note that Drs. Moiduddin and Skomurski are the only two certified doctors in the area, and they were not the ones who examined the other drivers.

Conclusions

The General Counsel alleges that the Respondent effectively terminated McCallum in violation of Section 8(a)(3) and (1) of the Act, because he objected to cuts in benefits at the April 11 meeting, and filed grievances on April 15, including one pertaining to his April 11 discharge.

The framework for analyzing alleged violations of Section 8(a)(3) is *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee’s protected conduct motivated an employer’s adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

Under the *Wright Line* framework, if the General Counsel makes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer’s action. Once this is established, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in absence of the protected activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399, 403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (per curiam). To meet this burden, “an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.” *Serrano Painting*, 332 NLRB 1363, 1366 (2000), citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

If the employer’s proffered defenses are found to be a pretext, i.e., the reasons given for the employer’s actions are either false or not, in fact, relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. On the other hand, further analysis is required if the defense is one of “dual motivation,” that is, the employer defends that, even if an invalid reason might have played some part in the employer’s motivation, the employer would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

³⁰ Id. at 1.

³¹ GC Exh. 8.

³² GC Exh. 9.

³³ GC Exhs. 10, 11.

³⁴ GC Exh. 12.

³⁵ GC Exh. 13 at 3; GC Exh. 14.

As to the first prong, McCallum's activities clearly came under the protection of the Act. Although McCallum's objection to any cuts in benefits was done as an individual, this occurred at a group meeting called by the Employer, and an inference may be made that his object was to initiate or induce group action; it therefore amounted to protected concerted activity. See *Cibao Meat Products*, 338 NLRB 934, 934 (2003); *Whittaker Corp.*, 289 NLRB 933, 934 (1988); *Enterprise Products*, 264 NLRB 946, 949 (1982) (by calling the meeting and soliciting employees' responses, the employer "lumped [them] together and viewed [them] as a group," citing *Frank Briscoe, Inc. v. NLRB*, 637 F.2d 946, 949 (3d Cir. 1981)).

Similarly, his filing of grievances, including the one over his April 11 discharge, constituted protected concerted activity. *NLRB v. City Disposal Systems*, 465 U.S. 822, 836 (1984) ("No one doubts that the processing of a grievance [according to the procedures in a collective-bargaining agreement] is concerted activity within the meaning of § 7"); *LB & B Associates, Inc.*, 340 NLRB 214, 216 (2003).

The knowledge element is also clearly satisfied, inasmuch as the Millers were present at the April 11 meeting and knew of McCallum's grievances.

As stated earlier, animus can be either direct or express, or inferred. With respect to McCallum's objections to any cuts in benefits, Miller responded by swearing at him and threatening him with deprivation of overtime. When McCallum protested Miller's language, Ms. Miller stated that he was fired for insubordination. Thus, the Millers demonstrated express animus toward McCallum for his protected activity.

Turning to the grievances that McCallum filed, Ms. Miller told him at the April 11 meeting that if he filed a grievance over his discharge, it would go nowhere. This aside, her actions after the April 22 decisions in McCallum's favor, and other evidence of record, provide ample inferential evidence of animus. It is noteworthy that grievance filings at the facility are a rarity—there is evidence of only one other grievance ever having been filed at any time, in approximately 2006.

The single most significant factor inferring animus is Ms. Miller's admission that, after she learned that the grievance committee had ruled in McCallum's favor and ordered her to reinstate him, she "immediately ran home," had McCallum's medical files pulled, and discovered that he did not have a current long form on file (even though the previous one had expired in July 2012, or approximately 9 months earlier).

Animus can also be inferred from the following.

Even according to the Millers' testimony, they were very sympathetic and understanding of McCallum's medical issues prior to April. Indeed, it is undisputed that Miller consistently accommodated McCallum's limitations prior to 2013 in terms of assignments, and never raised concerns about his ability to satisfactorily perform his job. Ms. Miller's abrupt and drastic change in attitude in April cannot be explained other than as reflection of animus against him for objecting at the April 11 meeting to cuts in contractual benefits and for successfully pursuing a grievance on his discharge.

McCallum was never before directed to submit a long form, and Miller had in fact previously said that their submission was unnecessary.

Ms. Miller's three asserted reasons for why she directed him to get a second opinion, even though he submitted a current card and current long form from Dr. Syed, rang false and smacked of pretext. The first was his "appearance," and the second, his "inability to do the job." However, neither she nor Miller ever talked to him about either, they brought him back to work in April, and neither of these became a problem until after McCallum engaged in protected activity. The third reason was that McCallum was "not being totally forthcoming" on the long form he submitted in April. She testified that she based this conclusion on his checking "no" on all the boxes in the health history section, even though he had MS, presumably engaging in some kind of fraudulent concealment. Such a contention is laughable. Dr. Syed, the examining physician, referenced McCallum's MS in his portion of the long form, and McCallum had notified the Millers that he had the condition almost immediately after it was diagnosed in May 2010. The flimsiness of this purported reason has to be viewed as evidence of pretext.

At the time in question, DOT did not require that examining physicians be FMSCA certified, nothing in the record establishes that any other drivers were required to see an FMSCA-certified doctor, and Ms. Miller admittedly never checked their records to determine such. Indeed, there are only two such certified physicians in the area (Drs. Moiduddin and Skomurski), and none of the drivers whose medical records are contained in Respondent's Exhibit 8 have cards or long forms from them. Thus, the Respondent treated McCallum arbitrarily and disparately, further reflections of inferred animus.

After Dr. Moiduddin refused to give McCallum a clearance, he went to Dr. Skomurski, the other area FMSCA-certified doctor, who did issue him the card and long form. When McCallum notified the Millers of this, they failed to respond, and still did not allow him to return to work.

In sum, the Respondent immediately focused on McCallum's MS as an ideal subterfuge to avoid its obligation to reinstate him as per the grievance panel's directive. Despite McCallum's diligent efforts to provide a medical clearance, the Respondent continued to refuse to reemploy him, even after he obtained the card and long form from an FMSCA-certified physician.

Based on the above, I conclude that both direct and inferential evidence establish animus against McCallum for his protected activities.

Turning to the last prong of *Wright Line*, the Respondent unquestionably discharged McCallum on April 11 because he objected to cuts in driver benefits. This, along with the circumstantial evidence of animus that I have described, lead to the conclusion that the Respondent effectively terminated him on and after April 22 because of his protected activities of objecting to cuts in contractual benefits and of filing grievances, including one pertaining to his April 11 discharge.

I conclude, therefore, that the General Counsel has met his burden of establishing a prima facie case that the Respondent's effective termination of McCallum on and after April 22 was because he engaged in protected activities. Since I further conclude that the Respondent's reasons for effectively terminating McCallum on and after April 22 were transparently pretextual, I need not perform the second part of *Wright Line* analysis.

Accordingly, I conclude that the Respondent's effective termination of McCallum on and after April 22, for his conduct on April 11 and for filing grievances, violated Section 8(a)(3) and (1) of the Act.³⁶

Independent 8(a)(1) Violations

I conclude that, at the April 11 meeting, the Respondent committed the following violations of Section 8(a)(1) of the Act:

- (1) Ms. Miller, without notifying the Union or giving it an opportunity to attend, held a meeting with drivers in which she solicited them to agree to a cut in wages or other benefits provided in the collective-bargaining agreement, in order to keep the Company in business. She thereby bypassed the Union and dealt directly with employees about a mandatory subject of bargaining. See *Mercy Health Partners*, 358 NLRB No. 69, slip op. at 1 (2012).
- (2) After McCallum stated that he would be filing a grievance over his discharge, Ms. Miller stated that would be futile. See *Grane Trucking Co.*, 241 NLRB 133 (1979).
- (3) Miller threatened McCallum with loss of overtime when he objected to any cuts in wages or other benefits mandated under the collective-bargaining agreement.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act: Effectively terminated Edward McCallum on and after April 22, 2013.

4. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act.

(a) Bypassed the Union and dealt directly with unit employees concerning their wages or other benefits.

(b) Told employees that filing a grievance would be futile.

(c) Threatened employees with loss of overtime when they objected to any cuts in their wages or other benefits mandated by the collective-bargaining agreement.

REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices, I will order it to cease and desist and to take certain affirmative action designed to effectuate the Act's policies.

Specifically, the Respondent shall make Edward McCallum whole for any losses, earnings, and other benefits that he suf-

fered as a result of the unlawful discipline imposed on him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (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).

Further, the Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and, if it becomes applicable, shall compensate McCallum for any adverse tax consequences of receiving a lump-sum backpay award. *Latino Express, Inc.*, 359 NLRB 518 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁷

ORDER

The Respondent, M.D. Miller Trucking & Topsoil, Inc., Plainfield, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating or otherwise discriminating against employees for objecting to cuts in wages or other benefits mandated by the collective-bargaining agreement with General Teamsters Local Union No. 179, affiliated with International Brotherhood of Teamsters (the Union), for filing grievances pursuant to the provisions of that agreement, or for otherwise engaging in activities on behalf of the Union.

(b) Bypassing the Union and dealing directly with employees concerning their wages or other benefits, or any other mandatory subjects of bargaining.

(c) Telling employees that filing grievances would be futile.

(d) Threatening employees with loss of overtime or other benefits when they object to cuts in pay or other benefits mandated by the collective-bargaining agreement.

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

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

(a) Within 14 days from the date of the Board's Order, offer Edward McCallum 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.

(b) Make Edward McCallum 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 remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful termination of Edward McCallum, and within 3 days thereafter notify him in writing that this has been done and that the termination will not be used against him in any way.

³⁶ In *Farmbest, Inc.*, 154 NLRB 1421, 1422 (1965), enf. denied on point 370 F.2d 1015 (8th Cir. 1967), the Board agreed with the ALJ that the discharge of an employee for insisting upon conformity to the provisions of the collective-bargaining agreement violated both Sec. 8(a)(3) and (1).

³⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

(e) Within 14 days after service by the Region, post at its facility in Rockdale, Illinois, copies of the attached notice marked "Appendix."³⁸ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in con-

³⁸ 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."

spicuous 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 set, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 11, 2013.

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