

Print Fulfillment Services LLC and Graphic Communications Conference of the International Brotherhood of Teamsters District Council 3, Louisville Local, 619-M. Cases 09–CA–068069, 09–CA–068849, 09–CA–069188, 09–CA–070706, and 09–CA–072457

December 16, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA,
AND SCHIFFER

On June 27, 2012, Administrative Law Judge Paul Buxbaum 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. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs, and has decided to adopt 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.

I. BACKGROUND

The Respondent is a full-service trade printer providing web-to-print services at its facility in West Louisville, Kentucky. In June 2011,² press operator Jonathan Bishop contacted the Union seeking representation of the Respondent's press department employees. The Union began an organizing campaign and on August 28 filed a petition for an election, which was conducted on October 28. The present case concerns the Respondent's alleged unfair labor practices both before and after that election, which the Union won.

The judge found, and we agree, that the Respondent committed several violations of Section 8(a)(3) and (1) of the Act before the October 28 representation election. We also adopt his findings that the Respondent committed additional violations of Section 8(a)(1), (3), and (5)

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

No exceptions were filed to the judge's finding that the Respondent lawfully disciplined employee Travis Dykstra for sending an "inappropriate" text message to another employee on December 14, 2011.

² All subsequent dates are in 2011, unless otherwise stated.

after the election.³ Below, we further explain the basis for certain of those violations. In addition, we find merit to the General Counsel's arguments that the judge erroneously dismissed additional 8(a)(5) and (3) allegations. Last, we modify two aspects of the judge's recommended remedy: contrary to the judge, we shall not order reinstatement and full backpay for four laid-off employees, but we shall order a reading of the notice to employees.

II. DISCUSSION

1. The judge found that Production Manager William Morrison unlawfully threatened employee Richard Woosley with unspecified reprisals by telling Woosley that he was "disappointed" by Woosley's support for the Union. We agree with this finding for the reasons that follow.

About 2 weeks before the October 28 election, the Union distributed a campaign flyer containing photographs and pronoun statements from seven press room employees, including Woosley, who were described as the Union's "solidarity committee." Either the day of or the day before the election, Morrison approached Woosley with a copy of the flyer, pointed at Woosley's picture, and said, "I've been debating whether I'm not—whether I'm going to say anything about this, but you know me, I say what I feel. I'm disappointed." In Woosley's own words (credited by the judge), he "really didn't know what to say" in response, and "I just said, 'for all you know, Bill, I didn't authorize that, and how do you know?'" According to Woosley's credited testimony, Morrison then "turned around kind of red-faced and walked off." Before seeing the flyer, Morrison had "felt strongly" that Woosley was not a "promoter of the Union."

The judge correctly found that a reasonable employee would interpret Morrison's remark as threatening the possibility of reprisals as a result of Morrison's disappointment in Woosley's support for the Union. We find in the circumstances presented here that Morrison's statements and actions reasonably tended to convey that he was not merely disappointed in Woosley, but felt strongly enough to take action against Woosley. To

³ Among those postelection violations, the judge found that the Respondent violated Sec. 8(a)(1) and (3) of the Act by announcing on December 9 that it would lay off employee Jonathan Bishop, who had recently been elected a union steward. We agree with the judge, for the reasons he gives, that this announcement violated Sec. 8(a)(1). We find it unnecessary, however, to pass on his finding that the announcement also violated Sec. 8(a)(3). The Respondent later informed the Union that Bishop's designation for layoff was a mistake, and in fact Bishop was not laid off. In those circumstances, the appropriate remedy for the additional 8(a)(3) finding would not differ materially from the remedy for the 8(a)(1) violation: a cease-and-desist order, expungement of the designation from Bishop's record, and a notice-posting provision.

begin, Morrison suggested that he was about to say something better left unsaid (“I’ve been debating . . . whether I’m going to say anything. . .”). Next, he indicated that his feelings were strong enough to overcome his hesitation (“I say what I feel.”). He then expressed that he was “disappointed” in Woosley. When Woosley attempted to deflect Morrison’s “disappointment” by suggesting that the flyer’s depiction of Woosley may have been unauthorized, Morrison did not continue the conversation, which might have mitigated the coercive tendency of his statement. Instead, he just turned and walk away “red-faced”—apparently confirming his strong feelings about the matter and demonstrating that he did not wish to hear from Woosley further. In those circumstances, we find that a reasonable employee in Woosley’s place would fear that his supervisor’s stated “disappointment” could manifest itself in subsequent reprisals.⁴

2. The judge also found that Quality Control Manager Scott Percy unlawfully blamed the Union for the Respondent’s asserted inability to give employee Travis Dykstra a raise. Again, we agree with the judge. On November 3, less than a week after the election, Percy informed Dykstra, a press operator on the second shift, that the Respondent was reassigning him to the third shift.⁵ Later the same day, Dykstra complained to Production Manager Morrison and Percy that this reassignment would impede his efforts to find a second job,

⁴ See *Sea Breeze Health Care Center*, 331 NLRB 1131, 1132 (2000) (supervisor’s statement that he was “highly disappointed” that employee supported the union without telling him was unlawful); *Sundance Construction Management*, 325 NLRB 1013, 1014 (1998) (supervisor’s statement that he was “disappointed” that employee was walking a picket line was unlawful); *Yerger Trucking*, 307 NLRB 567, 570 (1992) (supervisor’s saying that “in essence, he was upset and hurt” that employee had gone to union meeting was unlawful); *Downtown Toyota*, 276 NLRB 999, 1019 (1985) (manager’s statement that he “felt personally hurt” that salesmen had sought union representation without approaching him with their grievances was unlawful), *enfd.* 859 F.2d 924 (9th Cir. 1988).

This case is distinguishable from *Oklahoma Installation*, 309 NLRB 776 (1992), *enf. denied mem.* 27 F.3d 567 (6th Cir. 1994), a decision that, in light of the decisions just cited, seems to be outside the mainstream of Board precedent. In *Oklahoma Installation*, the Board disagreed with a judge’s finding that a supervisor violated Sec. 8(a)(1) when he “angrily” told two employees that he was “disappointed” by their union activities. The Board reasoned that the supervisor lawfully expressed only his “purely personal opinion,” given that he made no “direct reference to disloyalty.” As the Board’s rationale there suggests, the Board analyzed the supervisor’s statement purely in terms of whether the statement equated union activity with disloyalty to the employer. By contrast, here we find that, in all the circumstances, Morrison’s statements and actions reasonably tended to convey a threat of retaliation, regardless of whether his expression of “disappointment” equated Woosley’s union activity with disloyalty to the Respondent.

⁵ The General Counsel did not except to the judge’s finding that this reassignment was lawful.

and commented that he would not need a second job if he were given a pay raise. Percy replied that “[t]hey could not give [Dykstra] a raise because of the union proceedings.”⁶

The judge correctly found Percy’s unqualified statement unlawful. It is well established that an employer violates Section 8(a)(1) of the Act when it tells employees that it is withholding pay raises because of union activity.⁷ That is exactly what Percy did here.

In finding this violation, we observe that Percy’s response was unlawful whether, by “union proceedings,” he was referring to the representation proceeding, this unfair labor practice proceeding, or both.⁸ Moreover, we find no merit to the Respondent’s argument that Percy’s response merely conveyed the Respondent’s obligation to refrain from making unilateral changes following the employees’ vote for union representation.⁹ Percy’s remark conspicuously lacks any reference to the collective-bargaining process. His statement generally blaming the “union proceedings” thus would not reasonably inform an employee that the Respondent was merely abiding by its legal obligations. Particularly in the context of the Respondent’s other violations of the Act during this timeframe, we find that a reasonable employee would interpret Percy’s statement to mean simply that no pay increases would be given because of the arrival of the Union.

3. We agree with the judge that the Respondent unlawfully refused to hire William Lincoln as a permanent employee after September 26, when it began to employ him as a temporary employee, because it believed that he would support the Union if he were part of the unit. The Respondent argues that this complaint allegation was time barred by the 6-month limitations period prescribed by Section 10(b) because the Union did not file a charge supporting it until April 2012. The record establishes, however, that the Respondent’s unwillingness to hire Lincoln as a permanent employee was unknown to Lin-

⁶ We agree with the judge that the complaint’s erroneous attribution of this statement to Morrison rather than Percy was inconsequential and did not deprive the Respondent of due process. The complaint specified the correct date, and both managers were present when the comment was made.

⁷ See *Invista*, 346 NLRB 1269, 1270 (2006) (employer acted unlawfully when it “clearly place[d] the blame on the [u]nion for the employees’ not receiving a pay raise or bonus”).

⁸ Percy’s remark was made on November 3. The election was October 28, and the Union was certified on November 7. The Union filed its initial unfair labor practice charge on November 1.

⁹ See *Mike O’Connor Chevrolet*, 209 NLRB 701 (1974).

coln or the Union until December, less than 6 months before the charge was filed.¹⁰

In September, the Respondent had told Lincoln that, if he would save the Company some money by accepting employment initially as a temporary employee, which meant a lower hourly wage, then the Respondent would hire him after 90 days as a permanent employee. In December, when Lincoln asked about converting his status to permanent, Production Manager Morrison explained to Lincoln, “[I] can’t right now because of all the negotiations, and things, that was going on with the Union.” This was the first time Lincoln, much less the Union, had any notice that he would not be hired as a permanent employee.¹¹ The Union’s April 2012 charge thus satisfied Section 10(b).¹²

4. The judge found that the Respondent violated Section 8(a)(3) and (1) on November 3 when Quality Control Manager Percy issued a written warning to employee Woosley for a production error. The judge, however, dismissed related allegations that, evidenced in part by Woosley’s warning, the Respondent violated Section 8(a)(3), (5), and (1) by imposing a policy of more strictly enforcing its work rules. We agree with the judge that Woosley’s warning was unlawful, but, as explained below, we reverse his dismissal of the related stricter-enforcement allegations.

Disciplinary Warning. The events leading to Woosley’s warning are not in dispute. He conceded at trial that he made a production error, and that it “was a mistake I should have caught.” Quality Control Manager Percy admitted, however, that his decision to issue a warning to Woosley was a departure from his own practice and that he “never personally wrote anyone up before that.” Percy also admitted to Woosley at the time that “this is something that they have to do now because they received a letter from the Union demanding that they keep records of any disciplinary actions,”¹³ and that

¹⁰ The Union would have had no reason to approach Lincoln because it was known that Lincoln was a temporary employee excluded from the voting unit.

¹¹ *M & M Automotive Group*, 342 NLRB 1244, 1246 (2004) (10)(b) period begins only when party has “clear and unequivocal” notice of a violation of the Act, enfd. 483 F.3d 628 (9th Cir. 2007); *Desks, Inc.*, 295 NLRB 1, 11 (1989) (same).

¹² Given our finding that the charge relating to Lincoln’s status was timely filed, we find it unnecessary to reach the judge’s finding that this allegation was closely related to the complaint allegation within the meaning of *Redd-I, Inc.*, 290 NLRB 1115 (1988).

On the merits, for the reasons explained by the judge, the record fully supports his finding that the Respondent’s refusal to hire Lincoln as a permanent employee violated Sec. 8(a)(3).

¹³ This comment referred to the Union’s postelection request for information concerning the Respondent’s disciplinary policy and history. We agree with the judge that Percy’s characterization of the Union’s request for disciplinary information as a demand that the Respondent

Woosley “was the first employee to be written up” under this new requirement. Percy added that “they’re going to start writing up for everything” and that “there’s going to be a lot of changes made involving other people.”

Significantly, Percy’s statements to Woosley were fully consistent with an email Percy had sent to Executive Assistant Paul Barnum just days earlier, in which Percy promised, “I will keep written documentation of every issue that comes up of not doing their job properly and disobeying the rules that are set forth.” At trial, Percy confirmed that “the Union coming in just precipitated documentation of all errors. . . . No more lackadaisical attitude or not making people responsible for what they’d done or their actions.”

Given the totality of the evidence, we agree with the judge that the General Counsel met his initial *Wright Line*¹⁴ burden of showing that Woosley’s union activity, and that of his coworkers, was a motivating factor in his November 3 written warning. As the judge observed, Woosley was a prominent union advocate. The Respondent’s animus is apparent from Percy’s statements themselves and from the Respondent’s multiple contemporaneous unfair labor practices.

Further, we agree with the judge that Percy’s admissions and related statements are fatal to any claim by the Respondent that it would have issued the warning to Woosley even in the absence of his and his coworkers’ union activity. Indeed, although the Respondent introduced documentation that it had issued performance-related warnings on several previous occasions, employee witnesses testified without contradiction that they had committed errors similar to Woosley’s, with management’s knowledge, and had not been disciplined. In all the circumstances, we find in agreement with the judge that Woosley’s warning violated Section 8(a)(3) and (1).

Stricter enforcement. As stated above, we find that the Respondent further violated Section 8(a)(3) by instituting a policy of more strictly enforcing its disciplinary rules for production errors because of its employees’ union activity. The judge dismissed this allegation because the General Counsel did not amend the complaint to specifi-

issue discipline was an intentional misstatement designed to undermine employees’ support for the Union.

¹⁴ *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 do not rely on the judge’s characterization of *Wright Line* as requiring the General Counsel to establish a nexus between the employee’s protected activity and the adverse employment action. The showing required is that (1) the employee engaged in protected activity, (2) the employer had knowledge of the protected activity, and (3) the employer bore animus toward the activity. See *Mesker Door*, 357 NLRB 591, 592 fn. 5 (2011).

cally allege a stricter-enforcement allegation, despite the judge's suggestion that he do so.¹⁵ We find that the judge erred in this respect.

The complaint alleged in relevant part that the Respondent "about November 3, 2011, instituted a policy of disciplining unit employees for production errors" in retaliation for their protected activity. The judge found that this allegation did not notify the Respondent that the General Counsel was alleging stricter enforcement of an existing policy, as opposed to the issuance of a new policy. In his view, the Respondent could reasonably have believed that it could defeat the General Counsel's case simply by showing that it had a preexisting written disciplinary policy on production errors and that it previously had issued discipline under that policy.

We find the judge's due process concerns unpersuasive. First, even though the General Counsel argued this theory in his briefs to both the judge and the Board, the Respondent has not asserted any denial of due process with respect to the General Counsel's stricter-enforcement theory. Rather, the Respondent has defended this allegation only on the merits. We thus deem any due process issue waived. See Section 102.46(b)(2) of the Board's Rules and Regulations.

Second, it is well settled that the Board may find an unalleged violation "if the issue is closely connected to the subject matter of the complaint and has been fully litigated."¹⁶ Here, even assuming that the judge correctly read the complaint to allege only the unlawful imposition of a new disciplinary policy on performance errors, we find that the Respondent's alleged stricter enforcement of a preexisting policy is "closely connected" to that allegation and was "fully litigated." Both allegations appear to have been prompted by the same event (Percy's unprecedented issuance of a written warning to Woosley), rest on the same evidence (Percy's statements and email), and present the same basic factual question: whether, because its employees engaged in union activity, the Respondent decided to discipline them for performance errors that in the past would have gone unpunished. Whether the Respondent's previous "lackadaisical attitude," as Percy put it, was manifested in the absence of a policy or a failure to enforce such a policy is not a material difference in light of the commonalities just discussed. Further, the parties clearly litigated the issue of stricter enforcement, as shown by Percy's and employee

witnesses' testimony and the Respondent's documentary evidence. As the judge found, "there is clear evidence that management expressed an intent to apply stricter standards as to when to write disciplinary notices to unit employees given their representation by the Union, [and that management] desire[d] to impose stricter than normal accountability as an inappropriate response to the Union."

It is therefore appropriate to consider the General Counsel's stricter-enforcement allegation. Based on the evidence described above, we find that the Respondent clearly implemented a policy of more strictly disciplining production errors because its employees engaged in union activity. The Respondent thereby violated Section 8(a)(3) and (1) of the Act.

In addition, we find, again contrary to the judge, that the Respondent's change in its disciplinary policy also violated Section 8(a)(5) and (1). There is no dispute that the Respondent failed to give the Union notice and an opportunity to bargain over this change, which plainly was a mandatory subject of bargaining.¹⁷

In dismissing this allegation, the judge cited both due process concerns and an absence of evidence that the Respondent actually had commenced enforcing its policy more strictly. The judge's due process concerns were the same as those underlying his dismissal of the 8(a)(3) stricter-enforcement allegation: in his view, the complaint alleged only the imposition of a new policy. As with the 8(a)(3) allegation, however, the Respondent itself has not asserted such concerns, thereby waiving the issue. In any event, for the same reasons discussed in connection with the 8(a)(3) allegation, we find that the 8(a)(5) allegation of stricter enforcement is "closely connected" to the complaint allegation that the Respondent instituted a new policy and that the matter was "fully litigated."¹⁸

On the merits, the record fully supports a finding of stricter enforcement. As described, Quality Control Manager Percy made a point of telling Woosley at the time he gave him his warning that "this is something that they have to do *now* because they received a letter from the Union demanding that they keep records of any disciplinary actions" (emphasis added), and that Woosley "was the first employee to be written up" under this new requirement.¹⁹ In any event, our precedent does not re-

¹⁵ Because the discussion of this allegation between the judge and the General Counsel occurred off the record and is referred to only in the judge's decision, it is not established that the Respondent's counsel heard or was aware of that discussion.

¹⁶ *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990).

¹⁷ See *Toledo Blade Co.*, 343 NLRB 385, 387 (2004).

¹⁸ *Pergament United Sales*, *above*, 296 NLRB at 334.

¹⁹ The judge dismissed Percy's admissions as "foolish" statements that, although unlawful, were insufficient to establish a change in practice. We find it significant, however, that Percy's admissions to Woosley were consistent with Percy's earlier email to Executive Assistant Barnum, in which Percy promised, "I will keep written documentation of every issue that comes up of not doing their job properly

quire a showing of actual enforcement of a new or stricter disciplinary policy in order to find a violation of the Union's right to bargain. The unilateral imposition of the changed policy is sufficient.²⁰ We would accordingly find this violation even if it were not also clear that the new policy was enforced against Woosley.

5. The judge dismissed an allegation that, on December 28, the Respondent unlawfully issued a written warning to employee Travis Dykstra for a production error resulting in product spoilage. Dykstra admitted his error. The judge found that the General Counsel established that Dykstra's union activity was a motivating factor in his discipline, but that the Respondent proved that it would have issued the warning to Dykstra even in the absence of that activity. In particular, the judge noted that Dykstra previously had received a written warning for a similar error. The judge also relied on comparable disciplinary warnings the Respondent had issued during the 2-year period preceding the organizing campaign. We agree with the judge's dismissal.

The General Counsel excepts to the judge's finding, pointing out that Dykstra's warning occurred after the Respondent had decided, unlawfully, to enforce its disciplinary rules more strictly. Certainly, those points confirm that the General Counsel carried his initial *Wright Line* burden. They do not, however, negate the Respondent's affirmative defense, which, as noted, included specific evidence that the Respondent had disciplined other employees for production errors before the onset of union activity, and Dykstra, himself, previously had been warned for a similar error. Dykstra, therefore, is not similarly situated to Woosley, who committed an infraction for which the Respondent had never before imposed discipline. We thus agree with the judge's analysis and adopt his dismissal of this allegation.²¹

and disobeying the rules that are set forth." In those circumstances, we find that Percy's admissions in fact did reveal an actual change in the Respondent's disciplinary practices.

²⁰ See *Electri-Flex Co.*, 238 NLRB 713, 731 (1978) (finding unilateral change in disciplinary policy unlawful even absent evidence of actual enforcement), enfd. mem. 624 F.2d 1103 (7th Cir. 1979), cert. denied 447 U.S. 924 (1980).

²¹ For the reasons stated in his partial dissent, Member Miscimarra does not agree that the Respondent instituted a policy of more strictly enforcing its disciplinary rules in violation of Sec. 8(a)(3) or (5). Accordingly, he disagrees that allegations to the contrary "confirm that the General Counsel carried his initial *Wright Line* burden" as to Dykstra's warning. He agrees, however, that the Respondent demonstrated it would have issued the December 28 warning to Dykstra regardless of his union activity. Thus, even assuming the General Counsel carried his burden under *Wright Line*, Member Miscimarra finds that the judge correctly dismissed the allegation that the warning violated the Act.

Member Schiffer would find this violation. In her view, Dykstra's warning was unlawful for the same reasons that the Woosley warning and the Respondent's stricter enforcement of its disciplinary rules were

III. AMENDED REMEDY²²

In his remedial order, the judge included reinstatement and full backpay for the four unit members who were unlawfully laid off on December 16, based on the Respondent's failure to bargain in good faith with the Union over the layoff's effects. He noted that the Board has "sometimes" imposed the lesser remedy of 2 weeks' minimum backpay prescribed in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), for such violations, but found that in this case "[t]he breadth of the breach of the bargaining obligation" justified a full remedy. The Respondent argues that the judge erroneously departed from *Transmarine* in the circumstances of this case. We find merit to the Respondent's argument.

Where (as here) a layoff occurs solely for economic reasons, the union normally has the right to bargain over the layoff decision itself, not just its effects.²³ Moreover, where an employer unlawfully fails to bargain with a union over a decision to lay off unit employees, the remedy is reinstatement and backpay for all resulting losses the employees suffered.²⁴ In the present case, however, the Union effectively waived its right to bargain over the layoff decision. When the Respondent first informed the Union of the impending layoff, the Union apparently

unlawfully retaliatory. The only practical difference between the Woosley and Dykstra warnings was that Dykstra received his warning about 2 months later. As the Board has found, the Respondent openly expressed its intent to apply its disciplinary rules more strictly because employees had voted for the Union. There is no evidence that this intent changed from November to December, and the Respondent has defended against this allegation solely by noting that it issued discipline for errors on some occasions in the past. As to Dykstra's own previous warning, Member Schiffer observes that it occurred more than 2 years earlier, significantly diminishing its significance.

²² Although the complaint did not allege that the Respondent generally failed and refused to recognize and bargain with the Union, the judge's recommended Order included language reserved for such an allegation. We shall correct this error by substituting a limited bargaining order appropriate to the violations of Sec. 8(a)(5) we have found. We shall also modify the Order in accordance with our recent decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), and to conform to the violations found. We shall substitute a new notice to conform to the Order as modified and in accordance with *Durham School Services*, 360 NLRB 694 (2014).

The Respondent did not except to the broad cease-and-desist order recommended by the judge, which we find amply justified in any event in light of the Respondent's widespread misconduct. See, e.g. *Five Star Mfg.*, 348 NLRB 1301, 1302 (2006) (issuing broad order for multiple violations of varied sections of the Act in a single case), enfd. mem. 278 Fed. Appx. 697 (8th Cir. 2008).

²³ See, e.g., *McClain E-Z Pack, Inc.*, 342 NLRB 337, 342 (2004); *Lapeer Foundry & Machine*, 289 NLRB 952, 953-954 (1988).

²⁴ See *Eugene Iovine, Inc.*, 353 NLRB 400 (2008), reaffirmed 356 NLRB No. 134 (2011); *Pan American Grain*, 343 NLRB 318, 318 (2004), enfd. 558 F.3d 22 (1st Cir. 2009); *Wilens Mfg. Co.*, 321 NLRB 1094 (1996); *Plastonics, Inc.*, 312 NLRB 1045 (1993); *Porta-King Building Systems*, 310 NLRB 539 (1993), enfd. 14 F.3d 1258 (8th Cir. 1994); *Lapeer Foundry & Machine*, supra.

requested bargaining over both the decision and its effects, including the selection of employees to be laid off. Subsequently, however, the Union sought to bargain over only the individual selections and other effects of the layoff.²⁵

Consistent with the foregoing, the complaint alleged only that the Respondent unlawfully failed to bargain over “the effects” of the layoff. At trial, moreover, the General Counsel explicitly disclaimed any allegation that the Respondent unlawfully failed to bargain over the decision, and he made a point of affirming that he was alleging a failure to bargain only over the effects.

In cases where a failure to bargain is limited to the effects of a layoff decision (including the selection of employees for layoff, as here), the Board typically has provided a *Transmarine* remedy.²⁶ Given the Union’s stated intent to bargain only over “effects,” and the General Counsel’s disclaimer of any allegation that the Respondent unlawfully failed to bargain over the layoff decision, the remedy for the violation here is limited to *Transmarine*.

Accordingly, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, we will include in our order a limited backpay requirement designed to make whole the employees for losses suffered as a result of the Respondent’s failure to bargain with the Union about the effects of its layoff decision and to recreate in some practicable manner a situation in which the parties’ bargaining positions are not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the laid-off employees in a manner similar to that required in *Transmarine*, above, as clarified by *Melody Toyota*, 325 NLRB 846 (1998).

The Respondent shall pay its laid-off employees backpay at the rate of their normal wages when last in the Respondent’s employ from 5 days after the date of this

Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the layoffs; (2) a bona fide impasse in bargaining; (3) the Union’s failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 days after receipt of the Respondent’s notice of its desire to bargain with the Union; or (4) the Union’s subsequent failure to bargain in good faith. In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which they were laid off to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent’s employ. Backpay shall be based on earnings that the laid-off employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Finally, although the judge agreed with the General Counsel that the Respondent engaged in egregious and widespread unlawful conduct in this case, the judge refused to include a requirement that the remedial notice be read aloud to the unit employees by an authoritative management official or, at the Respondent’s choice, by an agent of the Board in the presence of such an official. The judge opined that the unit members in this case are “highly skilled craftspeople . . . who do not need the reassurance allegedly provided by a notice reading [and who] will have no difficulty understanding the meaning and content of the notice by reading it on their bulletin boards or computer screens.” Contrary to the judge, we find a notice-reading appropriate here given the nature and scope of the Respondent’s violations. In so finding, we emphasize that the judge’s focus on the ability of unit employees to read and understand the notice for themselves is not determinative. In addition to conveying information, an essential purpose of the notice-reading requirement is to assure employees that their employer understands the Board’s order and is committed to complying with the Act in the future. This is particularly apt here where, as the judge found, the Respondent’s highest levels of management developed an elaborate plan to thwart the employees’ unionization efforts. These pur-

²⁵ Israel Castro, the Union’s staff representative, testified that the purpose of the parties’ followup meeting on December 12 was to “discuss and bargain over the effects of [the] upcoming layoff.” The written proposal presented by the Union at that meeting specified that “the parties have met to discuss . . . procedures to be followed in the reduction of the workforce [and] the [Parties’] rights and obligations in connection with said reduction. . . .” And Castro, in a December 13 email to Executive Assistant Barnum, similarly agreed to meet on the following day to bargain about “the effects of the Company’s decision to lay off employees.”

²⁶ E.g., *Smurfit-Stone Container Enterprises*, 357 NLRB 1732, 1736—1737 (2011); *KGTV*, 355 NLRB 1283, 1286 (2010); *North Star Steel Co.*, 347 NLRB 1364, 1371—1372 (2006); *Odebrecht Contractors of California*, 324 NLRB 396, 397—398 (1997); *Miami Rivet of Puerto Rico*, 318 NLRB 769, 772 (1995); *Litton Business Systems*, 286 NLRB 817, 822 (1987), enfd. in relevant part 893 F.2d 1128 (9th Cir. 1990), revd. on other grounds 501 U.S. 190 (1991).

poses will be best accomplished here by having the Respondent read or be present for a reading of the notice.

ORDER

The National Labor Relations Board orders that the Respondent, Print Fulfillment Services, LLC, Louisville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Expressly or impliedly threatening employees that, because of their union activities and sympathies, they will have fewer work opportunities; be sent home when their presses are inoperative or when they request that new disciplinary rules be negotiated with the Union; be unable to receive pay increases; be written up more frequently for disciplinary infractions; or suffer other unspecified reprisals.

(b) Expressly or impliedly stating to bargaining unit employees that their union activities will be futile.

(c) Announcing the layoff of Jonathan Bishop or of any other employees who support the Union in a manner calculated to have a coercive or chilling impact on employees' exercise of their Section 7 rights.

(d) Granting Benjamin Timberlake or any other employees a pay increase in order to induce them to oppose the Union.

(e) Failing or refusing to hire William Lincoln or any other job applicant or to convert his or any other temporary employee's status to permanent employment by the Respondent because of their actual or presumed union activities or sympathies.

(f) Sending Nicklaus Recktenwald home from work or otherwise depriving employees of work opportunities due to their union activities or sympathies.

(g) Issuing written discipline to Richard Woosley or any other employees in retaliation for their union activities or support.

(h) Initiating a policy or practice of enforcing its disciplinary rules for production errors more strictly than in the past in retaliation for its employees' union activities or support.

(i) Issuing new work rules, policies, or procedures in retaliation for its employees' union activities or support.

(j) Failing and refusing to bargain in good faith with the Union, as the exclusive collective-bargaining representative of employees in the appropriate unit described below, by making unilateral changes in their terms and conditions of employment.

(k) Laying off Jonathan Bishop, Nicklaus Recktenwald, William Wellman, Robert Starks, or any other bargaining unit employees without bargaining in good faith with the Union over the effects of such a layoff, when so requested.

(l) Failing and refusing to furnish the Union with relevant information requested by the Union in the course of performing its representation duties, and by failing to furnish relevant requested information in a timely manner.

(m) Unilaterally initiating a policy or practice of enforcing its disciplinary rules for production errors more strictly, or issue new work rules, policies, or procedures, without bargaining with the Union.

(n) In any other 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 this Order, offer direct and permanent employment as a press operator to William Lincoln, or if such a position no longer exists, in a substantially equivalent position, without prejudice to his seniority or any other rights or privileges to which Lincoln would have been entitled if he had not been discriminated against.

(b) Make William Lincoln 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 this Order, remove from its files any reference to the unlawful refusal to hire or transfer William Lincoln from temporary service to regular employee, and within 3 days thereafter notify him in writing that this has been done and that the unlawful discrimination will not be used against him in any way.

(d) Make Nicklaus Recktenwald whole for any loss of earnings and other benefits suffered as a result of the discrimination against him by the early termination of his work shift, in the manner set forth in the remedy section of the decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful decision to terminate Nicklaus Recktenwald's shift early on October 31, 2011, and within 3 days thereafter notify him in writing that this has been done and that the unlawful discrimination will not be used against him in any way.

(f) Within 14 days from the date of this Order, remove from its files any reference to the disciplinary warning issued to Richard Woosley on November 3, 2011, and within 3 days thereafter notify him in writing that this has been done and that the unlawful warning will not be used against him in any way.

(g) Within 14 days from the date of the Board's Order, remove from its files any reference to the announcement on December 9, 2011, of the layoff of Jonathan Bishop,

and within 3 days thereafter notify him in writing that this has been done and that the unlawful announcement will not be used against him in any way.

(h) Within 14 days from the date of this Order, rescind in its entirety, in writing, its document entitled "Responsibility Press Operators" issued to bargaining unit employees on October 31, 2011, and remove from its files all copies of the document signed by bargaining unit employees, and within 3 days thereafter notify each employee in writing that this has been done.

(i) Within 14 days from the date of this Order, rescind, in writing, its orally promulgated policy of terminating bargaining unit employees' shifts early and sending them home when their presses are inoperative, as announced on October 31, 2011.

(j) Within 14 days from the date of this Order, rescind, in writing, its orally promulgated policy or practice of enforcing its disciplinary rules for production errors more strictly in retaliation for its employees' union activities or support, as announced on November 3, 2011.

(k) Before implementing any changes in wages, hours, or other terms of employment, notify and, upon request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time press department employees, including offset press operators, digital press operators, plate makers, feeders, helpers, and team leaders, but excluding all other employees, professional employees and guards and supervisors as defined in the Act.

(l) Upon request, bargain with the Union concerning the effects of its decision to lay off employees on December 16, 2011, and provide the Union with the information it requested regarding the layoff.

(m) Make Jonathan Bishop, Nicklaus Recktenwald, William Wellman, and Robert Starks whole for any loss of earnings and other benefits suffered as a result of the unlawful failure to bargain with the Union over the effects of the layoff, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(n) Provide to the Union, to the extent that it has not already done so, the relevant information it requested on November 1, 2011, regarding its health insurance benefit for bargaining unit employees, including benefit grid and rate information and claims history.

(o) Compensate any employee who receives backpay under this Order for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report

with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(p) 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.

(q) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice marked "Appendix" is to be read to the employees by the Respondent's president and chief executive officer or, at the Respondent's option, by a Board agent in that officer's presence.

(r) Within 14 days after service by the Region, post at its facility in Louisville, Kentucky, copies of the attached notice marked "Appendix."²⁷ Copies of the notice, on forms provided by the Regional Director for Region 9, 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, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its 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 September 16, 2011.

(s) 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.

²⁷ 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."

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

MEMBER MISCIMARRA, dissenting in part.

I agree with the majority as to most of the issues in this case. However, I disagree with my colleagues on four issues. As explained below, I would find that (i) Production Manager William Morrison did not unlawfully threaten employee Richard Woosley with unspecified reprisals for supporting the Union; (ii) Press Room Manager Scott Percy lawfully told employee Travis Dykstra after the election that he could not be given a raise “because of the union proceedings”; (iii) the Respondent did not violate Section 8(a)(3) when it issued a written warning to employee Woosley after he used the wrong “plates” when printing two jobs, which required “a reprint of both orders,” and which Woosley agreed “was a mistake”; and (iv) the record evidence is insufficient to show that the Respondent implemented a new policy of stricter discipline for production errors.

1. *Morrison’s Comment to Woosley Was Not a Threat and Was Protected by Section 8(c)*. On the day of or the day before the election, Production Manager Morrison approached Woosley with a piece of union campaign literature containing Woosley’s picture. According to Woosley, Morrison said, “I’ve been debating whether I’m not—whether I’m going to say anything about this, but you know me, I say what I feel.” Morrison then said that he was “disappointed.” Woosley described Morrison as being “red-faced.”

This recitation of the relevant facts reveals Morrison did not threaten Woosley. He expressed disappointment that Woosley supported the Union. Expressing disappointment is not a threat, and it does not interfere with, or restrain, or coerce employees in the exercise of their Section 7 rights. See *Oklahoma Installation Co.*, 309 NLRB 776, 776 (1992) (dismissing 8(a)(1) allegation where supervisor “angrily” told employee Stewart he was “disappointed” with Stewart and a second employee because of their union activities), *enf. denied* on other grounds mem. 27 F.3d 567 (6th Cir. 1994) (*per curiam*). Because Morrison’s statement contained no threat, Section 8(c) precludes the Board from concluding that Morrison’s statement constituted an unfair labor practice. Section 8(c) provides that “expressing . . . any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.” Morrison expressed an opinion about Woosley’s support for the Union, and his statement contained no threat of reprisal, or force, or promise of benefit.

Nor do I believe a different result is warranted based on testimony that Morrison was “red-faced” when advising Woosley of his disappointment. Whether or not Morrison was “red-faced,” Morrison’s statement to Woosley contained no “threat of . . . force,” and there is no record evidence that Morrison’s demeanor or behavior was itself threatening. One might guess that Woosley perceived Morrison as attempting to suppress some type of emotion, but the record fails to indicate what emotion we should equate with being “red-faced.” Morrison stated he was disappointed, and disappointment could cause someone to be “red-faced.” So could embarrassment, or suppressed anger. It is also possible that someone might be “red-faced” in the midst of a threatened or actual physical confrontation. As noted above, however, there is no evidence of a threat of violence or a physical confrontation, and I believe we are unable, without more, to find a violation based on the color of Morrison’s face. And even if Morrison, although expressing disappointment, was “red-faced” because he was angry, this is not sufficient to render the exchange unlawful. Congress did not limit the scope of 8(c) protection to dispassionate expressions of views, argument, or opinion. There is no proviso in Section 8(c) exempting from protection strongly felt expressions of opinion, such as Morrison’s. Accordingly, the Respondent did not violate Section 8(a)(1) by Morrison’s comment to Woosley.¹

¹ “There is no more elemental cause for discharge of an employee than disloyalty to his employer.” *NLRB v. Electrical Workers Local 1229 (Jefferson Standard Broadcasting)*, 346 U.S. 464, 472 (1953). Accordingly, the Board has found statements that equate union activity with disloyalty to the employer to be unlawful. Such a statement necessarily implies a threat of reprisal and therefore falls outside the scope of 8(c) protection. My colleagues acknowledge that Morrison’s statement that he was “disappointed” to learn that Woosley supported the Union did *not* equate union activity with disloyalty. Nonetheless, most of the cases they cite in support of their violation finding dealt with “disloyalty” statements and thus are distinguishable from this case. See *Sea Breeze Health Care Center*, 331 NLRB 1131, 1132 (2000) (finding manager’s statement that he was “highly disappointed” in employee for supporting the union *and not telling him about it* revealed that manager believed employee “was acting disloyally by deceiving him and denying him information about the [u]nion”); *Yerger Trucking*, 307 NLRB 567, 570 (1992) (finding unlawful owner’s statement to employee that he could not believe he had seen the employee at the union meeting *after all the things the owner had done for him*); *Downtown Toyota*, 276 NLRB 999, 1019 (1985) (finding that manager “equated disloyalty to [himself] with engaging in protected concerted activities”), *enfd.* 859 F.2d 924 (9th Cir. 1988). In the remaining case my colleagues cite, *Sundance Construction Management*, 325 NLRB 1013, 1014 (1998), the employer’s expression of disappointment towards an employee for walking a picket line, *combined with* a suggestion that the employee should have been at work instead, was found to imply a threat of reprisal against the employee for supporting the strike. Here, by contrast, Morrison simply expressed disappointment that Woosley was pronoun, without more.

2. *Pearcy's Statement to Dykstra Regarding Raises Was Lawful.* On November 3, 2011,² Quality Control Manager Scott Percy informed press operator Travis Dykstra that Dykstra would be reassigned from the second shift to the third shift. Later that day, Dykstra complained to Morrison and Percy that the reassignment would negatively impact his ability to find a second job, adding that he would not need to seek a second job if he received a raise. Percy replied that the Respondent could not give Dykstra a raise "because of the union proceedings."

I agree with my colleagues and the judge that the Respondent was not deprived of due process because the complaint erroneously alleged that the statement was made by Morrison rather than Percy. On the merits, however, I disagree with my colleagues' finding that the statement was unlawful. My colleagues dismiss the possibility that Percy was referring to the Respondent's duty to maintain the status quo of employees' wages (among other mandatory subjects of bargaining) until the Respondent bargained with the Union to agreement or lawful impasse. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enf. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). In my view, however, that is the likeliest interpretation. Percy did not say that the Respondent *would* not give Dykstra a raise. He said that it *could* not give Dykstra a raise. In other words, the Respondent was *unable* to give Dykstra a raise "because of the union proceedings." Percy was correct. The Union won the election on October 28, and the Respondent's duty to refrain from making changes in wages, hours, and other terms and conditions of employment attached on that date. See, e.g., *Livingston Pipe & Tube*, 303 NLRB 873, 878-879 (1991), enf. 987 F.2d 422 (7th Cir. 1993); *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975). Reasonably understood, Percy's statement simply acknowledged this new reality.

Contrary to the majority's suggestion, *Oklahoma Installation*, supra, is entirely consistent with the above-cited cases. Unlike *Sea Breeze Health Care Center*, *Yerger Trucking*, and *Downtown Toyota*, the statements at issue in *Oklahoma Installation* did not overtly or impliedly equate protected activity with disloyalty; and unlike *Sundance Construction Management*, the statements at issue were simple declarations of disappointment that employees were engaging in union activity, without any reference to strike activity or suggestion that employees should be at work instead (they *were* at work). In other words, *Oklahoma Installation* is distinguishable from the cases upon which the majority relies in exactly the same way the instant case differs from those cases. Thus, *Oklahoma Installation* is directly on point to the instant case and supports a finding that Morrison's statement to Woosley did not violate the Act.

² All dates are 2011, unless I state otherwise.

To find Percy's statement unlawful, the majority interprets "the union proceedings" to mean either the recently concluded representation proceeding or this unfair labor practice proceeding, or both. But the election was over, and there is no evidence that either Percy or Dykstra even knew on November 3 that an unfair labor practice charge had been filed.³ My colleagues also find that Percy's statement to Dykstra communicated that the Respondent was "withholding pay raises because of union activity." Again, however, Percy said that he *could* not give Dykstra a raise. "Withholding" connotes choice, and Percy's language conveyed a view that the Respondent had no choice. And, as a matter of Federal law, it did not. Respondent was no longer free to raise wages unilaterally, and it was lawful for Percy to convey this to Dykstra. Accordingly, I would reverse the judge's violation finding and dismiss this allegation.

3. *The Record Does Not Support a Finding that the Written Warning to Woosley Violated Section 8(a)(3).* I disagree with my colleagues' finding that Respondent engaged in antiunion discrimination, in violation of Section 8(a)(3), by issuing a written warning to employee Woosley after he committed printing errors that required two jobs to be reprinted. In my view, the finding that Respondent's written warning violated the Act is undermined by several considerations.

Virtually everyone would agree that something should happen when an employee commits a mistake that causes a material waste of money, time, materials, or finished product. The record reveals that Woosley here unquestionably was responsible for all of the above. The judge found that Woosley was responsible for "the erroneous printing of two jobs," which "required a reprint of both orders." According to the judge, Woosley himself "readily conceded that the Employer's complaint had merit." He testified that he had a "new helper" and some "plates got switched," and he "agreed it was a mistake [he] should have caught." So this is not a case where the Respondent's written warning, which stated, "Failure to Follow Instructions and Unsatisfactory Work Quality," was pretextual: Woosley's job required him to print jobs consistent with customer orders, and a mistake necessitating the reprint of two jobs clearly constitutes "Unsatisfactory Work Quality."

³ The Union filed the first unfair labor practice charge on November 1. The Region placed a copy of the charge in the mail, addressed to the Respondent's human resources manager, on November 2. The General Counsel cites no evidence that the Respondent had yet received the charge when Percy made the statement at issue on November 3, or that the Respondent's employees knew on November 3 that the Union had filed a charge.

Even if the Respondent had a legitimate reason to take some type of action against Woosley based on the erroneous print jobs, the Respondent would violate Section 8(a)(3) if the record supported a finding that the Respondent's treatment of Woosley, in actuality, constituted discrimination motivated by a desire to encourage or discourage union activity. In mixed-motive cases, the Board applies its *Wright Line* standard,⁴ which provides that the General Counsel, as an initial matter, must make "a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." 251 NLRB at 1089. If the General Counsel satisfies this initial burden, the Respondent will still be found not to have violated the Act if it can prove it would have made the same decision without regard to the employee's union activity. *Id.*

Here, I believe the facts do not permit us to find that the General Counsel satisfied his initial burden to establish a prima facie case that, instead of Woosley's admitted printing errors, his union activities were a "motivating factor" in the written warning he received. I do not doubt that the Act prohibits the issuance of a written warning—without more severe discipline—if the written warning is motivated by antiunion sentiments. However, the type and magnitude of the discipline imposed are relevant to determining whether the record supports a finding of antiunion motivation. Of course, the Board does not have authority to impose its own standards regarding appropriate levels of discipline for particular offenses, and the Act does not permit the Board to adopt a per se rule making it unlawful if an employer imposes severe discipline (for example, suspension or discharge) for a production error merely requiring the reprint of two jobs. See, e.g., *Neptco, Inc.*, 346 NLRB 18, 20 fn. 15 (2005) ("The decision of what type of disciplinary action to impose is fundamentally a management function.") (quoting *Midwest Regional Joint Board v. NLRB*, 564 F.2d 434 (D.C. Cir. 1977)). However, it is relevant

⁴ *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). I disagree with my colleagues that the judge erred in his characterization of the General Counsel's burden under *Wright Line*. The judge correctly stated that *Wright Line* requires the General Counsel to demonstrate a motivational link, or nexus, between the employee's protected activity and the adverse employment action. As the Board stated in *Wright Line*, the General Counsel's burden is to make a showing sufficient to support the inference that protected conduct "was a 'motivating factor' in the employer's decision." 251 NLRB at 1089 (emphasis added). Generalized antiunion animus does not satisfy the General Counsel's *Wright Line* burden absent evidence that the challenged adverse action was motivated by antiunion animus. See *Libertyville Toyota*, 360 NLRB 1298, 1306 fn. 5 (2014) (Member Miscimarra, concurring in part and dissenting in part).

to motive that the Respondent did not impose more severe discipline on Woosley. He was responsible for obvious production errors, and the result was a warning.

Nor do I believe the fact that it was a "written" warning supports an inference that Woosley's union activities were a "motivating factor" in the warning. The record shows that the Union made a request for written disciplinary records, which became a matter of some controversy. The Respondent received a written request from the Union for "[c]opies of all disciplinary records and personnel actions for the past year." When Woosley asked Manager Percy about the written warning, Percy made a variety of statements about the Union's request, stating (for example) that "this is something they have to do now," "you're going to be written up if you're late, if you're absent," and "[t]hey're going to start writing up for everything." However, the beginning of a collective-bargaining relationship *requires* employers to handle certain matters differently. Most important is the obligation to refrain from unilateral changes regarding wages, hours, and other mandatory bargaining subjects. *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). Because collective-bargaining agreements typically contain "cause" provisions that make discipline decisions subject to grievance arbitration,⁵ a new collective-bargaining relationship requires employers to focus more closely on the manner and consistency with which discipline decisions are documented. For this reason, in the circumstances presented here, I do not believe that reducing Woosley's warning to writing can reasonably be considered the basis for a violation, given the importance that reasonable documentation of discipline plays in every bargaining relationship, and given that the Respondent had recently been put on notice by a union request that disciplinary records would be relevant to its bargaining relationship. Nor do I believe that the mere preparation of written documentation can reasonably be regarded as more severe discipline, because such documentation is part and parcel of every bargaining relationship, in much the same way as the Act

⁵ Different collective-bargaining agreements articulate "cause" requirements in different ways, referring (for example) to "just cause," "proper cause," or "just and proper cause," but these different formulations are generally regarded as identical. See, e.g., *Worthington Corp.*, 24 Lab. Arb. (BNA) 1, 6—7 (McGoldrick, 1955) (regarding the right to suspend and discharge for "just cause," "proper cause," "obvious cause," or "cause," arbitrator states "[t]here is no significant difference between these various phrases"). The requirement of "cause" has nearly universal acceptance in most collective-bargaining agreements as a fundamental limitation on an employer's authority to discipline or discharge employees. Over 90 percent of all collective-bargaining agreements include an explicit "just cause" provision for discipline. See Bureau of National Affairs, *Basic Patterns in Union Contracts* (BNA, 14th ed. 1995).

provides for labor contracts to be reduced to writing upon the request of any party. See Section 8(d) (defining the duty to bargain collectively as including, among other things, “the execution of a written contract incorporating any agreement reached if requested by either party”).

4. *The Record Fails to Demonstrate that the Respondent Implemented a New Policy of Stricter Discipline for Production Errors.* In agreement with the judge, I would dismiss allegations that the Respondent implemented a policy of more strictly enforcing its disciplinary rules for production errors in violation of Section 8(a)(3) and (5). Predating the Union’s arrival on the scene, the Respondent already maintained and enforced a written policy regarding discipline for production errors. For the reasons stated above, under the circumstances of this case, I believe that the Respondent did not impose more severe discipline on Woosley merely because it prepared written documentation of his warning. But even assuming Woosley’s discipline represented stricter enforcement of the Respondent’s disciplinary policy, I agree with the judge that the record evidence is insufficient to support a finding that Woosley’s discipline was “part of a pattern” and not merely “an isolated incident.”

The majority cites *Electri-Flex Co.*, 238 NLRB 713 (1978), enfd. mem. 624 F.2d 1103 (7th Cir. 1979), for the proposition that a unilateral change in disciplinary policy may be found without evidence of actual enforcement. That case is distinguishable from this one. There, during a safety meeting attended by employees from several departments, a manager announced a new rule: safety glasses must be worn everywhere in the plant, and anyone who violates the rule will be suspended without pay for a week. The Board found that announcement sufficient to establish that the employer instituted a new rule. Here, by contrast, the Respondent *already had* a written policy regarding discipline for production errors. The issue is whether it implemented *a policy of stricter enforcement* of an existing disciplinary policy. In my view, the judge correctly found that a single incident was insufficient evidence upon which to base a finding that the Respondent had adopted a *policy* of stricter enforcement generally. As the judge observed, Woosley’s discipline might have been an isolated incident; more evidence was necessary to prove a pattern, and thus a policy, of stricter enforcement. Accordingly, I would affirm the judge’s finding that the Respondent did not violate Section 8(a)(3) by adopting a policy of stricter enforcement, or Section 8(a)(5) by adopting such a policy unilaterally.⁶

⁶ Like my colleagues, however, I would not dismiss these allegations on due process grounds.

For these reasons, as to the above issues, I respectfully dissent.

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, expressly or impliedly, threaten our employees that, because of their union activities and sympathies, they will have fewer work opportunities; be sent home when their presses are inoperative; be unable to receive pay increases; be written up more frequently for disciplinary infractions; or suffer other unspecified reprisals.

WE WILL NOT, expressly or impliedly, tell our employees that their union activities will be futile.

WE WILL NOT announce the layoff of Jonathan Bishop or of any other employee who supports the Union in a manner calculated to have a coercive or chilling impact on your exercise of the rights described above.

WE WILL NOT grant Benjamin Timberlake or any other employees a pay raise in order to induce them to oppose the Union.

WE WILL NOT refuse to make William Lincoln or any other temporary employee a permanent employee because of their actual or presumed union activities or sympathies.

WE WILL NOT send Nicklaus Recktenwald or any other employee home from work or otherwise deprive employees of work opportunities due to their union activities or sympathies.

WE WILL NOT issue written discipline to Richard Woosley or to any other employees due to their union activities or sympathies.

WE WILL NOT initiate a policy or practice of enforcing our disciplinary rules for production errors more strictly than in the past in retaliation for our employees’ union activities or support.

WE WILL NOT issue new work rules, policies, or procedures to our employees in retaliation for their union activities or sympathies.

WE WILL NOT fail or refuse to bargain collectively with the Graphic Communications Conference of the International Brotherhood of Teamsters District Council 3, Louisville Local, 619-M (the Union) as the exclusive collective-bargaining representative of our employees in the unit described below, by making unilateral changes in your terms and conditions of employment.

WE WILL NOT lay off Jonathan Bishop, Nicklaus Recktenwald, William Wellman, Robert Starks, or any other bargaining unit employees without bargaining in good faith with the Union over the effects of such a layoff, when so requested.

WE WILL NOT fail or refuse to furnish the Union with relevant information requested by the Union in the course of performing its representation duties, or to furnish relevant requested information in a timely manner.

WE WILL NOT unilaterally initiate a policy or practice of enforcing our disciplinary rules for production errors more strictly, or issue new work rules, policies, or procedures, without bargaining with the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer William Lincoln reinstatement to a position as a permanent, directly employed press operator, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges to which Lincoln would have been entitled if he had not been discriminated against.

WE WILL make William Lincoln whole for any loss of earnings or other benefits resulting from our unlawful failure to hire him as a permanent employee, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire or transfer William Lincoln from temporary service to regular employee, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the unlawful discrimination will not be used against him in any way.

WE WILL make Nicklaus Recktenwald whole for any loss of earnings or other benefits resulting from our unlawful decision to send him home early, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful decision to terminate Recktenwald's shift early on October 31, 2011, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the unlawful discrimination will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the disciplinary warning issued to Richard Woosley on November 3, 2011, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that this warning will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the announcement on December 9, 2011, of the layoff of Jonathan Bishop, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the unlawful announcement will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, rescind in its entirety, in writing, the document entitled "Responsibility Press Operators" issued to bargaining unit employees on October 31, 2011, and remove from our files all copies of the document signed by bargaining unit employees, and WE WILL, within 3 days thereafter, notify each employee in writing that this has been done.

WE WILL, within 14 days from the date of the Board's Order, rescind, in writing, our orally stated policy of terminating bargaining unit employees' shifts early and sending them home when their presses are inoperative, as announced on October 31, 2011.

WE WILL within 14 days from the date of the Board's Order, rescind, in writing, our orally stated policy of enforcing our disciplinary rules for production errors more strictly in retaliation for employees' union activities or support.

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

All full-time and regular part-time press department employees, including offset press operators, digital press operators, plate makers, feeders, helpers, and team leaders, but excluding all other employees, professional employees and guards and supervisors as defined in the Act.

WE WILL, upon request, bargain with the Union concerning the effects of our decision to lay off employees on December 16, 2011, and provide the Union with the information it requested regarding the layoff.

WE WILL make Jonathan Bishop, Nicklaus Recktenwald, William Wellman, and Robert Starks whole for any loss of earnings and other benefits suffered as a result of our unlawful failure to bargain with the Union over the effects of the layoff.

WE WILL provide to the Union, to the extent we have not already done so, the relevant information requested regarding our health insurance benefit for our employees, including benefit grid, rate, and claims history information.

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

PRINT FULFILLMENT SERVICES, LLC

The Board's decision can be found at – www.nlr.gov/case/09-CA-068069 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.



Eric A. Taylor, Esq. and *Joseph Tansino, Esq.*, for the Acting General Counsel.¹
C. Laurence Woods III, Esq., of Louisville, Kentucky, for the Respondent.

¹ For simplicity, I will refer to the Acting General Counsel as the General Counsel throughout the remainder of this decision.

Israel Castro, of Louisville, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Louisville, Kentucky, on February 27, 28, and 29; March 1 and 2; and April 10, 11, and 12, 2012. The Union filed the original charge November 1, 2011,² and an amended charge on November 14. Additional charges were filed on November 14 and 18, as well as, December 13.³ The Regional Director issued the original consolidated complaint and notice of hearing on December 15. A second consolidated complaint followed on January 18, 2012. This complaint incorporated allegations contained in the first four charges enumerated in the caption of this decision.

The Union filed its final charge in this matter on January 13, 2012, with an amendment on January 30. That charge formed a basis for a complaint and notice of hearing filed by the Acting Regional Director on February 28, 2012, at the same time that the first trial proceedings were underway regarding the issues raised in the earlier consolidated complaint. This new complaint was accompanied by a motion to consolidate the cases for hearing. The motion was unopposed⁴ and I granted it. The parties presented their evidence regarding the new complaint at the resumption of the proceedings in April.

During the period between the two hearings in this case, counsel for the General Counsel served written notice that he intended to move for leave to amend each of the complaints in certain respects. (GC Exh. 1(ee).) Essentially, the amendments were designed to conform the complaint allegations to the evidence that had been adduced thus far in the trial. I granted the

² All dates are in 2011, unless otherwise indicated.

³ An amendment to the charge referenced with docket number 09-CA-069188 was filed on April 6, 2012. (GC Exh. 1(hh).) Certain allegations contained in that amendment are alleged as violations in the Regional Director's complaint filed on February 28, 2012. That complaint lists only docket number 09-CA-072457 in its caption. (GC Exh. 1(y).) The discrepancy in captioning is unexplained. I do not deem this to be significant since it is not material to the Respondent's ability to defend itself. I will, however, address the rather odd chronology involving a complaint having been filed prior to its underlying charge at the appropriate point in this decision.

⁴ See Tr. 624.

motion.⁵ Counsel for the General Counsel has provided revised versions of each of the two complaints involved in this case that incorporate all of the amendments. (GC Exhs. 1(ff) and (gg).) These documents are useful references from which the issues being addressed in this decision may be identified. Broadly speaking, those issues concern the General Counsel's contention that the Employer engaged in a course of conduct that repeatedly breached three of the Act's provisions designed to protect the rights of employees.

In the first instance, the General Counsel asserts that the Employer violated Section 8(a)(1) of the National Labor Relations Act (the Act) by restraining, coercing, and interfering with protected activities by making various express and implied threats and by asserting to its employees that their union activities would be futile. Next, the General Counsel contends that the Employer violated Section 8(a)(3) and (1) by granting a pay raise in order to induce an employee to oppose the Union; failing and refusing to hire a job applicant due to his presumed opinion regarding the Union; sending an employee home without pay prior to the end of his assigned shift and transferring employees due to their union activities; issuing written warnings to employees due to their protected activities; and laying off employees due to their participation in those protected activities. Finally, in the General Counsel's view, the Employer has defaulted on its good-faith bargaining obligations imposed by Section 8(a)(5) of the Act by failing to provide certain information that is relevant and necessary for the Union to perform its duties as representative of the employees and by providing other such information in an untimely manner; by imposing and enforcing a variety of unilateral changes in the terms and conditions of employment without providing the Union with notice and an opportunity to bargain; and by laying off employees without meeting its obligation to engage in good-faith bargaining with the Union regarding aspects of such a layoff.

The Employer has filed answers to the complaints and has made an appropriate oral response to the amendments. In its responses, the Employer has denied the material allegations of wrongdoing. It has also raised procedural defenses to certain allegations under Section 10(b) of the Act.

For the reasons that I will discuss in detail in the remainder of this decision, I conclude that the General Counsel has met his burden of demonstrating that the Employer has violated the Act in a number of respects. Specifically, I find that the Employer did engage in violations of Section 8(a)(1) by uttering various threats in response to protected activities and by mak-

⁵ In granting the motion to amend, I applied the Board's standards expressed in Rule 102.17 and *Folsom Ready Mix*, 338 NLRB 1172 fn. 1 (2003). I concluded that the amendments were closely related to previous complaint allegations that were being litigated and that the Respondent would not be prejudiced by them. It is noteworthy that specific written notice of the proposed amendments was provided in advance of the resumed hearing date. Thus, the Employer was given at least as much opportunity to address the new matters as the respondent in *Folsom*. In that case, the motion to amend came at the beginning of the hearing. (Compare to *The New York Post Corp.*, 283 NLRB 430 (1987), where the Board found that it was error to grant a motion to amend that was not made until the final day of trial.)

ing statements of futility. The Employer further violated Section 8(a)(3) by granting a pay increase in order to induce an employee to oppose the Union, refusing to hire a job applicant due to presumed union support, announcing the layoff of an employee due to his union activities, sending an employee home prior to the end of his scheduled shift, and issuing a written warning to an employee due to his union activities. I also find that the Employer violated its bargaining obligations under Section 8(a)(5) by failing and refusing to provide certain information to the Union and by unreasonably delaying the provision of other information to the Union; by imposing and enforcing unilateral changes in terms and conditions of employment, and by laying off employees without affording an opportunity to bargain over aspects of the layoff decision. I have considered and rejected the proffered statute of limitations defense to certain of these allegations.

I have also concluded that several allegations made in the complaints have not been proven by the General Counsel. These include claims that the Employer transferred employees due to their union activities; laid off an employee due to those activities; and issued written warnings to an employee due to his protected activity. I will recommend that those allegations be dismissed.

On the entire record,⁶ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Employer, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability company, is a full service trade printer offering web-to-print fulfillment services at its facility in Louisville, Kentucky, where it annually purchases and receives at its Louisville, Kentucky facility, goods valued in excess of \$50,000 directly from points outside the Commonwealth of Kentucky. The Respondent admits⁷ and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

⁶ Errors in the compilation of exhibits and transcription of testimony from the first hearing were addressed on the record at the commencement of the resumption of proceedings. See Tr. 1239-1261. As to the second portion of the trial proceedings, at Tr. 1283, L. 23, "couldn't" should be "could;" at Tr. 1385, L. 13, "having been" should be "haven't been;" at Tr. 1422, L. 6, "down town" should be "down time;" at Tr. 1530, L. 17, "bulky" should be "balky;" at Tr. 1547, L. 5, "inclines" should be "inclined;" at Tr. 1683, L. 15, "yet" should be "yes;" at Tr. 1710, L. 9, "press" should be "process;" and at Tr. 1838, L. 21, "patiently" should be "patently." In addition, at Tr. 1705, L. 21, the wording is garbled. While I cannot recall my exact words, I did state that I was going to consider that the Respondent had entered a general denial of all substantive allegations contained in the amendments to the complaints. With one exception discussed in the body of this decision, all other errors of transcription are not significant or material.

⁷ See, for example, Respondent's amended answer at par. III. (GC Exh. 1(t), p. 1.)

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Background*

Print Fulfillment Services LLC (PFS) was chartered in 2005. It is a subsidiary of Farheap Solutions, Inc. Brett Heap is the president and majority shareholder of Farheap and is also the general manager and managing member of PFS.⁸ As explained by Paul Barnum, Heap's executive assistant at PFS,⁹ the Company's business model is that of a web-to-print operator who "prints for a limited number of customers who generate orders almost exclusively over the internet." (Tr. 1116.) Although the business model appears to be somewhat restrictive, the Company's handbook reports that it is "one of the largest printers in the United States." (GC Exh. 17, p. 10.)

The Company's printing plant is located in West Louisville. The primary purpose for the selection of this location is its proximity to the worldwide delivery operations of the United Parcel Service. Uncontroverted testimony revealed that the Company experiences two peak periods of production and also two "trough[s]," when incoming orders decline. (Tr. 1114.) Barnum reported that during the first peak, from October through mid-December, the work force reaches 150 persons, including 21 in the bargaining unit involved in this case. At the time of the second peak period in March and April, the total work force is 130–150, and the bargaining unit staffing ranges from 15 to 21. In the remainder of the year, the so-called trough periods, the work force varies from 90 to 105, with staffing in the unit from 15 to 18. The Company also maintains a practice of contracting with employment service agencies that provide it with temporary workers, including some assigned to the press room operation involved in this case.

PFS utilizes three types of expensive, highly sophisticated presses to produce much of its printed materials. Without going into unnecessary detail, these machines are denominated by shorthand titles. There are four substantially identical Karat presses, one 74G press, and another Rapida 105. At peak times, the presses run on three shifts around the clock. During slower periods, the third shift is eliminated. As one would expect, operation of the presses is a skilled occupation involving technical knowledge and the exercise of judgment and discretion.

B. *The Union's Organizing Campaign*

Prior to the events involved in this case, none of the Company's employees had union representation. In June 2011, a press operator, Jonathan Bishop, contracted Israel Castro, a staff representative for the Graphic Communication Conference of the International Brotherhood of Teamsters, District Council 3

⁸ His role at PFS was described as being the "equivalent" of the chief executive officer of a corporation. (Tr. 1299.)

⁹ In a manner not suggested by Barnum's bland formal title of executive assistant, he is a key management official at PFS. As he explained, "I'm it when Mr. Heap is not there." (Tr. 1109.) He exercised the authority to address all production and human resource issues that arose during the frequent periods when Heap was not present at the facility. In general, he reported that his duties involved, "[v]irtually everything dealing with managing the [Louisville] facility." (Tr. 1306.)

(the Union). Bishop's purpose was to seek representation for the PFS press department employees.

During the organizational campaign that ensued, a number of press operators joined Bishop in actively supporting the Union. These included Nicklaus Recktenwald, an operator who signed an authorization card and spoke favorably to other employees regarding the Union. Richard Woosley also signed a card, campaigned for the Union, and wore a union button. Travis Dykstra took a very active role, signing a card and obtaining other signatures, wearing a button and stickers, distributing literature, and answering questions about the Union.

The Union's campaign culminated with the filing of a representation petition on August 28. As the organizing campaign gathered momentum, it came to the attention of various managers. Scott Percy, press room and quality control manager at PFS from April through December 2011, testified that he was informed of the union activities by William Morrison, a fellow production manager. This occurred toward the end of August.

Insight into Percy's reaction to the news of an organizing effort was provided through the testimony of Dale Gartland, another press operator who worked under Percy's direct supervision. Gartland testified that, on the day the Union filed its representation petition, he had a phone conversation with Percy. Percy asked if he had heard about the Union and Gartland affirmed that he was aware of the organizing effort. Percy then opined that, "those guys are crazy . . . Brett [Heap] will get rid of them all." (Tr. 746.)

On September 6, the Regional Office held a hearing on the Union's representation petition in Case 09–RC–063284. Three employees, including Bishop, testified at the hearing as witnesses for the Union. Morrison and Dale Miller, human resources director for PFS at that time, testified for the Employer.

During this period, management officials made efforts to divine the strength of the Union's support among the employees. Percy testified that he participated in "numerous" discussions with other managers regarding the identities of the Union's advocates. (Tr. 223.) These discussions included Morrison and Barnum. Management concluded that Gartland, Bishop, Dykstra, Woosley, and Recktenwald, among others, were union supporters. These conclusions were based on their participation in pronoun activities, campaigning among their coworkers, and the testimony of some at the representation hearing.

Percy also testified that, after the representation hearing, he had a series of conversations with Heap regarding the situation with the Union.¹⁰ During the first such discussion, Heap told him that he was "unhappy with the people who—who were over there [attending the representation hearing], and basically he wanted to replace them." (Tr. 233.) In subsequent conversations, it became clear to Percy that Heap was particularly interested in terminating those press operators, including Bishop. As Percy put it, Heap "wanted them out." (Tr. 244.)

In addition to weeding out union supporters, the two men planned to hire a complement of new press employees who

¹⁰ At a later point in this decision, I will discuss in detail my reasons for concluding that Percy's testimony about these matters was both reliable and uniquely probative as to the underlying motivational issues in this case.

would not support the Union. Percy told Heap that he knew many press operators who might be interested in a position with the Company. Among those named was William Lincoln.

Percy outlined the long-range objective developed by the two key management officials:

The main thing at that time was, before the election, was that if the Union didn't go through and it did fail, that we have people to replace those people, so that in a year from now, that it wouldn't come up again, hopefully If we replace union supporters, then chances are, you know, a year goes by, that there wouldn't be another clamor for another union vote.

(Tr. 240.)

Contemporaneous documentary evidence reveals that this plan was also discussed and adopted by other managers. Thus, on September 10, Morrison sent an email to Percy discussing plans to train other current employees in press room operations and to hire new personnel, including two named individuals. Tellingly, Morrison went on to underscore the context for these personnel changes, concluding his message by exhorting Percy as follows:

[B]eating this union nonsense is extremely important to me as I am sure it is to others so let's keep putting our heads together daily on that effort. We will win!!!¹¹ [Punctuation in the original.]

(GC Exh. 42.)

At the same time, Morrison engaged in another highly revealing email exchange with Guy Fluharty, a manager in another department of the plant. Fluharty initiated the exchange by reporting serious misconduct by an employee named Kevin. He requested that Morrison suspend the offender. Morrison's candid response agreed that the employee's misconduct merited the suspension.¹² Nevertheless, he declined to impose the discipline and provided a frank statement of his rationale:

Guy, please don't take this the wrong way but right now I am extremely concerned about beating this union nonsense and that is absolutely my only point about Kevin right now I need to use him as bad as that may sound. I want Kevin in the plate room with [Press Operator] William Wellman on Monday

(GC Exh. 57.)

Additional documentary evidence shows that management undertook a variety of other initiatives to influence the outcome

¹¹ Morrison's testimony about this email underscored his lack of credibility as a witness in this case. Counsel for the General Counsel asked him how his exhortation about defeating the Union related to the preceding discussion of retraining and new hiring. His utterly disingenuous response was, "It—it—even though I'm the one that wrote it, it doesn't appear that it does. I—if you look at the date that I wrote it, it doesn't. It almost doesn't make sense to me, and I wrote it I don't have an explanation, I guess. I guess my answer is I don't have an explanation." (Tr. 1059.) Counsel then posed the obvious question, "[i]sn't the explanation that you were trying to hire people to pack the bargaining unit to defeat the Union vote?" (Tr. 1059.) This merely evoked a sheepish denial.

¹² Indeed, Morrison went so far as to suggest that the misbehavior would actually justify a decision to terminate that employee.

of the representation election. Thus, on September 16, an email from Morrison to HR Director Miller reported that press room employee, Benjamin Timberlake, was being given a pay increase in order to forestall him from accepting another offer of employment. Helpfully, Morrison explained, "[a]s you can imagine this is related to the union stuff." (GC Exh. 51.) In a bit of reluctant candor, in his testimony Morrison conceded that his intent in making this statement was that Timberlake "was going to be somebody . . . who was going to be eligible to vote one way or the other."¹³ (Tr. 1024.)

Company correspondence and related testimony also provide stark confirmation that management attempted to shape the electoral results in yet another manner. It will be recalled that Percy testified that he proposed to Heap that they consider hiring a press operator named William Lincoln. Lincoln is a digital press operator who had been employed by PFS in 2009. Morrison had subsequently discharged Lincoln for reasons that Barnum characterized as, "personnel issues." (Tr. 1835.)

In 2011, Lincoln was seeking new employment and had placed his resume on the internet. He testified that, "out of the blue," he received a telephone call from Rhonda at Staffmark, a firm providing temporary employees to other companies, including PFS.¹⁴ He reported that he did not know how Rhonda came upon his resume, but he assumed it was from his internet postings. In any event, Rhonda asked him if he was interested in a digital printing position and he told her he was. She called him later and asked if he would consent to a job interview with Morrison. He agreed.

On September 23, Lincoln and Morrison met at PFS. Morrison began the meeting by apologizing for Lincoln's termination in 2009. They then conducted a typical job interview, including discussion of work and compensation issues. Lincoln reported that, during this conversation, Morrison, "asked me about my experience working in the Union, because he mentioned to me that they were coming into a union situation." (Tr. 1660.) Lincoln elaborated by indicating that Morrison, "led into it how—what did I think about the Union, you know, did I like it, things of that nature" (Tr. 1661.) Lincoln told him that he had prior experience as a union member and also as a supervisor who dealt with union issues. As a result, "I really didn't have an opinion." (Tr. 1660.) At the conclusion of the meeting, Morrison told Lincoln that the Company would be in touch later.

As soon as Lincoln returned to his home, he received another telephone call from Rhonda at Staffmark. She asked if he was willing to meet with Barnum and he agreed. The two men did meet on the following morning at PFS. Lincoln testified that they discussed several topics related to his employment. Barnum explained that, "they were in a bit of a fix right now" and that this was due, in part, to issues "with the Union." (Tr.

¹³ On receiving his raise, Timberlake expressed his gratitude and Morrison emailed an unsubtle reply, stating, "Your [sic] welcome and I hope I can count on your vote." (GC Exh. 76.)

¹⁴ Lincoln reported that such calls regarding employment opportunities were not unusual. As he put it, "I have people calling me now and I have e-mails that [were] sent to my phone in my e-mail all the time." (Tr. 1682.)

1663.) He indicated that, “at that time, they had to go through a temporary service, that’s the reason why Staffmark called me, but they could buy out my contract.” (Tr. 1668.)

Given the difficulties he had outlined to Lincoln, Barnum made the following request:

[I]f I could be patient and do the Company a favor, that they would promise to take care of me after my 90 days. But if I could go through the temp service right now, that that would be doing the Company a great favor saving money.

(Tr. 1668.) Lincoln explained his understanding of the import of their discussion regarding Staffmark in the following testimony:

The way I understood it was since the temporary service already contacted me, they [PFS] couldn’t just hire me on right there and then through PFS, because you would have to buy my contract out through the temp service since I went through Rhonda first.

(Tr. 1669.)

During the course of this job interview, Barnum also raised the subject of the Union. Lincoln reported that he “asked me, you know, again, how did I feel about the Union, since they were going through the Union coming in.” (Tr. 1670.) He gave Barnum a similar account of his attitude to that provided to Morrison, indicating that, “I didn’t have a problem either way.” (Tr. 1671.)

Interestingly, Barnum’s account of this meeting with Lincoln confirmed that the two men discussed the Union.¹⁵ As Barnum put it,

I wanted to alert him to the fact that even though he had come to us through a temporary agency that there may be some things that affected his employment, his working arrangements—uh, and his future, that might require him, for instance, to join the union. And I wanted to know if he had any trouble with that.

(Tr. 1834.)

In a letter on September 24, Barnum reported to Morrison on the results of his interview with Lincoln. Barnum indicated that Lincoln offered many advantages as a prospective employee, including his extensive job experience, certification on the equipment, and flexibility. Two “negatives” were also described, including, “the Union issue.” (GC Exh. 4, p. 2.) Lest there be any doubt as to Barnum’s meaning, it is spelled out in

¹⁵ This supported my conclusion that Lincoln was a reliable witness. While I recognize that he has a potential pecuniary interest in this matter, this was counterbalanced by his difficult position as a current press operator at PFS. See, for example, *Advocate South Suburban Hospital*, 346 NLRB 209 fn. 1 (2006), enf. 468 F.3d 1038 (7th Cir. 2006) (testimony of current employees which contradicts statements of their supervisors is likely to be “particularly reliable”). Beyond this, his demeanor and presentation were impressive and, as I have indicated, his testimony was corroborated in key aspects. I found his account to be entirely credible.

the following language, “Lincoln gives us all the options except a management vote on the Union.” (GC Exh. 4, p. 2.) Ultimately, Barnum suggested a resolution of this dilemma that would permit the Company to make use of Lincoln’s advantages and avoid the perceived negative regarding the election vote. As he put it, “I would therefore recommend that if we hire him now, it be temp to hire.”¹⁶ (GC Exh. 4, p. 2.) The evidence reveals that Lincoln was, in fact, hired as a temporary employee through the Staffmark agency commencing on either September 26 or 27. It should be noted that such temporary employees were not included in the bargaining unit that would be casting ballots in the representation election.¹⁷

As the month of September drew to its close, the election campaign continued and the Regional Director issued his decision regarding the representation issues. He found the Union’s claimed unit to be an appropriate craft unit and described the bargaining unit as follows:

All full-time and regular part-time press department employees, including offset press operators, digital press operators, plate makers, feeders, helpers, and team leaders, but excluding all other employees, professional employees, and guards and supervisors as defined in the Act.

(GC Exh. 89, p. 16.) The election was scheduled to be held on October 28.

The month of October witnessed the culminating events of the organizing campaign. In the middle of the month, the Union issued a flyer that contained photographs and pronoun statements from seven press room employees who were described as the Union’s “solidarity committee.” (GC Exh. 7.) These individuals included Bishop, Dykstra, and Woosley. The flyer was distributed throughout the press room and even affixed to equipment in that location. It was also taped to a window in the break area.

As one would anticipate, the election was the focus of much discussion among the press room employees. A large part of this dialogue was accomplished through strings of emails. The evidence reveals that many of these email communications found their way into management’s possession. These included a long pronoun missive authored by Dykstra that was obtained by Morrison who forwarded it to Barnum and Heap. (GC Exh. 55.) In addition, an articulate defense of the Union was drafted by Bishop and eventually received by Morrison. (GC Exh. 63.)

In the week immediately preceding the election, management conducted a series of meetings with employees to discuss the union issue. The meetings were conducted by Morrison. During these meetings, Morrison made statements that are the focus of the General Counsel’s allegations of unlawful coercion of voters. These statements took several forms as described below.

In the first instance, Morrison responded to employees’ questions about pay raises. Percy testified that Morrison told the questioners that, “with this union vote coming up, and every-

¹⁶ In the letter, Barnum goes even further, noting that Lincoln would “probably vote for the union,” so, “I would probably not bring him on as a permanent employee at this time.” (GC Exh. 4, p. 1.)

¹⁷ See the Regional Director’s decision, at p. 6 fn. 7. (GC Exh. 89.)

thing, that we couldn't give you a raise right now, to look like we were trying to give you money, you know, to vote different on the Union."¹⁸ (Tr. 319.)

The subject of pay raises also came up outside the context of group meetings. Press room employee Paris Bradford testified that he requested a raise during the course of a private meeting with Percy, Morrison, and Barnum. He reported that Barnum pointedly told him that, "they would like to give me a raise, or go over me having a raise, but they couldn't because next week it would be the election. So either the Union would be negotiating my next raise, or that following Monday we could sit down and talk about my raise if the Union wasn't voted in." (Tr. 953.)

Bradford was also among the group of employee witnesses who provided credible accounts of far more nakedly coercive statements made by Morrison during the group meetings. He described Morrison as telling the assembled voters that, "they would never sign a contract, we'd be out on strike, you know." (Tr. 948.) Morrison elaborated, observing that, "if I know Brett [Heap] like I think I do, he won't—he's not going to sign a contract."¹⁹ (Tr. 949.)

Bradford's account was essentially corroborated by testimony from other attendees at the group meetings, including Robert Starks and Nicklaus Recktenwald. Starks testified that, at the end of a meeting he attended, Morrison warned that, "if you guys think you're going to win a battle by voting in a union, you're not going to win the war." (Tr. 731.) Recktenwald described this threat by Morrison as, "you all may win this battle, but you all won't win the whole thing." (Tr. 774.)

Any doubt as to the accuracy of these accounts is dispelled by resort to the documentary record. It demonstrates that on election day, an antiunion press operator addressed an email to Morrison expressing his desire to begin work on decertification of the Union. During the course of his responses to this email, Morrison employed what certainly appears to be a favorite aphorism of his. He told the employee not to fret about the issue and counseled him to, "[r]emember the old saying, 'You may have won the battle but you haven't won the war.' Things will be OK . . ." (GC Exh. 50, p. 1.) Under cross-examination, Morrison was forced to confront the meaning of this statement, a remark that he had made repeatedly to the press room employees:

COUNSEL: [Y]ou mean they may have gotten in, but they may never get a contract; is that what you meant?

MORRISON: Yes.

(Tr. 1068.)

Another theme developed by management during the campaign and conveyed to various employees involved pointed indications that the Employer would respond to a prounion vote

¹⁸ Ironically, during the same week Morrison emailed Timberlake, asking, "Have you received your increase yet? Just want to make sure you got that as promised." (GC Exh. 56, p. 1.)

¹⁹ Corroboration that Morrison employed this type of threat was provided by Matt Murray, another press operator, who testified that, in a private conversation with Morrison during that week, he was told that, "you know how Brett [Heap] is. He's not going to sign the deal with them. He's—he's not going to work with them." (Tr. 942.)

by altering the existing terms and conditions of employment in ways that would disadvantage the work force. In a familiar pattern, the testimony of employees regarding this type of threatening commentary is powerfully corroborated by contemporaneous written statements by managers. Thus, Percy addressed an email to Morrison on September 14. In the first instance, he alluded to the ongoing plan to alter the composition of the press room work force, "by hiring what we need to so that we can keep the best we have when all the dust settles on this union stuff." (GC Exh. 61.) He follows this ominous thought by turning to another topic:

I saw that Richard ran the job wrong[.] I will get a write up warning when I talk to you tomorrow and get the details, I think now more than ever we need to document all the re runs and operator errors, instead of just telling them about it.

(GC Exh. 61.)

Percy's plan to threaten alterations in existing work rules and procedures was conveyed to the prospective voters. For example, the Company had a preexisting policy of assigning temporary duties to press operators when their presses were unavailable due to maintenance issues. As Recktenwald explained, if an operator's press was inoperative, "we never worried about that. We never worried about how long we could get our hours in." (Tr. 819.)

Suddenly, on the day before the election, this issue became a concern. Morrison held a discussion with operators Recktenwald and Ben Teague to ask what they planned to do during their workday since their press was not functioning. They told him that they intended to assist other operators. Recktenwald testified that Morrison, "agreed to it, and then he told us that if the Union was voted in tomorrow, that we would have to go home if our press was down, and that there would be no work for us to do." (Tr. 780.)

Morrison essentially confirmed the key portions of this account. He reported that he did have the discussion with Recktenwald and Teague, telling them that "our policy is not to have people here when their machines are down and we were going to have to come up with a plan."²⁰ (Tr. 997.) Percy also provided critical testimony on this threatened change in working conditions. He flatly stated that no employee had ever been sent home when their press became inoperative. He was then asked if Teague had been warned that this would change after the election. He confirmed that, "I believe we told everybody that—that came out and broached that subject that people would be sent home." (Tr. 328.)

Finally, the overwhelming testimony shows that Morrison engaged in one additional preelection attempt at coercion, this

²⁰ Morrison attempted to assert that this was actually not a proposed change in operations. He contended that, "for the most part, in my years of being production manager, we would not have a person for a machine that wasn't operational, it just wouldn't make sense, business-sense." (Tr. 999.) Apart from the utter failure to document the existence of such a preexisting policy through payroll records or other written materials, the falsity of this claim is underscored by Morrison's use of the future tense when, by his own account, he felt it necessary to explain to Recktenwald and Teague that "we are going to have to come up with a plan." (Tr. 997.)

time consisting of an oblique or slightly veiled threat uttered to Richard Woosley. Woosley testified that on the day of the election or the day preceding that event, Morrison approached him while holding the Union's solidarity committee flyer in his hand. It will be recalled that Woosley's picture and pronoun comment were on the flyer. According to Woosley, Morrison then stated, "I've been debating whether I'm not—whether I'm going to say anything about this, but you know me, I say what I feel. [He] [o]pens it up, points at my picture, and said, 'I'm disappointed.'" (Tr. 858–859.) Woosley described Morrison as being "red-faced" as he made this statement. (Tr. 859.)

As with other alleged behavior by managers, there is no need for the fact-finder to engage in any lengthy analysis of the reliability of this account. In his own testimony, Morrison agreed that he had approached Woosley with the flyer in his hand. He reported that, "I just told him, just told him, I kept it in my hand, that I was disappointed in this." (Tr. 1000.) When I asked Morrison what he meant by being disappointed in "this," he explained that he was disappointed "[t]o find his picture on that flyer." (Tr. 1000.)

The representation election was held on October 28. The Union prevailed and was formally certified as representative of the bargaining unit on November 7.²¹

C. *Developments Subsequent to the Union's Election Victory*

Pearcy testified that, immediately after the election results were known, he had a discussion with Heap. Heap asked him if he, "had any operators or we had people lined up to replace the Union people." (Tr. 247.) Heap then outlined the Employer's strategy in response to the employees' decision to select the Union as their representative, stating that, "we had to look in and start documenting, and everything, and get all our stuff in a row that we'd have probable cause, I suppose, is the best way to put it, to—to let employees go who were with the Union." (Tr. 247.) As will be described shortly, actions taken by management in the succeeding weeks fully confirm the accuracy of Pearcy's account of management's planned response to the election results.

The election having been held on a Friday, the following Monday, October 31, was the first work day for the members of the newly represented bargaining unit. Unit employees on each shift were called into meetings conducted by Pearcy and Morrison. At those meetings, they were issued a document entitled, "Responsibility Press Operators." (GC Exh. 2.) While the content of this document will be analyzed later in this decision, suffice it to say at this point that the document contained a list of 23 work rules. Of these, 15 were described as applying to all press operators and the remainder were directed at specific requirements for each of the three types of press machines being operated by the Company. The subject matter of these rules was very broad, including rules of conduct on such topics as time and attendance, recordkeeping, and general behavior in the workplace. In addition, the list contained numerous highly

²¹ There is no dispute as to the Union's status as bargaining representative. See, for example, Respondent's amended answer to the second consolidated complaint, par. V. (GC Exh. 1(t), p. 2.)

detailed rules regarding the specific duties involved in the operation of each of the presses. After listing all of these items, the document warned that, "[f]ailure to follow these procedures will incur [sic] disciplinary action up to and including termination [sic]." ²² [Emphasis in the original.] (GC Exh. 2, p. 2.) Finally, the document provided a signature line to create a record of acknowledgment that each employee had received the rules and understood their meaning.

Numerous witnesses called by both sides in this case described the events at the meetings conducted by Pearcy and Morrison on October 31. These accounts are strikingly consistent with each other. Because he was a key participant in one of those meetings, I will cite Bishop's description in detail. He testified that, upon distributing the Responsibility Press Operators document, Morrison began the meeting by stating that, "this is our new responsibility sheet for our duties as a press operator." (Tr. 78.) He then proceeded to read each item on the list aloud. After this, Bishop asked whether management had discussed the document with the Union or had engaged in any bargaining over its contents. Morrison replied that he saw no need for this, since, "we were not a union because we did not have a contract." (Tr. 79.) Pearcy then chimed in with a similar assertion that there was no need to discuss matters with the Union because there was no existing contract.²³ (Tr. 88.)

At this point in the meeting, Morrison directed each of the employees to sign the document. Bishop stated that he preferred not to do so. Morrison told him, "[t]hat's fine. If I didn't want to sign them, I could go home." (Tr. 81.) Faced with this dilemma, Bishop said that he would, "sign under protest, because it hadn't been bargained with, with our Union."²⁴

²² The haste with which these rules were promulgated may be inferred from the sloppy manner of their presentation as illustrated by the errors in the sentence just quoted. This conclusion was also supported by Barnum's surprising testimony that, while he had been involved in prior efforts to draft work procedures, he did not see these rules prior to their distribution to the employees. When asked if he knew that they were going to be distributed on October 31, he responded, "[a]bsolutely not." (Tr. 1155.) This is striking, given his central role in all matters related to production and personnel. All of this supports the conclusion that these rules were issued on this date as an immediate and provocative response to the election results.

²³ For his part, Morrison testified that Bishop, "made a comment about whether or not the Union was made aware of this. And I told him that that meeting was not about discussing the Union, it was about . . . making sure that we followed up with everybody and revisited . . . the job responsibilities." (Tr. 1004–1005.) Pearcy testified that Bishop asked about input from the Union and his recollection was that he made the response, telling Bishop, "[W]e don't have a union, sit down." (Tr. 316.)

²⁴ As to Morrison's threat to send Bishop home, Pearcy's succinct testimony was that Morrison told Bishop, "to sign it or go home." (Tr. 314.) Morrison's own version was only slightly more equivocal. He testified that, "I said that . . . if you don't sign it, I may have to send you home, because . . . are you telling me that you're not going to follow these? Then how can I have you run the press?" (Tr. 1005.) To the extent these variations may be deemed material, I credit the accounts of Bishop and Pearcy, both because they are consistent and because these two witnesses were generally reliable while Morrison's self-serving accounts about many matters at issue were not credible.

(Tr. 79.) Eventually all employees did sign the document, with Bishop adding a notation that his signature was made under protest.

As with so much else in this case, documentary evidence provides penetrating insight into the motivation behind the issuance of the Responsibility Press Operators document on the first workday after the union election. At 2:48 p.m. on October 31, Percy sent an email to Barnum reporting on the issuance of the document and the reaction at the meetings with the press operators. It bears quotation at some length:

I think the press operators think that the guidelines Katharina and I wrote and the measuring and keeping their presses and press sheets up to standards is a joke, and they are mistaken if they think this. I have already been told that PFS is a union shop and that the union is going to make the rules, again they are mistaken, I will keep written documentation of every issue that comes up of not doing their job properly and disobeying the rules that are set forth.

(GC Exh. 37.) Barnum replied at 6:02 p.m., ominously opining that, “I wouldn’t want to test Brett’s resolve on this if I were the pressmen.”²⁵ (GC Exh. 37.) He observed that the Union was unable to impose any rules on the Company absent an agreement and, “[u]ntil then, they’d better follow whatever instructions they’re given . . . Doing otherwise is at the peril of anyone refusing to follow orders.” (GC Exh. 37.)

Apart from the issuance of the work rule document, management made two additional personnel decisions on October 31. Press operator Woosley was informed by Morrison that he would be transferred from third shift to second shift with a week’s notice. He protested due to child care issues, but Morrison declined to alter the planned transfer. That transfer would involve a swap in shifts between Woosley and Dykstra.

Perhaps more significantly, management changed its prior response to the problem posed by the mechanical breakdown of operator Recktenwald’s press. It will be recalled that, before the election, Morrison had approved Recktenwald’s request to perform other duties while his press remained inoperative. Such approval had been consistent with past practices. Those practices were described by Percy who reported that operators whose machines were down would be assigned to, “[c]lean up, wipe on the machine, stack boxes, just, you know, again, menial tasks that, anything we could find—you know, to find for them to do.” (Tr. 330.) Despite this existing practice, Morrison had warned that the policy could change after the election.

Recktenwald testified that, in fact, the policy did change as of October 31. He reported that, after the employee meeting regarding the new work rule document, he was pulled aside by Morrison and Percy. Percy told him that, “since your press is down, that we don’t have any work for you to do today, and you just need to go on home.” (Tr. 789.) Recktenwald asked if

he could continue to help out around the pressroom but he was informed that his name had been selected “out of a hat,” and it was his turn to go home. (Tr. 790.) Percy added that, “tomorrow somebody else will go home and you’ll be able to stay and get your hours.” (Tr. 791.) Recktenwald reported that he then proceeded to punch out and go home. He did not receive full pay for this date.

While Percy did not hesitate to confirm that he sent Recktenwald home on this day and that his action was without prior precedent, this was a rare occasion where his testimony was otherwise somewhat equivocal and evasive. Thus, he explained the reasoning behind this change in procedure as:

Normally, they’d do something [when their press was inoperative]. But we were—we were lax in that, we were tightening up, not only with the Union, that didn’t—that wasn’t as much as it was just circumstances, we were tightening up our belt strings a little bit.

(Tr. 325.) After being pressed as to the motivation for the change, he eventually described management’s reasoning:

I don’t know if all the—all the finances and wanting to save money, and everything, would have been at such a forefront if there’d never been anything about the Union . . . that definitely precipitated me thinking about how to cut costs and get people out.

(Tr. 329.)

Management’s conduct on that date evoked a predictable reaction from the Union. On the following day, November 1, Castro filed the initial charge involved in this case, alleging that the issuance of the new work rules, the decision to send Recktenwald home, and the threat to send Bishop home were unfair labor practices. In addition, Castro made a direct response to the Employer regarding the Responsibility Press Operators document. He addressed a letter to HR Director Miller in which he stated that, “[t]hese new work rules were not negotiated with the Union and to date no copy of the document has been provided to the Union for our review.” (GC Exh. 12, p. 1.) He demanded that the Company cease and desist from any further implementation of the rules and engage in bargaining both about those rules and, generally, for a collective-bargaining agreement.

At the same time, Castro also drafted two letters to the Company seeking information. While the nature of the information being sought will be addressed later, at this point it is sufficient to simply note that the first letter (GC Exh. 12, p. 3) requested general information about bargaining unit employees, work rules, wages, benefits, and personnel policies,²⁶ while the second letter (GC Exh. 12, p. 4) was confined to obtaining information regarding health insurance. In each letter, Castro asked that the information be provided within 10 days.

Finally, on this date Percy sent emails to two fellow managers, Barnum and Morrison. The contents continue the pattern

²⁵ Interestingly, Barnum made another comment in his email that foreshadowed the Employer’s effort to justify its conduct in unilaterally implementing the Responsibility Press Operators document in this trial. Thus, he suggested to Percy that “[p]erhaps we should introduce the guidelines as simply documenting the procedures we have been attempting to follow.” (GC Exh. 37.)

²⁶ One of the items Castro requested was, “[c]opies of all disciplinary records and personnel actions for the past year.” (GC Exh. 12, p. 3.) This request was interpreted by management in a manner that provoked a strong reaction as will be described shortly.

of providing persuasive documentation of management's ongoing motivations. Interestingly, in one instance they provide evidence of legitimate business motives and in the other they provide convincing evidence of unlawful antiunion animus. Thus, the first email to Barnum contains Percy's report regarding the proposed transfer of shifts between Woosley and Dykstra. He explains his rationale for the transfer decision as follows:

I am changing the shifts of a couple of the operators to better man the presses at night and hopefully bring our production up on the [74G press] on that shift.

(GC Exh. 52.) It should be noted that there was uncontroverted testimony establishing that Dykstra was a more productive operator than Woosley and that the Employer considered Dykstra's new shift assignment to be the more important shift overall.

In contrast to the evidence regarding genuine business motivation for the shift transfer, Percy's second missive of the day showed naked animus. The exchange of emails began with one from Morrison to Percy containing prounion quotes from Bishop's Facebook page. Morrison characterized Bishop as "a **jackass**." [Emphasis in the original.] (GC Exh. 41, p. 1.) Percy replied by making reference to a layoff that was being planned for later in the year. He told Morrison that, "[Bishop] is going to get less hours and be the 1st to go when we start cutting back so he thinks he is getting something [from the Union] but actually he is setting himself up to fail." (GC Exh. 41, p. 1.)

During early November, matters continued to evolve. The bargaining unit members elected Bishop as their steward. Meanwhile, management began preparations for the upcoming layoff that was going to be implemented in mid-December. Percy provided detailed information regarding this process. His account documents the mental conflict between the desire to lash out at union supporters and the conflicting recognition of some obligation to comply with labor law. Thus, he testified that he attended a meeting with Barnum and Morrison in order to formulate the "protocol we would use to conduct the layoffs." (Tr. 253.) As I have indicated, this posed a considerable dilemma for the three managers. Percy outlined the nature of the problem as follows:

Brett [Heap] wanted to lay off the people in the Union . . . but we had to find—you couldn't just go and lay them off and not have a reason to lay them off. So that's why, you know, we had to come up with the protocol. And that's why I said, you know, it wasn't the ideal people that Brett would want to laid [sic] off,²⁷ but we had to try to follow the law the best we could as to pick the people that fell under that category. . . . We went by production—production numbers of the press operators, and the quality of the press operators.

(Tr. 253–254.)

Percy went on to report that management proceeded to obtain the production numbers. On review of these statistics, they

²⁷ Percy reported that the "ideal" subjects for lay off in Heap's opinion were Bishop, Murray, Gartland, and Starks. (Tr. 258.)

noted that, "[t]he bottom tier of the people were right there together, so you could go either way on that. They were all on a relatively narrow band of production difference." (Tr. 260.) As a result, the managers determined that it was necessary to use "attitude, or performance, or perceived attitude" to make the necessary selections. (Tr. 260.) He also acknowledged that support for the Union "could" qualify as an adverse attitudinal factor. (Tr. 260.)

Applying these protocols, the managers noted that not all of the union supporters targeted by Heap would be subject to lay off. Percy testified that Barnum observed that, "Brett's not going to be happy about the list, but, you know, we have to follow the law and we have to do what we have to do to—that's best for the Company." (Tr. 263.) Barnum confirmed the nature of this discussion regarding Heap's attitude. After the managers acknowledged that Heap might be unhappy about their selections for the upcoming layoff, he told Percy that, "I don't care what Mr. Heap is happy with, we are not going to do anything which violates the law."²⁸ (Tr. 1337.)

At this period in early November, management also began unveiling its response to Castro's request for disciplinary information related to bargaining unit members. On November 3, Percy issued a written warning to Woosley for offenses consisting of, "Failure to Follow Instructions and Unsatisfactory Work Quality." (GC Exh. 9.) The issue arose from the erroneous printing of two jobs. This required a reprint of both orders. Woosley readily conceded that the Employer's complaint had merit. As he testified, "Some plates got switched. Actually, I had a new helper. Whether it was his fault or it was mine, I agreed it was a mistake I should have caught." (Tr. 868–869.)

Woosley's disciplinary warning would not be of particular moment in this litigation, if not for what transpired during the disciplinary meeting. Woosley and Percy both testified consistently regarding their conversation. Thus, Woosley reported that he asked Percy why he was being issued a written warning. Percy explained that, "this is something that they have to do now because they received a letter from the Union demanding that they keep records of any disciplinary actions."²⁹ (Tr. 872.) He reiterated that Woosley was the first employee to be written up under the requirement stated in a letter from the Union that demanded the Company "to keep documentation of any disciplinary action." (Tr. 873–874.) Percy predicted that, "you're going to be written up for if you're late, if you're absent. They're going to start writing up for everything." (Tr. 875.) He underscored the widespread nature of this change in

²⁸ I recognize the obviously self-serving nature of this bit of testimony from Barnum. Nevertheless, I credit it because it is consistent with Percy's account of the same discussion and I have found Percy to be an objective informant. I will discuss my assessment of Percy's testimony in detail later in this decision.

²⁹ Of course, this is an intentional misreading of Castro's information request which merely sought to obtain any copies of disciplinary reports that had already been created. Nothing in Castro's letter can reasonably be construed as a demand that the Employer create disciplinary records that did not already exist. Indeed, it would defy common sense to believe that the Union was demanding that the Employer issue writeups for disciplinary offenses.

procedure by warning that, “there’s going to be a lot of changes made involving other people, not just me.” (Tr. 876–877.)

In his own account, Percy readily confirmed the significant details of his meeting with Woosley and added insight into management’s motivations and thought processes. Thus, he reported that he told Woosley that, “we were going to start writing up,” adding that this was a consequence of the need to prepare “paperwork for the Union.” (Tr. 340.) He observed that this was quite a change in his own practices since, as he put it, “I never personally wrote anyone up before that.” (Tr. 335.) He also provided a penetrating summary of the rather vindictive nature of the rationale for the new procedures:

[T]he Union coming in just precipitated documentation of all—all errors and all—all things wrong. No more lackadaisical attitude or—or not—not making people responsible for what they’d done or their actions.

(Tr. 337.)

On this day, management also took additional steps to arrange the transfers of Woosley and Dykstra. Dykstra testified that Percy informed him of the switch in shifts. Later on, he took the opportunity to complain about the change in a conversation with Percy and Morrison. He explained that it would negatively impact on his ability to find a second job. He also observed that he would not need to seek a second job if he were to be given a pay raise. Percy replied that, “[t]hey could not give me a raise because of the union proceedings.” (Tr. 688.) Dykstra reported that the shift transfer was implemented as of November 7.

In the middle of November, Castro took several measures on behalf of the Union designed to respond to the procedural changes implemented by management after the election. These initiatives included the filing of additional unfair labor practice charges regarding the unilateral change in work shifts and the utterance of threats by management. He also addressed correspondence to the Employer on November 22, reporting that Bishop and Dykstra had been elected as steward and assistant steward, respectively. The letter contained demands for provision of information, bargaining, and the cessation of unilateral implementation of shift changes, work duties, rules, transfers, and “any possible layoffs or reduction in work force.” (GC Exh. 15, p. 1.) Counsel for the Employer responded by letter dated November 30 which provided certain previously requested information.³⁰ (GC Exh. 16.)

³⁰ Castro testified that he did not actually receive this material until December 5 because counsel for the Employer had mailed it to the Union’s main office in Cincinnati instead of his Louisville address. The General Counsel suggests that this was a deliberate attempt to delay the provision of information to the Union. While some of the Employer’s statements and actions justify the General Counsel’s suspicions, I decline to conclude that counsel for the Employer engaged in such petty mischief. Nothing in his demeanor or behavior during this fairly long trial would support such a conclusion. Furthermore, the Union’s letterhead lists the Cincinnati address in a prominent position and Castro’s testimony shows that he was somewhat inattentive to the possibility that the letterhead could cause confusion. In sum, even where animus is clearly shown, some mishaps may still be innocent.

With the coming of December, the Employer continued its preparations for the anticipated layoff in the middle of the month. On December 7, Barnum sent a cryptic and rather disturbing email to Heap on this topic. He began by informing Heap that he had attached a list of the entire total of 41 employees who were going to be laid off throughout the plant. Strikingly, he observed that, “Bishop may be the only anomaly. He produces more sheets per hour than a couple of pressmen we’re retaining, but they can operate more than the Karat. Obviously the Union will fight anyway.” (GC Exh. 60.)

Two days later, union officials were notified of the layoffs. This was done at a meeting on December 9 attended by Barnum and Woods for the Employer and Bishop, Dykstra, and Castro on behalf of the Union.³¹ Bishop testified that they were provided with a list, “of people who were in our unit that were going to be laid off and my name was on the list.” (Tr. 63–64.) His reference is to a letter from counsel for the Employer to the Union indicating that the Company, “typically experiences a slowdown in business in mid-December and lays off employees.” (GC Exh. 26.) It reported that such a layoff would occur on December 16 and listed the unit employees who were to be affected. The list consisted of six pressmen and one helper.³² Counsel explained that the methodology employed in determining the identities of the selected employees was “based primarily on their productivity, although other factors, including the employee’s versatility with additional equipment may be considered.”³³ (GC Exh. 26.) Finally, counsel advised the Union to notify the Company of any desire to “discuss this matter” prior to December 16, since “layoffs need to be completed by that date.” (GC Exh. 26.)

After receiving the layoff notice letter, a discussion ensued. Barnum referenced the anticipated slowdown in business and the resulting need to lay off workers. He told the union officials that management had “reviewed the productivity of the employees,” and that those selected for layoff had been the least productive. (Tr. 1583.) Castro testified that Barnum elaborated by noting that, “where the numbers were close, they looked at who was able to run multiple pieces of equipment.” (Tr. 1584.)

There is no dispute that Castro made a request for bargaining related to the layoff. There is a bit of conflict as to whether he requested such bargaining about the decision to have a layoff or

³¹ Castro was not notified of the meeting by the Employer. Instead, he learned about it from Dykstra and simply decided to “show[] up.” (Tr. 1581.)

³² The pressmen to be laid off are listed as Bishop, Recktenwald, Starks, Glover, Wellman, and Thomas Jones.

³³ The letter claims that, “[t]his selection process is unchanged from previous years.” (GC Exh. 26.) This assertion was not supported at trial with any documentary evidence or detailed testimony. The failure of proof as to this point, in circumstances where such proof would ordinarily be anticipated, was noteworthy. See *Reeves Rubber, Inc.*, 252 NLRB 134, 143 (1980) (where employer’s testimony regarding layoff defense was uncorroborated by documentary evidence, it was not convincing). It is also noteworthy that the General Counsel presented contrary testimony from press operator Gartland who reported that he was present during the previous layoff in 2010 and was told by a manager that the methodology for selection at that time was, “highest wage, lowest seniority.” (Tr. 1541.)

only about the effects of the layoff decision. Unfortunately, the transcript contains a likely error in describing Castro's own account. He is indicated as having testified that, "[w]e asked to bargain over the decision of the effects." (Tr. 1584.) Dykstra testified that Castro "did request to bargain over the decision and the effects." (Tr. 1722.) Barnum reported that he recalled Castro asking to bargain "over the effects," but did not recollect a demand to "bargain over the decision to make a layoff." (Tr. 1836.) Fortunately, this ambiguity in the record does not require any definitive resolution since it is clear that, in this case, the General Counsel does not allege any unfair labor practice related to the decision to conduct a layoff. The alleged violations are strictly related to an asserted failure to bargain over the methodology of the selection process and other effects of the ensuing layoff.³⁴

After approximately 30 minutes of conversation, the meeting concluded. The parties agreed to meet again on December 12 to continue their discussions regarding the layoff. On that date, the Employer's representatives were Barnum, Woods, Jason Burwinkel, and Ken Lawson. Burwinkel was the newly hired human resources manager, and Lawson was a human resources professional for the parent company, Farheap Solutions. Castro, Bishop, and Dykstra attended on behalf of the Union. The Union presented a written proposal regarding the layoff issue that focused on seniority as the proposed predominant selection criterion. (GC Exh. 65.) While the Company did not make a response to this proposal, management did indicate that they would be using productivity as the predominant criterion and that they were not going to differentiate between PFS employees and personnel who were working at PFS under temporary agency contracts.

During their discussions, the Union also raised the subject of allowing employees to bump other personnel in order to avoid being laid off. In particular, Dykstra referred to the unique situation of press operator Recktenwald. He observed that Recktenwald had been promoted from helper to operator but was still being paid at the helper's rate. Thus, Dykstra suggested that it would be easy to retain Recktenwald by permitting him to revert to performing a helper's job. He also noted that Recktenwald offered additional flexibility as he had "previously done some platemaking." (Tr. 1592.) Management responded that, "they didn't see the benefit in allowing those employees to bump down." (Tr. 1592.)

There is a significant dispute regarding a statement made by Castro on the topic of the productivity numbers used by management to evaluate employees for layoff. Castro testified that he "requested a copy of the productivity information since they were using it as their basis for layoff of all employees in the bargaining unit." (Tr. 1592.) He reported that management explained the information was derived from the Company's data management system known by the acronym of PROFIT.

³⁴ At trial, I took some pains to clarify this point on the record. In his forthright response to my questioning about the General Counsel's legal theory, counsel explained that, "definitively, we are not challenging the decision whether to have layoff at this point." (Tr. 963.) He noted that what was being litigated was, "the selection process, as well as a failure to bargain over the effects." (Tr. 963.)

Castro suggested that it be sent to him electronically. Barnum replied that, "it was proprietary software, and he doubted that our [the Union's] computers would be compatible with it." (Tr. 1593.) Castro then proposed that the data be provided in printed form. He testified that he was told that, "it was a lot of information, but that they would be able to start compiling that and give it to me." (Tr. 1593-1594.) He noted that Woods stated that they would provide the productivity information.³⁵ Furthermore, he indicated that Barnum told him that the data would be meaningless absent an explanation of it. Therefore, he told Castro that they would "get together and he would show it to [Castro] and explain it." (Tr. 1630.)

Bishop and Dykstra both corroborated Castro's account of his demand for the productivity information during the course of the bargaining session. Bishop's testimony also indicated that the demand involved three steps. Castro first asked for the data to be sent in electronic form. He was told that "it was proprietary software and it couldn't be sent out." (Tr. 1449.) He then requested a "printout" of the data and was told that they weren't "sure if that was possible." (Tr. 1449.) Finally, Castro suggested that he "just come in and see it." (Tr. 1449.) The response was that management would "get back with him." (Tr. 1450.)

Barnum presented the Employer's version of the discussion regarding the productivity data. His account provided a vivid illustration of the need for some skepticism when evaluating the accuracy of his testimony regarding hotly contested issues in this case. Thus, he conceded that the topic of productivity data did come up during the meeting, but only as an offhand remark by Castro to the effect that, "[e]ventually we will want to get the data you've used to make the determination for the layoff." (Tr. 1836.) It was his initial position that there was no immediate request for the data, merely the prospect that such a request would be made in the future.³⁶

In the first instance, this claim is hard to credit for reasons of logic and common sense. Barnum never explained why the Union would express an intention to obtain the data only after the layoff had been effectuated. In a different context, Barnum did acknowledge the reality that there was extreme time pressure in the bargaining over the layoff. He testified that, "[w]e had a very limited time, one week, between the date of that meeting and the date that the layoff would take effect." (Tr. 1842.) It defies common sense to believe that Castro would defer a request for the data until after the layoff or that he would have any use for such material once the layoff had taken place.

More importantly, Barnum's account was thoroughly impeached under cross-examination. Thus, counsel showed him an email sent by Woods to Castro with a copy to Barnum on

³⁵ Castro also reported that he asked Woods if he needed to make a written demand for the productivity information and Woods told him that this would not be necessary. Dykstra confirmed this aspect of the discussion.

³⁶ Barnum did report that Castro raised the need for the Company to respond to his prior demands for information related to, "health insurance, work rules, [and] a list of employees," and he asked for "some idea when he thought we might get those." (Tr. 1842.) In reply, Woods told him that, "we would get them to you." (Tr. 1883.)

December 14. In that email, Woods made a passing reference to “the productivity information you requested relating to the layoffs.” (GC Exh. 18, p. 1.) On seeing this, Barnum was forced to concede that his prior testimony indicating that Castro had not made an immediate demand for productivity information was “[a]pparently” incorrect. (Tr. 1890.) Based on the totality of the evidence as to the question, I readily credit the testimony of the Union’s witnesses that demonstrates that Castro made a clear and present demand for the productivity data and that, at the very least, the nature of the demand was understood by counsel for the Employer as reflected in his email correspondence 2 days later.

After the meeting, an email sent from Barnum to Heap regarding the Union’s proposal provides a glimpse at how the Company reacted to it. Barnum concluded that, “[o]bviously nothing in there we are interested in but we have to go through the motions.” (GC Exh. 59.) Not surprisingly given Barnum’s description of the Employer’s viewpoint, the Union’s proposal was summarily rejected by letter dated December 13 from Attorney Woods. He advised Castro that, “we will rely on our ability to differentiate between employees based on skill and ability.” (GC Exh. 66, p. 1.) He offered to meet with the Union on the following morning for additional discussions, but also stated the Company planned to implement the layoffs using the methodology that it had previously articulated.

Castro replied by email to Barnum at 3:28 p.m., agreeing to meet on the following day to bargain about “the effects of the Company’s decision to layoff employees.” (GC Exh. 18, p. 2.) He also observed that he needed “employees’ productivity numbers” in order to make such bargaining “fruitful.” (GC Exh. 18, p. 2.) Woods replied approximately 2 hours later, declining to meet on the next day as such a meeting, “would not be productive.” (GC Exh. 18, p. 2.) He did, however, add that the Employer “will get you the productivity information you requested related to the layoff.” (GC Exh. 18, p. 2.)

On December 14, Woods telephoned Castro and also emailed him regarding a new matter related to the imminent layoffs. As he explained in his email, “we discovered an error which will result in Jonathan Bishop avoiding layoff. Robert Roederer will be laid off. The productivity statistics showed Mr. Bishop to be more productive than Mr. Roederer.”³⁷ (GC Exh. 18, p. 1.) When Castro informed Bishop of this development, Bishop replied that he “could better afford to take the layoff” than Roederer and suggested that the Employer be so advised. Castro informed Woods and was notified that the Company had agreed to “your suggestion that Bishop be laid off instead of Roederer.”³⁸ (GC Exh. 67, p. 1.)

Also on this date, Dykstra was issued a written warning for having sent a text message to a coworker. The issue arose due to an ongoing conflictual relationship between Dykstra and

Bradford. Both men operated the same press, albeit on different shifts. This was the source of tension between them, particularly related to matters involved in the turnover of the press from one operator to the other. Thus, Dykstra reported that on December 13, he arrived at work to find that the inner deck dryers of the press were disassembled and the work area was, “just [in] general disarray.” (Tr. 1725.) There was no communication from Bradford to explain what had been done or the nature of any malfunction in the press.

Confronted with this situation, Dykstra sent an angry text message to Bradford. There is no dispute that the content of this text was, “Wtf is going on with these dryers and why is no one leaving a damn note about it?” (R. Exh. 47.) There is also no dispute that the abbreviation, “Wtf” meant, “What the fuck.”³⁹ After dispatching this text, Dykstra also raised the issue of the lack of communication with the supervisor, Javier Ortiz.

At the end of Dykstra’s shift, Bradford came in to take over the operation of their shared press. Dykstra characterized Bradford was appearing “visibly upset.” (Tr. 1727.) He also reported that Bradford accused him of being “disrespectful.” (Tr. 1727.) After some angry words, Dykstra sought the intervention of Supervisor Ortiz. As his shift was over, he then departed the facility.

Later that day, Morrison contacted Dykstra and Union Steward Bishop and advised them that there would be a meeting on the following day. Morrison explained to Bishop that the topic was, “an inappropriate text message sent from Mr. Dykstra to Paris Bradford.” (Tr. 1468.) Bishop was shown a copy of this text. Bishop testified that he discussed the matter with Dykstra prior to the meeting and told him that, “it was inappropriate for him to send that kind of message to a fellow employee.” (Tr. 1486.)

Dykstra and Bishop provided accounts of the ensuing disciplinary meeting. Their testimony was consistent and uncontroverted and I credit it. They indicated that Morrison told Dykstra that his text message to Bradford had been “very inappropriate.” (Tr. 1469.) He issued a formal warning document to Dykstra that expressed the Employer’s viewpoint as, “[t]his type of offensive communication will not be tolerated at PFS.” (R. Exh. 47.) While he admitted the content of his text message, Dykstra protested the discipline, noting his own grievance regarding Bradford’s failure to communicate with him about the condition of the press. Morrison rejoined that the discipline was for the content of the text message, observing that this was “the whole premise of the writeup.” (Tr. 1731.)

After this discussion that focused on the matter at hand, Morrison chose to digress. He raised a concern regarding two “nonconforming runs” by Dykstra on October 9 and December 9. He told Dykstra that he was “thinking about writing me up” for these production errors. (Tr. 1732.) Dykstra replied that Percy had already discussed the October mistake with him and had chosen not to issue a writeup. Morrison asserted that Percy was supposed to have issued such formal discipline for the incident. Bishop testified that Morrison concluded this discussion by stating that, “he wasn’t sure if Travis [Dykstra] was

³⁷ It is ironic to note counsel’s reference to the productivity statistics in light of the Employer’s unjustified and unlawful refusal to provide those statistics to the Union.

³⁸ In his testimony, Bishop confirmed that he remains on layoff status now due to this decision on his part. He conceded that, had he not elected to volunteer to substitute for Roederer, he would be currently employed by the Company.

³⁹ See Dykstra’s testimony conceding this point. (Tr. 1740.)

going to be written up for them. But the Union was requesting documentation and now they were going to write people up for documentation.”⁴⁰ (Tr. 1470.)

As it was now the middle of December, the Employer implemented its anticipated layoff. While Percy was able to provide detailed and illuminating testimony regarding the planning process for this layoff, he was not able to shed light on the events involved in the actual implementation. As of the implementation date, Percy had resigned from PFS in order to take a position with another firm that afforded him a much better commute.

Barnum testified that he was the official who made the final layoff selections and that he did so after consulting all of the managers in order to obtain “their assessment of who they believed we could afford to do without and who were the most likely candidates to be laid off.” (Tr. 1209.) Barnum was asked whether the Union played any part in his determinations regarding the layoff. He replied that the Union was considered, “[o]nly to the extent that I knew we had an obligation to advise the Union and to attempt to bargain with them about the layoff.” (Tr. 1210–1211.)

As implementation proceeded, Recktenwald reported that Morrison gave him notice of his layoff on December 15. The layoff would begin on the following day. According to Recktenwald, Morrison also asked him if he wished to return to PFS if business picked up later. Recktenwald expressed his desire to do so. Six press room employees, including Union Steward Bishop, were laid off on December 16. Subsequently, Dykstra assumed the role of union steward.

As one would expect, the layoff was the subject of considerable discussion in the plant. Among these conversations was an exchange between Lincoln and Morrison. Lincoln expressed his concern as to whether the current employment situation was going to affect his own transfer from temporary agency status to that of a full-time PFS employee. Morrison stated that he would like to hire Lincoln, but did not know what Heap would decide to do. Morrison asserted that, “Heap would sooner move the Company up—uproot the Company and move it to Memphis, or wherever the FedEx hub is in Tennessee than to deal with the Union here in Kentucky.” (Tr. 1674.) Lincoln summarized Morrison’s ultimate statement as to the issue of his status as being that, “he would like to put me on, but he can’t right now because of all the negotiations, and things, that was going on with the Union.”⁴¹ (Tr. 1676.)

As the year drew to its close, Dykstra was again involved in a disciplinary procedure. On December 28, he was issued a formal written warning for a production error committed on December 21. This warning referenced the specific mistake and characterized the warning as being for “Unsatisfactory Work Quality.” (R. Exh. 48.)

⁴⁰ Actually, Dykstra reported that he was never issued any writeup for either of these production mistakes.

⁴¹ As with Lincoln’s other testimony, I found his description of this conversation to be reliable based on his general demeanor and presentation, the consistency of his testimony with much other credible evidence regarding motivation of the Employer, and the uncontroverted nature of his account.

In his own account, Dykstra conceded much of what was at issue. He explained that on December 21, he was having difficulties with the ink agitators on his press. He reported that, in consequence, “I believe I ran that one before I noticed that they were having an issue.” (Tr. 1744.) He also confirmed that, when a manager asserted that he should have checked the product coming off the press more often, he “agreed.” (Tr. 1746.)

Early the next year, on January 6, 2012, counsel for PFS mailed answers to certain of the Union’s information requests to the Board agent. (GC Exh. 47, pp. 2–5.) Unfortunately, he failed to send a copy of this to Castro. On January 21, copies were sent to Castro with an apology for the “inadvertent” oversight. (GC Exh. 47, p. 1.) During this period, on January 11, counsel also sent Castro another letter addressing certain information requests regarding health insurance. (GC Exh. 32.)

Also at the beginning of 2012, the Regional Director filed the two complaints that are before me for adjudication. These include the second consolidated complaint bearing lead docket number 09–CA–068069, filed on January 13 and the complaint and notice of hearing bearing docket number 09–CA–072457, filed February 28. These complaints have since been amended. I will now address the resolution of the issues presented by those amended complaints.

D. Legal Analysis

For purposes of organization, it is useful to group the General Counsel’s allegations against this Employer into three categories based on the framework established by the terms of the Act itself. I will, therefore, first assess those alleged violations consisting of acts and statements that are asserted to have coerced, restrained, or interfered with the employees’ statutory rights. Next, I will analyze those acts alleged to constitute discrimination against employees due to their involvement in protected activities. Finally, I will examine the alleged violations of the Employer’s duty to engage in good-faith collective bargaining with the elected representative of its employees. In each instance, I will generally employ a chronological approach.

Before embarking on this assessment, it is useful to outline my general findings and conclusions regarding the credibility of those accounts that are in conflict and the quantity and quality of the evidence as to the key issue of this Employer’s attitude and motivation with regard to its statements and behavior that affected the discharge of its statutory obligations toward its press room workers.

1. The evidence regarding credibility and motivation

The Board mandates that the evaluation of an employer’s intent and motives proceed from an assessment of the “total circumstances proved.” *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), enf. 976 F.2d 744 (11th Cir. 1992). As a result, the required analysis involves the examination of both direct and circumstantial evidence as to motive. As the Board has explained, “[p]roof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole.” *Embassy Vacation Resorts*, 340 NLRB 846, 847 (2003), review dismissed 2004 WL 210675 (D.C. Cir. 2004).

As a practical matter, the Board has noted that, “[d]irect evidence of unlawful motivation is often unavailable.”⁴² *Metro-politan Transportation Services*, 351 NLRB 657, 663 (2007). It is for this reason that I find it striking that, in this case, a plethora of persuasive direct evidence exists. This evidence includes both testimony and a variety of documentary sources.

Compelling testimony regarding the Employer’s evolving mindset, intentions, and motivation was provided by Scott Percy. It will be recalled that Percy was hired in April 2011 as the quality control and press room supervisor. His position was sufficiently elevated in the ranks of management that he reported directly to the ultimate authority, Heap. Percy remained in this position throughout the organizing campaign, the election, and the initial period of the Union’s presence as representative of the press room employees. He was a primary participant in the formulation of the response to the Union’s organizing campaign, the drafting and implementation of work policies and rules, the imposition of disciplinary sanctions, and the selection of the methodology for conducting the December layoff. Percy left the Company in early December.

In examining Percy’s testimony, I have first scrutinized his presentation for signs of bias. It is a reality that the testimony of former employees may be colored by a sense of grievance over the manner in which the employment relationship came to its end. In this case, there is no contention by the Company that Percy is such a disgruntled former employee. More importantly, there is convincing evidence that he left the Company’s employ voluntarily and on good terms with his colleagues. He reported that he accepted another job offer in the printing field because it afforded him better working conditions. His account was powerfully corroborated by an email from Barnum to Heap dated November 29. In that missive, Barnum advises Heap that Percy’s new job, “includes better medical, probably some additional money, but is closer to Scott’s home and does not require the hours we do.” (GC Exh. 74, p. 1.) The evidence establishes that Percy left PFS for personal reasons and there is no basis on which to infer that he bears any ill will toward his former employer related to the circumstances of his departure.

In assessing the reliability of Percy’s description of the attitudes of the key management officials in this case, I have also included my evaluation of his demeanor and presentation as a witness. As one of my colleagues has noted, such assessment includes examination of “the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during examination, the modulation or pace of his speech, and other non-verbal communication.” *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996), cited with approval by the Board in *Daikichi Corp.*, 335 NLRB 622 (2001).

On the stand, Percy’s demeanor struck me as calm, confident, impartial, and objective. He expressed a sense of detachment from the events and personalities involved that befitted his current removal from the workplace. While he did not

shrink from describing his own and his former colleagues’ willingness to display unlawful discriminatory intent, he also offered evidence of contrary attitudes where appropriate. Two examples illustrate this sense of balance and objectivity in Percy’s account. He summarized management’s overall attitude toward those employees who supported the Union as follows:

Brett [Heap] wanted to get rid of the people in the Union at the time, he wasn’t happy. We talked about it on occasions. And the—the names that were brought up was the people in the Union, the—the supporters that had the stickers, and everything . . . on numerous occasions and when I talked to him and we all talked together, not just him, but the management, yeah, we wanted to get the people in the Union out.

(Tr. 251.)

While he provided this type of unvarnished description of unlawful animus by management, his sense of balance was well illustrated by his testimony regarding the layoff protocol issue. Thus, he described the attitude of the supervisors as recognizing that, “we had to follow the law the best we could” when choosing people for layoff. (Tr. 253–254.) For this reason, he explained that they developed a method of selection focused on productivity rather than basing the decision on the employees’ attitudes toward the Union.

In reaching a final conclusion that Percy’s accounts were entitled to great probative force, I also examined the content of his testimony in light of other evidence, particularly the documentary record. As I will shortly describe, that body of contemporaneously written evidence strongly corroborated Percy’s assertions and provided the final and conclusive measure of his reliability. In sum, I have found Percy’s testimony regarding the Employer’s intentions, motives, and responses to the Union to be credible evidence that forms a vital foundation for the conclusions I have reached in this case.

Apart from Percy’s direct evidence regarding the thought processes of the managers, a large body of contemporaneously written material exists. Interestingly, these documents, consisting primarily of emails sent from both computers and cellular telephones, offer an equally unvarnished and forthright view of the Employer’s intentions and motivations. The striking candor of this correspondence bears some discussion and consideration.

In my four decades of experience in the legal profession, I have witnessed a dramatic evolution of communication technology. It is my belief that the nature of these technological advances accounts for the type of evidence featured in this trial and reflects significant changes occurring in the trial process generally. As a young lawyer evaluating the sort of evidence that could be obtained and presented in my cases, written expressions of intent or motive were rarely encountered. Personal communication was primarily through face-to-face conversation, telephone calls, or by memoranda and letters. While interoffice memos may have been delivered by in-house staff, letters were transmitted through the post office. Of these limited avenues of expression, conversation and phone calls were

⁴² Indeed, the Board is prepared, in appropriate circumstances, to find unlawful motivation even in the total absence of direct evidence. See, for example, *Tubular Corp. of America*, 337 NLRB 99 (2001).

entirely evanescent. There was no hope of obtaining a documentary record of what was said.⁴³

Turning to memoranda and letters, it is important to recall how these documents were created. Typically, the writer composed a hand written draft of the correspondence. This was then typed by a secretary or other clerical employee. The typewriting process did not permit easy alteration of content and corrections were both difficult and unsightly. As a result, the prudent drafter spent considerable time and effort in polishing and correcting the handwritten draft before the typing began. These difficulties in the process of composition gave ample opportunity for the writer to refine the ultimate written product. As a result, the final version was rarely spontaneous. While it may have offered strong evidence as to events and facts, it provided few useful insights into unguarded emotions or intentions. Indeed, even the postwriting process afforded limitations on spontaneity. For example, in my own experience, on various occasions I found myself scrapping letters written in the heat of emotion when given the extra time for reflection involved in proofing the typed version, finding and sealing an envelope, locating a stamp, and taking the finished product to the mailroom or post office.

In stark contrast, today's writing process offers instant and effortless access. We are able to literally dash off a written account of our thoughts in mere moments, whether we are sitting at our desks or travelling about the workplace or even commuting or vacationing. In seconds, we can compose a message and dispatch it to our intended recipient or even multiple recipients. The ease of such communication by email, text message, or social networking platform promotes candor and diminishes opportunities for reflection and reconsideration. Written communication more and more resembles speech in its speed, ease, and fluidity. The writer is lulled into a similar sense that the email has the same intimacy and privacy as conversation. The creation of this mentality leads to the modern reality that extremely candid expressions of emotion, intention, and motivation have become a much more frequent component of the lawyer's evidentiary arsenal. It can fairly be said that the email and its technological relatives are becoming the judges' (and, as the case may be, jurors') best friends.

All of this is dramatically illustrated in this case. To cite some examples of the unparalleled frankness of the Employer's officials, we have Morrison emailing the HR director that he is giving Timberlake a raise "related to the union stuff." (GC Exh. 51.) We see Barnum's email to Morrison after his interview with Lincoln reporting that Lincoln "would probably vote for the union" so, "based on his statements, I would probably not bring him on as a permanent employee at this time." (GC Exh. 44, p. 1.) In another unguarded moment, Barnum emails Heap regarding the Union's layoff proposal, opining that, "[o]bviously nothing in there we are interested in but we have to go through the motions." (GC Exh. 59.) By the same token, Percy emails Barnum after implementing new shop rules. He reports that employees are stating that PFS is a "union shop,"

⁴³ Even this is changing. For example, in a recent case on my own docket, *Dresser-Rand Co.*, 358 NLRB 254 (2012), the key evidence on the central issue in the case consisted of a recorded voice mail message.

and concludes that, "they are mistaken, I will keep written documentation of every issue that comes up of not doing their job properly and disobeying the rules that are set forth." (GC Exh. 37.) Similarly, Percy emails Morrison that Bishop's pronoun stance as expressed on his Facebook page will cause him "to get less hours and be the 1st to go when we start cutting back." (GC Exh. 41.)

The Board has, quite logically, emphasized the importance of this sort of contemporaneous documentary evidence in cases where it exists. Thus, while supervisors in this case testified that antiunion animus played "[a]bsolutely" no role in their decision making, the written record tells us otherwise. (Tr. 1863.) As the Board has put it, "[i]n such circumstances, we find . . . that the [documents] are more reliable than contradictory and self-serving testimony proffered years after the fact." *Domsey Trading Corp.*, 351 NLRB 824, 836 (2007).

Apart from the direct evidence just described, it is appropriate to comment on one additional circumstantial factor that sheds powerful light on the issues of intent and motivation in this case. I am referring to the temporal proximity of significant events in the organizing campaign and significant actions taken by management. Two examples vividly underscore this point. On the day before the representation election, Morrison approved of Recktenwald's plan to assist other press operators during the period that his own machine was inoperative. By contrast, on the first workday after the Union's electoral victory, Recktenwald was refused the same opportunity and was sent home instead. Even more tellingly, it was on this same date, immediately after the election, that management chose to implement a new set of hastily drafted work rules for press room employees.

As the Board has explained, "[i]t is well settled that the timing of an employer's action in relation to known union activity can supply reliable and competent evidence of unlawful motivation. (Citations omitted.) *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004). My own favorite formulation of this analytical principle is from the oft-cited appellate case of *NLRB v. Rubin*, 24 F.2d 748, 750 (2d Cir. 1970), where the Court characterized the timing of layoffs within a few days of the initiation of an organizing campaign as, "stunningly obvious."⁴⁴ By the same token, the timing of the actions of this Employer described above are equally obvious and entirely indicative of an unlawful motive.

In sum, based on powerful direct evidence consisting of testimony and numerous revealing and corroborating documents, coupled with the compelling inference to be drawn from the timing of the Employer's actions, I find that a substantial, and often entirely dispositive, motivation for the Employer's decisions and actions subsequent to the initiation of the organizing campaign was unlawful antiunion animus.⁴⁵

⁴⁴ The Board has cited this colorful formulation of the principle so often that the original citation is sometimes lost. See *Gaetano & Associates, Inc.*, 344 NLRB 531, 532 (2005), enf. 183 Fed.Appx. 17 (2d Cir. 2006), where the language is attributed to a 1982 precedent.

⁴⁵ To be clear, it is important not to be overly simplistic in assessing people's motives. I recognize that employers' decisions are often the product of multiple motivations and that human beings are entirely capable of harboring both legitimate and base motives and that the

2. The alleged violations of Section 8(a)(1)
of the Act

The General Counsel alleges that the Employer's supervisors engaged in conduct during the organizing campaign and after the Union's electoral victory that restrained, coerced, and interfered with its press room employees in the exercise of their rights guaranteed under the Act. This conduct is alleged to have violated Section 8(a)(1).

To begin, it is necessary to outline the Board's analytical framework for evaluation of an employer's conduct in such circumstances. In assessing whether an employer's statements or actions constitute an unlawful threat of reprisal for protected activities, the Board employs the following objective standard:

An employer violates Section 8(a)(1) by acts and statements reasonably tending to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. The Board employs a totality of circumstances standard to distinguish between employer statements that violate Section 8(a)(1) by explicitly or implicitly threatening employees with loss of benefits or other negative consequences because of their union activities, and employer statements protected by Section 8(c).

Empire State Weeklies, Inc., 354 NLRB 815, 817 (2009) ((Citations and certain internal punctuation omitted.) In this regard, the Board has also stressed that,

[I]n considering whether communications from an employer to its employees violate the Act, the Board applies the objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect.

Scripps Memorial Hospital Encinitas, 347 NLRB 52, 52 (2006) (Citation and internal quotation marks omitted.)

The General Counsel first contends that, during the approximately 1-week period prior to the October 28 representation election, Morrison made a variety of unlawful statements to employees regarding the prospect of union representation. (GC Exh. 1(gg), pars. 6(c) and (d).) In particular, press operator Bradford provided testimony that Morrison told a group meeting of employees that, if the Union won the election, management "would never sign a contract, we'd be out on strike, you know." (Tr. 948.) In the same vein, he added that, "if I know Brett like I think I do, he won't—he's not going to sign a contract." (Tr. 949.)

In describing such a preelection meeting conducted by Morrison, press operator Starks testified that Morrison asserted that, "if you guys think you're going to win a battle by voting in a union, you're not going to win the war." (Tr. 731.) This account was corroborated by press operator Recktenwald, who reported that Morrison told the assembled prospective voters

that, "you all may win this battle, but you all won't win the whole thing." (Tr. 774.)

There is powerful corroborating evidence as to Bradford, Starks, and Recktenwald's accounts, demonstrating that Morrison made these statements. Thus, those accounts contend that Morrison elaborated on two themes. First, the Employer would not enter into a collective-bargaining agreement with the Union. In particular, he argued that Heap would not agree to such a contract. Second, he observed that a union victory in the election would be analogous to an army's battlefield success. However, continuing with his analogy, he explained that the Employer's fixed unwillingness to sign a contract with the Union would ensure that the employees would ultimately lose the proverbial "war."

As to Morrison's prediction that Heap would never sign a contract, press operator Murray testified that he had a private conversation with Morrison during this period. At that time, Morrison told him that, "you know how Brett is. He's not going to sign the deal with them. He's—he's not going to work with them."⁴⁶ (Tr. 942.) Even more potent corroboration exists regarding Morrison's warlike analogy. Thus, on the day of the election, he emailed an antiunion employee to reassure him that matters would work out despite a union victory. He told the employee, "Remember the old saying, 'You may have won the battle but you haven't won the war.'" (GC Exh. 50, p. 1.)

I readily conclude that Morrison made the statements attributed to him regarding Heap's determination to refuse to enter into a collective-bargaining agreement and his analogy arguing that a union victory in the election would not result in any ultimate success in the "war" between management and labor.⁴⁷ Equally readily, I find that these assertions are unlawful threats. Indeed, they are classic examples of a particular type of threat that is a staple of labor law jurisprudence, so-called statements of futility. As the Board has explained:

An employer violates Section 8(a)(1) . . . by threatening employees that attempts to secure union representation would be futile. An unlawful threat of futility is established when an employer states or implies that it will ensure its nonunion status by unlawful means. [Citations omitted.]

Winkle Bus Co., 347 NLRB 1203, 1205 (2006). Morrison's statements and predictions clearly implied that the top levels of management would violate their legal obligation to bargain in good faith in order to frustrate and nullify the employees' decision to obtain union representation. This prediction violated Section 8(a)(1) of the Act.

The General Counsel also alleges that, during the runup to the representation election, Morrison threatened Recktenwald with the prospect of fewer work opportunities in the event the Union prevailed in the vote. (GC Exh. 1(ff), par. 6(a).)

Board requires that a careful determination to be made before concluding that unlawful motives were a substantial cause of adverse personnel actions. See the Board's classic formulation of the dual motive analysis in *Wright Line*, 251 NLRB 1083 (1980). In the remainder of this decision, I will perform the required individualized assessment regarding the role of the clearly-established animus displayed by these managers in assessing the lawfulness of their ensuing activities.

⁴⁶ Under cross-examination, Morrison essentially conceded that he made such statements. When asked if, during his presentations at employee meetings, he stated that Heap would never sign a contract with the Union, he replied, "I—I may have said that. I may have said that." (Tr. 1077.)

⁴⁷ This includes the statements made during group meetings with employees and the statements made in private conversation with Murray.

Recktenwald testified that this issue came up during a discussion on October 27 regarding the inoperability of his press due to mechanical problems. Morrison asked Recktenwald and another operator what sort of work they were planning to do, given that the press was not operable. Recktenwald indicated that he intended to assist other press operators. He testified that, on hearing this, Morrison, “agreed to it, and then he told us that if the Union was voted in tomorrow, that we would have to go home if our press was down, and that there would be no work for us to do.” (Tr. 780.)

Morrison flatly denied making this statement or any similar comment regarding a reduction in work opportunities when breakdowns rendered a press inoperative. The conflict in testimony is easily resolved. It is only necessary to recall that, on the first workday after the Union’s electoral victory, Recktenwald’s press was still broken. Percy and Morrison met with him and instructed him to go home. Percy described this meeting in detail and testified that, “if there wasn’t any machines to run, we were setting a precedent that the operators would trade off and be going home.” (Tr. 325.) The immediate fulfillment of Morrison’s predicted consequence of the Union’s victory is powerful evidence that he uttered the threat to Recktenwald in the manner described. See *Vico Products Co.*, 336 NLRB 583 fn. 16 (2001), enf. 333 F.3d 198 (D.C. Cir. 2003), where the Board drew a similar inference arising from the logical nexus between a particular threat and its subsequent fulfillment.

The General Counsel next contends that, on election day, Morrison uttered an implied threat to an employee. (GC Exh. 1(ff), par. 6(b).) The reference here is to press operator Woosley’s testimony that Morrison approached him while holding in his hand a piece of union campaign literature that contained Woosley’s photo accompanied by an exhortation to his coworkers urging them to, “Vote Yes!” (GC Exh. 7.) He reported that Morrison was red-faced. Morrison proceeded to point to Woosley’s photo and say that he was “disappointed.” (Tr. 859.) There is no factual dispute. Morrison testified that he “said that I was disappointed in this.” (Tr. 1000.) When I asked what he meant by “this,” he explained that he was disappointed “[t]o find his picture on that flyer.” (Tr. 1000.)

Turning to the legal implications of Morrison’s expression of disappointment at Woosley’s participation in the Union’s campaign literature, it is clear that this does not constitute an express threat. However, as the Supreme Court has noted:

Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting . . . [and] must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).

Applying this sort of realistic appraisal, I conclude that Morrison did intend his comment to have a coercive impact on Woosley’s right to seek union representation. I also conclude that a reasonable employee in Woosley’s position would interpret Morrison’s remark as containing a warning of possible

adverse consequences arising from his disappointment at Woosley’s behavior. In *Leather Center*, 308 NLRB 16, 23 (1992), the Board adopted the judge’s conclusion that “a veiled threat of possible repercussions” from prounion activity constituted a violation of Section 8(a)(1). I reach the identical conclusion here.⁴⁸

The General Counsel asserts that, on the first workday after the Union’s electoral victory, Morrison unlawfully threatened to send press operator Bishop home for refusing to sign an acknowledgment of his receipt of the newly-issued Responsibility Press Operators document. As a predicate to the assessment of this claim, I note that in succeeding portions of this decision I will articulate my rationale for finding that the issuance of the Responsibility Press Operators document constituted violations of Section 8(a)(3) and (5) of the Act. These findings add vital context to my assessment of Morrison’s statement to Bishop.

As in several other instances, there is no dispute about what was said. At a meeting convened on October 31 by Morrison and Percy, press operators, including Bishop, were issued the set of newly implemented work rules entitled Responsibility Press Operators. Bishop challenged Morrison, asking him if the Employer had bargained with the Union regarding these rules. Morrison told him that there was no need for bargaining as, “we weren’t really union because we didn’t have a contract.” (Tr. 79.) Bishop said that he would prefer not to sign the document, or alternatively, that he would sign it under protest. Morrison retorted, “That’s fine. If I didn’t want to sign them, I could go home.” (Tr. 81.)

Morrison’s only quibble regarding the accuracy of Bishop’s account was that he contended that he said, “[I]f you don’t sign it, I may have to send you home.” (Tr. 1005.) However, he agreed that he added that this would be necessary, “because that’s—you—are you telling me that you’re not going to follow these? Then how can I have you run the press?” (Tr. 1005.) In any event, Morrison’s attempt to engage in a minor bit of evasion was totally undercut by his former colleague, Percy. Percy testified that Morrison told Bishop, “to sign it or go home.” (Tr. 314.)

The legal analysis here is a simple one. Bishop engaged in protected union activity when he protested the Employer’s unlawful implementation of new work rules. In response, Morrison threatened to suspend or discharge him. Obviously, Morrison’s threat consists of a naked example of coercion, restraint, and intimidation. It violated Section 8(a)(1).

The General Counsel contends that Morrison again engaged in unlawful speech on November 3 by telling Dykstra that he could not be given a pay raise due to the Union’s involvement in the workplace. (GC Exh. 1(ff), par. 6(f).) There is relatively little in the record regarding this allegation. Dykstra credibly testified that he had a discussion with Morrison and Percy on this date concerning their decision to transfer him to another shift. He complained that the transfer would interfere with his efforts to find a second job. He went on to observe that he would not need to look for a second job if he were given a pay

⁴⁸ See also *Hialeah Hospital*, 343 NLRB 391 (2004) (supervisor telling employee that he felt “betrayed” by prounion activity constituted an implicit threat of unspecified reprisals).

raise. He testified that Percy responded that, “[t]hey could not give me a raise because of the union proceedings.” (Tr. 688.)

In the first instance, I am not overly troubled by the variance between the complaint allegation attributing the remark to Morrison and the testimony indicating that the speaker was actually Percy. The date of the conversation and the nature of the statement as proven are consistent with the complaint allegation and both supervisors were present when the statement was made. The Respondent had a full and fair opportunity to defend against the allegation and I do not find any significant due process concern regarding the discrepancy. *Artesia Ready Mix Concrete*, 339 NLRB 1224, 1226 (2003) (“the Board and courts have consistently found that an unfair labor practice complaint is not judged by the strict standards applicable to certain pleadings in other, different legal contexts”).

Turning to the merits, the Board holds that, where an employer attributes an inability to grant a raise to the involvement of a union, it violates Section 8(a)(1). *Sacramento Recycling & Transfer Station*, 345 NLRB 564, 565 (2005), and *Marshall Durbin Poultry Co.*, 310 NLRB 68, fn. 2 (1993), enf. denied in pertinent part 39 F.3d 1312 (5th Cir. 1994) (Board finds employer’s statement that, “thanks to the union you all didn’t get a raise” is unlawful).⁴⁹

The General Counsel also alleges that on this date, November 3, Percy violated the Act by advising Woosley that all employees would now be given written disciplinary notices for infractions because the Union had requested documentation regarding the discipline of employees. (GC Ex. 1(ff), par. 7.) As with a number of other instances, there is no conflict in the testimony about this conversation. Woosley reported that he was issued a written disciplinary report for a production mistake. He asked Percy why he was being given a written notice. Percy told him that, “this is something that they have to do now because they received a letter from the Union demanding that they keep records of any disciplinary actions.” (Tr. 872.) Percy added that, “you’re going to be written up for if you’re late, if you’re absent. They’re going to start writing up for everything.” (Tr. 875.)

Percy agreed with every aspect of Woosley’s testimony about their discussion. He noted that he had never before issued written discipline. However, “we made the decision we needed to start having more documentation on everything that happened in the pressroom.” (Tr. 334.) As to the rationale for this change, Percy observed that, “the Union coming in just precipitated documentation of all—all errors and all—all things wrong.” (Tr. 337.) He also acknowledged that he told Woosley that, “we were going to start writing up” and “we were doing the paperwork for the Union.” (Tr. 340.)

In *International Baking Co. & Earthgrains*, 348 NLRB 1133, 1135 (2006), the Board explained that, “[a]n employer

may lawfully tell its employees that its freedom to deal directly with them will be constrained if they choose union representation.” However, the Board took pains to distinguish such statements from the claim that, “stricter discipline would be imposed under a union contract.” *Infra* at fn. 14. Similarly, the Board has characterized an employer’s statement that enforcement of work rules would become “by the book” due to union activity as constituting evidence of unlawful antiunion animus. *St. John’s Community Services—New Jersey*, 355 NLRB 414, 415 (2010).

Here, I begin by noting that I have already found that Percy’s claim that documentation was being required due to the Union’s demand for it was a malicious and intentional falsehood designed to undermine employees’ support for the Union. As a result, it is precisely the sort of threat of enhanced disciplinary procedures that is an interference and restraint on lawful protected activity. Percy’s statements violated Section 8(a)(1).

In sum, I find that the Employer’s supervisors made each of the unlawful coercive statements alleged by the General Counsel.

3. The alleged violations of Section 8(a)(3) and (1)

The General Counsel contends that the Employer violated Section 8(a)(3) and (1) of the Act by engaging in acts of discrimination in order to discourage union membership. The first such allegation is that the Company granted a pay increase to Employee Timberlake on September 16 in order to induce him to vote against union representation in the election held during the following month. (GC Ex. 1(ff), par. 8(a).) Initially, the Employer raises a timely and vigorous procedural objection under the provisions of Section 10(b) of the Act.

The Employer correctly observes that the Act contains a statute of limitations providing that “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.” (Sec. 10(b).) The complaint alleges and the underlying evidence supports the contention that Timberlake was granted his raise on September 16. The Union filed its charge alleging that the raise was unlawful on April 6, 2012. (GC Ex. 1(hh).) Thus, on its face, the allegation appears to have been filed more than 6 months after the occurrence of the alleged offense.

The General Counsel concedes this point, but argues that the pay increase allegation is closely related to other timely allegations and should be permitted to proceed under the test established by the Board in *Redd-I, Inc.*, 290 NLRB 1115 (1988). Counsel for the Respondent contends that, under this analytical test, the allegation should be barred.

I do not reach the issue as framed by the parties. In my view, they have omitted a key preliminary step in the 10(b) analysis. Quite logically, “the Board has consistently held that the 10(b) period does not commence until the charging party has clear and unequivocal notice of the violation.” [Internal punctuation and citations omitted.] *Vallow Floor Coverings*, 335 NLRB 20, 20 (2001). In assessing whether the charging party had such notice, the burden of proof falls upon the party asserting the limitations defense. *United Kiser Services, LLC*, 355 NLRB 319, 320 (2010). In that case, the Board outlined the nature of the inquiry as follows:

⁴⁹ I would certainly not characterize the legal principle as being free from doubt. Apart from the Fifth Circuit’s denial of enforcement cited above, I would note then-Chairman Battista’s dissenting observations at fn. 6 in *Sacramento Recycling*. He argued that the law regarding unilateral implementation of wage increases is complex and that an employer’s expressions of “concern” regarding the issue should not be found unlawful.

In evaluating whether a party has either actual or constructive notice, the Board has found that such knowledge may be imputed where the conduct in question was sufficiently open and obvious to provide clear notice. Similarly, knowledge may be imputed where the filing party would have discovered the conduct in question had it exercised reasonable or due diligence. [Internal punctuation and citation omitted.]

Infra.

In this case, the Respondent has provided no evidence to show that Timberlake's raise was announced to anyone except Timberlake. It is not the sort of employer conduct that one would ordinarily expect would be subject to public announcement. Nothing in the record indicates that the Employer's conduct was open or obvious to anyone except Timberlake.

More importantly, the record demonstrates that the Charging Party did exercise timely and reasonable diligence in attempting to determine the wage history of bargaining unit employees, including Timberlake. On November 1, almost immediately after the Union's election victory, Castro submitted an information request to the Employer seeking the names of unit employees, their "rates of pay, date of last wage increase and amount of increase." (GC Exh. 12, p. 3.) Counsel for the Employer provided the information to Castro by letter dated November 30. (GC Exh. 16, p. 1.)

Having, through the exercise of due diligence, learned on receiving counsel's November 30 letter that Timberlake received a pay increase, Castro filed a charge related to the pay raise on April 6, 2012. The date of filing was well within the required 6-month period after the Union received clear notice of the conduct alleged to constitute the unfair labor practice. As a result, I reject the Respondent's statute of limitations defense.

Turning now to the merits of this alleged unfair labor practice, the Supreme Court has held that the Act, "prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of infringing upon their freedom of choice for or against unionization." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). Where such conduct is asserted to have violated Section 8(a)(3), the Board requires the use of its dual motive analysis to assess the evidence. *Clark Electric*, 338 NLRB 806, 806 (2003). That methodology was established in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 889 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983).

In *American Gardens Management Co.*, 338 NLRB 644, 645 (2002), the Board provided a comprehensive summary of the *Wright Line* analytical process:

Wright Line is premised on the legal principle that an employer's unlawful motivation must be established as a precondition to finding an 8(a)(3) violation. In *Wright Line*, the Board set forth the causation test it would henceforth employ in all cases alleging violation of Section 8(a)(3). The Board stated that it would, first, require the General Counsel to make an initial showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. If the General Counsel makes that showing, the burden would

then shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The ultimate burden remains, however, with the General Counsel. [Internal punctuation and citations omitted.]

The Board's exposition of the test goes on to outline the nature of the General Counsel's burden, including the requirement that four elements must be proven by a preponderance of the evidence. These include the existence of protected activity, the employer's knowledge of such activity, the imposition of an adverse employment action, and "a motivational link, or nexus, between the employee's protected activity and the adverse employment action." 338 NLRB at 645. [Citation omitted.] If the General Counsel sustains his burden of proof regarding these elements, a rebuttable presumption of unlawful discrimination is created. The burden then shifts to the employer to demonstrate that the same adverse action would have been imposed even in the absence of the employee's protected activity.

In this matter, the initial elements are met through the involvement of the bargaining unit members in the organizing campaign and representation election, the Employer's undisputed awareness of this activity, and the evidence showing that Timberlake was granted a pay raise during this period of such activity. The key issue concerns the Employer's motives in deciding to give Timberlake a raise. At trial, Barnum testified that he learned from Morrison that Timberlake was receiving "some offers" of employment and was thinking of leaving PFS. (Tr. 1831.) He viewed Timberlake as a versatile employee and was concerned that they were "heading into our busiest season." (Tr. 1831.) He asserted that he decided to give Timberlake a raise due to these considerations. When asked if he granted the raise in order to influence Timberlake's vote in the union election, he said, "Absolutely not." (Tr. 1832.)

As is so often true when examining the record in this case, the assertions contained in testimony from management officials may appear plausible on the surface. However, scrutiny of the managers' written accounts made while the events were in progress paints an entirely different picture. On September 16, Morrison sent an email to HR Director Miller for the precise purpose of explaining why management had decided to grant a raise to Timberlake. His terse rationale sheds illuminating light on the entire matter. Morrison told Miller that, "[a]s you can imagine this is related to the union stuff." (GC Exh. 51.) On the witness stand, counsel for the General Counsel questioned Morrison with the aim of eliminating any ambiguity about this statement of the rationale. When he asked what was meant by the reference to "union stuff," Morrison conceded that Timberlake "was going to be somebody . . . who was going to be eligible to vote one way or the other." (Tr. 1024.)

Based on this clear record as to the Employer's motivation, I conclude that the Employer has failed to meet its burden of showing that it would have granted a raise to Timberlake regardless of its unlawful animus against the Union. To the contrary, Timberlake's supervisor, Morrison, made it clear that the predominant reason that Timberlake was given a raise was to preserve his status as a likely antiunion voter in the upcoming

representation election.⁵⁰ In such circumstances, the granting of a pay raise constitutes a violation of Section 8(a)(3) and (1). See, for example, a virtually identical situation and outcome in *Holly Farms Corp.*, 311 NLRB 273 (1993), enf. 48 F.3d 1360 (4th Cir. 1995).⁵¹ The Employer's grant of a pay increase to Timberlake violated Section 8(a)(3) and (1) of the Act.

The General Counsel next alleges that the Employer engaged in unlawful discrimination against William Lincoln by failing and refusing to hire him as a PFS press operator on September 24. It is contended that, by deciding to utilize his services only through a temporary employment agency, the Employer again violated Section 8(a)(3) of the Act. As with Timberlake's pay raise, the Employer has raised a timely statute of limitations defense, noting that the Charging Party filed its charge regarding Lincoln on April 6, 2012.

The General Counsel submits that the allegations concerning Lincoln are "closely related" to timely charges filed in the case within the meaning of the Board's test established in *Redd-I, Inc.*, supra.⁵² Both parties cite the Board's decision in *Carney Hospital*, 350 NLRB 627 (2007), as central to this analysis. I agree. In my view, for purposes of this case, the key principle elucidated in *Carney* was expressed in the following observations:

Mere chronological coincidence during a union's campaign does not warrant the implication that all challenged employer actions are related to one another as part of a planned response to that campaign.

⁵⁰ Counsel for the General Counsel has repeatedly requested that I reconsider my decision to sustain an objection to the receipt of a post-election email (proposed GC Exh. 70) from Timberlake to Morrison advising him, without elaborating regarding his reasons, that he had voted against the Union. See, for instance, GC Br., at p. 49 fn. 6. As I indicated at trial, from a policy perspective such proffered evidence regarding how a unit member voted in a Board election should be viewed with apprehension. It ill befits an agency charged with the fair administration of secret-ballot elections to introduce evidence as to how a person voted in that election unless it is absolutely essential to resolve a controversy. Apart from this general concern, I continue to conclude that the evidence is simply immaterial to the issue on which it was being offered. The fact finder is not aided by evidence suggesting that the unlawful inducement to Timberlake accomplished the desired result. My point is best illustrated through a thought experiment. Had the Employer offered evidence to show that Timberlake had voted in favor of the Union, surely counsel for the General Counsel would have resisted its admission on the quite proper ground that it was irrelevant to the question of whether the Employer had improperly attempted to influence Timberlake's vote.

⁵¹ *Holly Farms* went all the way to the Supreme Court on an entirely different issue. See *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996).

⁵² I have again considered whether the Charging Party filed the charge within 6 months of having been put on notice regarding Lincoln's status. I think it is a close question. Immediately after winning the representation election, the Union sought a list of all current employees. It received such a list by letter from the Employer's counsel dated November 30. It filed the charge within 6 months of receiving the list of employees. I do not, however, find that the situation matches that regarding Timberlake. Lincoln's status as a temporary employee would have been far more open to knowledge among the unit members, including those who became union officials after the election such as Bishop and Dykstra.

We agree that a sufficient factual relationship can be established by showing that the timely and untimely alleged employer actions are part of an overall employer plan to undermine the union activity. If allegations are demonstrably part of an employer's organized plan to resist union organization, they are closely related. This is not a new concept.

....

[W]here the two sets of allegations . . . are part of an overall plan to undermine union activity, we will find that the second prong of the *Redd-I* test has been satisfied. [Internal punctuation and citations omitted.]

350 NLRB at 630.

I conclude that the General Counsel has demonstrated that this Employer maintained a long-range and comprehensive overall plan to unlawfully thwart the Union's organizing efforts at PFS. This plan originated at the top of the management pyramid and came into existence no later than the time that Heap attended the representation hearing. At its heart, the plan sought to mold and reshape the composition of the bargaining unit in order to pack it with opponents of the Union. The most obvious component of the plan was to remove supporters of the Union. Thus, Percy testified that, immediately after the representation hearing, Heap told him that he wanted to "replace" the Union's supporters. (Tr. 233.)

The plan went far beyond the proposed discharge of pronoun employees. Thus, during other conversations, Heap and Percy outlined ways to bring new press operators into the organization who would be opposed to the Union. Indeed, their operational goal was designed for the long-term future. It was summarized by Percy as follows:

The main thing at that time was, before the election, was that if the Union didn't go through and it did fail, that we have people to replace those people, so that in a year from now, that it wouldn't come up again, hopefully . . . If we replace union supporters, then chances are, you know, a year goes by, that there wouldn't be another clamor for another union vote.

(Tr. 240.)

Another facet of the plan to reshape the unit so that the electorate would be favorably inclined to reject union representation was revealed in an email from Morrison to Percy discussing various personnel transfers and hires in the context of "beating this union nonsense." (GC Exh. 42.) And a further element of the plan was revealed by an email from Morrison to another supervisor explaining that he was not going to impose fully justified discipline on a misbehaving employee because he wanted that employee's presence in the unit since, "I am extremely concerned about beating this union nonsense." (GC Exh. 57.)

The General Counsel is alleging that yet another aspect of the plan described above was to avoid hiring Lincoln who was seen as a potential pronoun voter, while still obtaining his valuable services through the mechanism of a temporary employment agency. I agree that, if proven, this allegation is intimately related to the Employer's plan to defeat the organizing effort by thoroughly reshaping the composition of the bargaining unit

through discharges, transfers, and new hires. Eliminating existing union supporters and precluding the hire of potential new supporters are part and parcel of the same plan. For this reason, I find that the *Redd-I* test supports the General Counsel's position. The untimely allegation involving Lincoln involves the same legal theory and arises from the same unlawful scheme as events alleged in timely charges. Similarly, the defenses to be raised to both the timely charges and the untimely charge are the same. See, for example, *Trim Corp. of America*, 349 NLRB 608 (2007) (*Redd-I* test satisfied where timely and untimely allegations involved same coercive statements and defense was that the statements were not made).

Turning now to the merits of the allegations involving Lincoln, the evidence showed that a temporary agency initiated contact with him. He was invited to interview for a press operator position located at PFS. He met separately with both Morrison and Barnum. Notably, both interviewers asked him pointed questions about his attitude toward the Union. As Lincoln explained, Barnum asked, "[W]hat did I think about the Union, you know, did I like it." (Tr. 1661.) He added that Barnum put it this way, "[H]ow did I feel about the Union, since they were going through the Union coming in." (Tr. 1670.) Barnum admitted that he probed Lincoln regarding the prospect that he might be asked to "join the union."⁵³ (Tr. 1834.)

During the job interviews, Lincoln was advised that he may be brought on through the agency rather than as a PFS employee. He expressed apprehension about this prospect, but reluctantly consented. Ultimately, Lincoln's services were obtained through the agency and, as of the date of his testimony at trial, he remains employed at the PFS facility through the temporary staffing service. He has never been offered direct employment at PFS.

Applying the *Wright Line* analysis, *supra*, to Lincoln's situation, it is clear that management probed him regarding his protected activities and sympathies and then declined to offer him direct employment as he desired.⁵⁴ There is abundant evidence

⁵³ The General Counsel did not allege that these two interrogations of Lincoln were unfair labor practices. Indeed, in his brief, counsel for the General Counsel described this conduct by the Employer as, "unlawful (though unalleged) interrogation of an applicant's union sentiments." (GC Br. at p. 54.) I cannot ignore the fact that the questions asked about Lincoln's attitude toward unions were blatant violations of Sec. 8(a)(1). See *Gilbertson Coal Co.*, 291 NLRB 344, 348 (1988), enf. 888 F.2d 1381 (3d Cir. 1989) ("questions concerning union preference, in the context of job application interviews, are inherently coercive and unlawful"). I will consider these questions as probative of the Employer's unlawful animus toward Lincoln's presumed prounion attitude. See *South Jersey Sanitation Corp.*, 357 NLRB 1446, 1446 fn. 1 (2011), and *Meritor Automotive*, 328 NLRB 813 (1999) (conduct not subject to formal complaint allegation may be considered as evidence of unlawful animus).

⁵⁴ I agree with counsel for the General Counsel's citation of *Webasto Sunroofs, Inc.*, 342 NLRB 1222, 1224 (2004), for the proposition that *Wright Line*, rather than the Board's method for assessing salting cases set forth in *FES*, 331 NLRB 9 (2000), enf. 301 F.3d 83 (3d Cir. 2002), should apply to this unique situation, particularly given Lincoln's past direct employment for PFS and his ongoing long term temporary position at the facility. In any event, the clear evidence of the predominant

of unlawful motivation as outlined directly above regarding the Employer's overall plan to defeat the Union by a variety of unlawful means and methods.

The Employer, through Barnum's testimony, attempted to rebut the inference by contending that Lincoln's prolonged employment through the temporary agency had two legitimate explanations. In the first place, Barnum explained that Lincoln had come to the Company as an agency referral and that the Employer had contractual obligations toward the agency. While this is certainly true, it does not explain the decision to hire Lincoln as a temporary employee. The Company had two choices. It could either pay the agency a fee for locating a press operator that it wished to hire directly. Alternatively, it could make ongoing payments to the agency for its services in providing that press operator as a temporary employee. As Barnum frankly conceded, it was "maybe a function of whether we paid them now or paid them later." (Tr. 1835.) As a result, this is a dubious rationale for the decision to keep Lincoln off the Company's employment rolls.

Barnum's second asserted reason related to the fact that Lincoln had actually been a PFS press operator in 2009. It is undisputed that the Company terminated him. For this apparent reason, Barnum cited "personnel issues" with Lincoln as another reason to employ him through the agency. (Tr. 1835.) I find it noteworthy that Barnum never specified the nature of these issues and it is obvious that their degree of severity was not sufficient to dissuade the Employer from using his services at the facility on an ongoing basis.⁵⁵

Beyond the weakness of the rationales offered, I conclude that there is powerful evidence explaining why Lincoln was not hired immediately and directly by PFS. Following the familiar pattern in this case, that evidence consists of another email, this time from Barnum to Morrison dated September 24. Barnum explains his thinking in persuasive detail:

My overall impression i[s] that he would probably vote for the union all else being equal, although he strikes me as an intelligent individual who might be convinced otherwise. Nonetheless, based on his statements, I would probably not hire him on as a permanent employee at this time.

(GC Exh. 44, p. 1.) The fact that the Employer followed Barnum's suggested course of action and that this decision was entirely consistent with the overall plan to reshape the complement of the bargaining unit to influence the outcome of the election persuades me that, but for his presumed prounion attitude, Lincoln would have been offered immediate work as a direct employee of PFS. The ongoing refusal to offer him such

role of unlawful antiunion animus in the Employer's motivational matrix would dictate the same result under either method of analysis.

⁵⁵ Lincoln testified that he was never told why he was fired and speculated that his termination may have had something to do with a dispute over a rental car that he hired on a business trip for the Employer. Of course, his guess as to the reason for his termination is not evidence. Interestingly, however, in a post-interview email (GC Exh. 44), Barnum noted Lincoln's speculation about the reason for his termination and opined that he believed Lincoln's account of the rental car incident, not HR Director Miller's version of the event.

employment due to his presumed union attitude is unlawful discrimination in violation of Section 8(a)(3) and (1) of the Act.

The representation election took place on October 28. The General Counsel contends that the Employer continued its pattern of discriminatory actions against unit employees immediately after the results were known. Thus, at the beginning of the unit members' first working day after the election, Percy and Morrison convened meetings with the press room staff. At those meetings, they issued a new set of work rules to all of the unit members. This document was entitled "Responsibility Press Operators," and it contains a set of 23 work rules. Employees were required to sign the document, both acknowledging that they understood the rules and that their failure to abide by the rules could result in disciplinary action, including termination. (GC Exh. 2.) The General Counsel argues that this document was issued in direct and discriminatory response to the Union's victory in the election in violation of Section 8(a)(3) and (1).⁵⁶ (GC Exh. 1(ff), pars. 9(a) and (d).)

The newly issued set of work rules includes previously existing rules that were enforced, previously existing rules that were not enforced, and entirely new rules. Overall, Bishop opined that the effect of the document was to, "require[] a lot more documentation . . . and a few additional tasks were added." (Tr. 1422.) He testified that those new chores added between 10 minutes and 1 hour per shift of additional downtime that negatively affected each operator's productivity. Similarly, Dykstra reported that his impression after examining the new rules was that, "this is a whole lot of little stuff now that I'm going to have to do." (Tr. 697.)

There is no doubt that the press room employees had engaged in the protected activity of voting for union representation and that management knew that they had done so. The evidence also demonstrates that the new rules represented an adverse action as they required employees to undertake new tasks and threatened severe disciplinary sanctions for violations. It is now necessary to examine the motivation evidence.

Unlike much of this case, consideration of motivation begins with compelling circumstantial evidence. Any examination of the Employer's intent in issuing the work rule document must begin with a recognition that it was issued on the first workday after the election. While timing is sometimes just a "coincidence,"⁵⁷ on many occasions it is powerful evidence of unlawful animus. As the Board has explained, "where adverse action occurs shortly after an employee has engaged in protected activities, an inference of unlawful motive is raised." [Citation omitted.] *McClendon Electrical Services*, 340 NLRB 613 fn. 6 (2003).⁵⁸ In this case, such an inference is supported by exam-

ination of the surrounding context regarding the timing of the new rules.

Percy testified that he began working on a new set of written rules after the representation hearing. He reported that he was assisted in this endeavor by an employee of a sister company in Germany, Katarina Sheeman. They worked on them together for a number of weeks. Barnum added to the account of their creation by explaining that he was involved in preliminary discussions and saw various draft documents, including one introduced into the record as Respondent's Exhibit 7. It is, therefore, striking that he testified that he had not seen the actual version issued to employees on October 31. When asked if he was aware that this document would be issued on that date, he adamantly asserted, "Absolutely not." (Tr. 1155.) The exclusion of Barnum from the issuance of the rules is striking and indicates that their promulgation on the first working day after the election was not routine, but rather a hasty and impromptu response to the Union's victory. This conclusion is also supported by the rather sloppy editing of the document as issued. It contains significant typographical errors and inconsistencies in presentation, all of which leave an odd impression given the Company's occupation as a professional printer.⁵⁹ The two supervisors sacrificed editing and refinement of the work rules in order to issue them as a direct, pointed, and immediate response to the Union's new status.

Apart from the circumstances, there is also significant direct evidence of unlawful intent. Percy emailed Barnum to report that they had issued the new rules. He noted that, "I have already been told that PFS is a union shop and that the union is going to make the rules." (GC Exh. 37.) He worried that the press operators thought that "the guidelines Katharina and I wrote and the measuring and keeping their presses and press sheets up to standards is a joke." (GC Exh. 37.) He warned that the operators would be "mistaken" in that belief. (GC Exh. 37.) The overall impression supports the conclusion that the new rules were issued in direct response to the Union and as an attempt to exert enhanced control over the unit members because they had decided to organize.

Barnum's reply to Percy's email only enhances this impression. He warns that the unit members should not "test Brett's resolve on this." (GC Exh. 37.) Indeed, he opines that the press room employees "better follow whatever instructions they're given Doing otherwise is at the peril of anyone refusing to follow orders." (GC Exh. 37.)

Based on the direct and circumstantial evidence, I find that the General Counsel has met his burden of demonstrating that

Gourmet Restaurant, 353 NLRB 1063, 1065 (2009). Such is the case here.

⁵⁹ This odd impression begins with the unusual title of the document as, "Responsibility Press Operators." The word order and syntax are peculiarly inappropriate for an English language document. Interestingly, the syntax makes sense in German. I have little doubt that had the document been submitted to Barnum for his review, he would have made editing changes, including revision of the title to either "Press Operators' Responsibilities," or "Responsibilities of Press Operators." Barnum spent much time on the witness stand and I readily concluded that he was clearly a highly articulate, precise, and intelligent corporate manager.

⁵⁶ The General Counsel also asserts that the issuance of this set of work rules violated the Employer's bargaining obligations under Sec. 8(a)(5) of the Act. I will address this issue later in this decision. At that time, I will analyze the content of the rules to determine whether they represented new requirements or merely restated ongoing practices. To any extent that resolution of this question affects the analysis here, I incorporate those findings.

⁵⁷ *Frierson Bldg. Supply Co.*, 328 NLRB 1023, 1024 (1999).

⁵⁸ The Board has described the impact of timing as "dramatic" when adverse action follows "on the heels" of protected activity. *Saigon*

the predominant motivation for the issuance of the Responsibility Press Operators document was to demonstrate management's dominion by imposing new and adverse working conditions as a reply to the unit employees' desire to obtain representation by the Union. The Employer has not met its burden of showing that the rules would have been imposed on October 31 regardless of the protected activity of the unit employees. Issuance of the Responsibility Press Operators document was a violation of the provisions of Section 8(a)(3) and (1) of the Act as it was expressly designed to interfere with, restrain, and coerce the unit employees and to discriminate against them because they voted for the Union.

The next allegation of unlawful discrimination concerns the Employer's decision to send press operator Recktenwald home because his press was inoperative on October 31. (GC Exh. 1(ff), par. 8(c).) Recktenwald had been a supporter of the Union during the electoral campaign and had urged coworkers to vote for representation. Percy testified that management was aware of Recktenwald's prounion attitude. On October 27, the day before the election, his press was not functioning. He provided credible testimony that Morrison approached him at the start of the shift and asked what duties he intended to perform. He told Morrison that he would assist other press operators. Morrison agreed to this plan, but ominously warned Recktenwald that, "if the Union was voted in tomorrow, that we would have to go home if our press was down." (Tr. 780.)

Despite Morrison's denials, there was persuasive evidence demonstrating that such a policy would represent a dramatic departure from past practices. As Recktenwald put it, "[w]e never worried about how long we could get our hours in." (Tr. 819.) Percy confirmed this, testifying that, prior to the election, operators assigned to machines that were not functioning would be instructed to "[c]lean up, wipe on the machine, stack boxes, just, you know, again, menial tasks that, anything we could find—you know, to find for them to do." (Tr. 330.) While Morrison attempted to deny this past practice, he undercut his effort by admitting that he told Recktenwald that, "we were going to have to come up with a plan" to send operators home in the future. (Tr. 997.) Of course, there would have been no need to devise such a plan if this practice had already been in effect.

While the Employer allowed Recktenwald to perform ancillary duties on October 27, the situation changed dramatically on the first workday after the election, October 31. After attending a group meeting convened by his supervisors, Recktenwald was pulled aside by Morrison and Percy. Percy informed him that, "since your press is down, that we don't have any work for you to do today, and you just need to go home." (Tr. 789.) Percy confirmed this, noting that it was the first time they sent an operator home when his press was inoperative. On receiving these instructions, Recktenwald punched out and went home. He was not paid for the remainder of his scheduled shift.

Applying *Wright Line*, it is clear that Recktenwald engaged in protected activities, particularly the activity of participating in the representation election. As of October 31, the Employer knew that the press room employees had voted to obtain union representation. It was this knowledge that prompted the change

in procedure that cost Recktenwald the ability to complete his shift despite the problems with his press. The Board finds that, in such circumstances, the *Wright Line* element of knowledge is satisfied. See *W. E. Carlson Corp.*, 346 NLRB 431, 433 (2006) (violation found where employer knew that its technicians were seeking to organize and denied a raise to one technician despite absence of other evidence it knew of that technician's union activity). In any event, I credit Percy's testimony that, during management discussions, it was concluded that Recktenwald was among the ranks of the Union's supporters.

As was often true in this case, Percy provided insight as to the Employer's motivation for sending Recktenwald home. He asserted that the decision was part of a general effort to "tighten [] up our belt strings a little bit." (Tr. 325.) When pressed, he conceded that the decision to send Recktenwald home would not have been "at such a forefront if there'd never been anything about the Union . . . that definitely precipitated me thinking about how to cut costs and get people out." (Tr. 329.) Of course, Percy's account is compellingly corroborated by the fact that management had never taken such action before the election. The timing of the decision to send Recktenwald home on the first workday after the prounion vote is dramatic evidence of unlawful motivation. Given the evidence I have just described, I conclude that at the final *Wright Line* step, the Employer has failed to show that it would have sent Recktenwald home absent the protected activities of the press operators. To the contrary, the credible evidence demonstrates that it was precisely because of those activities that Recktenwald was not permitted to complete his work shift.⁶⁰ Management's actions constituted unlawful discrimination against him in violation of Section 8(a)(3) and (1).

The General Counsel contends that, on November 3, the Employer disciplined press operator Woosley for discriminatory reasons that are unlawful pursuant to Section 8(a)(3). (GC Exh. 1(ff), par. 8(d).) There is no dispute that Percy issued a written warning to Woosley on that date for the infractions of Failure to Follow Instructions and Unsatisfactory Work Quality. This arose from an incident involving the need to reprint two jobs. Woosley was forthright in conceding that, "it was a mistake I should have caught." (Tr. 869.)

Applying the *Wright Line* analysis, it is clear that Woosley was a prominent prounion advocate. Morrison demonstrated both knowledge of this and aversion to it when he confronted Woosley with a prounion flyer that contained Woosley's photo and his exhortation to coworkers that they should "Vote Yes!" in the election. (GC Exh. 7.) Morrison told Woosley he was disappointed in him for his participation in the flyer. I infer that Woosley's manifestation of union support was particularly offensive to management because supervisors had believed that he would not support the Union. Morrison had even gone so

⁶⁰ The situation is very similar to that described by the Board in *Network Dynamics Cabling*, 351 NLRB 1423, 1428–1429 (2007) (employer failed to rebut General Counsel's case where it did not establish that, "when work was short, it had any Section 7-neutral procedure for deciding which employees would and which would not work on any given day").

far as to offer Woosley the opportunity to serve as a Company observer at the election.

It is obvious that the Employer had dual motives for issuing the writeup to Woosley. As I have indicated, there is no dispute that Woosley made a production error that cost the company time and money. Equally evident to me, the evidence revealed that Woosley's open support for the Union's successful organizing campaign caused anger against him among managers. In determining whether the Employer would have issued the written warning to Woosley absent its animus against his union activity, I place ultimate reliance on the motives articulated by Percy, the official who issued the warning.

Of critical importance, I note that Percy testified that, "I never personally wrote anyone up before that." (Tr. 335.) Furthermore, Percy both told Woosley at the time and reported in his trial testimony that the reason for the writeup was, "the Union coming in." He made the false and malicious claim that the Union's information request regarding disciplinary reports was being interpreted as requiring management to create such reports. This led him to make the absurd claim to Woosley that, "we were doing the paperwork for the Union." (Tr. 340.)

In fact, Percy conceded that the motive for Woosley's writeup was the desire to retaliate against the unit members' pronoun vote by showing that management would no longer maintain a "lackadaisical attitude." (Tr. 337.) Percy's own articulation of management's rationale demonstrates that the predominant motive for the issuance of a written warning for Woosley's production error was retaliation against the unit members because they voted in favor of the Union. Had there been no union electoral victory, Percy would have followed his own prior invariable practice of handling such matters without resort to formal written documentation. As a result, the issuance of the formal written warning constituted unlawful discrimination in violation of Section 8(a)(3) and (1).

Going far beyond the specifics of Woosley's disciplinary situation, the General Counsel also alleges that, on November 3, the Employer, "instituted a policy of disciplining unit employees for production errors." (GC Exh. 1(ff), par. 9(c).) During the trial proceedings, I commented on the unusually sweeping nature of this allegation with its clear and necessary implication that, prior to November 3, the Employer had no such policy of disciplining for production errors. Although the General Counsel moved to amend the complaint allegations in many respects to conform to the evidence presented, no amendment was offered regarding this allegation. I decline to make such an amendment *sua sponte*.

The fact is that the record plainly shows that the Employer has maintained a work rule regarding production errors. In the employee handbook, dated April 5, 2010, employees are notified that "unsatisfactory performance" is subject to disciplinary enforcement, including written warning, suspension, and termination. (GC Exh. 17, p. 34.) The Employer's preprinted disciplinary action form lists categories of violations, including "Unsatisfactory Work Quality" and "Carelessness." (See, for example, R. Exh. 53 which shows this form in use as of 2009.) Furthermore, the Employer submitted numerous disciplinary reports showing imposition of sanctions for production errors going as far back as February 2009 and continuing through

November 3, 2011. (In chronological order, these are R. Exhs. 41, 31, 40, 38, 39, 42, 20, 45, 49, 44, 46, 21, 23, 33, 22, 32, 16, 25, 24, and 30.)

The Board understands that the Constitution requires, "that a respondent have notice of the allegations against it so that it may present an appropriate defense." *Postal Service*, 356 NLRB 407, 409 (2011), quoting *KenMor Electric Co.*, 355 NLRB 1024, 1029 (2010). Of course, the extent of the protection required is "flexible," depending on the circumstances presented. *Id.* at 409, quoting *Sunshine Piping*, 351 NLRB 1371, 1378 (2007).

In this case, the General Counsel has steadfastly maintained the wording of its allegation despite it being called into question and despite the ability to observe the evolving nature of the evidentiary record over the rather lengthy course of the trial. In my view, the failure to conform the allegation to the evidence has prejudiced the Employer's defense. Competent defense counsel faced with the allegation as written would reasonably be content to present the evidence showing the existence of a written policy against production errors and the existence of numerous disciplinary reports documenting the imposition of sanctions under that policy long before November 3. There would be no perceived need to address the separate question of whether the policy's degree of enforcement changed on and after November 3. Because these two concepts involve "different sets of facts and different ultimate issues," I decline to attempt to shoehorn the complaint allegation into the framework of the evidence actually presented. *SPE Utility Contractors, LLC*, 352 NLRB 787 (2008).

As to the actual allegation that the Employer instituted a policy of disciplining employees for production errors on November 3, the evidence plainly shows that this is not accurate. The employer had an existing written policy to this effect and enforced it in numerous documented instances, including instances involving press room employees, over a period of years prior to November 3. There is no evidence that the handbook policy was promulgated for any improper motive. I will recommend that this allegation be dismissed.

The General Counsel next claims that, when the Employer switched the shifts of operators Dykstra and Woosley on November 7, it engaged in another set of discriminatory acts in violation of Section 8(a)(3) and (1). The two press operators ran the same machine, the 74G. They were the only such operators. Management swapped their shifts so that Dykstra was assigned to the more important third shift, while Woosley was moved to the second shift.

It is clear that Woosley and Dykstra were active union supporters. This is best illustrated by the fact that Dykstra joined Woosley in appearing by photo and statement on the Union's flyer. Dykstra's comment on the flyer was to the effect that management always failed to keep its promises. As a result, the employees needed the protection of a union contract. I have already indicated that the content of the flyer was regarded by management as highly provocative.

Both Woosley and Dykstra testified that they considered the shift swap as an adverse action and reported the difficulties the transfers would create to their supervisors. Each had personal reasons why the change in their schedules was onerous. I will

assume, arguendo, that such a shift swap may constitute an adverse employment action within the meaning of *Wright Line* where, as here, the Employer knew that the employees objected to the swap for personal reasons.⁶¹

The General Counsel's motivational argument is that the Employer's documented animus against union supporters would naturally be capable of expression through a decision to swap shifts that would be regarded as inconvenient by the affected employees. Unlike many other complaint allegations, such a general conclusion here is not corroborated by any testimony or documentary evidence showing that management took the shift change action with the Union in mind. Despite the relative weakness of the animus evidence as to this charge, I do find that the Employer's documented generalized animus is sufficient to establish the General Counsel's prima facie case.

Turning now to the Employer's defense, it rests on testimony from Barnum that is corroborated to a noteworthy and impressive degree by Dykstra's testimony. Thus, Barnum reported that the entire purpose of the transfer was, "in order to increase production." (Tr. 1183.) He opined that it made economic sense to switch Dykstra to the more important third shift because, "Mr. Dykstra was more versatile and more productive and that Mr. Woosley was not."⁶² (Tr. 1184.) In his own testimony, Dykstra confirmed that management was dissatisfied with Woosley's production on the third shift and that he was assigned to replace Woosley on that shift in order to increase production. He also confirmed that he and Woosley were the only employees who ran the particular press involved in the transfer decision. Finally, in language echoing that of Barnum, Dykstra testified that he was, "one of the most versatile pressmen at Print Fulfillment Services." (Tr. 717.)

The General Counsel argues that this evidence of legitimate motive is rebutted by the Employer's own statistics showing that Woosley ranked immediately above Dykstra on the statistical spreadsheets that management produced in response to a subpoena issued in this case. (See GC Exhs. 83-86.) Certainly, counsel for the General Counsel's point gives me pause. I would not be the first judge to harbor a wish that the parties had delved into a paradox such as this in more depth during their presentations of evidence. However, recognizing that no record is ever perfectly complete, I must resolve the issue on the facts presented. Considering those facts in the entire context of this case, I conclude that the stunning confirmation of Barnum's articulated rationale by Dykstra predominates. In testimony that was directly contrary to his own interests in the matter, Dykstra confirmed the underlying legitimacy of Barnum's asserted rationale. To the extent that the rationale conflicts with

⁶¹ I agree with the reasoning by analogy argument articulated by counsel for the General Counsel and supported by the precedents cited in the General Counsel's brief at p. 58. I also wish to commend counsel for also citing an administrative law judge's contrary viewpoint in a case where the issue was not reached by the Board. Such scholarly candor serves the public, the Board, and its judges well.

⁶² The night shift was the most important shift because it was charged with producing the Company's signature product, so-called BITGIT's ("buy it today, get it tomorrow"), printed materials that would be dispatched to customers on the very next day following their order.

certain statistical evidence, I conclude that the numbers do not adequately take into account the need for versatility that both Barnum and Dykstra reported was a major component in the decision to effectuate the transfer.

On balance, I conclude that, while the transfer may have served to gratify management's animus against the two press operators, it would still have been implemented even if there had been no union activity that aroused such animus. The Board has counseled that adjudicators "should not substitute [their] own business judgment for that of the employer in evaluating whether an employer's conduct is unlawful." *Framan Mechanical Inc.*, 343 NLRB 408, 412 (2004). Here, the Employer's assessment of versatility and overall efficiency should be given appropriate deference. Put another way, as the Board has cautioned, "mere suspicion cannot substitute for proof of an unfair labor practice." *Lasell Junior College*, 230 NLRB 1076 (1997). While such suspicions are natural in this case given the strength of the generalized animus evidence, they are rebutted as to the shift transfer by the proof of economic legitimacy. As counsel for the Employer asserts,

The Company had compelling economic considerations for changing the shifts—the need to increase production while entering a peak time of year for their business. There is no evidence of union animus related to this instance of a shift change.

(R. Br. at p. 9.) The General Counsel has failed to prove that the decisions to transfer Woosley and Dykstra represented unlawful discrimination in violation of Section 8(a)(3) and (1).

The General Counsel next alleges that the Employer's decision to announce the layoffs of Bishop and Recktenwald and to proceed to implement that decision regarding Recktenwald constitute additional examples of unlawful discrimination in violation of Section 8(a)(3) and (1).⁶³ (GC Exh. 1(gg), pars. 6(a), (b), and (c).) Because the facts as to each press operator are significantly different, I will address these claims separately.

Turning first to the announcement of Bishop's layoff, Bishop testified that he was notified on December 9 that he had been selected for layoff along with five other press room employees. At the same time, counsel for the Employer wrote to the Union to explain the layoff procedure. He reported that, "[w]e identify employees based primarily on their productivity, although other factors, including the employee's versatility with additional equipment may be considered." (GC Exh. 26.)

While Bishop had been notified regarding his selection for layoff on December 9, this decision was reversed on December 14. At that time, counsel for the Employer sent an email to Castro reporting that, "we discovered an error which will result in Jonathan Bishop avoiding layoff. Robert Roederer will be

⁶³ More generally, the General Counsel alleges that the manner in which the layoffs were implemented violated the bargaining obligation established by Sec. 8(a)(5) and (1). I will address this in the section of this decision related to alleged bargaining violations.

laid off. The productivity statistics showed Mr. Bishop to be more productive than Mr. Roederer.”⁶⁴ (GC Exh. 18, p. 1.)

Applying the *Wright Line* criteria, it is obvious that Bishop, the union steward, engaged in protected activities and that his involvement in those activities and support for the Union’s cause were well known to management. I have carefully considered whether Bishop suffered an adverse consequence from the announcement that he had been selected for layoff.⁶⁵ While he did not suffer any financial harm or loss of employment due to the subsequent retraction of the announcement, I conclude that he did experience an adverse employment action. In the first place, if his selection was discriminatory, it would represent an intentional and unlawfully motivated infliction upon him of the mental anguish that inevitably would accompany an announcement of the loss of his livelihood. It has been observed that the discharge of an employee represents the workplace equivalent of “capital punishment” as it “demonstrate[s] most sharply the power of the employer over its employees.” *Reno Hilton Resorts*, 320 NLRB 197, 209 (1995). I deem it appropriate to conclude that the discriminatorily motivated announcement of such an impending fate is an adverse employment action.

On a more concrete level, I find that the publicly announced criterion for the layoff selection process also establishes that the Bishop announcement was an adverse action. Had the Employer reported to the Union that Bishop was selected for layoff because he had drawn a short straw or lost a coin toss, it would not have reflected on him as an evaluation of his competence as an employee. However, by announcing that Bishop had been selected for layoff using a process that involved the comparative analysis of the worth of each press operator, it sent a pointed and public assertion that Bishop was a less than satisfactory performer. Such a finding would serve to diminish his standing in the workplace.⁶⁶ More importantly, it would create a record of deficient performance that could be used against him in the future. See *Altercare of Wadsworth Center*, 355 NLRB 576 (2010) (verbal counselings constitute adverse actions where they lay a foundation for future action against the employee).

⁶⁴ On learning of this, Bishop volunteered to take Roederer’s place as he believed he could more easily cope with the financial consequences of the layoff. Management agreed to this substitution and Bishop was, in fact, laid off in place of Roederer. With regard to the allegation of unlawful discrimination against Bishop arising from the layoff announcement, there is no contention that he suffered any financial consequence. See GC Br. at p. 88, fn. 17.

⁶⁵ Given some degree of uncertainty that arises from the ultimate retraction of Bishop’s layoff announcement, it may be more accurate to view that announcement as a violation of Sec. 8(a)(1). There can be no doubt that the selection of Bishop for layoff due to his protected activities and its announcement to the Union had the effect of coercing, restraining, and interfering with the employees in the exercise of their rights under the Act.

⁶⁶ The potential damage to Bishop’s reputation was illustrated when Castro reported that, “there was a strong belief with some of the folks that there was no way Jonathan Bishop could fall into the least productive category.” (Tr. 1624.) A maliciously motivated public announcement that he was in this category strikes me as an adverse action within the meaning of *Wright Line*.

Concluding that Bishop was subjected to an adverse action, I must next determine whether the General Counsel has shown that the action was motivated to a substantial degree by anti-union animus against him. From the very beginning of the organizing campaign, management expressed animus against Bishop. Percy reported that Heap “mainly” wanted to fire Bishop and Murray. (Tr. 239.) Heap told Percy he wanted Bishop, “out.” (Tr. 244.) As was almost invariable, Percy’s assertions were corroborated in the documents. Thus, Morrison emailed Percy regarding Bishop’s union sympathies, concluding that he was “a jackass.” [Emphasis in the original.] (GC Exh. 41, p. 1.)

Apart from a longstanding desire to rid itself of Bishop due to his troublesome union activities, the specific evidence regarding the layoff process establishes that his selection was spurred on by the animus against him. Percy testified that in November, managers met to decide on the layoff selection criteria. During their discussions, they acknowledged that Heap wanted them to pick candidates for layoff based on union activity. He reported that among the “ideal” candidates for discharge due to such activity was Bishop. (Tr. 258.) Of course, this was also entirely consistent with the November 1 email exchange between Morrison and Percy regarding their distaste for Bishop’s prouinion stance. At that time, Percy predicted that Bishop would be “the 1st to go when we start cutting back.”⁶⁷ (GC Exh. 41.)

In what approaches the proverbial “smoking pistol,” Barnum sent an email to Heap on December 7 to report the results of management’s deliberations regarding the layoff process. He told Heap that, “Bishop may be the only anomaly. He produces more sheets per hour than a couple of pressmen we’re retaining . . .” (GC Exh. 60.) The email goes on to note that Bishop is only capable of operating one type of press. He concludes that, “[o]bviously, the Union will fight” Bishop’s selection. (GC Exh. 60.)

I readily find that the General Counsel has shown that unlawful animus against Bishop played a very prominent role in the decision to select him for layoff. The Employer, through the testimony of Barnum, attempted to prove that the decision to lay off Bishop was reached through an impartial application of its productivity criteria. Barnum explained that the original set of productivity numbers showed Bishop as producing slightly less work than Roederer. However, when the Company’s computer technicians refined their programming techniques to better capture individual production numbers, it turned out that Bishop’s production exceeded Roederer’s. As a result, according to Barnum’s account, the Union was notified that Bishop would not be subject to layoff.

There are two primary difficulties with Barnum’s version of these events. In the first place, Barnum was usually a precise and confident witness. For example, regarding the impact of union activity on the layoff selection process, he asserted that

⁶⁷ The Board does not hesitate to draw the appropriate inference from the relationship between a specific threat against an employee for involvement in union activity and the subsequent imposition of that threatened form of reprisal. See *Vico Producers Co.*, 336 NLRB 583 fn. 16 (2001), enf. 333 F.3d 198 (D.C. Cir. 2003)

this played “absolutely” no role. (Tr. 1863.) Therefore, his choice of wording when cross-examined regarding the specifics of Bishop’s selection is telling. When counsel asked him to confirm the assertion that Bishop was originally selected for layoff because his numbers were less than Roederer’s, he responded, “I believe that’s the case.” (Tr. 1909.) Retreating even farther, he then added, “I don’t know if it was absolutely lower or if it was within a few sheets. And that’s what I’m telling you.” (Tr. 1909.)

I readily grasp the reasons for Barnum’s sudden caution. It will be recalled that the written record shows that he reported to Heap that Bishop’s numbers were better than those of a “couple” of other press operators. (GC Exh. 60.) As a result, he candidly described Bishop’s selection for layoff as an “anomaly.” (GC Exh. 60.) Despite writing this on December 7, he attended the meeting on December 9 at which Bishop’s layoff was announced. This demonstrates that his testimony that management retracted Bishop’s selection upon learning that revised statistics showed him to be a higher producer is false. At the time of his selection for layoff, Barnum was already well aware that Bishop’s numbers were better than those of other operators who were not being laid off. There is simply no credible innocent explanation for the decision to announce the layoff of the union steward. The only reliable evidence as to the motive for this decision is that it was taken in the face of the statistics and for the purpose of effectuating Heap’s desire to be rid of Bishop. As a result, I find that the decision to announce Bishop’s layoff constituted unlawful discrimination prohibited by Section 8(a)(3) and (1).

The General Counsel also contends that the announcement of Recktenwald’s layoff, as well as its implementation, constitute additional violations of Section 8(a)(3) and (1). (GC Exh. 1(gg), par. 6(c).) Applying *Wright Line*, I have already noted that Recktenwald was a supporter of the Union. In addition, Percy testified that from an early point in the organizing campaign, managers often discussed their assessments of who among the press operators were union activists. Among those determined to be union adherents was Recktenwald. There can be no doubt that Recktenwald’s selection for layoff and actual layoff constitute adverse employment actions. In addition, I have already noted that compelling evidence consisting of Percy’s testimony as corroborated by a variety of documents written by the Company’s managers demonstrate that the Employer harbored unlawful antiunion animus against all of the press room employees who were deemed to support the Union. As a result, the General Counsel has met his initial burden under *Wright Line*.

I must now determine whether the Company has carried its burden of demonstrating that Recktenwald would have been selected for layoff and actually laid off regardless of his involvement in protected activities and regardless of management’s unlawful motivation. In support of its position, the Employer cites to the productivity statistics as the actual reason for Recktenwald’s layoff from his employment as a Karat operator. Barnum testified that those statistics demonstrated that, “Mr. Recktenwald is second from the bottom, producing 135 sheets per hour.” (Tr. 1847.) He also reported that, in evaluating the productivity information, “what I attempted to do was to

compare apples to apples. We looked at Karat operators against Karat operators.” (Tr. 1848.) Barnum also provided persuasive testimony indicating that he had carefully weighed other factors that could affect the comparative statistics, including machine malfunctions and situations where one operator began a job and another finished that job. I found his account of the decision making process as to Recktenwald to be credible, particularly since a review of the spreadsheets containing the productivity statistics does show that Recktenwald was the second from the bottom in production. (See GC Exhs. 83–86.)

In concluding that the Employer has met its *Wright Line* burden with regard to Recktenwald’s layoff, I have placed particular emphasis on the same credibility factors that have guided much of my decision making in this case. Often, those factors have strongly supported the General Counsel’s position. In this instance, they support the Employer. It will be recalled that Percy testified that, when management officials met to determine the methodology for the upcoming layoff, they expressed their concern that Heap wanted to pick union supporters but this would run afoul of the requirements of the labor laws. As he explained:

Brett [Heap] wanted to lay off the people in the Union . . . but we had to find—you couldn’t just go and lay them off and not have a reason to lay them off. So that’s why, you know, we had to come up with the protocol. And that’s why I said, you know, it wasn’t the ideal people that Brett would want to [be] laid off, but we had to try to follow the law the best we could as to pick the people that fell under that category We went by production—production numbers of the press operators, and the quality of the press operators.

(Tr. 253–254.)

I have already explained in detail my reasons for concluding that Percy’s testimony was credible. My reasoning applies equally to those parts of his account that demonstrate unlawful activity and this portion that shows that middle managers made an effort to conform to the requirements of the law. Interestingly, like so much of Percy’s reporting, his account of the layoff decision making is supported by company documents. I am referring here in particular to Barnum’s email to Heap in which he listed the operators selected for layoff and explained that Bishop was the “anomaly” because he actually produced more product than other “pressmen we are retaining.” (GC Exh. 60.) While this is damning evidence against the Employer as to Bishop’s selection for layoff, the opposite is true regarding Recktenwald. As Barnum explained to Heap with trepidation, all of the persons selected for layoff, excepting Bishop, were picked through the use of neutral productivity statistics. Thus, the documentary evidence supports the legitimacy of Recktenwald’s selection.⁶⁸

⁶⁸ Ironically, another factor supporting the Company’s defense here is the striking abundance of inculpatory emails from management demonstrating their pattern of unlawful antiunion conduct. By this I mean that it is noteworthy that there is no similar documentary record tending to indicate that they decided to lay off Recktenwald due to his protected activities. While this would not be dispositive if it stood alone, in combination with Percy’s testimony, the actual statistics, and Barnum’s explanatory email to Heap, I find it probative.

Based on the totality of the evidence, I conclude that the General Counsel has failed to establish that Recktenwald was selected for layoff, and laid off, due to his protected activities.⁶⁹ To the contrary, I find that the adverse action taken against Recktenwald was primarily motivated by a neutral assessment of his productivity and would have occurred regardless of management's animus against him arising from his union activities. See *Arlington Hotel Co.*, 278 NLRB 26 (1986) ("even if [the employee's] union activity were a reason for her discharge, the Respondent . . . demonstrated that it would have discharged [her] in the absence of such protected activity"). I will recommend that this allegation be dismissed.

The General Counsel argues that the Employer's pattern of unlawful discrimination against union supporters culminated in the issuance of two written warning notices to Dykstra in December. (GC Exh. 1(gg), pars. 9(a), (b), and (c).) Because the fact situations involving these incidents are significantly different, I will address them in turn.

Dykstra provided candid testimony regarding the circumstances of the first incident. On December 13, he reported to work and found his press to be partially disassembled and his workplace in "general disarray." (Tr. 1725.) He shared the press with his colleague, Bradford. Bradford had not left him any communication explaining the nature of the problem with the press. Angered by the lack of communication and the impact of the situation on his efforts to be productive, Dykstra dispatched a text message to Bradford. It said, "Wtf is going on with these dryers and why is no one leaving a damn note about it?" (R. Exh. 47.) Dykstra conceded that the abbreviation, "Wtf," stood for, "What the fuck." [Counsel's words.] (Tr. 1740.)

Dykstra testified that, at the end of his shift, Bradford reported for work. He was "visibly upset," and asserted that Dykstra's text message had been "disrespectful." (Tr. 1727.) It is clear that Bradford reported his displeasure with the text message to management.⁷⁰ Morrison summoned Dykstra and Bishop to a meeting on the following day.

At the meeting, Dykstra was issued a written warning for the offense of, "Wrongful Conduct." (R. Exh. 47.) Specifically, the content of his text message to Bradford was described and he was warned that, "[t]his type of offensive communication will not be tolerated at PFS." (R. Exh. 47.) When Dykstra attempted to raise his own concerns regarding the transfer of the press between shifts, Morrison cut him off, noting that his text message "is the whole premise of the write-up."⁷¹ (Tr. 1731.)

⁶⁹ In this regard, I have also taken note of Recktenwald's testimony that, at the moment that Morrison handed him his layoff notice, he also asked Recktenwald if he would be willing to return once business "picked up." (Tr. 1645.) This is hardly consistent with a discriminatory motive.

⁷⁰ There is no evidence of any dispute between Dykstra and Bradford that would relate to the Union. Indeed, after Bishop's layoff, Dykstra became the steward and Bradford became his assistant steward.

⁷¹ Morrison did make other ill-advised comments about alleged production errors by Dykstra. I have considered these as evidence of animus, but they are not dispositive of the outcome for reasons I am about to explain.

Applying *Wright Line*, Dykstra was clearly a major union activist and management was apprised of his prominent role and objected to it. There is evidence of unlawful intent and motivation to strike out at union supporters, particularly those whose support was at the strong level manifested by Dykstra. Therefore, I conclude that the General Counsel has met his initial burden. The Company defends its action by noting that the warning was for an actual and undisputed example of offensive conduct toward a coworker. It also supports the legitimacy of the discipline by referring to other employee discipline for similar and related offenses toward coworkers. I find its arguments persuasive.

In the first instance, it is important to note that this is not an example of an employer going out to look for any infraction by a union supporter in order to create a pretext for retaliatory discipline. To the contrary, it is clear that the Employer would never have learned of Dykstra's conduct except for Bradford's report. Thus, management was placed in the position of having to determine an appropriate response to Bradford's complaint regarding Dykstra's behavior. This strongly supports the genuine nature of that response, particularly given the realities of today's workplace environment with its potential both for harassment and, equally, for litigation arising from such behavior. The legitimacy of management's response is also supported by its reasonable nature. The level of discipline imposed was plainly a reasonable response to the nature of the offense.

I also agree with counsel for the Employer's contention that the Company has proven that it punished similar workplace infractions with similar disciplinary actions. Thus, the record contains such discipline for offenses described as, "bad language," communications contributing to "a hostile work environment," cursing at a coworker, "rude behavior," and failure to treat a coworker with "respect." (R. Exhs. 56, 55, 53, 58, and 52 respectively.)

In his brief, counsel for the General Counsel attempts to draw fine distinctions between the circumstances of the prior disciplinary actions and Dykstra's case. I have considered these arguments and conclude that they are insufficient to disturb my ultimate conclusion that the Employer has met its burden of proving that Dykstra would have been issued the warning for offensive communication regardless of his union activities and support. As the Board has observed, "perfect consistency," is not the required standard. *Consolidated Biscuit Co.*, 346 NLRB 1175 fn. 24 (2006), enf. 301 Fed. Appx. 411 (6th Cir. 2008). Absent proof of disparities based on protected activity, an employer meets its burden by showing that it had an existing work rule governing the conduct and "that the rule has been applied to employees in the past." [Footnote omitted.] *Merillat Industries*, 307 NLRB 1301, 1303 (1992). Finding the warning to Dykstra for his offensive text message to a coworker to be motivated by genuine reasons unrelated to protected activities, I will recommend that this allegation be dismissed.

The final allegation of unlawful discrimination in this case concerns another written warning issued to Dykstra on December 28. The written warning was for Unsatisfactory Work Quality, arising from an incident on December 21, when Dykstra "let the ink chamber run out of ink/lost over half the job." (R. Exh. 48.) Dykstra testified that his press was having

problems with the ink agitators and, “I believe I ran that one before I noticed that they were having an issue.” (Tr. 1744.) He conceded that he agreed with management’s assertion that he “should have checked the product coming off the press more often,” but also noted that this was difficult given the quantity of work he was assigned to perform after the staff reductions. (Tr. 1746.)

As with Dykstra’s prior warning, I conclude that he was a known union activist and management displayed animus against such activists, including Dykstra. Because the General Counsel has met his initial burden, the focus again shifts to management’s evidence of the legitimacy of the disciplinary action. As with the text message warning, that evidence takes two forms. In the first place, I again note that Dykstra does not seriously contest the genuine nature of the claim that he made a production error that cost the Employer time and money. Beyond that, the Employer’s response appears appropriately calibrated to address the nature and extent of the infraction in a reasoned and impartial manner. This is particularly true since Dykstra had a prior written warning for a similar production error. He was issued a written warning for failure to “check stock before printing” an order in 2009. (R. Exh. 38.) I find it significant that the Employer did not grasp the opportunity to escalate its disciplinary response to a second related infraction. Thus, a comparison of the nature of the workplace offense and the employee’s prior disciplinary history with the degree of discipline imposed supports the claim of legitimate motivation.

Beyond the circumstances of the event under examination, the Employer has submitted an array of prior disciplinary notices demonstrating its history of responding to employees’ production errors throughout the plant. I have approached these documents with caution and some skepticism because there is clear evidence that management expressed an intent to apply stricter standards as to when to write disciplinary notices to unit employees given their representation by the Union. Because of this concern, I have tended to discount the notices submitted by management that relate to discipline issued after the commencement of the organizing campaign. To some degree, such notices may be viewed as tainted by the desire to impose stricter than normal accountability as an inappropriate response to the Union.

The General Counsel takes the broad position that the Employer had no policy regarding the discipline of employees for production errors until it instituted such a policy on November 3 as an unlawful response to the Union. (See GC Exh. 1(ff), par. 9(c).) The evidence belies this sweeping claim. Apart from the unusual and illogical nature of the contention that a large industrial employer would have no policy at all regarding discipline for production errors, the documentary evidence establishes that it did issue formal discipline for such errors prior to the Union’s involvement. To illustrate, I will examine the period from July 2009 through July 2011, a date just prior to the organizing campaign. During that period, the Employer issued written disciplinary actions for production errors to various employees throughout the plant on July 9, 2009; August 12, 2009; September 1, 2009 (two employee warnings); September 4, 2009; January 15, 2010; February 23, 2011; March 10, 2011 (two warnings); March 23, 2011 (two warnings); March 30,

2011; April 6, 2011; July 8, 2011; and July 29, 2011. (R. Exhs. 31, 40, 38, 39, 42, 20, 49, 46, 23, 33, 22, 32, 15, 16, and 25 respectively.)

While I am mindful that this Employer expressed an unlawful intent to tighten up its disciplinary standards in response to the Union, I nevertheless conclude that the warning issued to Dykstra on December 28 was not unlawful. Thus, the nature of the offense and the extent of the disciplinary response combined with the disciplinary history of the employee and the entire work force persuade me that Dykstra would have been issued the warning for his production error regardless of his participation in protected activities. The Employer has proven that it had a significant past history of responding in the same way to similar production errors, particularly during the 2-year period preceding any union activity. I will recommend that this allegation be dismissed.

4. The alleged violations of Section 8(a)(5) and (1)

The General Counsel alleges that the Employer has failed to comply with its obligations to engage in collective bargaining as required by the Act. These alleged violations fall into two broad categories: the imposition of unilateral changes in terms and conditions of employment and the failure to comply with the duty to furnish information to the Union in a complete and timely manner. Before turning to the specific issues, I will provide an overview of these two key concepts.

A vital underlying purpose of the Act is the promotion of commerce through the elimination of labor conflicts. As the Supreme Court has explained, “[t]he Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife.” *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211 (1964). In order to meet the Act’s purposes, the Court endorsed the Board’s remedial power in this area as follows:

[T]he Board is authorized to order the cessation of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement. Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance. It follows that the Board may hold such unilateral action to be an unfair labor practice in violation of § 8(a)(5).

NLRB v. Katz, 369 U.S. 736, 747 (1962).

The Board imposes the Act’s bargaining obligation to refrain from making unilateral changes to terms and conditions of employment from the earliest moment that employees manifest their choice of a bargaining representative. Thus, where a union has prevailed in an election and the employer has filed objections seeking to contest the outcome of that election, it must refrain from imposing unilateral changes. Where the objections are pending and a final determination regarding certification of the bargaining representative has not been made, an employer “acts at its peril,” if it imposes unilateral changes. *Flambeau*

Airmold Corp., 334 NLRB 165 (2001). In this case, although the Union was formally certified as representative on November 7, it is clear that the Employer's duty to refrain from making unilateral changes commenced as of the Union's electoral victory on October 28.⁷²

Another vital component of the obligation to engage in collective-bargaining is the duty to furnish requested information that is relevant to a union's responsibilities as bargaining representative of the employees. The Board has characterized this responsibility as, "axiomatic." *Amersig Graphics*, 334 NLRB 880, 885 (2001). An employer must not only provide such information, but must deliver the information, "in a timely fashion." *Spurlino Materials, LLC*, 353 NLRB 1198, 1200 (2009). In determining whether information has been provided in a timely manner, the Board requires "a reasonable good faith effort to respond to the request as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). The Board will examine "the complexity and extent of information sought, its availability and the difficulty in retrieving the information." *Samaritan Medical Center*, 319 NLRB 392, 398 (1995).

With this background, I will now assess each claimed violation of Section 8(a)(5) and (1), beginning from the time of the Union's electoral victory. In fact, the General Counsel contends that the Employer violated this duty in two respects on the very first workday after the election, October 31. First, it is asserted that the issuance of the Responsibility Press Operators document constituted a set of unlawful unilateral changes to the terms and conditions of employment for the unit members. (GC Exh. 1(ff), par. 9(a).)

As previously discussed, the document at issue contained a list of 23 individual work rules and required each employee to sign an acknowledgement that he understood those rules and recognized that a failure to comply with any of them could result in disciplinary action, including termination from employment. Both parties presented painstaking testimony regarding the nature and history of each of the 23 rules. From that evidence, it is clear that the rules may be divided into three categories: (1) those that merely restated existing work rules and procedures that were in effect at the time of the election; (2) those that restated existing work rules that were not in effect and were not enforced as of the time of the election; and (3) entirely new work rules and procedures. In determining the proper category for each of the individual rules, I have placed great weight on the testimony of the actual press operators and their supervisors. In many instances, Barnum provided opinions that contradicted those of the personnel actually involved in the printing process. As he is not a qualified printer, his contrary viewpoint carries comparatively little probative value.

Generally speaking, there was a consensus among the knowledgeable witnesses regarding the conclusion that rules 2, 9, 10, 14, 15, 19, and 22 were merely restatements of existing work rules that had been in effect and enforced as of the election. Rules 3, 4, 5, and 7 are properly characterized as rules that had been in existence at the time of the election, but were

⁷² The Employer did not file any challenges or objections to the election.

not actually being enforced.⁷³ As a result, the warning regarding future disciplinary action for violations of those rules contained in the Responsibility Press Operator document represented something new. As the Board has explained, "a unilateral change from lax enforcement of a policy to more stringent enforcement is a matter that must be bargained over." [Citations omitted.] *United Rentals*, 350 NLRB 951, 952 (2007).

Of greatest significance, the credible evidence demonstrated that the majority of the 23 rules were new to this workplace. Thus, rule 1 required additional documentation from the press operators. As Bishop explained, "[w]e had been doing electronic records for time and now we were supposed to do electronic and then written records, both."⁷⁴ (Tr. 90.) Percy reported that Rule 6 requiring the operators' presence at the press during work processes represented something that should always have been required, but "[o]bviously" had not been before. (Tr. 292.) Rule 8 directed press operators to notify management in writing of problems with their presses. The consensus among the witnesses was that previously such reports could have been made orally. Rules 11, 12, 16, 17, 18, 20, 21, and 23 imposed set times for maintenance and operating functions that had previously been performed as needed.⁷⁵ Rule 13 imposed a new recordkeeping requirement for quality control purposes.

From the foregoing discussion, it is evident that over half of the 23 rules listed in the Responsibility Press Operators document were new to the press room, while another 4 were subject to new enforcement guidelines. Despite this, management chose to announce and distribute these rules directly to the press room employees without any notice to the Union or opportunity to bargain. To underscore management's determination to reject the need to engage in such bargaining, it will be recalled that when Bishop objected to this lack of notice and bargaining, supervisors made the fatuous argument that, since there was no collective-bargaining agreement in effect, bargaining was not required.⁷⁶ The General Counsel has plainly demonstrated that the issuance of the Responsibility Press Operators document imposed a broad variety of unlawful unilateral changes in working conditions in violation of Section 8(a)(5) and (1).

⁷³ For example, regarding rule 3, Bishop testified that the rule had been "inconsistently enforced and now it's in writing." (Tr. 190.) As to rule 4, Percy acknowledged that the intent was to tighten up enforcement because, "not everybody's got time to babysit and fix [time clock errors]." (Tr. 288.) As to rule 5, Percy testified that Heap, himself, had told employees that he was waiving enforcement of this rule. (See Tr. 289.) According to Percy, rule 7 had been previously required, "but not done." (Tr. 292.)

⁷⁴ Requiring an additional form of verification procedure is a material change to the conditions of employment. See *Goya Foods of Florida*, 351 NLRB 94, 95-96 (2007), enf. 309 Fed. Appx. 422 (D.C. Cir. 2009) (new signature requirement for verification purposes is an unlawful unilateral change).

⁷⁵ For instance, Percy explained that rule 18 was intended to create "a set pattern" for performing maintenance chores. (Tr. 301.)

⁷⁶ Shortly after the implementation of the Responsibility Press Operators document, Castro wrote to HR Director Miller demanding that the rules be rescinded and the parties bargain about the topic. See GC Exh. 12, p. 1. He did not receive a response.

The General Counsel points to a second alleged violation on the same date. Specifically he argues that, in addition to the issuance of the unlawfully altered work rules, the Employer also established a new policy requiring that press operators whose presses were inoperative would be sent home on a rotating basis instead of being assigned to other ancillary duties in the facility. (GC Exh. 1(ff), par. 9(b).) As Percy explained, “[W]e were setting a precedent that the operators would trade off and be going home.” (Tr. 325.) He noted that such a policy had never been applied before the representation election. As discussed earlier in this decision, the new policy was first applied on the first working day after the election when Recktenwald was sent home pursuant to the new plan. The Employer did not provide any notice or opportunity for the Union to bargain about this unilateral change in a significant term of employment directly affecting employees’ work opportunities and compensation. The Employer’s behavior in this regard constituted another violation of the bargaining obligation enforced through Section 8(a)(5) and (1).

On November 1, Castro wrote to the Employer to demand two sets of information for purposes of preparing to engage in contract negotiations. His first information request asked the Employer to provide, within 10 days, a variety of general information relevant to the anticipated bargaining process.⁷⁷ (See GC Exh. 12, p. 3.) The General Counsel contends that the Employer’s compliance with these information requests was deficient under the Act. (GC Exh. 1(ff), pars. 12(a) and (b).) In evaluating this claim, I have placed particular weight on the documentary evidence and on the testimony of Castro. I found Castro to be a calm, responsible, and relatively objective informant as to these matters. At no time did he strike me as engaging in partisanship in order to secure any advantage in this litigation.

As to his first request seeking information about the unit members and their wage and disciplinary histories, Castro testified that he received this information from Attorney Woods by letter dated November 30. (See GC Exh. 16, p. 1.) At the same time, Woods sent him the response to the second and third requests regarding personnel policies and procedures. Woods’ letter of November 30 also included benefit information that was sought in Castro’s fourth request. Similarly, Woods provided the Employer’s only existing job descriptions at that time. As to the sixth request that sought wage and salary plans, Woods’ letter reported that these did not exist. Finally, Woods’ letter responded to Castro’s request for disciplinary notices by providing those documents.

The General Counsel argues that the Employer’s response as to these matters on November 30 was unreasonably delayed in violation of Section 8(a)(5). In reply, the Employer presented Barnum’s testimony to explain why it took a month to provide the information. He reported that two things interfered with his efforts to respond. In the first place, he had business travel during the first part of November. More importantly, he testified that the initial responsibility for gathering the information

⁷⁷ The Employer has not made a claim that any of the information being sought by the Union in this case was irrelevant, unduly burdensome to produce, or protected by any privilege.

fell to HR Director Miller. Unfortunately, Miller took medical leave from November 18 through 28. When he returned to work on November 29, it was decided that his employment at PFS would cease. Documentary evidence supports the Employer’s claim regarding the timing and events involved in Miller’s termination. (See GC Exh. 74, pp. 1–2.) On Miller’s abrupt departure, Barnum took over the chore of responding to Castro and opined that, “I did it as quickly as I could.” (Tr. 1194.)

The Board employs a “totality of the circumstances” test to assess the contention that the Employer’s response time of approximately a month was unlawfully delayed. *Spurlino Materials, LLC*, supra at p. 1200. In making this assessment, I have balanced the fact that the Union was seeking routine materials against the difficulties outlined by Barnum and the reality that this Employer was unfamiliar with the collective-bargaining process. I do not find that the General Counsel has met its burden of showing an unreasonable delay. As a result, I will recommend that this allegation be dismissed.

At the same time that Castro filed his first written request for general information, he sent the Employer a second letter seeking information regarding the Employer’s health insurance benefit. This letter was also dated November 1. It contained 11 separate items seeking information. The General Counsel contends that the Employer failed to provide some of the material and provided the remainder in an untimely fashion. This is alleged to have violated Section 8(a)(5) and (1). (GC Exh. 1(ff), pars. 12(a) and (b).) In this regard, I note that the Board requires an employer to obtain requested health benefit information from its insurance provider so that it may be furnished to the employees’ representative. See *Hanson Aggregates BMC, Inc.*, 353 NLRB 287, 289 (2008), and the numerous cases cited there.

Castro’s first request was for copies of the health care plan and a summary plan description. Woods responded in writing on November 30, but his reply was limited to what Castro termed, “cheat sheets of some of the plans.” (Tr. 447.) Ultimately, Castro testified that by January 15, 2012, he had received materials that met his needs, although they were not the precise materials requested.⁷⁸ Taking into account the routine nature of the materials requested, I find that a delay of well over 2 months is unreasonable and unlawful.

The second item requested was a so-called form 5500, which is a government form regarding health insurance benefits. Castro testified that his request was not answered until approximately January 14, 2012. At that time he received an email from Woods explaining that the plan was too small to require submission of a form 5500, so no such item existed. Again, it is evident to me that the more than 2-month delay in responding to this simple request was unreasonable and unlawful.

The third request was for plan rules, procedures, and policies. While Woods made a partial response on November 30,

⁷⁸ Throughout my analysis here, I have deferred to Castro’s judgment as to whether the Employer’s ultimate responses were satisfactory. I found Castro to be a practical and realistic business agent and his willingness to accept less than the letter of what he demanded in certain areas is sensible and should be given deference.

satisfactory information was not received by Castro until mid-January 2012. Once again, while I appreciate that this request was somewhat broad, an unexplained delay of more than 2 months is unreasonable and unlawful.

Castro next requested the “cost breakdown” of the plan to the Employer. (GC Exh. 12, p. 3.) On December 13, Woods sent Castro an email providing some information. Castro testified that the information provided was not entirely responsive because “it told us what their cost was. It still didn’t break down the entire cost for the plan. We had to go back to the grid benefit sheets.” (Tr. 470.) Overall, I interpret Castro’s position as to this item to be that he has been able to determine the necessary financial information, albeit in a more difficult manner than would have been necessary if the response had been complete. Taking my cue from Castro’s practical approach to these issues, I find the response to be insufficient and unlawful but will not order the Employer to take any remedial action as the Union was able to learn what it desired to know.

Castro’s next request for was a very simple item. He sought contact information for the plan administrator. Amazingly, he did not receive this until mid-January 2012. It is evident that a diligent agent of the Employer could have obtained and dispatched this information to Castro with hours or even minutes of it having been requested. The lengthy delay is unreasonable, unconscionable, and plainly unlawful.

While the preceding request was the essence of simplicity, the next item was quite complicated. Castro sought copies of all claims and related correspondence over the past 5 years. While there is no doubt that it would require time and effort to obtain this material, the Board has held that “[i]nformation about the claims experience of unit employees is presumptively relevant” and must be provided. *Hanson Aggregates BMC*, supra at fn. 7, and the cases cited there. Castro testified that as of mid-January 2012, he had been furnished claims materials for the preceding 3 years. In addition to the failure to provide such information for 2 of the years being sought, Castro reported that the material he was given had not been sorted in a manner that would allow him to identify bargaining unit members as opposed to other company employees. I conclude that the Employer has not provided the information sought to the extent just outlined. I find that conduct to be unlawful and will order an appropriate remedy.

Item 7 sought by Castro was sick leave and attendance records for unit employees. He received these by letter on November 30. I have already opined in connection with the first information request letter that this response time was not unreasonable in the circumstances presented here. I will not find a violation as to this material.

Castro next requested health benefit contracts between the Employer and providers. He did not receive all of this material until mid-January 2012. Given the relatively simple nature of the request and the lengthy delay in meeting it, I find the Employer to have violated the Act through unreasonable tardiness in providing the material.

The next item requested was a census of the bargaining unit members, including their type of insurance coverage. While this appears to be a simple and routine item, Castro’s testimony described a tortuous response from the Employer. Almost 6

weeks after making the request, Woods replied that, “[w]e are putting together the information.” (GC Exh. 18, p. 2.) Castro reported that he finally received the census on January 21, 2012, and that it was incomplete since some bargaining unit employees were not included. It was not until the second week of February 2012 that Barnum gave him the missing information. It is obvious that this course of conduct in responding to a simple request was unreasonable, dilatory, and unlawful.

Castro’s next request was another complex one, albeit one that the Employer was legally obliged to address. It involved a report on large insurance claims over the amount of \$75,000, including the diagnoses and other medical history. A glimpse into the Employer’s mindset regarding the sense of urgency in responding was provided by an email from Woods dated December 13. Referring to this material, he informed Castro that, “[w]e’ll ask the insurance company.” (GC Exh. 18, p. 2.) By using the future tense, Woods was indicating that, after the passage of 6 weeks from the date of the request, the Employer had failed to take any action to procure the material. Ultimately, Castro testified that by mid-January 2012, he had received large claims information in the \$60,000 to \$65,000 range. While this was not all that he had desired, he opined that it was “close enough.” (Tr. 493.) I will deem the Employer’s response to constitute a blatantly obvious instance of unreasonable delay rather than an actual failure to provide the material. Nevertheless, such a delay is unlawful.

Castro’s final demand was for a copy of the “benefit grid and current rates for each.” (GC Exh. 12, p. 3.) The Employer’s initial response was provided on November 30, but was incomplete. As Castro explained, “[L]ater on we found out these were the rates that the employees, themselves, were paying, not the rate of the plan.” (Tr. 453.) While the Employer provided additional information later, Castro testified that the response was still “incomplete” because it did not break down dental and vision information. (Tr. 493.) From this, I conclude that the Employer has failed to meet its obligation to provide a full response to this request and I will order an appropriate remedy.

In sum, the Employer’s response to the Union’s written request for information regarding the health insurance benefit, dated November 1, was entirely inadequate. Many items were only provided after an unreasonable and protracted period of delay. Beyond this, two items have still not been provided in their entirety. I conclude that the Employer’s overall response was inadequate, unlawful, and indicative of a lack of intent to engage in good faith bargaining with the newly-elected representative of the press room employees. Its conduct violated Section 8(a)(5) and (1) of the Act.

The General Counsel next alleges that the Employer made an additional unlawful unilateral change in the press room employees’ terms and conditions of employment on November 3. (GC Exh. 1(ff), par. 9(c).) The reference here is to certain statements made during the course of imposing discipline on press operator Woosley for a production error that required reprinting of two jobs. I discussed this incident in detail during my analysis of the claimed discriminatory nature of Woosley’s discipline. At that time, I concluded that the discipline arose from dual motives consisting of a genuine concern about Woosley’s production error and an illegitimate intent to crack down

on Woosley in response to his pronoun attitude. On balance, placing particular reliance on Percy's own testimony about his mindset, I found that Woosley's discipline was unlawful because it would not have been imposed absent his protected activities.

At the same time, I turned to an assessment of the General Counsel's claim that the Employer had engaged in another act of unlawful discrimination arising from Percy's statements to Woosley indicating that the Employer's disciplinary policy would be tightened up. I noted that the General Counsel had persisted in characterizing the Employer's action as the institution of a new policy of issuing discipline for production errors. As I also observed when discussing this manner of framing the Employer's actions, the evidence belies this contention. The Employer has shown that it maintained a written handbook policy regarding discipline for production errors and had issued formal discipline for production errors on a variety of occasions over the preceding 2 years, including formal discipline imposed on press operators in response to their mistakes. As a result, I rejected the General Counsel's contention that the Employer imposed a new policy of discipline for production errors in violation of Section 8(a)(3). The same outcome must apply to the related contention that the supposedly new disciplinary policy for production errors constituted an unlawful unilateral change in violation of Section 8(a)(5). The Employer's documentary evidence demonstrates that this claim is unfounded.⁷⁹ I will recommend that this allegation be dismissed.

The remaining issues all revolve around the Employer's layoff that was planned in November, announced on December 9, and implemented on December 16. The General Counsel asserts that the Employer violated its bargaining obligations by failing and refusing to bargain over the selection criteria for the layoff and the effects of the layoff. In addition, it is contended

⁷⁹ During the trial, counsel for the General Counsel raised the contention that the complaint allegation under consideration encompassed the idea that the Employer had unlawfully changed an existing policy of punishing production errors by making it stricter. I have already noted that this sort of impromptu attempt to amend the formal allegation violates the Employer's due process rights by precluding it from planning its defense. On the merits of such a claim, I would note that it is very early in the life of this workplace as a union shop to assess whether the Employer is issuing more formal discipline for production mistakes than it had over the preceding period. I have found that it did issue an improperly motivated discipline to Woosley, but have also concluded that the discipline issued to Dykstra on two separate occasions was consistent with past practices and was lawful. Thus, it is too soon to tell whether the unlawful conduct vis-à-vis Woosley was an isolated incident or part of a pattern. In my view, despite foolish and unlawful statements made by managers on this topic, the General Counsel has not met his burden of proving that the Employer is actually embarked on a course of carrying out the threat of enhanced discipline for production errors. The Board should proceed with caution in such circumstances. See *Midwest Regional Joint Board v. NLRB*, 564 F.2d 434 (D.C. Cir. 1977), cited by the Board with approval in *Neptco, Inc.*, 346 NLRB 18 fn. 15 (2005) ("decision of what type of disciplinary action to impose is fundamentally a management function"). I am confident that the Charging Party will monitor the evolving developments in this workplace. Should a pattern of increased discipline for production errors be charged by it in the future, this will necessarily be subject to careful investigation and analysis by the Board and its agents.

that the Employer failed to provide productivity statistics that were sought by the Union as part of its effort to meet its duty to represent unit employees regarding the layoff and its effects. These aspects of the Employer's conduct are alleged to violate Section 8(a)(5) and (1). (GC Exh. 1(gg), pars. 6(a), (b), (d), and (e); 7(a) and (b), and 8.)

Because these allegations are intertwined, I will address them together. The fundamental inquiry is a determination of whether the Employer met its statutory obligation to bargain in good faith with the Union regarding the selection criteria and effects of the December 16 layoff of press room employees. For the reasons I am about to outline, I conclude that, although the Employer did meet with the Union on two occasions regarding the layoff, it utterly failed to comply with the duty to bargain in good faith.

In the first place, the evidence shows that managers met in November to plan for a mid-December layoff. In particular, they focused on devising selection criteria. Ultimately, they decided on a method that relied primarily on analysis of comparative productivity data for the press operators. Despite having engaged in this planning process well in advance of the layoff date, the Employer did not choose to notify the Union about the upcoming layoff until December 9, merely a week before the implementation date.⁸⁰ The failure to provide more timely notice is completely unexplained by the Employer. The Board has held that the failure to provide timely notice of an upcoming layoff violates the obligation to bargain in good faith. See *Eugene Iovine, Inc.*, 353 NLRB 400, 407-408 (2008), adopted at 356 NLRB 1056 (2011), and the many precedents cited therein by the judge.

When the Employer provided its belated notice of the layoff on December 9, the Union made an immediate request to bargain over the issues raised. In addition, Castro made a request for information consisting of the productivity data that the Employer had utilized in selecting unit members for layoff. The parties scheduled a meeting on December 12 to confer regarding the layoff.

On December 12, members of management and officials of the Union did hold a meeting. Although the Union had not received the productivity data, it attempted to bargain over the issues raised by the layoff. In particular, it presented a detailed written proposal. (See GC Exh. 65.) After receiving this document, managers held a brief caucus and returned without any response or counterproposal. The Union was merely told that the Employer would reply, "at a later date." (Tr. 1458.) No such response was received and the Employer never provided the productivity data that had been requested.

As has been the pattern in this case, the circumstances just recounted raise a strong inference that the Employer had no intention of engaging in any real bargaining about the layoff. Beyond this, the perception raised by the circumstances is verified in no uncertain terms in the Employer's contemporaneous

⁸⁰ In fact, while the Employer scheduled a meeting with press operators Bishop and Dykstra, it failed to inform the Union's business agent, Castro. He only attended the meeting because he was notified by Dykstra. As he put it, after learning about the session from Dykstra, he just "showed up." (Tr. 1581.)

correspondence. Thus, immediately after the December 12 meeting, Barnum sent a report about it to Heap. He advised Heap that the Union had submitted its written proposal and attached a copy to his email. He asked Heap, “[i]f you can stand to, review their two page proposal and let me know what you think.” (GC Exh. 59.) Even more tellingly, he told Heap that there was, “[o]bviously nothing in there we are interested in but *we have to go through the motions.*” [Emphasis added.] (GC Exh. 59.)

As the authors of a leading labor law treatise have observed, “the Board will find a refusal to bargain in good faith if it concludes the employer is merely ‘going through the motions’ of bargaining.” [Footnote omitted.] *The Developing Labor Law*, Fifth Edition, Volume 1, 2006, p. 864. The significance of Barnum’s attitude as revealed in his correspondence was outlined by the judge and adopted by the Board and the circuit court in an aptly-named case, *Unbelievable, Inc.*, 318 NLRB 857, 867 (1995), enf. in pertinent part 118 F.3d 795 (D.C. Cir. 1997). In that case, the employer manifested exactly the same mindset. As the judge explained:

The whole matter was simply a charade. [The Employer’s negotiator] had been given marching orders . . . to go through the motions of collective bargaining in order to force the Unions either to strike and risk losing their jobs or to tame them to such an extent that their representation of employees would be ineffectual. Such an attitude is contrary to the policies of . . . the Act and I so find. This was classic surface bargaining. [The Employer’s negotiator] approached this table with the attitude that it was all take and no give.

It is noteworthy that the Board and the circuit court found it appropriate to impose extraordinary remedies in response to this conduct, behavior that the Board characterized as “egregious.” 318 NLRB at 858.

In this case, the Employer’s mindset and conduct were equally egregious. Its conduct mirrored behavior found unlawful in *TNT Logistics of North America*, 346 NLRB 1257 (2006), enf. 246 Fed. Appx. 220 (4th Cir. 2007), where the employer agreed to only one bargaining session and failed to make any counterproposals or express any willingness to move from its initial position.

The Employer’s utter unwillingness to engage in any meaningful dialogue with the Union regarding the layoff is underscored by its total failure to provide the productivity data that was essential for the Union to evaluate and understand. Not only did the Employer fail to convey this data to the Union prior to the implementation date of the layoff, it continued to refuse to provide the data until the last stage of this trial. Only then did it offer the data into evidence as part of its defense.⁸¹ The Employer’s unwillingness to provide verification of its productivity numbers to the Union strikes at the heart of the collective-bargaining process envisioned in the Act. As the Supreme Court has observed:

Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims If . . . an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.

NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153 (1956).

For all of these reasons, I agree with the General Counsel that the Company engaged in blatant and egregious misconduct by failing and refusing to bargain in good faith with the Union regarding the selection criteria for the layoff and the effects of the layoff. By choosing to merely “go through the motions,” the Employer violated Section 8(a)(5) and (1) of the Act. Similarly, by failing and refusing to supply the Union with the productivity data that it sought in order to meet its duty toward its members, the Employer again violated these statutory provisions.

CONCLUSIONS OF LAW

1. The Employer has interfered with, coerced, and restrained its press room employees in the exercise of their rights under the Act in violation of Section 8(a)(1) by:

(a) Threatening employees that the Company would never sign a contract with the Union and by offering the analogy that by voting for the Union in the representation election, the employees may have won a battle but would not win the war.

(b) Threatening employees by telling them that they would have fewer work opportunities if the Union won the representation election.

(c) Impliedly threatening an employee by telling him that it was disappointing that he had appeared in a prounion election flyer.

(d) Threatening to send an employee home without pay if he refused to sign a set of new work rules because he believed that the Employer had failed to bargain over those rules with the Union.

(e) Interfering with and restraining an employee in the exercise of his rights under the Act by telling him that he could not be given a pay raise due to the presence of the Union.

(f) Threatening employees by telling them that they would be issued written disciplinary notices due to the Union’s presence in the workplace and its demand for documentation.

2. The Employer has discriminated against its employees due to their participation in protected activities and support for the Union in violation of Section 8(a)(3) and (1) by:

(a) Granting an employee a pay raise in order to induce him to vote against the Union in the representation election.

(b) Deciding to bring on a press operator, Benjamin Lincoln, as a temporary agency employee instead of a direct hire because of its presumed belief that he would support the Union.

(c) Publishing and implementing a set of new work rules entitled Responsibility Press Operators because the press room employees had voted in favor of union representation.

(d) Sending an employee, Nicklaus Recktenwald, home without pay when his press was inoperative because he had engaged in protected activities.

(e) Issuing a written warning to an employee, Richard Woosley, because of his participation in protected activities.

⁸¹ Because the data was finally received and explained by Barnum in his testimony as this case neared its conclusion, I will not order the Employer to provide it to the Union again as part of the remedy.

(f) Announcing the selection of an employee, Jonathan Bishop, for layoff due to his participation in protected activities.

3. The Employer has defaulted its obligation to engage in good-faith collective bargaining with the Union in violation of Section 8(a)(5) and (1) by:

(a) Unilaterally publishing and implementing a set of new work rules entitled Responsibility Press Operators without first providing notice to the Union and an opportunity to bargain about these rules.

(b) Implementing a new work rule requiring that employees be sent home without pay when their press became inoperative without first providing notice to the Union and an opportunity to bargain about this rule.

(c) Engaging in unreasonable delay in responding to the Union's requests for information that was relevant and necessary for the performance of its duties as representative of the press room employees.

(d) Failing and refusing to provide historical information regarding health insurance claims involving bargaining unit members that had been requested by the Union and was relevant and necessary for the performance of its duties as representative of the press room employees.

(e) Failing and refusing to provide benefit grid and rate information about the Employer's health insurance benefit that had been requested by the Union and was relevant and necessary for the performance of its duties as representative of the press room employees.

(f) Failing and refusing to provide productivity data regarding the selection process of press room employees who were subject to layoff that had been requested by the Union and was relevant and necessary for the performance of its duties as representative of the press room employees.

(g) Failing and refusing to bargain in good faith with the Union about the selection criteria and effects of its decision to lay off press room employees on December 16, 2011.

4. The Employer has not violated the Act in any other manner alleged by the General Counsel in the complaints issued on January 18 and February 28, 2012.

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. Given the wide variety of unfair labor practices committed by this Employer, it is necessary to order a range of appropriate remedies. I will now address several remedial issues.

Having found the Employer to have engaged in unlawful discrimination against various of its employees and one job applicant, I will recommend the usual Board measures to remediate each such instance of discrimination.⁸² In the case of applicant William Lincoln, I will order his reinstatement to a position as a direct employee of PFS, as well as, backpay and other ancillary relief. Backpay for Lincoln shall be calculated

⁸² It is not appropriate to order any remedy apart from the usual cease-and-desist order as to the discriminatory decision to grant a pay raise to Benjamin Timberlake.

in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as required in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

As to the retaliatory decision to send Nicklaus Recktenwald home for the ostensible reason that his press was inoperative, I will order backpay and ancillary remedies. Backpay for Recktenwald shall be calculated in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest compounded daily as required by *Kentucky River Medical Center*, 356 NLRB 66 (2010). Regarding the discriminatory written warning issued to Richard Woosley and the equally discriminatory announcement of Jonathan Bishop's selection for layoff, I will order that each of these be removed from their records. Finally, because the issuance of the Responsibility Press Operators document was unlawfully motivated, I will order that it be rescinded.⁸³

Regarding the Employer's widespread violations of its bargaining obligations, I will order the rescission of the new policy mandating that press operators whose presses are inoperative may be sent home without pay. Having already ordered similar rescission of the Responsibility Press Operators document, there is no need to address this as a separate bargaining violation remedy.

In addition to ordering the Employer to provide complete and timely responses to the Union's future requests for relevant information needed in order to fulfill its responsibilities as bargaining representative, I will order the Employer to furnish those items already sought that have not been provided to a satisfactory degree. Specifically, I will direct the Employer to furnish the Union with benefit grid and rate information, as well as, historical claims information related to its health insurance benefit for unit employees as requested by the Union by letter dated November 1, 2011.⁸⁴ (GC Exh. 12, p. 3.)

Finally, and perhaps most significantly, I will order a remedy designed to fully redress the Employer's announcement and implementation of a layoff without providing the Union with adequate notice and opportunity to bargain and without engaging in the good-faith bargaining required by the Act. At trial, I asked the lawyers to address in their briefs the remedial issues presented by the layoff. I took specific note that in cases involving a violation of the obligation to bargain over effects of a layoff decision, the Board has sometimes imposed the limited remedy outlined in *Transmarine Navigation Corp.*, 170 NLRB 389, 390 (1968). On consideration of counsel for the General Counsel's articulate, scholarly, and persuasive arguments as to this remedial issue, I have concluded that the limited *Transma-*

⁸³ Although several items on the list of 23 work rules in the document simply restated existing policies, I will direct that the entire document be rescinded for the reasons discussed by the Board in *United Cerebral Palsy of New York City*, 347 NLRB 603 at fn. 13 (2006).

⁸⁴ As previously indicated, I do not deem it necessary to order the Employer to provide the productivity data that had been unlawfully withheld from the Union. That data was admitted into the record in this case and explained by Barnum in his testimony. It would serve no useful purpose to require the Employer to go through the same process twice.

rine remedy is inadequate and inappropriate. (See GC Br. at pp. 86–88.)

Throughout these proceedings, the General Counsel has argued that the Employer’s failure to bargain over the layoffs had two aspects. In addition to a complete unwillingness to bargain over the effects of the layoff,⁸⁵ the Employer equally steadfastly refused to engage in bargaining over the method for selection of employees who would be subject to the layoff. Indeed, as to one employee, Bishop, the Employer chose to announce his layoff based on the unlawful selection criterion that he was an active and persistent union supporter.

The unwillingness to bargain over the selection criteria may likely have had particularly great impact in the circumstances of this case. The Employer’s criteria did not mandate any difference in treatment between PFS employees and employees of temporary services agencies. At the December 12 meeting, Castro suggested to management that, if they eliminated the temporary agency employees, there would not be any need to lay off unit members. Had the parties engaged in meaningful bargaining about this, the criteria may have been altered to give retention preference to PFS employees. In that event, fewer bargaining unit members would have been laid off at all. The breadth of the breach of the bargaining obligation as to the layoff issue persuades me that a full make-whole remedy is needed in order to effectuate the policies embodied in the Act.

The scope of remedy for a bargaining violation that resulted in the layoff of employees was comprehensively addressed in *Pan American Grain Co.*, 343 NLRB 318 (2004). In that case, the judge observed:

With respect to the Respondent’s unlawful failure to provide the Union with notice or an opportunity to bargain over the . . . layoff, I find that a full backpay remedy is appropriate. The Board has held that “the traditional and appropriate Board remedy for an unlawful unilateral layoff decision and the effects of that decision [is an order] reinstating the laid-off employees, and requiring the payment to the laid-off employees of full backpay, plus interest, for the duration of the layoff.” *Ebenezer Rail Car Services*, 333 NLRB 167 fn. 5 (2001). [Additional citations omitted.]

343 NLRB at 344. In its decision, the Board approved the judge’s remedy.⁸⁶ The matter was subject to intense litigation

⁸⁵ Castro testified that the effects he wished to address in bargaining included a severance package, recall rights, bumping rights, and health insurance coverage issues.

⁸⁶ In *Pan American*, two Board Members speculated that the result could have been affected by proof that the employer’s layoff process had been consistent with past practice. See 343 NLRB 318 at fn. 2. In this case, PFS has argued that it employed the same selection criteria for layoff that it had used in past instances. The party asserting such a past practice bears the burden of proof. *Caterpillar, Inc.*, 355 NLRB 521, 522 (2010) (employer must meet burden of proving that the past practice was applied with such regularity and frequency that it would reasonably be expected to continue on a consistent basis). Here, there was a complete failure of such proof. Apart from naked assertions that productivity statistics had been compiled and assessed in past layoff decisions, there was absolutely no supporting evidence. Indeed, Barnum’s account of the ongoing development and revision of the statistical database by the Company’s information technology specialists

in the First Circuit, involving multiple decisions. Ultimately, the circuit court enforced the Board’s remedial order. See *Pan American Grain Co. v. NLRB*, 558 F.3d 22 (1st Cir. 2009).

Very recently, the Board has had occasion to review this issue. In *Jason Lopez’ Planet Earth Landscape*, 358 NLRB 383 (2012), the Board considered the judge’s remedy for a failure to bargain over a layoff and its effects. While it amended the judge’s formula for computing backpay, it agreed with the scope of his remedial order that included full reinstatement and backpay requirements. See the Board’s own remedial order at 358 NLRB 383, 385.

Because of the scope and extent of the Employer’s bargaining violations regarding its layoff decisions, I will order that it reinstate all of the unit members who were laid off and provide each of them with a make-whole remedy for any losses they suffered during their layoff. Those laid-off unit members were Jonathan Bishop, Nicklaus Recktenwald, William Wellman, and Robert Starks. As mandated by the Board in *Jason Lopez’*, supra, I will order that their backpay be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as required in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In this case, the General Counsel also seeks two unusual remedies. First, he seeks an order, “requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination.” (GC Exhs. 1(ff) at p. 7 and 1(gg) at p. 5.) As the Board has explained, “[t]his would involve a change in Board law.” [Citation omitted.] *Bouille Clark Plumbing, Heating*, 337 NLRB 743 (2002), enf. 81 Fed. Appx. 377 (2d Cir. 2003). While I understand the General Counsel’s desire to provide notice of his intentions and preserve the issue for later review, my own obligation is clear. As the Board has explained, “it remains the judge’s duty to apply established Board precedent Only by such recognition of the legal authority of Board precedent will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.” *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004). For this reason, I decline to order the suggested tax remedy.

Finally, the General Counsel seeks an extraordinary remedy, an order requiring that the Employer convene a meeting or series of meetings of unit employees and their union representatives at which a management official or a Board agent will read aloud the notice attached to this decision as an appendix. The Board limits its use of the notice reading remedy to cases it characterizes as involving “egregious” conduct by a party. *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001), affd. 354 F.3d 534 (6th Cir. 2004).

I agree with the General Counsel that the Employer’s behavior in this case has been both well documented in its motives and intentions and entirely egregious in its breadth and scope. It calls for the imposition of an effective and particularized

thoroughly undermined any claim that there was an established past practice in this regard. The evidence strongly suggests that the Company was developing its statistical model as it went through the December 2011 layoff process.

extraordinary remedy. The determination of the precise contours of such a remedy at this stage of the proceedings falls to the trial judge. See *Willamette Industries*, 341 NLRB 560, 564 (2004) (failure of General Counsel to seek a specific remedy does not limit authority to impose it). With respect for the General Counsel's viewpoint, I have decided to impose a different remedy than the notice reading provision as recommended. I will explain my reasoning as follows.

In the first place, I have always been wary of the notice reading remedy. I grasp the Board's belief that, in appropriate circumstances, it can be a way to "let in a warming wind of information and, more important, reassurance" for employees who have been victims of serious unfair labor practices. *United States Service Industries*, 319 NLRB 231, 232 (1995) (quoting *J. P. Stevens & Co. v. NLRB*, 417 F.2d 533 (5th Cir. 1969)). Despite this, in my view, it reflects a rather outmoded conception of appropriate governmental intervention reflective of the Act's origins in the mid-Twentieth Century. I would submit that the idea of the Government forcing a private employer to convene a meeting at which that employer is to read aloud to the assemblage a script written by a government agency as a means of confessing error and promising improved behavior in the future is disturbing. The history of this same mid-Twentieth Century offers too many examples of the dangers lurking in this heavy-handed view of the role of government.⁸⁷ In fashioning remedies, the Board has been attuned to evolving technological and cultural developments. See, for example, the requirement that notices now be posted by electronic means. *J. Picini Flooring*, 356 NLRB 11 (2010). A good case may be made that the notice reading remedy should become an historical artifact.

While these views may have influenced my remedial calculus, there is a more important reason why I have concluded that a notice reading provision is not the most effective extraordinary remedy in this case. The evidence shows, and my observation of the witnesses confirms that the members of this bargaining unit are highly skilled craftspeople. They were articulate, intelligent, and sophisticated witnesses who do not need the reassurance allegedly provided by a notice reading. They will have no difficulty understanding the meaning and content of the notice by reading it on their bulletin boards or computer screens.

The particular facts of this case demonstrate to me that there is another form of extraordinary remedy that is better suited to the circumstances presented. I feel confident that the Charging Party and the General Counsel would agree that the ultimate goal in this case is to forestall any unlawful plan by the Employer and its managers to destroy the lawful choice of its press room employees to seek the aid of the Union as their bargaining representative. Given the very complete record of testimony

⁸⁷ It conjures up images from such tragic episodes as the Cultural Revolution in Communist China. I am not for a moment suggesting that a notice reading is comparable to the cruel and extra-judicial punishment through so-called self-criticism that characterized that sad period of Chinese history. Still, the superficial similarities are troubling and suggest that this type of remedy be approached with skepticism or at least great caution.

and documentation regarding the thinking of the managers in this case, I conclude that the most effective way to accomplish this vital objective is to impose a broad cease-and-desist order.

It will be recalled that Percy provided compelling testimony about the discussions among managers regarding the selection of employees to be laid off. Those managers all recognized that their superior, Heap, wanted them to select union activists for lay off. Ultimately, they shrank from such misconduct out of a combination of fear and respect for the law. As Barnum explained in his testimony, "I don't care what Mr. Heap is happy with, we are not going to do anything which violates the law."⁸⁸ (Tr. 1337.) It is my sense that, particularly for those managers caught in the middle, the knowledge that unlawful conduct could subject them to swift and unpleasant consequences will serve as a powerful support to their better natures and an equally powerful deterrent to their baser instincts. Imposition of a broad order would render them subject to rapid involvement in contempt proceedings before a federal judge. As the Supreme Court has said, "the possibility of contempt penalties by the court for future Labor Act violations adds sufficient additional sanctions to make material the difference between enjoined and non-enjoined employer activities." *May Department Stores Co. v. NLRB*, 326 U.S. 376, 388 (1945). I conclude that this is the most effective available prophylactic measure for this workplace.

Of course, having found that a broad order would be effective, it is still necessary to determine whether it may lawfully be imposed here. The Board's leading case on this topic, *Hickmott Foods*, 242 NLRB 1357 (1979), mandated a totality of circumstances standard for analysis and focused the inquiry on whether the respondent has manifested an ingrained attitude of opposition to the Act's purposes, including the protection of the rights of employees. Where the evidence shows an egregious or widespread pattern of misconduct, imposition of a broad order is appropriate. Ultimately, the test must be whether the evidence demonstrates "an objective basis for enjoining a reasonably anticipated future threat to any of those Section 7 rights." *Five Star Mfg.*, 348 NLRB 1301, 1302 (2006), enf. 278 Fed. Appx. 697 (8th Cir. 2008). While a history of recidivism is powerful evidence in support of the need for a broad order, the absence of such a past record is not dispositive, particularly where, as here, the Union is a newcomer to the workplace. See *infra* at 1302-1303 ("mere fact that the Respondent has no prior history of violations does not, in and of itself, undermine the necessity for a broad order").

In this case, from the moment the Union began an organizing campaign through the period following its electoral victory, management formulated and implemented a single-minded course of action. In response to the press room employees' support for the Union, the highest levels of management developed an elaborate plan to thwart it by a strikingly board variety

⁸⁸ Of course, Barnum is exaggerating his own virtue. The evidence shows that they did many things that violate the law. But, in fairness, it also shows that they ultimately did refrain from terminating anyone in retaliation for protected activities. They came close to the line with Bishop but, to their credit, they reversed that decision before it could take effect.

of unlawful means ranging from improper inducements, threats by supervisors, statements of futility, refusal to hire based on projected pronion sentiments, imposition of retaliatory discipline, promulgation of new and onerous work rules, and a fixed intent to completely refuse to engage in good-faith bargaining with the Union. The comprehensive and reliable evidence of management's intent documents its mindset of incorrigible animus at every step. The record is littered with testimony and written statements from managers proving that they intentionally set out to violate the rights of their employees in the widest manner in order to defeat the Union.

I find that the imposition of a broad cease-and-desist order is tailored to the unique circumstances revealed in this compelling record, both because of the egregious nature of the intent and actions of management and because of the evidence indicating that fear of the law's sanctions weighs on the minds of those same managers. Pursuant to Section 10(b) of the Act, I urge the Board to impose this remedy.

[Recommended Order omitted from publication.]