

Corliss Resources, Inc. and Teamsters Local 174, affiliated with the International Brotherhood of Teamsters. Cases 19–CA–093237, 19–CA–093281, 19–CA–102190, 19–CA–104557, 19–CA–105226, and 19–CA–106514

February 27, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA,
AND MCFERRAN

On March 24, 2014, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The Respondent and the Charging Party Union filed limited exceptions and supporting and answering briefs. The General Counsel filed a brief supporting the Union’s exceptions, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to adopt the judge’s rulings, findings,¹ and conclusions except as modified below and to adopt his recommended Order as modified and set forth in full below.²

We agree with the judge, for the reasons he explained, that the Respondent discharged Don Sturdivan in violation of Section 8(a)(3) of the Act.³ We also adopt the

¹ The Union has implicitly excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent did not except to the judge’s findings that on multiple occasions after the Union won a Board election, the Respondent violated Sec. 8(a)(1) by unlawfully interrogating employees; creating the impression of surveillance; threatening that joining the Union would be futile; and threatening drivers with discharge, withholding of pay raises, undesirable truck assignments, and other retaliatory treatment for supporting the Union. Nor did the Respondent except to the judge’s finding that it violated Sec. 8(a)(3) by removing Jeff Cope, for a period of months, from the preferred truck he normally drove. Neither the General Counsel nor the Union excepted to the judge’s dismissal of an allegation of an unlawful threat when the Respondent’s dispatcher, after the Union’s certification, told a driver that “[it] would be better on the nonunion side versus the union side,” or of an allegation that the dispatcher unlawfully interrogated the same employee (when he later asked to transfer to a job outside the bargaining unit) by saying, “Whoa, wait a minute, we need you for the vote [for decertification], unless you’re for the Union.”

² In adopting the judge’s recommended Order as modified with respect to backpay, we rely on our recent decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). We shall also substitute a new notice in accordance with *Durham School Services*, 360 NLRB 694 (2014), and conform the notice to our other findings.

³ In finding that the Respondent had knowledge of Sturdivan’s protected activity, we do not rely, as did the judge, on *Coastal Sunbelt*

judge’s dismissal of the allegations that the Respondent unlawfully suspended Duane Crow for 1 day and that it assigned preferred work to employees who opposed the Union.

Contrary to the judge, however, we find that, in violation of Section 8(a)(1), Randy Britt, the Respondent’s dispatcher, on 2 consecutive days called drivers “backstabbers” for supporting the Union, and that the Respondent unlawfully advanced Jeff Cope’s start time in order to further isolate him from other drivers.

A. “Backstabbers”

The Union was certified to represent a unit of the Respondent’s dump truckdrivers on December 20, 2012. Brian Tilly was one of two unit members elected to the Union’s first bargaining team. On March 6, 2013,⁴ while negotiations for a first contract were continuing, Tilly went to the dispatch office and invited Britt (an undisputed supervisor) to join him and other drivers for an afterwork social event that was intended to reduce ongoing tension in the unit between prounion and antiunion employees. Britt responded, “Why the fuck would I want to go to drink with a bunch of backstabbers?” Tilly, whose description of the conversation the judge credited, repeatedly asked whom Britt was talking about. Britt initially replied “everyone,” but “[u]ltimately, it came down to he ended up calling me [Tilly] a backstabber.” Britt said this was because Tilly had told an antiunion employee that Britt had wrongly accused the Union of outing another employee as a union supporter. Britt then told Tilly that “[w]e have the numbers and we’re going to get all of you guys out” and to “get the fuck out” of his office.

The judge correctly found (and the Respondent does not except) that Britt’s statement that “we’re going to get all of you guys out” was an unlawful threat. In the judge’s view, however, the General Counsel had not alleged that Britt’s reference to “a bunch of backstabbers” including “everyone” was unlawful. He also found that Britt’s “backstabbers” comment referred solely to Tilly and to Britt’s being personally “upset because Tilly called him a liar,” and was therefore not unlawful.

Contrary to the judge, the complaint alleged that the Respondent unlawfully “called its *employees* ‘backstabbers,’” (emphasis added)—i.e., in plural. Moreover, in determining whether a supervisor’s statement is unlawfully coercive, the question is not the supervisor’s motive

Produce, 358 NLRB 1287, 1287 fn. 3 (2012). We find it unnecessary to pass on the judge’s finding that the discharge also violated Sec. 8(a)(4) because this additional finding would not materially affect the remedy.

⁴ All dates are in 2013, unless otherwise stated.

for making the statement, but whether the employee would reasonably be coerced by it.⁵ Particularly in light of Britt's parting unlawful threat to "get all you guys out," his initial reference to "a bunch of backstabbers" in response to Tilly's invitation would reasonably have been understood to characterize all supporters of the Union as disloyal and to threaten them with retaliation.⁶

The following morning, March 7, Britt made a similar comment that was broadcast to all the drivers in the unit over the Respondent's CB radio system (which serviced all of the Respondent's trucks). While John Bobbitt and the other drivers were waiting their turns to pull out from the Respondent's facility to make their first deliveries, Bobbitt commented over the radio that two other drivers (both known to be antiunion) had just pulled out of the plant ahead of Tilly, who was senior to both of them. This was contrary to established practice, by which drivers pulled out in order of their seniority.⁷ Britt immediately retorted over the CB system that "maybe they were told to leave at that time." Bobbitt (who had formerly been the Respondent's dispatcher) replied that "senior drivers are supposed to roll out first," at which Britt "got really agitated" and said, "You guys are a bunch of whiners and you're a backstabbing piece of shit." Bobbitt asked what Britt meant, and Britt said, "You know what, just drive your truck and collect your check on Thursday, and I'll talk to you when I talk to you."

The judge noted that the Union was not mentioned in this exchange and that Bobbitt was not, at the time, known to be a strong supporter of the Union and was not a charging party or the subject of any pending Board charge. Accordingly, in the judge's view, Britt's comments would "more reasonably" be interpreted simply as "pique" that a former dispatcher "question[ed] his dispatch decisions," and were not unlawful.

Britt's labeling of Bobbitt as "a backstabbing piece of shit," however, immediately followed his broadcast comment that "[y]ou guys are a bunch of whiners," which was made in direct response to Bobbitt's remark in support of seniority. In those circumstances, we find that employees would reasonably interpret Britt's "back-

stabbers" statement to refer to employees' concerted activity regarding a term of employment.⁸ As such, it is irrelevant whether Bobbitt previously had expressed support for the Union. Britt's accusation of "backstabbing" by Bobbitt, as with Tilly, was unlawfully coercive.⁹

B. Cope's Start Time

Cope was a senior driver who drove one of the Respondent's newest model "transfer" trucks. (Most drivers preferred to be assigned to transfer trucks because they were relatively new and, unlike other types, air-conditioned.) He was also known to be one of the most active union supporters in the unit. As discussed below, the Respondent's advancement of Cope's start time occurred in March 2013, but a brief summary of background events in 2012 is necessary to put the start time issue in context.

As found by the judge, sometime in mid-September 2012 (about 2 weeks before the election), Tim Corliss, one of the Respondent's co-owners, unlawfully asked Darryle Jackson, a driver known to be antiunion, to participate in what Corliss called a "secret squirrel job." Corliss told Jackson that this job involved assigning Cope to Jackson's "belly" dump truck because, unlike the Respondent's other trucks, it was used only to carry loads between the Respondent's own plants rather than to customers. As Corliss explained to Jackson, "We're gonna pull the radios out of that truck and we're gonna put Jeff Cope in that truck and just have him run plant-to-plant all day long and that way he can't badmouth the Company." As found by the judge, this comment clearly referred to Cope's outspoken support for the Union and confirmed an intent by the Respondent to prevent Cope from communicating with the Respondent's other drivers. Jackson, however, persuaded Corliss not to make

⁵ E.g., *Engelhard Corp.*, 342 NLRB 46, 60–61 (2004) (test for coercion under Sec. 8(a)(1) is "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act") (emphasis in original), enf'd. 437 F.3d 374 (3d Cir. 2006).

⁶ See *George L. Mee Memorial Hospital*, 348 NLRB 327, 349 (2006); *Wometco Coca-Cola Bottling Co.*, 255 NLRB 431, 443 (1981). Even if Britt had been referring solely to Tilly's purported comment about him, that would have been unlawfully coercive because Britt's reference was to Tilly's protected activity of defending the Union to another employee.

⁷ Priority in leaving was valued because it enabled drivers to complete their first hauls as early in the day as possible.

⁸ Accordingly, even if Britt had been expressing "pique" solely at Bobbitt's publicly "questioning his dispatch decisions" on the principle of seniority, he would have been unlawfully expressing hostility toward Bobbitt's public assertion that the Respondent was improperly deviating from an established term and condition of employment. Member Miscimarra agrees that both of Britt's "backstabber" statements were unlawful, but he finds it unnecessary to reach the issue of whether Bobbitt was engaged in concerted activity during his conversation with Britt. Instead, based on Britt's hostility to the Union and the commonsense meaning of the term "backstabber," Member Miscimarra would find that employees would reasonably understand Britt's use of the term as an accusation that supporters of the Union have engaged in a type of betrayal and based on such an expression, attributable to Britt, employees would reasonably fear reprisals for supporting the Union. See, e.g., *Hialeah Hospital*, 343 NLRB 391, 391 (2004) (manager's statements to employees that he felt "betrayed" and "stabbed in the back" implied employee disloyalty in supporting the union and constituted an implicit threat of unspecified reprisals).

⁹ See the authorities cited in fn. 6.

this reassignment because he, Jackson, preferred driving the “belly” truck.

About 2 weeks later, Cope took his transfer truck into the Respondent’s maintenance shop for repair. When the truck was released from the shop, it was not returned to Cope but was instead used as a spare for other drivers whose trucks were down. The Respondent did not reassign Cope to a preferred transfer truck until months later. As the judge found (and the Respondent does not expect), the Respondent’s ongoing removal of Cope from his truck was designed to isolate him from other employees and thus violated Section 8(a)(3).

Finally, in March 2013, while Cope was still awaiting reassignment to a transfer truck, Britt (with Scott Corliss’ approval) offered Cope assignment to a “belly” truck, which he accepted. Over the 12 previous months, the “belly” truckdrivers had started their workday between 6 and 6:45 a.m. On March 27, however, the day after Cope agreed to drive a “belly” truck, Britt changed the start time for “belly” drivers to 5 a.m., an hour or more before the other drivers in the unit typically started and before most of them arrived at the facility. From then until late July, Cope and the other full-time “belly” driver, George Dye, were required to depart from the terminal at 5 a.m. A third driver, Gary Hamilton, also started at 5 a.m. when he intermittently drove a “belly” truck during the same period.

The judge correctly found that the General Counsel met his initial *Wright Line*¹⁰ burden of showing that the advancement of Cope’s start time was unlawfully motivated, citing an unlawful comment Corliss made to employee Duane Crow,¹¹ and noting that requiring Cope to leave the plant before other drivers arrived “fit nicely with the Company’s plan” to isolate union supporters from other drivers.¹² The judge found, however, that the Respondent met its *Wright Line* burden of showing that it

would have advanced Cope’s start time even if he had not engaged in union activity, based on evidence that the “belly” trucks “typically” started earlier in the summer (the Respondent’s busy season) and that they also started earlier than the other trucks. The judge acknowledged that the Respondent’s 12-month history immediately preceding the change in Cope’s start time “does not support a practice of 5 a.m. start times in the busy season,” but he relied on undisputed testimony that “there has been such a practice in the past.” The judge also noted that Britt simultaneously imposed a 5 a.m. start time on Dye, who was antiunion.

Contrary to the judge, the Respondent’s earlier practice of imposing a 5 a.m. start time for the “belly trucks” at some indeterminate time “in the past” does not negate the significance of the actual start time having been 6 a.m. during the 12 months immediately preceding Cope’s assignment. That period included the summer of 2012, when the Respondent, according to its own rationale, should have been similarly motivated to advance the start time, but did not.¹³

An arbitrary departure from a past practice may support an inference of unlawful motive.¹⁴ In this case that inference is further supported by (1) the timing of the change only 1 day after Cope agreed to drive a “belly” truck; (2) Tim Corliss’ undisputed plan, as early as September 2012, to implement a “secret squirrel job” to isolate Cope; and (3) Corliss’ subsequent confirmation to Crow of the Respondent’s intent to “keep the assholes [who were driving one or more “belly” trucks] away from the new people.”

The fact that Dye, the other full-time “belly” truckdriver, was also required to start at 5 a.m. carries little weight in light of the affirmative evidence that the Respondent had an ongoing agenda of isolating Cope.¹⁵ Where an employer takes an adverse action against an employee who is not a union supporter because the employer could not otherwise justify taking the same action

¹⁰ 251 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).

¹¹ Not long after Cope began driving a “belly” truck, Duane Crow, a relatively new driver, asked Tim Corliss if he could switch to driving a “belly” truck. Crow explained that this would enable him to avoid the ongoing dispute between pro and antiunion drivers. Corliss replied, “Yeah, you know, that’s kind of tough. We’ve been trying to keep the assholes away from the new people.” As the judge found, Corliss’ comment again indicated that the Respondent was trying to isolate pronoun drivers from the others.

¹² As the judge noted, although the complaint alleged that this was an 8(a)(1) rather than an 8(a)(3) violation, the analysis is the same because the violation turns on the Respondent’s motive. *Gates & Sons Barbeque of Missouri*, 361 NLRB 563, 566 (2014); *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB 347, 349 (2006); *Grand Industries*, 335 NLRB 360, 361 (2001). In this respect, however, we do not rely on *Saigon Gourmet Restaurant*, 353 NLRB 1063, 1065 (2009), as did the judge.

¹³ Moreover, while the Respondent’s business as of March 2013 might have picked up from the winter, there is no basis for assuming that it jumped immediately to the level of high summer, or that it was necessary for the Respondent to advance the start time by an hour that early in the year. It is clear from the record that the Respondent’s busiest season was June to August.

¹⁴ For similar cases involving employer actions to isolate union supporters, see *Florida Tile Co.*, 300 NLRB 739, 741 (1990), enfd. 19 F.3d 36 (11th Cir. 1994); *Inductive Components*, 271 NLRB 1448, 1471 (1984); *Hall of Mississippi, Inc.*, 249 NLRB 775, 778–779 (1980).

¹⁵ A fourth driver, Ray Green, also drove a belly dump for 6 weeks beginning May 14 and started at 6 a.m. most days. However, the Respondent does not cite or otherwise rely on Green’s start time, and Green did not drive a “belly” truck until almost 2 months after Cope started. His start time therefore has no bearing on the Respondent’s motivation for assigning the earlier start time to Cope when it did.

against a union supporter, the former employee is being used as a “pawn in an unlawful design” and the actions against both employees are unlawful.¹⁶ We find from the above evidence that the “busy” season was a convenient pretext for further implementing the Respondent’s established plan to prevent Cope from communicating with other drivers about the Union by advancing the start time for “belly” trucks, and that this action was consequently unlawful.¹⁷

ORDER

The National Labor Relations Board orders that the Respondent, Corliss Resources, Inc., Sumner, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Interrogating employees about whether they or other employees support Teamsters Local 174.
 - (b) Telling employees that the representation campaign was futile.
 - (c) Threatening to never enter into a collective-bargaining agreement with the Union.
 - (d) Threatening to sell the business before entering into a contract with the Union.
 - (e) Threatening employees that a strike is inevitable if they unionize.
 - (f) Threatening to assign or reassign employees to particular trucks based on their union sympathies.
 - (g) Threatening to isolate prounion employees.
 - (h) Threatening to deny employees raises because they selected the Union as their collective-bargaining representative.
 - (i) Creating the impression that it is engaged in surveillance of its employees’ union or other protected concerted activities.
 - (j) Threatening to retaliate against prounion employees.
 - (k) Threatening to discharge employees for engaging in activities that it perceives as prounion.
 - (l) Threatening to treat union supporters as disloyal by calling them “backstabbers.”

¹⁶ *Dawson Carbide Industries*, 273 NLRB 382, 389 (1984), enfd. 782 F.2d 64 (6th Cir. 1986). See also *Bay Corrugated Container*, 310 NLRB 450, 451 (1993), enfd. 12 F.3d 213 (6th Cir. 1993); *Robin Transportation*, 310 NLRB 411, 418 (1993). The complaint does not allege that the change to Dye’s start time was unlawful.

¹⁷ Although the judge found that Cope’s removal from his truck was unlawful, his recommended order did not include related make-whole language. Since the record does not show whether the Respondent’s unlawful treatment of Cope affected his pay or benefits, we will include make-whole language for both violations.

- (m) Threatening to fire all union supporters.
 - (n) Threatening to consider and evaluate transfer requests and other personnel matters based on an employee’s union sympathies.
 - (o) Removing drivers from their assigned trucks because of their union activities.
 - (p) Advancing prounion drivers’ start times to isolate them from other employees.
 - (q) Discharging drivers because they support the Union.
 - (r) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Within 14 days from the date of this Order, offer Don Sturdivan full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
 - (b) Make Sturdivan 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 judge’s decision.
 - (c) Compensate Sturdivan 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.
 - (d) Within 14 days from the date of this Order, remove from its files any reference to Sturdivan’s unlawful discharge, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.
 - (e) Offer Jeff Cope reassignment to transfer truck 337 or an equivalent truck, displacing if necessary the driver currently assigned to that truck.
 - (f) Make Cope whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), 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).

(g) Compensate Cope 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.

(h) Within 14 days from the date of this Order, remove from its files any reference to Cope's removal from his transfer truck or assignment of an earlier start time, and within 3 days thereafter notify him in writing that this has been done and that those actions will not be used against him in any way.

(i) 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.

(j) Within 14 days after service by the Region, post at its facilities in Washington State copies of the attached notice marked "Appendix."¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 19, 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. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 30, 2012.

(k) 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.

¹⁸ 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."

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 interrogate you about whether you or other employees support Teamsters Local 174.

WE WILL NOT tell you that the representation campaign was futile.

WE WILL NOT threaten to never enter into a collective-bargaining agreement with the Union or to sell the business before entering into a contract with the Union.

WE WILL NOT threaten that a strike is inevitable if you unionize.

WE WILL NOT threaten to assign or reassign you to particular trucks based on your union sympathies.

WE WILL NOT threaten to isolate prounion employees.

WE WILL NOT threaten to deny you raises because you selected the Union as your collective-bargaining representative.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT threaten to retaliate against prounion drivers.

WE WILL NOT threaten to discharge you for engaging in activities that we perceive as prounion.

WE WILL NOT threaten to treat you as disloyal by calling you "backstabbers" if you support the Union.

WE WILL NOT threaten to fire all union supporters.

WE WILL NOT threaten to consider and evaluate transfer requests and other personnel matters based on your union sympathies.

WE WILL NOT remove prounion drivers from their assigned trucks because of their union activities.

WE WILL NOT advance prounion drivers' start time to isolate them from other employees.

WE WILL NOT discharge drivers because they support the Union.

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

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

WE WILL make Sturdivan whole for any loss of earnings and other benefits suffered as a result of our discrimination against him, less any net interim earnings, plus interest.

WE WILL compensate Sturdivan 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.

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

WE WILL offer Jeff Cope reassignment to transfer truck 337 or an equivalent truck, displacing if necessary the driver currently assigned to that truck.

WE WILL make Cope whole for any loss of earnings and other benefits suffered as a result of our discrimination against him, with interest.

WE WILL compensate Cope 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.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful reassignment of Cope from his transfer truck or assignment to an earlier start time, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that our unlawful conduct will not be used against him in any way.

CORLISS RESOURCES, INC.

The Board's decision can be found at www.nlr.gov/case/19-CA-093237 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.



Susannah C. Merritt, Esq., for the General Counsel.
Selena C. Smith, Esq., and *Erik M. Laiho, Esq.* (*Davis, Grimm, Payne & Marra*), for the Respondent Company.
Danielle Franco-Malone, Esq. (*Schwerin, Campbell, Barnard, Iglitzin & Lavitt, LLP*), for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

JEFFREY D. WEDEKIND, Administrative Law Judge. In late 2012, Teamsters Local 174 was elected and certified as the bargaining representative for approximately 38 dump truck-drivers employed by Corliss Resources, Inc., a concrete and aggregate production and supply company in Washington State. The General Counsel alleges that the Company, which had strongly opposed the representation campaign, unlawfully responded to the Union's election and certification by (1) making numerous coercive antiunion statements and threats to the drivers; (2) discriminatorily discharging, reassigning, isolating, or suspending three drivers (Don Sturdivan, Jeff Cope, and Duane Crow) because they were known or perceived as pro-union and/or because they testified at the pre and postelection hearings or cooperated in the Board's unfair labor practice investigation; and (3) assigning more hours and desirable work to five other drivers because they were known to be strongly opposed to the Union.¹

Following several pretrial conferences, a 7-day hearing on the foregoing allegations was held on August 12–16 and 22–23, 2013, in Seattle. The General Counsel and the Company thereafter filed briefs on November 12, 2013. After carefully considering the briefs and the entire record, for the reasons set forth below I find that the Company made numerous unlawful postelection statements and threats to the drivers as alleged. I also find that the Company unlawfully removed Cope from his truck and discharged Sturdivan. However, I find that the General Counsel has failed to prove the remaining alleged violations by a preponderance of the evidence.²

¹ The underlying charges and amended charges were filed by the Union on various dates between November 2012 and June 2013. The NLRB Regional Director issued the most recent, second consolidated complaint on June 28, 2013, upon receiving the last amended charge. The NLRB's commerce jurisdiction is undisputed and well established by the admitted allegations in the complaint.

² Specific citations to the transcript, exhibits, and briefs are included where appropriate to aid review, and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant and appropriate factors have been considered, including the demeanor and interests of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts;

I. FACTUAL BACKGROUND

The drivers began talking about bringing in a union around December 2011. The first union meeting was held several months later, in March 2012. Later the same month, Scott Corliss, the president and co-owner of the Company with his brother Tim, held a mandatory meeting with the drivers to address the matter. He told them that they had got his attention; that hearing about them contacting the Union was like being asked for a divorce. He acknowledged that there had been some tough times financially, and that the Company had stopped funding the 401(k) plan. He also acknowledged that he could be a hothead. However, he said there was no way the Company could operate or compete if there was a union; that it would kill the business and he would have to sell or close it. He therefore asked the drivers to give him more time. He said the Company would be able to resume funding the 401(k) plan the following month, after making the final \$50,000 payment on its most recent purchase of new trucks, and would take a look at increasing wages as well. He also said he would be stepping back and letting his son Steve and the general manager take the lead.³

About 6 weeks later, on May 4, the Union filed a formal petition for a Board-conducted election among the dump truckdrivers. The Company immediately challenged the petition on the ground that the unit should include all of the drivers, including the cement mixer drivers in the concrete division. However, following a hearing, the NLRB Regional Director issued a decision on June 12 finding that the petitioned-for unit limited to the dump truckdrivers in the aggregate division was appropriate.

During this time, in May and June, there was a substantial amount of discussion among the drivers about the Union. Several of the drivers were openly for the Union, and several openly against the Union. Scott Corliss also continued his campaign against the Union, distributing several antiunion fliers to the drivers. Consistent with his previous statements at the March 2012 meeting, one of the fliers stated that the Company would be budgeting to resume 401(k) contributions for the 2012 plan year (GC Exh. 12, p. 2).⁴

inherent probabilities; and reasonable inferences which may be drawn from the record as a whole. See, e.g., *Daikichi Sushi*, 335 NLRB 622, 633 (2001), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), *cert. denied* 522 U.S. 948 (1997).

³ The relevant facts regarding the March 2012 meeting are based on the testimony of drivers Michael Anderson, Don Sturdivan, and Jeff Cope (Tr. 130–135, 298–302, 339, 481–485.) To the extent there are inconsistencies, I give the greatest weight to the testimony of Anderson, as he demonstrated the best memory and provided the most detailed account of the hour-long meeting and the Company has not disputed the credibility or accuracy of that account. Although the General Counsel notified the Company on the first day of hearing that Anderson's testimony regarding Corliss' March 2012 statements would be relied on as background evidence to show union animus (Tr. 131), the Company did not call Corliss to testify or ask the two management witnesses who were present, Truck Supervisor Darrin Rousseau and HR Manager Shawna Williamson, about the meeting.

⁴ Other fliers offered various additional reasons to vote against the Union, including that Corliss had recently decided not to terminate an

The election was held the following month, on July 12. The Union narrowly lost, 16–13. However, the Union filed objections alleging that the Company had unlawfully surveilled, threatened, and promised benefits to the drivers, and the Company subsequently agreed/stipulated to a rerun election.

The rerun election was held on September 26. This time the tally was 18–14 in favor of the Union, with several additional challenged ballots. Following a hearing on the challenged ballots, the NLRB Regional Director issued a decision on December 20, 2012, certifying that the Union had been duly elected as the exclusive bargaining representative of the unit.

Thereafter, in or around late February 2013, union and company representatives began meeting to negotiate an initial collective-bargaining agreement. However, the negotiations were contentious, and no contract had been reached as of the August hearing (Tr. 181, 776). Further, the antiunion drivers continued to campaign against the Union, distributing a 4-page letter in March 2013 stating, among other things, that they would file a petition for another election “in due time” to decertify it as bargaining representative (GC Exh. 10).⁵

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Alleged Unlawful Statements and Threats*

As indicated above, the complaint alleges that owners Scott and Tim Corliss and the dispatcher, Randy Britt, made numerous postelection unlawful statements and threats to the drivers between December 2012 and May 2013 in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). As discussed below, I find that all but a few of these allegations are well supported.

1. Owner/President Scott Corliss

In March 2013, Duane Crow, one of the newer, seasonal drivers, approached Scott Corliss in the yard and introduced himself. Crow told Corliss that he was tired of hearing the pros and cons of the Union from other drivers, and wanted to hear directly from the Company what his options were. Corliss replied,

Duane, this is what's going to happen, they're going to force me to wave my white flag, they're going to tell me I'm going to have to go union. I'm not going to go union, I'll never go union, and I will fight them forever. So you've got two options. You can come to work, do your job, or you can stand outside that fence and hold a sign like the rest of them. [Tr. 235.]

Corliss made a similar statement to Crow 2 months in late May when Crow told him that he had decided not to give an affidavit to the NLRB in support of the Union's unfair labor practice

employee even though he had been involved in a “very serious incident,” and would consider establishing a grievance committee to ensure everyone is treated fairly in the future (GC Exh. 16, p. 2).

⁵ I take administrative notice that a decertification petition was, in fact, subsequently filed by Robert Cummings, one of the antiunion drivers, on December 24, 2013, a few days after the 12-month bar to such petitions had elapsed (docketed as Case 19–RD–119595).

charges. Corliss replied, “[I]t doesn’t really matter Duane. I’m not going union, I’ll fight it forever” (Tr. 239–240).⁶

In agreement with the General Counsel, I find that Corliss’ foregoing statements to Crow were unlawful. Considered both in combination and in context (i.e., after the Union was certified and contract negotiations had begun), the statements would reasonably be understood to mean that the representation campaign and election had been futile; that Corliss would never enter into a collective-bargaining agreement with the Union; and that a strike was inevitable. See, e.g., *Wolfe Electric*, 336 NLRB 684, 687 (2001), enfd. 314 F.3d 325 (8th Cir. 2002); *Bolivar Tee’s Mfg. Co.*, 334 NLRB 1145, 1152–1153 (2001), enfd. per curiam 61 Fed. Appx. 711 (D.C. Cir. 2003); *Basic Metal & Salvage Co.*, 322 NLRB 462, 464 (1996); *Ideal Elevator Corp.*, 295 NLRB 347, 351 (1989); and *Cannon Industries*, 291 NLRB 632, 637 (1988).

Weldon, Williams & Lick, Inc., 348 NLRB 822 (2006), cited by the Company, is clearly distinguishable. The statement there was an isolated remark by a low-level supervisor before the union became the bargaining representative, and could not otherwise reasonably be interpreted as a threat of futility under the circumstances. Here, in contrast, the Union had already been elected and certified, and the statement was made by the Company’s owner and president. Further, it was not an isolated statement. As discussed above, Scott Corliss had promised the drivers benefits and threatened them with plant closure without any objective basis during the preelection organizing campaign. Although those promises and threats occurred outside the 6-month limitations period and are not alleged as separate unfair labor practices, they were clearly coercive. See, e.g., *South Jersey Sanitation Corp.*, 357 NLRB 1446 (2011); *ADB Utility Contractors*, 353 NLRB 166, 168 (2008), reafld. 355 NLRB 1020 (2010); *Valerie Manor, Inc.*, 351 NLRB 1306, 1316 (2007); *Superior Emerald Park Landfill, LLC*, 340 NLRB 449, 459 (2003); *Airtex Air Conditioning*, 308 NLRB 1135 fn. 2 (1992); and *Bakers of Paris*, 288 NLRB 991 (1988), enfd. 929 F.2d 1427 (9th Cir. 1991). See also *Progressive Electric, Inc. v. NLRB*, 453 F.3d 538, 544 (D.C. Cir. 2006), and authorities cited there.⁷ Finally, as discussed below, Co-owner Tim Corliss and Dispatcher Randy Britt also made various unlawful postelection statements to employees indicating that the Company would seek to rid itself of the Union and its supporters by unlawful means.

2. Co-Owner Tim Corliss

a. Tim Corliss’ statement to Ozuna

John Ozuna is also a relatively new driver. Like Crow and other junior drivers, he was therefore assigned to a truck and

⁶ There is no dispute that Scott Corliss made these statements to Crow. As indicated above, Corliss did not testify, and there were no other witnesses to the conversation. Nor does the Company’s posthearing brief articulate any reason to discredit Crow’s account.

⁷ As indicated by the General Counsel, the promises and threats may therefore also be considered as background evidence of animus in support of the 8(a)(3) allegations. See, e.g., *Wilmington Fabricators, Inc.*, 332 NLRB 57 fn. 6 (2000); and *Douglas Aircraft Co.*, 307 NLRB 536 fn. 2 (1992). See also *NLRB v. Relco Locomotives*, 734 F.3d 764, 781–782 (8th Cir. 2013).

trailer rather a newer transfer truck. Unlike most of the truck and trailers, all of the transfer trucks have air-conditioning. And most drivers prefer them for this and other reasons. Thus, when a transfer truck becomes available (as when a driver quits or is terminated), the Company normally offers it to the next senior driver, who usually accepts it. Regardless of the type of truck, however, each driver is normally assigned the same numbered truck day after day until a newer or better one becomes available. Thus, it is common for the more senior drivers to drive the same transfer truck for several years. (Tr. 48–49, 92, 96, 107–108, 224, 292, 360–361, 395, 445–446, 474–475, 489–491, 774–745, 1040–1043, 1144–1145, 1192.)

Sometime in December 2012, Ozuna walked up to the third-floor dispatch office after completing his trips to submit some paperwork. When he got to the office, Tim Corliss was there talking to Britt. Upon seeing Ozuna, who was considered a very good driver and had never given management any reason to believe he was prouion, Corliss said, “Put him in the transfer truck and take the union guy out.” Britt replied, “Whoa, whoa, you’re jumping the gun, let’s not move too fast.”⁸

As indicated by the General Counsel, under all the circumstances, including the recent election campaign and Britt’s response, Tim Corliss’ statement would reasonably be understood to mean that the Company intended to assign or reassign drivers to trucks based on their union sympathies, rather than seniority in accordance with the normal practice. Indeed, as discussed below, this is precisely what the Company had recently done by removing senior driver Jeff Cope, one of the most vocal union supporters, from his transfer truck. And the Company’s posthearing brief does not offer any alternative meaning or interpretation. Accordingly, I find that the statement was unlawful. See, e.g., *Aircraft Hydro-Forming, Inc.*, 221 NLRB 581, 590 (1975).

b. Tim Corliss’ statement to Crow

Around May 2013, at the end of the workday, Crow approached Tim Corliss in the yard and spoke with him about the tension and uneasiness in the work atmosphere. Crow told Corliss that he wanted to switch to driving one of the few belly dump trucks, which only run between the Company’s plants (plant to plant) rather than to construction sites with the transfers and truck and trailers. Crow said he wanted to do this so that he “didn’t have to be playing both sides of union, nonunion,” and could “just kind of do my own deal and stay out of it.” Corliss replied, “Yeah, you know, that’s kind of tough. We’ve been trying to keep the assholes away from the new people.” (Tr. 249–250.)⁹

⁸ The relevant facts regarding this December 2012 incident are based on Ozuna’s testimony (Tr. 451), which was both credible and uncontroverted. Tim Corliss, like his brother, did not testify. As for Britt, he did not deny that the incident occurred, that Tim Corliss made such a statement, or that he urged Corliss not to move so fast (counsel never asked him). Although he testified that he did not recall ever himself telling Ozuna that he was going to put him in a transfer truck and take a prouion guy out (Tr. 1080), there is no allegation or testimony that he did so.

⁹ Again, there is no dispute that Tim Corliss made this comment to Crow.

As indicated by the General Counsel, in context, Corliss' comment would reasonably be understood to mean that the Company was trying to isolate prounion employees. And, again, the Company has not offered any alternative meaning or interpretation.¹⁰ Accordingly, I find that this comment was likewise unlawful. See, e.g., *Tyson Foods*, 311 NLRB 552 (1993); and *Montgomery Ward & Co.*, 93 NLRB 640, 640–641 (1951), *enfd.* as modified 192 F.2d 160 (2d Cir. 1951).

3. Dispatcher Randy Britt

Britt is related by marriage to both Scott Corliss and one of the openly antiunion drivers (Richard Vandyk), i.e., both are his brothers-in-law.¹¹ He has worked for the Company for 24 years, and has performed various jobs, including dump truck-driver, manager, and salesman. He has also twice served as the aggregate dispatcher: from about 2005 to 2007, and again since April 2012, shortly after the union campaign began. He has admittedly been the drivers' supervisor and an agent of the Company at all times material to the case.

a. Britt's conversation with Mowatt

John Mowatt has worked for the Company for over 9 years, and drives a transfer truck. He has attended a couple of union meetings, but was not an open union supporter during the campaign.

Sometime around December 2012, as Mowatt was leaving to go home, Britt pulled him aside outside the drivers' room. Britt asked Mowatt, "Off the record, what are you hearing about the Union from the other drivers?" Mowatt replied, "Nothing." Mowatt then asked Britt why the junior drivers were getting paid more than him. Britt replied, "You're not, there is no way you're getting a raise right now, not with the fucking Union here."¹²

¹⁰ As noted by the General Counsel, Crow testified that he did, in fact, understand Corliss' reference to "assholes" to mean the prounion drivers. However, the test for evaluating such statements under Sec. 8(a)(1) of the Act is an objective one; i.e., whether it would be reasonable for an employee to conclude that a statement referred to the union or union activity. See, e.g., *Miami Systems Corp.*, 320 NLRB 71 fn. 4 (1995), *affd.* in relevant part 111 F.3d 1284 (6th Cir. 1997); and *Smithers Tire & Automotive*, 308 NLRB 72 (1992). Accordingly, I have given no weight to Crow's subjective interpretation of Corliss' comment.

¹¹ Scott Corliss married Britt's sister, and Britt married Vandyk's sister. Although Britt testified that Corliss will soon be his ex-brother-in-law, they are "very close" and talk "all the time." (Tr. 54, 1050–1051, 1122, 1130–1132, 1193.)

¹² I credit Mowatt's testimony about the conversation (Tr. 747). Although Britt testified to the contrary, there are significant problems with that testimony. Britt testified that he did not recall asking Mowatt what the guys thought of the Union, and that he did not tell Mowatt that there was no way he would get a raise with the Union. Indeed, he testified that he "barely talk[s]" to Mowatt. (Tr. 1091–1092.) However, Britt had earlier admitted in his direct testimony, before being specifically asked about Mowatt, that he "talk[s] to every driver every day half a dozen times about everything," including "union stuff" (Tr. 1091); that he talked to the drivers "quite a bit" regarding "lots of things" about the Union throughout the relevant period (Tr. 1067); and that he specifically asked drivers about what went on at union meetings, including how many drivers were there (Tr. 1068, 1089).

In agreement with the General Counsel, I find that Britt's initial question to Mowatt about what other drivers were saying about the Union was unlawful. Britt testified that he typically engaged drivers in conversations about the Union simply because, as a former driver, he was "curious." He also testified that he is himself a former union mechanic and "a union guy."¹³ He suggested that he was trying to protect the drivers from Scott Corliss, who "obviously" did not want a union, had "broke" a union once before, and might retaliate against the drivers if they were too "brash" in asserting or voicing their union rights or sympathies. See transcript 1068, 1090–1096, and the discussion *infra* regarding Britt's warning to driver and former dispatcher John Bobbitt to "keep it on the down low." However, Britt admitted that he is opposed to the Corliss dump truckdrivers having a union because the Company is a relatively small family business and would lose its "niche" (Tr. 1093–1095). And his reference in the same conversation to the "fucking union" certainly evinces that hostility.¹⁴ In any event, there is no evidence that Mowatt, who had not previously revealed his union sympathies, viewed Britt as his compatriot or protector (rather than as his immediate supervisor and Corliss' brother-in-law). Accordingly, under all the circumstances, the question was coercive. See generally *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), *affd.* sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). See also *Woodcrest Health Care Center*, 360 NLRB 415 (2014).

I also find that Britt's subsequent statement that there was "no way" Mowatt would get a raise at that time because of the "fucking union" was unlawful. As indicated above, the statement on its face reflects animus towards the Union, and would reasonably be understood to mean that the Company would deny employees raises because of that animus. Contrary to the Company's posthearing brief (p. 106), there is nothing in the statement itself, the context of the conversation, or the record as a whole to suggest that Britt was simply making a legal point about the Company's statutory obligation to bargain in good faith with the Union over wages, hours, and working conditions to an overall agreement or impasse, or that the statement would reasonably be interpreted as such. Accordingly, it was likewise coercive. See generally *Earthgrains Baking Cos.*, 339 NLRB 24 (2003), *enfd.* 116 Fed. Appx. 161 (9th Cir. 2004); and *Wellstream Corp.*, 313 NLRB 698, 707 (1994).

b. Britt's statement to Jackson

Darryle Jackson was a driver for the Company for 11 years, from 1992 until he voluntarily left in late January 2013. He drove a belly dump the first 2 years, then a truck and trailer for several years, and again a belly dump for the last 6 months.¹⁵ He also worked as a dispatcher for a brief period in 2006. It was common knowledge that he was on management's side

¹³ See Tr. 190 ("I am just kind of a union guy"), and 1093 ("I am, at heart, a union guy, which Corliss might beat me up if he heard me say it").

¹⁴ See, e.g., *A. D. Connor, Inc.*, 357 NLRB 1770 (2011).

¹⁵ See Jackson's 2012 daily trip sheets, R. Exh. 68 [flash drive], which indicate that he resumed driving belly dumps (408 and 406) on June 29, 2012. See also Jt. Exh. 2 (list of trucks by number); and Tr. 795.

during the 2012 representation elections (Tr. 66, 97–99). Indeed, in mid-September 2012, about 2 weeks before the rerun election, Tim Corliss actually asked him to participate in a “secret squirrel job.” Corliss told him that the Company wanted to move Jackson out of his belly dump, pull the CB radio out of it, and put Cope in it so that Cope would just drive from plant to plant all day and could not “badmouth” the Company over the CB in his transfer truck.¹⁶ Jackson talked Corliss out of doing this at the time, because he personally liked driving the belly dump plant to plant all day, and had asked for and been given the truck after the first election. However, he decided to leave the Company shortly thereafter to get away from the whole “mess.” (Tr. 50–52, 56–59, 66, 93, 97–99.)¹⁷

During his last few months at the Company, Jackson and Britt talked numerous times about the Union. They were casual, friendly conversations, usually early in the morning, when Jackson came in to wash his truck, and before the transfer-truck and truck-and-trailer drivers arrived. However, Britt repeatedly made statements during the conversations such as, “Scott’s just not going to let it happen,” and “Scott’s not going to let the Union [in] because Scott will sell everything he owns to fight the Union.” (Tr. 54–55, 65–68.)¹⁸

Like Scott Corliss’ own statements to Crow, I find that Britt’s foregoing statements to Jackson were unlawful, as they would reasonably be understood to mean that the representation campaign and election had been futile, and that Corliss would sell the business before signing a contract with the Union. It is of no significance in this regard that Jackson and Britt were friends, or that Jackson was already known to be against the Union. As noted above, the test in evaluating such statements is an objective one; it makes no difference whether the listener was actually coerced. To hold otherwise would give unlimited license to managers and supervisors to say whatever they wanted to friendly and/or known antiunion employees—including unsupported predictions of plant closure and other statements that would normally be considered hallmark violations of the Act¹⁹—knowing that those employees were likely to repeat or disseminate the statements to other employees in the voting unit.

Indeed, there is reason to believe this is precisely what occurred here. Jackson testified that he talked about the Union, not only with Britt, but also with everybody who worked in the

Company (who were also his friends), and that he said the same thing Britt said many times.²⁰ Cf. *Wabash Transformer Corp.*, 215 NLRB 546, 549, 553 (1974) (manager’s statement to employee that the plant would close if the union won violated Section 8(a)(1) even though the manager knew that the employee was strongly procompany and antiunion); *Nu-Skin International, Inc.*, 320 NLRB 385, 397 (1995) (supervisor’s tearful statement to two employees, “Don’t these people understand that if the Union is voted in, this place will close down?” violated 8(a)(1) even though the two employees were strong company supporters); and *Phillips 66 (Sweeny Refinery)*, 360 NLRB 24 (2014) (supervisor’s statement to lead operator that the company would probably make lead operator a salaried position in the event the union came in violated 8(a)(1) even though they had known each other for 30 years and were friends).

c. Britt’s conversations with Bobbitt

John Bobbitt has worked for the Company for approximately 15 years. For the first 7 years he was a dump truckdriver. He then worked for about a year with Britt as assistant dispatcher, and for another year thereafter as salesman. He and Britt then switched jobs, and he became the dispatcher, which he did for the next 7 years, until April 2012, shortly after the union campaign began. He left at that time because Britt, who Bobbitt considered a friend, told him that he had a “target on his back”—that Scott Corliss thought the drivers might have contacted the Union because of the way Bobbitt was dispatching them. However, Corliss called Bobbitt a few weeks later, in mid-May, and asked him to come back. Corliss did not offer to return Bobbitt to the dispatcher position (which Britt now again occupied), but said he would put Bobbitt in a transfer truck for a month, and then move him into a sales position after terminating the current salesman.

During either that or a subsequent conversation, Corliss also mentioned the upcoming May 25 hearing to determine the scope of the voting unit. He had apparently learned that Bobbitt had been subpoenaed by the Union to testify at the preelection hearing. Corliss said he knew Bobbitt had to go to the hearing, and that he would not tell him what to say, but he really did not want the Union in. He also told Bobbitt during this or a subsequent conversation that he needed him to vote against the Union in the election, and Bobbitt agreed to do so.

Bobbitt subsequently did, in fact, testify under subpoena at the May 25 preelection hearing. He returned to the Company as a unit driver a few days later, and remained in that position during and after both of the 2012 elections (Corliss put someone else in the sales position). He has never expressed his opinion about the Union, and attended only one union meeting, on Saturday, January 26, 2013, after the Union was certified, when two of the drivers, Michael Anderson and Brian Tilly, were elected to be the union bargaining representatives.²¹

¹⁶ Based on the record as a whole, I find that Corliss’s comment about Cope “badmouthing” the Company referred to Cope’s outspoken support for the Union, and that the comment would reasonably have been interpreted as such. Indeed, the Company does not contend otherwise. I also infer that Scott Corliss was party to the plan, as Tim Corliss used the plural personal pronoun “we” and indicated that Scott might also talk to Jackson about the plan.

¹⁷ As indicated above, Tim Corliss did not testify. Jackson’s testimony regarding the “secret squirrel” phone conversation is therefore undisputed. Although Corliss’ statements during that conversation are not alleged as a separate unfair labor practice, as discussed below they are obviously relevant to the complaint allegations regarding Cope.

¹⁸ Jackson’s testimony about Britt’s statements is undisputed. Britt did not deny either that the conversations occurred or that he made such statements (counsel never asked him). See Tr. 1090–1091.

¹⁹ See, e.g., *Overnite Transportation Co.*, 333 NLRB 1392, 1394 (2001).

²⁰ See also GC Exh. 18 (antiunion Facebook page).

²¹ The foregoing facts are based on Bobbitt’s testimony (Tr. 538–548, 570–572, 633–635, 691–692, 728–730, 735), which was both credible and uncontroverted. As previously noted, Scott Corliss did not testify. As for Britt, he never expressly or clearly denied that he told

On Monday, January 28, 2 days after he attended the union meeting, Bobbitt called in as usual to get his start time and first assignment for the day from Britt. After giving Bobbitt the information, Britt told Bobbitt that he should keep the whole union thing “on the down low.” Bobbitt did not respond.

Later that morning, Britt brought up the subject again when Bobbitt went up to the dispatch office to say goodbye to Jackson. Britt said, “I heard Brian Tilly was a committee member.” When Bobbitt did not respond affirmatively, Britt said, “Well, what did you think about the meeting . . . were you at the meeting?” Bobbitt replied, “Well, obviously you know I was at the meeting because you’re asking me about it.” Britt said, “Well, what do you think of it?” Bobbitt just shrugged his shoulders.²²

Britt raised the subject again 2 days later, on January 30. When Bobbitt called in for his dispatch time, Britt said he had heard Tim and Scott Corliss talking about Anderson, Tilly, and the Cope brothers (Jeff’s brother Todd was also an openly pronoun driver), and they were not too happy with them. He told Bobbitt, “You’d better be on the fence and keep this on the down low.” Britt repeated the same advice later that morning, both when Bobbitt went upstairs to fill out a vacation request form, and again when he subsequently called Bobbitt on his cell phone. Britt asked Bobbitt if he understood what he meant, and warned him that the Corliss brothers “like to get even.” Bobbitt assured Britt that he would keep it on the down low.²³

In agreement with the General Counsel, I find that Britt’s questions and statements to Bobbitt on January 28 were unlawful, both because they constituted unlawful interrogation, and

Bobbitt that he had a “target on his back,” and admitted that he told Bobbitt that Corliss was not happy with him. See Tr. 1081–1083.

²² I credit Bobbitt’s testimony about these conversations with Britt (Tr. 573–574). I reject the Company’s argument (Br. 105) that it “makes no logical sense” that Britt would tell Bobbitt to keep his union sympathies “on the down low” because Scott Corliss already knew that Bobbitt had testified on behalf of the Union at the preelection hearing 7 months earlier. As indicated above, Corliss knew that Bobbitt had been subpoenaed by the Union, and thus had no choice but to testify. Moreover, Bobbitt assured Corliss at the time that he would vote against the Union in the election if Corliss hired him back. Finally, Britt himself never denied that the conversations occurred. Nor did he expressly or clearly deny that he told Bobbitt to “keep it on the down low.” Rather, he appeared to explain it, testifying,

[H]ave I said something of that nature to John, “on the down low?” I don’t care if John Bobbitt is union. I don’t care if Rich Vandyk isn’t union. I really don’t. So, my thing that I said to John, which I think we are talking about, was, “Don’t be brash about it. I don’t care if they are union or not union. Nothing good is going to come out of kicking Corliss in the teeth. You know, you can be union but don’t rub it in his face, you know. Nothing good is going to come out of it.” Something of that nature is what I was saying. [Tr. 1085 [quotation marks from court reporting service’s transcript].]

As noted earlier, he also admitted that he asked drivers about what went on at union meetings.

²³ For the same reasons noted above, I credit Bobbitt’s testimony about these additional conversations with Britt (Tr. 575–577). See also Britt’s testimony (Tr. 1133–1137) (admitting that he has said the same or similar things to a couple of guys, and naming several pronoun drivers he thinks are being “brash” in their union support, including the Cope brothers and bargaining representatives Anderson and Tilly).

because they would reasonably cause Bobbitt to believe that union activities were under surveillance. Again, considering all the circumstances leading up to and surrounding the conversations, it makes no difference that Bobbitt considered Britt his friend. Cf. *Bruce Packing Co.*, 357 NLRB 1084 (2011) (supervisor’s questioning of employee about union activity violated 8(a)(1) even though the conversation occurred after the employee’s shift and the supervisor was her friend and godfather to one of her sons); and *Woodcrest Health Care Center*, supra (supervisor’s statements to employee that he should “watch his back,” “be careful,” “tone it down,” and “keep it under wraps” unlawfully created the impression of surveillance notwithstanding their friendly relationship). See also *Relco Locomotives, Inc.*, 358 NLRB 298 (2012), enfd. 734 F.3d 764 (8th Cir. 2013). I also find that Britt’s additional comments on January 30 violated 8(a)(1), as they would reasonably be interpreted as a threat that the Corliss brothers would retaliate against drivers who openly engaged in union activities. Cf. *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462 (1995) (manager warned employee to “watch out” or “watch your back” in reference to union activity); and *Springfield Hospital*, 281 NLRB 643, 653 (1986) (supervisor stated that he would “get even” with employee for signing petition).

d. Britt’s conversation with Ozuna

As discussed earlier, Ozuna is a relatively new driver who did not openly take a position on the Union during the campaign. One evening in March 2013, Britt called Ozuna on the CB and asked him to come up to the dispatch office after he parked his truck. When he arrived, both Britt and Tim Corliss were there, and Britt asked Ozuna to go out into the hallway. Britt then followed him out, leaving Corliss in the office. Britt told Ozuna that the Corliss brothers were looking at him and wondering who he was. He told Ozuna to keep his nose clean and not to be seen talking to the union guys because, after the Company went nonunion, it was going to get rid of all of them. Ozuna responded that he said hi to everybody, and did not draw the line by whether they were union or nonunion members. Nevertheless, he subsequently avoided talking for too long to known pronoun drivers, such as the Cope brothers, Anderson, and Tilly, particularly in the yard, where there are cameras.²⁴

Like Britt’s statements to Bobbitt, Britt’s foregoing statements to Ozuna would reasonably create an impression of surveillance and threaten drivers that they would be discharged for engaging in activity that the Company perceived as pronoun. Accordingly, in agreement with the General Counsel, I find that they were unlawful as well. See also *Pratt (Corrugated Logistics)*, 360 NLRB 304 (2014); *Statler Industries*, 244 NLRB 144, 149 (1979), affd. and remanded on other grounds 644 F.2d 902, 904 (1st Cir. 1981); and *Sandy’s Stores*, 163 NLRB 728,

²⁴ I credit Ozuna’s testimony about his conversation with Britt (Tr. 453–454, 472). Britt never denied that he had a conversation with Ozuna in the hallway or that he told Ozuna not to be seen talking to pronoun drivers because the Company would get rid of them after it became nonunion again (counsel never asked him). As for whether he ever told Ozuna to “keep his nose clean,” Britt testified that he did not recall doing so, but admitted that he used the phrase often (Tr. 1080–1081).

736 (1967), enfd. in relevant part 398 F.2d 268, 270 (1st Cir. 1968).

e. Britt's conversation with Tilly

Brian Tilly has worked for the Company for 15 years, and is one of the most senior drivers in the aggregate department. He was not a vocal or open union supporter during the campaign. However, as indicated above, on January 26, 2013, he was elected with Anderson to be on the union bargaining team.

About 6 weeks later, on March 6, Tilly went up to the dispatch office and invited Britt to join him and some of the drivers at a local restaurant for a get-together after work. Britt responded, "Why the fuck would I want to go to drink with a bunch of backstabbers?" Tilly asked him who he was talking about, and Britt initially said, "everyone." However, he eventually said that Tilly was the backstabber because he had told Vandyk (who, as noted above, is Britt's brother-in-law and one of the openly antiunion drivers) that Britt had wrongly accused the Union of sending a letter to the Company that effectively outed Mowatt as a union supporter. Britt was upset because he believed Tilly, who he had known and worked with for many years, was calling him a liar. Britt told Tilly, "We have the numbers and we're going to get all of you guys out." He then told Tilly to "get the fuck out" of his office.²⁵

Contrary to the General Counsel, I find that the evidence fails to establish that Britt called Tilly a "backstabber" because of Tilly's support for the Union or that the statement would reasonably be interpreted as such. Rather, Britt made clear that he was upset because Tilly called him a liar.²⁶ Accordingly, this allegation is dismissed.²⁷

However, in agreement with the General Counsel, I find that Britt's subsequent statement, "We have the numbers and we're going to get all of you guys out," was unlawful, as it would reasonably be understood in context to mean that the Company would fire all of the union supporters after getting rid of the Union. As previously noted, the antiunion drivers were contin-

²⁵ I credit Tilly's testimony about his conversation with Britt (Tr. 371-375, 414, 426-432). Although Britt denied that he called Tilly a "backstabber," he admitted that the conversation occurred and that he called Tilly something else and told him to get out of his office. As noted below, he also admitted that he called Bobbitt a "backstabber" the very next day. (Tr. 1075-1076.) Finally, he did not deny that he told Tilly the Company had the numbers and would "get all of you guys out" (counsel never asked him).

²⁶ The General Counsel does not allege that Britt's initial statement that "everyone" was a backstabber violated the Act.

²⁷ The General Counsel alleges that Britt likewise unlawfully called Bobbitt a "backstabber" over the CB radio on March 7, 2013. I dismiss this allegation as well. It is undisputed that Britt called Bobbitt a "backstabber" after Bobbitt commented over the CB that two less senior drivers had pulled out of the plant ahead of Tilly. There was no mention of the Union during the conversation and Bobbitt was not a strong union supporter, either in fact or by reputation. Nor is there any record evidence that Bobbitt was the author or subject of any unfair labor practice charges at the time. The record discloses only one charge filed as of that date, which alleged only that the Company had discriminatorily removed Cope from his transfer truck (GC Exh. 1(a)). Thus, under the circumstances, Britt's comment would more reasonably be interpreted simply as pique over a former fellow dispatcher questioning his dispatch decisions.

uing to campaign against the Union in order to eventually decertify it. (See GC Exh. 10; and Tr., 264, 282-283, 374.) Further, as discussed above, Britt made similar unlawful statements to both Bobbitt and Ozuna around the same time indicating that the Company would discharge or otherwise retaliate against prounion drivers after getting rid of the Union.

f. Britt's statement to Anderson

Michael Anderson has worked for the Company for about 10 years. As indicated above, he openly supported the Union during the campaign and was elected, along with Tilly, to the union bargaining team.

In late April 2013, Anderson called the dispatch office and asked Britt to mark him and Tilly down as off work on May 3, 14, and 30 for the contract negotiations. Britt responded that he had already marked other drivers down as off on those days, and that he did not really have to do what Anderson was asking. Anderson replied, "I know you don't, we can do it formally, it's been okay before," adding, "All you have to do Randy is tell your buddy Scott to sign a contract and then we won't have to do this no more." Britt replied, "That ain't never gonna happen," and something to the effect that he would be "dead or 80 or retired" before that happened.²⁸

For the same reasons discussed above with respect to the similar statements Britt and Scott Corliss made to Jackson and Crow, respectively, I find that Britt's statement to Anderson was likewise unlawful.

g. Britt's statements to Crow

As indicated above, Duane Crow is a relatively new driver who the Company typically lays off during the slowest winter months. In March 2013, he had a number of telephone conversations with Britt about coming back to work for the upcoming busy season. During one of those conversations, he and Britt talked about whether it was better to be union or nonunion. Britt said that, in his opinion, Crow would be better on the non-union side versus the union side, and Crow agreed that he would be better nonunion.²⁹

About 2 months later, in May 2013, Crow went up to the dispatch office after work to ask Britt about his initial assignments the following day. While Crow was waiting in the hallway for Britt to finish a conversation with another driver, he

²⁸ I credit Anderson's testimony about this phone conversation with Britt (Tr. 160-161). Again, Britt never denied that he had a conversation with Anderson about him and Tilly getting time off for negotiations (counsel never asked him). Although Britt did not recall ever saying that Corliss would never sign a contract, and denied that he would have made such a comment to Anderson, Anderson's testimony is more credible. As discussed above, Britt admitted that he frequently talked to the drivers about union matters; it is undisputed that Britt made similar statements to Jackson around January 2013; and it is also undisputed that Scott Corliss himself made a similar statement to Crow in March 2013.

²⁹ I credit Crow's testimony regarding his March conversation with Britt (Tr. 233). Britt never specifically denied that the conversation occurred (counsel never asked him). And while Britt testified that he "wouldn't have carried on any type of conversation" with Crow (Tr. 1074), I discredit this testimony for the same reason I discredited his similar testimony regarding his conversation with Mowatt.

saw Darrin Rousseau, the truck supervisor. Crow jokingly asked if he could get one of the Company's beautifully refurbished mixer trucks if he transferred to the concrete side. Rousseau laughed and said that particular truck was already spoken for, but he would be happy to put Crow in a different truck. At that point, Britt became free, so Crow left Rousseau and went into the office. Crow told Britt that he was "thinking about going to the concrete side." Britt replied, "Whoa, whoa, wait a minute, we need you for the vote, unless you're for the Union." Crow replied, "I'm not for the Union, Randy, you know that."³⁰

Contrary to the General Counsel, I find that the evidence fails to establish that Britt's statements to Crow during their March telephone conversation were unlawful. An employer is generally free to state its opinion that employees would be better off without a union. See *Langdale Forest Products Co.*, 335 NLRB 602 (2001), and cases cited there. Moreover, here, it is unclear whether Britt or Crow initiated the conversation about being union versus nonunion, or in what context Britt expressed his opinion on the matter. Accordingly, this allegation is dismissed.

However, in agreement with the General Counsel, I find that Britt's subsequent statement to Crow during the May conversation was unlawful, as it would reasonably be understood to mean that transfer requests and other personnel matters would be considered and evaluated based on a driver's union sympathies. Contrary to the Company's contention, the evidence does not show that Britt's comment was made in a joking manner or tone. Although Crow had previously joked around with Rousseau in the hallway about getting a particular mixer truck, Crow testified that he was not joking when he told Britt in the office that he was thinking about going to the concrete side, and that Britt did not appear to be joking either (Tr. 264).³¹

B. Alleged Retaliation Against Cope, Sturdivan, and Crow

As indicated above, the complaint also alleges that the Company carried out its unlawful threats by taking certain adverse actions against drivers Jeff Cope, Don Sturdivan, and Duane Crow after the rerun election. The General Counsel contends that the Company did so because they were known or perceived

³⁰ I credit Crow's testimony regarding his May conversations with Rousseau and Britt (Tr. 235–238). As indicated above, there was a lot of conversation at the time about a third vote to decertify the Union. (See also GC Exh. 18 (antiunion Facebook page); and (Tr. 150–153), 158, 1061. Further, Rousseau offered a weak denial regarding his hallway conversation with Crow, testifying only that he did not recall the conversation (Tr. 871). As for Britt, I discredit his denial (Tr. 1073) for the same reasons I have discredited his denials regarding his conversations with Mowatt and Anderson.

³¹ *Continental Can Co.*, 282 NLRB 1363 (1987), cited by the Company, is therefore distinguishable. Compare also *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1216 fn. 9 (2004) (disavowing judge's reasoning that supervisor's statement was not a threat because he was joking). The General Counsel also alleges that Britt's statement during the May conversation constituted an unlawful interrogation under the standards set forth in *Rossmore House*, supra. I need not reach this issue as such a finding would be cumulative and not affect the remedy. *Gaylord Chemical Co.*, 358 NLRB 525, 525 fn. 1 (2012).

as prouction and/or because they testified at the pre and postelection hearings or cooperated in the Board's unfair labor practice investigation, in violation of Section 8(a)(3) and/or (4) of the Act.

The appropriate test for evaluating such 8(a)(3) allegations is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under that test, the General Counsel must prove by a preponderance of the evidence that the employee's union activity was a substantial or motivating factor in the disciplinary or other adverse action. The General Counsel can make a sufficient initial showing in this regard by demonstrating that (1) the employee engaged in union activity and the employer knew it, or the employer believed or suspected that the employee engaged in or was likely to engage in such activity, and (2) the employer had animus against such activity. If the General Counsel makes the required initial showing, the burden shifts to the employer to establish by a preponderance of the evidence that it would have taken the same action even in the absence of the employee's union activity. See *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007); *Multi-Ad Services*, 331 NLRB 1226, 1240 (2000), enfd. 255 F.3d 363 (7th Cir. 2001), and cases cited there. See also *Concepts & Designs, Inc. v. NLRB*, 101 F.3d 1243 (8th Cir. 1996). A similar analysis is applied in evaluating 8(a)(4) allegations that an employer has retaliated against an employee for filing charges or giving testimony under the Act. *Newcor, Inc.*, 351 NLRB 1034 fn. 4 (2007).

Applying the foregoing analysis, for the reasons set forth below, I find that the Company unlawfully removed Cope from his transfer truck and discharged Sturdivan, but did not otherwise unlawfully retaliate against Cope and Crow in the manner alleged.

1. Retaliation against Jeff Cope

a. Removing Cope from his transfer truck

Jeff Cope has worked for the Company for 14 years and drove one of its newest, 2006 model transfer trucks (337) for approximately the last 3 of those years prior to the relevant events here. He was one of the most outspoken and enthusiastic supporters of the Union during the campaign. He would talk up the Union daily, in the parking lot, drivers' room, throughout the facility, to anyone who would listen. He also spoke about his views to supervisors, including Britt, who he considered a friend and had coffee with every morning in the dispatch office before going out, and Rousseau. (Tr. 111, 120, 297, 336–337, 454–455, 477–480, 548, 1135.) He was also named as a witness in support of the Union's July 26, 2012 objections to the first election (GC Exh. 6).

In late September 2012, Cope took truck 337 into the shop because there appeared to be an oil leak in the top of the transmission. He then took the following week off for a previously planned vacation. When he returned to work on October 1, shortly after the rerun election, he went back to the shop to get his truck; however, the mechanic told him it was still down. So Cope went to see Britt, who put Cope in two older 2000 truck and trailers over the next few days instead (322 and 321).

Around this time, truck 337 was released from the shop. However, it continued to sit for a couple of days. Britt, who

never liked to leave a new transfer truck sitting,³² talked to Scott Corliss about this. However, according to Britt, Corliss told him to just “leave it open” for the time being, without further explanation (Tr. 1035–1036, 1119). Britt subsequently reported this to Cope, when he asked about getting 337 back (Tr. 533), and assigned him to even older, 1994 truck and trailers (303, 302, and 308) over the next few weeks.

About this time, the Company began using 337 as a spare or loaner truck for other drivers when their trucks were down for refurbishing or repair. This, of course, did not escape Cope’s attention, and after driving 308 for a few weeks—which, like 303 and 302, he considered “a write-up waiting to happen”³³—he decided to stop accepting such assignments. He continued coming in early to see if Britt needed him, but would usually decline work if Britt was going to put him in 308 or other old truck and trailer. Cope told Britt that he was going to file an NLRB charge over the matter, which the Union did on his behalf shortly thereafter, on November 14, 2012. (Tr. 534–536, 1038–1039, 1113; GC Exh. 1(a).)

Over the next several months, Britt occasionally joked around with Cope by telling him that he should drive a belly dump truck. Britt never forced anyone to drive a belly dump because they just went back and forth between the plants all day, and, unlike Jackson, most drivers did not like driving them.³⁴ However, with Scott Corliss’ approval, in late March 2013, after Jackson quit and business started picking up, Britt formally offered a belly dump to Cope, and Cope agreed to give it a try.

Cope continued to drive the belly dump for several months thereafter, until a few weeks before the unfair labor practice hearing, when he was put into one of the 1998 transfer trucks (325).³⁵ In the meantime, in early May, Jesse Flanders, a 6-year employee and vocal antiunion driver, asked for and was assigned 337 to drive on a regular/daily basis, which he continued to do as of the hearing. (Tr. 457, 497–499, 502, 517–518, 522, 532, 802, 1040, 1032–1034, 1111–1112; GC Exh. 18; R. Exhs. 46, 68 [flash drive].)³⁶

I find that the General Counsel has made a sufficient showing under *Wright line* that Cope’s outspoken support of the Union was a substantial or motivating factor in not returning him to truck 337 after the reported oil leak was repaired. The Company does not dispute, and I find, that Scott Corliss was aware of Cope’s strong support for the Union. As discussed in the previous section, there is also abundant evidence of his animus and intent to unlawfully retaliate, not only against union supporters generally, but against Cope specifically. Indeed, just

³² See Tr. 1037–1038 (“I like to have the transfer trucks full. They are—they are worthy of—I mean, there is no way I want to sit a transfer truck because you can use them on any job.”).

³³ Cope testified that, based on his understanding of new rules, infractions may be recorded on a driver’s license, even if the employer rather than the driver is responsible or at fault (Tr. 498). And the Company offered no testimony or evidence to the contrary.

³⁴ See Tr. 121–123, 959, 997, 1032–1033, 1312, and 1634.

³⁵ The record provides no explanation why the Company reassigned Cope from the belly dump to transfer truck 325.

³⁶ Whenever there are discrepancies between witness testimony and a driver’s daily trip sheets, I have given greater weight to the latter.

a week before Cope took 337 into the shop, Tim Corliss disclosed to Jackson that he and Scott Corliss had a “secret squirrel” plan to remove Cope from 337 and isolate him in Jackson’s belly dump.

Given this strong evidence of a discriminatory motive, the Company’s rebuttal burden is substantial. *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 936 (D.C. Cir. 2011). In any event, I find that the Company has failed to meet it. As noted above, Scott Corliss, who made the decision to keep Cope out of the truck, did not even testify.³⁷ And Britt testified that Corliss did not tell him why he decided to keep Cope out of the truck. While Britt speculated, based on his observations about how 337 was subsequently used, that Corliss wanted to use 337 as a spare or loaner truck (Tr. 1036–1037), this explanation makes no sense. As indicated above, 337 was one of the newest transfer trucks in the fleet, and Britt admitted that transfer trucks should always be full and never sit. Britt also admitted that it is better for the Company to keep drivers in their assigned truck (Tr. 1042), and that there were many other trucks available for the drivers (most of whom were junior to Cope) to use as spares or loaners when their assigned trucks were in the shop (Tr. 1030, 1037). Moreover, the only reason Britt could offer why Corliss might have selected 337 as the spare—because it was “down” (Tr. 1120–1121)—is both inconsistent with the facts and illogical. Truck 337 was not down at the time Corliss told Britt to “leave it open”; it had already been fixed. And if it was still down, it could not have been used at all.

I also reject the various other, equally speculative justifications proffered by the Company in its posthearing brief. For example, the Company cites Cope’s testimony that he did not really need or want to work a full 40-hour week (Tr. 530). However, as indicated above, business normally decreased in the winter. And there is no evidence that the Company had removed Cope from 337 during previous slow seasons. Nor is there any evidence that this was actually the reason Corliss did not put Cope back in 337 after it was fixed.

The Company also cites Britt’s testimony that he would not have put Cope back into 337 after November 2012 without Scott Corliss’ approval because Cope had filed an unfair labor practice charge over the matter (Tr. 1038–1039). However, again, this testimony tells us nothing about why Scott Corliss did not approve putting Cope back into 337. And even if it did, it would not really help. See *Pergament United Sales*, 296 NLRB 333 (1989), enfd. 920 F.2d 130 (2d Cir. 1990) (finding violation where personnel director admitted that employees were not hired because of pending unfair labor practice charges). See also *Carey Salt Co.*, 360 NLRB 201, 201 fn. 4 and JD at 11 (2014) (finding violation where respondent conceded that

³⁷ As indicated by the General Counsel, Scott Corliss’ unexplained failure to testify warrants an adverse inference that his testimony, assuming it was truthful, would not have helped or supported the Company’s defense. See, e.g., *Government Employees (IBPO)*, 327 NLRB 676, 699 (1999), enfd. mem. 205 F.3d 1324 (2d Cir. 1999); and *Ready Mixed Concrete*, 317 NLRB 1140, 1143 fn. 16 (1995), enfd. 81 F.3d 1546 (1996). However, as discussed infra, an adverse inference is unnecessary as there is nothing but speculation to support the Company’s defense. See *C.P. Associates*, 336 NLRB 167, 168–169 (2001).

it delayed a wage increase because of an unfair labor practice injunction proceeding); and *Laidlaw Waste Systems*, 307 NLRB 52 (1992).

The Company additionally cites the fact that Cope eventually agreed to drive a belly dump truck instead. However, as indicated above, Cope agreed to drive a belly dump long after he had been removed from 337, and only after it became clear that the Company would continue to assign him to old truck and trailers if he did not do so. Thus, again, this fact provides the Company no help. See also *Deleon v. Kalamazoo County Road Commission*, 739 F.3d 914, 920 (6th Cir. 2014) (“under certain circumstances, a voluntary or requested transfer may still give rise to an adverse employment action”).

Finally, the Company cites Britt’s testimony that a few other drivers have moved to another truck after their truck went into the shop for repairs (Tr. 1042–1044). However, Britt’s testimony was equivocal both as to when and under what circumstances these examples occurred, and was contradicted by senior drivers Anderson and Tilly (Tr. 109, 204, 360–361). Moreover, the Company presented no documentary or other testimonial evidence to clarify or corroborate Britt’s testimony. Specifically, the Company failed to present any evidence that, like Cope, other drivers had been involuntarily and permanently reassigned to an older model and type of truck under similar circumstances.

Accordingly, I find that the Company’s removal of Cope from truck 337 violated Section 8(a)(3) of the Act as alleged. See *Yerger Trucking, Inc.*, 307 NLRB 567, 572 (1992).

b. Changing Cope’s hours to isolate him

In the 12 months before Cope began driving a belly dump, the belly dump drivers typically started their workday between 6 and 6:45 a.m. every morning.³⁸ However, on March 27, 2013, the day after Cope began driving a belly dump, Britt changed the start time for the belly dump drivers to 5 a.m., an hour or more before the transfer-truck and truck-and-trailer drivers typically started. Virtually every day thereafter until around late July, when he was put into transfer truck 327, Cope and the other full-time belly dump driver during the same period, George (Butch) Dye, were scheduled to start at that time.³⁹

³⁸ See Cope’s testimony, Tr. 500–501; and the belly dump drivers’ daily trip sheets, R. Exh. 68 [flash drive]. The trip sheets indicate as follows: Mike Griffin drove belly dump 408 from April 23–June 14, 2012, and started between 6:30–6:45 a.m. virtually every day. John Broughman drove 407 and started at 6:45 a.m. virtually every day from May 9–July 10, 2012, and at 6:15 a.m. virtually every day from July 12–31, 2012. Jim Sherman drove 407 from July 31–Aug. 9, 2012, and started at 6:15 a.m. virtually every day. George (Butch) Dye drove 407 from September 2012–March 26, 2013, and started at 6 or 6:15 a.m. virtually every day. And Jackson drove 408 and 406 from late June, 2012–late January 2013, and likewise started at 6 or 6:15 a.m. during most of that time; on only about 12 days over the 7-month period did he start prior to 6 a.m., and only once before 5:15 a.m.. One exception was Earl Dietz, who drove 407 for only a few weeks in June 2012, and started between 5:30 and 6 a.m. virtually every day.

³⁹ See *id.* A third driver, Gary Hamilton, was likewise scheduled to start at 5 a.m. virtually every time he intermittently drove a belly dump during that period. However, Ray Green, who drove a belly dump from May 14–June 26, 2013, started at 6 a.m. virtually every day.

As with the Company’s previous removal of Cope from truck 337, I find that the General Counsel has made a sufficient initial showing under *Wright line* that Cope’s outspoken support of the Union was a substantial or motivating factor in changing his start time.⁴⁰ Indeed, as discussed in the previous section, it is undisputed that Tim Corliss told Crow about this same time that the Company was “trying to keep the assholes away from the new people.” As found above, in context, Corliss’ use of the term “assholes” was plainly a crude reference to vocal union supporters. And changing Cope’s start time so that he was out of the plant when other drivers arrived fit nicely with the Company’s plan.

However, I find that the Company has adequately established, by a preponderance of the evidence, that it would have changed Cope’s start time regardless of his union activity. It is undisputed that the dump trucks typically start earlier in the summer, and that the belly dumps usually start earlier than the other trucks for various reasons. Further, although the 12-month history preceding March 2013 does not support a practice of 5 a.m. start times in the busy season, Bobbitt, who had the dispatch job before Britt (and was a witness for the General Counsel) confirmed that there has been such a practice in the past (Tr. 563). Finally, as indicated above, the Company likewise assigned a 5 a.m. start time to Dye, who Cope testified opposed the Union (Tr. 504).

Accordingly, this allegation is dismissed.

2. Discharge of Don Sturdivan

Don Sturdivan drove a dump truck for the Company for 7 years before being terminated on October 30, 2012. He attended every union meeting, talked to a few drivers about the Union after the first meeting, and put a union flier in all of the trucks before the first election. (Tr. 113, 295–296, 548.) He also testified for the Union at the preelection and postrerun election hearings on May 25 and October 25, 2012. Although Bobbitt and another driver were also union witnesses at the May hearing, Sturdivan was the only union witness at the October hearing. (GC Exhs. 19, 20.) Like Cope, Sturdivan was also named as a witness in support of the Union’s July 26, 2012 objections to the first election (GC Exh. 6).

On October 29, 2012, 4 days after testifying at the second hearing, Sturdivan accidentally bumped into the rear of another dump truck at a stop light. According to the driver incident reports completed shortly after the accident, Sturdivan and the other truck, which was driven by Paul Dykes (one of the anti-union drivers), were stopped behind several other cars at the light waiting for it to turn green. Sturdivan saw Dykes’ brake lights go off, and in the mistaken belief that Dykes was moving forward, he began moving forward himself. Realizing his mistake, Sturdivan tried to stop but his foot slipped off the brake and the truck continued rolling forward. The resulting impact damaged both his front bumper and Dyke’s rear ICC bar, reach, and license plate light. (R. Exhs. 23, 24.)⁴¹

⁴⁰ The complaint alleges that this conduct violated Sec. 8(a)(1) rather than 8(a)(3). However, the analysis is the same. See *Saigon Gourmet Restaurant, Inc.*, 353 NLRB 1063, 1065 (2009).

⁴¹ Dykes testified that the collision also injured his shoulder, neck, and upper back, and that he went to a chiropractor for about 4 weeks

After checking the damage, which appeared minor, and talking to Britt, both drivers continued on to pick up their loads. They then returned to the main plant as instructed, and went to the HR office to fill out their accident reports. (Tr. 320–322, 1150–1151.)⁴²

Shawna Williamson, the HR director and likewise a Corliss family relative,⁴³ was present in the office when Sturdivan arrived. She had heard about the accident from Britt and noticed that Sturdivan appeared shaken, so she asked if he was okay. Sturdivan said he was, but was concerned because the Union had told him that an accident would give the Company a reason to terminate him. He asked Williamson if he was going to be terminated. Williamson said she was not sure. Sturdivan told Williamson that he had been stressed out lately, and that his “head is just not in the game right now.” He expressed frustration and stress about the union representation campaign, specifically mentioning the fact that he and Williamson had testified on opposite sides at the recent hearing. Williamson told him he had done a good job. Sturdivan also said he was stressed out by some things happening in his personal life, and asked for the contact number for the Employee Assistance Program (EAP), which she gave him.⁴⁴

Williamson subsequently reviewed Sturdivan’s personnel file in order to make a recommendation about appropriate discipline. She concluded that Sturdivan should be discharged based on his following history:

(1) July 17, 2010 incident. While turning right at an intersection, Sturdivan cut the corner too closely, so that his trailer rolled onto the pedestrian sidewalk and hit a light pole, causing approximately \$2500 damage to the trailer. Williamson recommended to Scott Corliss that Sturdivan be terminated for this incident, but Corliss rejected her recommendation because he liked Sturdivan. Instead, Sturdivan was issued a written warning. (R. Exhs. 13–15; Tr. 1379–1380, 1387.)

(2) August 2, 2010 incident. Less than a month later, Sturdivan hit an ecology block with his truck, causing damage to the front bumper. He was driving up a hill on the way to get a load, when the truck stereo fell out towards his face, causing him to close his eyes and turn the truck left into the block. He was again issued a written warning. (R. Exh. 12.)

(3) August 15, 2011 incident with his transfer truck. While Sturdivan was transferring the trailer tub into the truck, the trailer started to slide forward and the tub fell out and landed on

thereafter for treatment (Tr. 1152–1153). However, he did not miss any work and there is no evidence that his injury was considered by the Company in determining the appropriate discipline for Sturdivan.

⁴² Sturdivan and Dykes also subsequently took postaccident drug tests at another facility. The results were negative. (Tr. 1383.)

⁴³ According to Williamson, Scott Corliss was married to her biological aunt, and Eric Corliss, the company comptroller, is her cousin. She is also related to Britt, who is her uncle. (Tr. 1355–1356.)

⁴⁴ The foregoing summary is based on both Sturdivan’s and Williamson’s testimony, which is largely consistent. See Tr. 320, 343–344, 350, 354–355, and 1374–1375. To the extent there are inconsistencies in their accounts, I credit Williamson as she impressed me as having the better memory of the conversation and Sturdivan was admittedly going through a difficult period, was under a lot of pressure, and not as focused as normal at the time.

the reach, causing substantial damage. Again, per Scott Corliss’ instructions, Bobbitt (who was the dispatcher at the time) issued Sturdivan a written warning and reassigned him to a truck and trailer (which does not perform the transfer procedure). (GC Exhs. 21 and 22; R. Exhs. 30–31; Tr. 333–334, 1635–1636.)

Williamson also considered the following earlier incidents in Sturdivan’s file, for which no discipline had been issued: in July 2005, shortly after he was hired, he swung too wide and his front dual wheel hit the entrance to the scale, destroying the wheel; on August 20, 2007, he failed to check the fuel gauge before leaving and ran out of fuel; on August 28, 2007, he caught a wheel on a piece of steel on the curb while turning around, blowing a tire; in June 2008, there was apparently a minor collision between his truck and a forklift, which bent his mud flap bracket and light; in August 2008, he hit a 1-foot tall manhole with the tow hook while turning the truck around, breaking the manhole and denting his bumper; in January 2009, he forgot to set his parking brake before getting out of the truck at a jobsite and had to jump back in to stop it safely; and in April 2011, he was using a hammer to break out a rock that was stuck between his dual wheels, when a piece of the rock flew up and broke the truck’s back window. (R. Exhs. 16–22; Tr. 1384.)

Williamson subsequently discussed the foregoing history over the phone with Rousseau, who was on vacation at the time, and he agreed that termination was appropriate. Williamson then called Scott Corliss. Corliss continued to make final decisions regarding discipline, which, as reflected by his refusal to terminate Sturdivan in 2010, did not always follow his managers’ recommendations and typically turned on whether he liked the particular driver or not. (See also Tr. 565 and 1538.)⁴⁵ Williamson’s conversation with Corliss was very brief. As she described the call,

it wasn’t a very in-depth conversation . . . I didn’t get into any of the past documents with him, the history or anything. It was just, “I think that he needs to be terminated,” and Scott said, “Okay.” [Tr. 1387.]

Williamson subsequently contacted Sturdivan and informed him of Corliss’ decision. She also prepared a termination form for payroll and personnel purposes, which Scott Corliss signed on or about November 5, 2012. Williamson did not set forth the reason for the termination, but simply wrote, “Please see file for accident history.” (R. Exh. 11.)

I find that the General Counsel has made a sufficient showing under *Wright Line* that Sturdivan’s activities and/or testimony on behalf of the Union were a substantial or motivating factor in Corliss’ decision to terminate him. As previously discussed, there is abundant evidence, much of it undisputed, that Corliss harbored animus toward, and intended to retaliate against, union supporters. Further, the Company does not dispute, and I find, that Corliss knew that Sturdivan supported and testified on behalf of the Union. Indeed, Corliss was obviously aware of Sturdivan’s testimony at the May hearing because his

⁴⁵ The Company acknowledges that it does not follow a progressive disciplinary system (R. Br. 42 fn. 35).

June 7, 2012 antiunion memo to all the drivers specifically mentioned the two drivers' testimony (GC Exh. 14, p. 2).⁴⁶ And, as indicated above, Williamson was present during Sturdivan's testimony at the subsequent hearing in October.⁴⁷

Moreover, there is strong circumstantial evidence that Corliss discharged Sturdivan because of his union support and testimony. As indicated above, in July 2010, prior to the union campaign, Corliss liked Sturdivan so much that he rejected Williamson's recommendation to terminate him. Corliss likewise directed that Sturdivan be given only a written warning after another incident just 2 weeks later, and again a year later after the dropped tub incident in August 2011.⁴⁸ However, in October 2012, after the union campaign, Corliss approved discharging Sturdivan for his accident with Dykes without a single question or comment, notwithstanding that there was only minor damage and over a year had passed since the last incident. Indeed, he did so without even reviewing Sturdivan's history. As indicated above, Williamson did not discuss it with him. And Bobbitt, who signed most of the earlier incident reports between 2005 and 2011, testified that he did not always notify Corliss about incidents that did not involve an accident or damage to the truck (Tr. 565–568.) Nor is there any evidence that Corliss knew about or considered Sturdivan's comment to Williamson after the accident about his head not being in the game due to the stress at work and at home.⁴⁹

⁴⁶ The memo does not mention Sturdivan by name, but appears to refer to his testimony that he did not perform concrete mixer work or other types of work other than driving his dump truck. See GC Exh. 19.

⁴⁷ See *Coastal Sumbelt Produce, Inc.*, 358 NLRB 1287 fn. 3 (2012); *State Plaza Hotel*, 347 NLRB 755, 756–757 (2006), and cases cited there (supervisor's knowledge of employee's union or protected activity is properly imputed to employer in absence of credible evidence to the contrary). Not all courts agree with the Board that a supervisor's knowledge may be imputed to the decisionmaker. See *Vulcan Basement Waterproofing of Illinois v. NLRB*, 219 F.3d 677 (7th Cir. 2000). However, it is a fair inference here given Williamson's high-level position as HR manager and Corliss' regular presence at the facility and hands-on involvement in the business. See *Relco Locomotives*, 734 F.3d at 782 and 786–787. See also *Encino Hospital Medical Center*, 360 NLRB 319 fn. 6 (2014) (employer's knowledge of employee's testimony before State Attorney General was established by circumstantial evidence); and *Holsum De Puerto Rico v. NLRB*, 456 F.3d 265, 270 (1st Cir. 2006), and *Abbey's Transportation Services v. NLRB*, 837 F.2d 575 (2d Cir. 1988) (employer's knowledge of employee's union activity was adequately established by circumstantial evidence).

⁴⁸ See also the examples discussed below where only written warnings were issued to other drivers, including Jeff Cope, for similar or more severe incidents prior to the union campaign.

⁴⁹ Rousseau testified that he also spoke with Scott Corliss about Sturdivan's accident. However, he testified that he did not do so until after he returned from his vacation, which the record indicates was a day or two after Corliss had already told Williamson to terminate Sturdivan. Further, he testified that, like Williamson, he simply told Corliss that termination was appropriate. (Tr. 832–833.) Finally, although not necessary to my decision, I discredit Rousseau's denial (on direct examination by company counsel) that Sturdivan's union support came up during their conversation (Tr. 846). First, it was an exceptionally weak denial ("not that I can remember, no") and, in marked contrast to his usual testimony, was barely audible. See *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985) (variation in a witness' demeanor and voice

As with the decision to remove Cope from his truck, I also find that the Company has failed to establish that it would have discharged Sturdivan absent his union activity. Although the Company cites several examples where Corliss terminated drivers following accidents, all are distinguishable. (See R. Exh. 25 (driver Bee terminated after a second rear-end accident where he ran into a Chevy Malibu at a red light causing heavy damage to the rear of the car); R. Exh. 27 (driver Brickell terminated for jackknifing and rolling his trailer over on its side while backing up a hill at plant), and R. Exhs. 28–29 (driver Martin terminated in November 2012 after two incidents in 1 month: he was involved in highway accident and ticketed for improper lane change, and 5 days later he backed into a marked-off area on jobsite and fell into an empty septic tank, causing extensive damage to the tank).) (See also GC Exh. 33 (driver Futch terminated after rear-ending a car, leaving the scene, and lying about it later); and GC Exh. 34 (driver DeHaven terminated in September 2008 after rolling his trailer on the highway, subsequently rehired in 2011 but terminated again in June 2012 after backing up his truck into a fellow employee's Corvette).)

Moreover, Corliss did not terminate other drivers who had similar or more severe incident or accident records. For example, in late July 2012, a few weeks after the first election, Robert Cummings, the most vocal antiunion driver, was not discharged even though he hit a homeowner's roof as he was raising his box, lifting the corner of the roof and causing significant damage to the roof line, truss, and gutter. Cummings was likewise not discharged when, just 7 months later, in February 2013, his truck slid on a down slope as he was making a turn and ran into a fence post. Indeed, there is no record evidence that Cummings was issued any discipline whatsoever for these incidents.⁵⁰

There are also a number of examples before the union campaign. Brian (not Michael) Anderson was given only a written warning in February 2010 after he ignored prior safety instructions and followed a loader up a hill, resulting in a collision when the loader backed into him. He was also given only a written warning a year later, in March 2011, when he failed to lower his truck box before leaving a jobsite and caught an overhead cross walk sign and ripped it out of its fasteners, requiring the city to close one of the traffic lanes and call a boom truck out to remove the sign. (GC Exh. 30.)

Another example is Jeff Cope, who as discussed above would later become a vocal union supporter. He was issued only a verbal warning in September 2010 after he laid his load-er trailer over on its side while taking a left hand turn around the add hopper at a scale. He was also given only a written

tone or inflection may justify disbelieving a witness); and *Flamingo Hilton-Laughlin*, 324 NLRB 72, 99 (1997) (discrediting witness whose voice "wilt[ed] to a near-whisper in response to critical questions"), enf. denied in part on other grounds 148 F.3d 1166 (D.C. Cir. 1998). Second, it was not corroborated, as Corliss did not testify.

⁵⁰ See GC Exh. 32. See also Cummings' antiunion flier, GC Exh. 10, pp. 2–3 (describing his history of incidents or accidents and Corliss' response). The Company offers no explanation for the absence of any discipline for the 2012 and 2013 Cummings' incidents. See Tr. 441; and R. Br. 43.

warning less than a year later, in June 2011, when his left foot slipped off the clutch while sitting at a stop light and he lightly bumped the rear of the car in front of him. And he was again given only a written warning when, just 4 months later, in October 2011, he failed to yield the right of way to a loader and the loader backed into him, damaging his right front headlight, fender, and bumper. (GC Exh. 31.)

In sum, the record indicates that Corliss makes disciplinary and discharge decisions on a highly individual, personal, and subjective basis, without necessarily following the recommendations of his managers or even reviewing the driver's personnel file. Thus, in the absence of any contemporaneous documentation of Corliss' thought processes in deciding to discharge one driver but not another, the only real or probative evidence of his reason or motive for doing so would be his own testimony. However, as indicated above, he chose not to testify. The Company has therefore failed to meet its burden. See *Carpenter Technology Corp.*, 346 NLRB 766, 773 (2006); and *Desert Toyota*, 346 NLRB 118, 119 (2005), and cases cited there (employer does not satisfy its burden merely by showing that it could have discharged the employee, i.e., by presenting a legitimate reason for the discharge; rather, it must show that it would have discharged the employee even absent his union activities).⁵¹

Accordingly, I find that the discharge of Sturdivan violated Section 8(a)(3) and (4) of the Act as alleged.

3. Suspension of Duane Crow

As discussed above, Crow is a relatively new driver who is employed by the Company on a seasonal basis. He was not an open union supporter. Indeed, he told Britt in March 2013 that he agreed he would be better nonunion. He also told Britt during a conversation in May that he was not for the Union. And later that month, Crow told Scott Corliss that, although he had planned to give an affidavit to the NLRB against the things Cummings had said, he had "decided that it would probably be better if he didn't at this point." As discussed above, Corliss responded that it did not really matter because he was "not going union" and would "fight it forever."⁵²

The next workday after the foregoing conversation with Corliss (May 28, the Tuesday after the Memorial Day holiday), Crow called the dispatch office to find out his start time. Britt told Crow he was not needed. Crow asked if he could come in anyway and just drive plant to plant. Britt agreed, and Crow ended up hauling pea gravel plant to plant for almost 9 hours, from 7 a.m. to 3:40 p.m. (See R. Exh. 68 [flash drive].)

At home later that evening, Truck Supervisor Rousseau received a text message from Scott Corliss with an attached pic-

ture. The picture showed a truck's reach with some pea gravel in it (R. Exh. 3). The message identified the truck number (306) and instructed Rousseau to investigate who drove it and why the gravel was not cleaned off. Rousseau, who also served as the Company safety coordinator, had repeatedly reminded the drivers to remove any gravel from their reach, as it could get blown off and strike other vehicles. Indeed, he had recently reminded the drivers of this at safety meetings on April 19 and May 10, as there had been a marked increase in windshield damage claims against the Company (R. Exhs. 4-6, 47).

Rousseau knew most of the drivers by their truck number, so he knew immediately that 306 was assigned Crow. However, he also knew that Crow could have been off that day and that someone else might have driven the truck. So, when he arrived at work early the next morning, after taking his own picture of the reach, he contacted Britt to find out who the driver had been. Britt was already aware of the issue, as he had likewise received a text message and picture from Corliss the previous evening, and advised Rousseau that Crow had been the driver.

In the meantime, Crow called Britt as usual for his start time. However, Corliss' text message to Britt the evening before had instructed him to leave the truck parked until Rousseau had completed his investigation. So Britt told Crow not to come in. He did not mention the pea gravel or Rousseau's investigation, but instead told Crow that he was not needed; that there had been a lot of rain and there was nothing going on. He told Crow to enjoy the day off and call again the next day.

Later that morning, however, Crow noticed some of the new drivers on the road heading to one of the plants. He called Rousseau and asked what was going on. Rousseau said he did not know and would call him back in a couple hours. A few hours later, Crow called Rousseau again. Rousseau at that point revealed to Crow that he had been left home because somebody had reported pea gravel on the reach of his truck.⁵³

Crow next worked on May 31 and June 3, both days for over 9 hours. At the end of the latter day, Rousseau gave Crow a verbal warning notice that he had prepared on May 29. The notice stated that pea gravel had been found on the reach of Crow's truck and that Crow had been left home on that date to investigate it. Crow signed the notice, returned to work the next day, again for almost 9 hours, and continued to work regularly through the season. (See GC Exh. 11; R. Exh. 68 [flash drive].)

In agreement with the Company, I find that the General Counsel has failed to establish, by a preponderance of the evidence, that Corliss suspended Crow, i.e., told Britt to leave his truck empty pending the pea gravel investigation, in retaliation for Crow's known or suspected support for the Union or cooperation in the Board's investigation of its charges.⁵⁴ Unlike Cope and Sturdivan, there is no evidence that Crow actually

⁵¹ As noted earlier with respect to the discriminatory treatment of Cope, Scott Corliss' unexplained failure to testify warrants an adverse inference that his truthful testimony would not have supported the Company's defense. However, again, an adverse inference is unnecessary here as there is nothing but speculation to support the Company's defense.

⁵² As found above, in context (after the Union's certification and contract negotiations had begun), this statement unlawfully conveyed that the employees' efforts to obtain representation had been futile and that the Company would never sign a labor agreement with the Union.

⁵³ Although Crow denied, both at the time and at the hearing, that he had failed to clean off his reach, there is no evidence or allegation that Corliss or anyone else planted the pea gravel there.

⁵⁴ There is no allegation that the Company violated the Act by issuing Crow the verbal warning notice on June 3. The sole allegation is that the Company "suspended" Crow on May 29 in violation of Sec. 8(a)(3) and (4) of the Act.

supported the Union or that Corliss suspected that he did. Indeed, as indicated above, Crow had twice told Britt that he did not support the Union. Further, he was not a union witness at the pre and postelection hearings and was not identified as a witness in the Union's objections to the first election. Nor is there any evidence that Crow actually cooperated in the Board's investigation or that Corliss believed he had done so prior to the pea gravel incident. Although Crow had made an appointment to give an affidavit in support of the unfair labor practice charges, he canceled it and told Corliss that he had done so.

Moreover, even assuming, as the General Counsel asserts, that Corliss harbored such strong union animus that he would have wanted to retaliate against Crow for even considering giving such an affidavit, there is no direct evidence that Corliss knew that Crow had driven the truck that day. Nor is there a sufficient basis in the record to infer it. Although Rousseau testified that Corliss knew which trucks most of the drivers were assigned to, Britt testified that it was unlikely Corliss knew it was Crow's truck. While Britt was not always a credible witness, I credit him in this instance. As indicated above, Crow was a relatively new driver who was not employed year round.⁵⁵ Indeed, by his own testimony, Crow felt it necessary to introduce himself when he spoke to Corliss about the Union in March 2013. (See Tr. 235 ("Scott, you probably don't know me, but I drive a dump truck for you. . . .")) Further, both Rousseau and Britt testified that Corliss did not mention Crow's name in his text messages that evening; rather, he only identified the truck number.⁵⁶

Finally, on its face, there is nothing remarkable about a decision to leave a truck parked to investigate a problem with it. Nor is there anything remarkable about failing to reveal an ongoing investigation to the subject employee. And, as noted above, despite the arguably suspicious timing of the incident, there is no allegation that Corliss planted the pea gravel on Crow's reach or that Rousseau discriminatorily disciplined Crow for the incident by issuing him a verbal warning notice after the investigation concluded that he was at fault.

Accordingly, the allegation is dismissed.⁵⁷

⁵⁵ See Tr. 250, 261, 281; Jt. Exh. 1; and R. Exh. 68 [flash drive].

⁵⁶ The General Counsel does not contend that Corliss' failure to testify warrants an adverse inference that Corliss knew Crow was the driver. In any event, I do not draw such an inference given the absence of any substantial independent direct or circumstantial evidence of such knowledge. See *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995) (improper for judge to rely on adverse inference to fill evidentiary gap in General Counsel case); and *Ridgewell's, Inc.*, 334 NLRB 37, 42 (2001), *enfd.* 38 Fed. Appx. 29 (D.C. Cir. 2002) (denying respondent's request for adverse inference against General Counsel for failing to present any evidence on a particular issue, as respondent had the burden of proof on that issue). See also *Urooj v. Holder*, 734 F.3d 1075, 1078 (9th Cir. 2013) ("if the burden of proof were satisfied by a respondent's silence alone, it would be practically no burden at all") (citation omitted); and *NLRB v. Louis A. Weiss Memorial Hospital*, 172 F.3d 432, 446 (7th Cir. 1999) ("an absence of evidence does not cut in favor of the one who bears the burden of proof on an issue").

⁵⁷ Given the foregoing findings, there is no need to address whether the Company met its rebuttal burden under *Wright Line* by showing that Corliss would have directed that Crow be left home even absent his

C. Alleged Preferential Treatment of Antiunion Drivers

As indicated above, the General Counsel's final allegation is that the Company assigned work and hours more favorably to antiunion drivers from January through April 2013.⁵⁸ Specifically, the General Counsel alleges that the Company gave preferential treatment to the following five drivers (listed by their overall seniority ranking): Richard Vandyk (7), Paul Dykes (12), James Thrasher (15), Jesse Flanders (26), and Robert Cummings (31).

There is some support for this allegation. It is undisputed that the five-named drivers are openly antiunion. (See, e.g., GC Exhs. 10, 18.)⁵⁹ It is also clear that they were openly antiunion before January 2013, and that the Company would have known this. (See Tr. 143, 184, 186, 258, 277, 457, 485-488, 1067, 1076, 1126-1127, and 1186.) See also Scott Corliss' July 5, 2012 memo to employees (GC Exh. 15 ("many drivers have approached me to discuss the union, and many of them agree with us that the union is wrong for this company").)

There is also abundant evidence, not only of Corliss' antipathy towards drivers who supported the Union, but also of his corresponding gratitude to those who opposed it. (See, e.g., GC Exh. 17.) And there is reason for suspicion that this antipathy and/or gratitude was expressed through the dispatch process, as Britt stopped posting the daily dispatch sheets in the drivers' room, contrary to longstanding practice dating back at least 9 years (Tr. 115-117, 187-188, 251, 389-390, 487, 512, 754-755). No explanation for doing so was provided, either at the time (mid-2012) or at the hearing.

However, to prove unlawful preferential treatment, the General Counsel must prove that there actually was preferential treatment. Here, the allegation ultimately fails, as there is insufficient evidence that Britt actually assigned hours or work to the five antiunion drivers more favorably.

1. Hours of work

The General Counsel contends that Britt favored the five antiunion drivers with respect to both the total hours of assigned work and weekday overtime hours.

a. Total hours

According to the General Counsel, the "clearest evidence" of the Company's bias in favor of the five antiunion drivers is the following statistics regarding their total hours in each of the first 4 months in 2013 as compared to the same period in 2012:

revelation that he had considered giving an affidavit in support in the Union's charges.

⁵⁸ The complaint alleged that such preferential treatment has occurred since at least October 5, 2012 (6 months before the underlying charge was filed). However, the General Counsel now contends that it began as of January 2013, the first full month after the Union was certified, and continued through April, the last full month before the charge was filed.

⁵⁹ Contrary to the General Counsel's posthearing brief, the record indicates that GC Exh. 10 was distributed in early April 2013, not 2012. See Tr. 144, 257, 458, 486. Indeed, it is clear from the document itself that it was distributed after the Union was certified. Thus, it states that "the union buzz" began "a year ago," refers to the "negotiations," and states that "we will start a decertification process in due time."

January: the total hours of the five antiunion drivers increased 70.1 percent, as compared to 64.1 percent for the other drivers.

February: the total hours of the five antiunion drivers increased 62.2 percent, but only 36.2 percent for the other drivers.

March: the total hours of the five antiunion drivers decreased only 7.2 percent, but decreased 13.5 percent for the other drivers.

April: the total hours of the five antiunion drivers increased 20.7 percent, but 16.2 percent for the other drivers.

The General Counsel also cites the following difference in the total average monthly increase: 39.5 percent for the five antiunion drivers, but only 29.2 percent for the other drivers.

There are significant problems with these statistics, however. The most obvious, even to a nonstatistician,⁶⁰ is that they fail to consider whether the drivers in the two groups (i.e., the five antiunion drivers versus all other drivers) were equally available to work in 2013. For example, as discussed above, Jeff Cope refused most assignments in January, February, and March, and thus worked only a few days in each of those months. (See R. Exh. 68 [flash drive].) Anderson likewise worked only a few days in January, February, and March. (See R. Exh. 59.)⁶¹ In contrast, all five of the antiunion drivers worked throughout all 4 months. (See R. Exhs. 43 (Vandyk); 36 (Dykes), 44 (Thrasher), 46 (Flanders), and 58 (Cummings).)⁶²

Moreover, the General Counsel acknowledges that “there were three outliers” in the group of other drivers “that skewed the monthly averages.” (Br. 58 fn. 22.) No explanation is provided as to what should be done with this information or how it affects the comparison.

Finally, an examination of the 2013 records indicates that openly pronoun drivers who worked throughout the first 4 months had about as many or more hours as antiunion drivers. Thus, Tilly, who is fourth in overall seniority, had 728 hours, only 32 hours (4 percent) less than Vandyk (760 hours), and 12 hours (2 percent) more than Dykes (712 hours), the antiunion drivers next closest to him in seniority.⁶³ And Ozaki, who is 21st in seniority and was identified by Britt as a strong union supporter (Tr. 1135), had 663 hours, 85 hours (14 percent) more than Flanders (578 hours), the antiunion driver next closest to him in seniority. Swanson, another driver identified by Britt as pronoun, likewise had a substantially higher total (655 hours) than Flanders, even though Swanson was lower in seniority (30th). (See R. Exh. 51, as corrected, R. Br. 60 fn. 53, based on the time card entries and trip sheets.)

⁶⁰ For purposes of this analysis, I have assumed that the percentage differences cited by the General Counsel are statistically significant (there is no expert testimony on the issue).

⁶¹ There is no evidence that Anderson was available or wanted to work additional days in those months.

⁶² While Cope and Anderson likewise worked few or no days in January 2012, Dykes and Flanders also worked only part of that month.

⁶³ Even assuming *arguendo* that the 4-percent deficit with Vandyk is statistically significant, it could be explained by the fact that he is Britt’s brother-in-law.

Other senior drivers likewise had high totals. For example, Bobbitt, who is fifth in seniority, had 773 hours. This was more hours than any of the antiunion drivers except Cummings (777 hours), whose higher number, as discussed *infra*, could be explained by the fact that he volunteered more than any other driver for weekend work.⁶⁴

b. Weekday overtime hours

As indicated above, the General Counsel’s posthearing brief (p. 60) also asserts that Britt assigned weekday overtime hours more favorably to the five antiunion drivers. However, it cites no testimony or documentary evidence to support this assertion. Nor does it dispute the accuracy of the Company’s statistical summary showing that both Tilly (34 hours) and Swanson (38 hours) had about the same or more weekday overtime during the first 4 months of 2013 than any of the antiunion drivers except Vandyk (71 hours);⁶⁵ that Ozaki (21 hours) also had more than Flanders (20.5 hours) and Dykes (19 hours); and that other senior drivers such as Bobbitt (60 hours) also had a high number of overtime hours. (R. Exh. 53.)

2. Work assignments

The General Counsel contends that Britt assigned the following types of work more favorably to the five antiunion drivers: weekend work, prevailing-wage work, and other desirable work.

a. Weekend work

Weekend work has historically been assigned by seniority; that is, the dispatcher requested volunteers over the CB radio, usually on Friday, and assigned whatever jobs there were to the most senior drivers who wanted to work. If not enough drivers volunteered, the dispatcher went to the bottom of the seniority list and/or contacted drivers who the dispatcher knew generally wanted weekend work. (Tr. 46–48, 83, 95–96, 127, 253, 273, 385, 558, 564.) The General Counsel contends that Britt stopped following this seniority-based practice in January 2013 and instead assigned weekend work primarily to the five antiunion drivers.

Again, there is some support for this allegation. Anderson and Tilly both testified that they heard such announcements over the CB radio only rarely or occasionally after Britt became dispatcher (Tr. 191, 386–388). Crow and Bobbitt also testified that they have heard few announcements for weekend work since that time (Tr. 253–254, 274–275, 560).⁶⁶

However, as indicated above, Anderson worked only a few days in the first 3 months of 2013, and only once on a Friday (March 1). (See R. Exh. 59.) He also acknowledged that he hardly ever volunteers to work weekends (Tr. 228). Further,

⁶⁴ As discussed *infra*, Thrasher’s high total number (747 hours) can likewise be explained by the fact that he volunteered more than other drivers for weekend work.

⁶⁵ Again, the exceptionally high number for Vandyk could be explained by the fact that he is Britt’s brother in law rather than his opposition to the Union.

⁶⁶ However, this was not corroborated by Cope, Ozuna, or Mowatt, who were also called by the General Counsel but never asked about weekend work.

Tilly admitted that he has been assigned weekend work since he informed Britt he was interested in it (Tr. 387, 413). This is confirmed by the Company's records, which show that Tilly performed almost 32 hours in the first 4 months of 2013, more than Vandyk (9 hours), Dykes (21 hours), and Flanders (22 hours). (See R. Exh. 57.)⁶⁷

Other senior drivers likewise worked a substantial number of weekend hours during the same period. Thus, Mark Kukhahn, who is second in overall seniority and not identified in the record as either pro or antiunion, worked 29 hours. And Bobbitt, who as indicated above is fifth in seniority, worked 25 hours. Again, both of these totals are higher than those for Vandyk, Dykes, and Flanders.

Finally, while Thrasher and Cummings worked more weekend hours than any other driver in the first 4 months of 2013 (47 and 60 hours, respectively), this was also true in the first 4 months of 2012 (when Bobbitt was dispatching). The preponderance of the record evidence indicates that the simple reason for this is that they volunteer more than any other driver (Tr. 1159, 1207, 1244, 1309–1310).

b. Prevailing wage work.

The General Counsel also asserts that the record is "replete with evidence" that Britt assigned the five antiunion drivers to more public works jobs that could "potentially" be paid at substantially higher King County prevailing wage or Davis-Bacon rates (Br. 56). Specifically, the General Counsel cites Britt's dispatch sheets from late March through April 2013 showing that VanDyk was repeatedly dispatched to a "potential" Davis-Bacon job at Joint Base Fort Lewis and McCord, while more senior transfer drivers such as Bobbitt and Tilly were dispatched to other, less desirable jobs such as "one hit wonders" (single hauls to multiple customers) and plant-to-plant runs (GC Exhs. 24–29; Tr. 606–623).

With respect to the preceding period from January through late March 2013, the General Counsel requests an adverse inference that Britt likewise assigned such potentially higher wage jobs to the antiunion drivers based on the Company's failure to produce Britt's marked-up paper dispatch sheets for that period (assertedly because they had been tossed prior to receiving the subpoena). The General Counsel also requests an adverse inference based on the Company's failure, until the seventh and last day of trial, to produce: (1) the initial, unmarked electronic version of those dispatch sheets, and (2) the

prevailing wage sheets Britt prepared for use by payroll in determining the appropriate wage rate to pay the drivers.

However, the General Counsel's framing of the issue assumes that Britt did not know whether a driver would actually be entitled to a higher wage on the job. In fact, both Britt and Bobbitt (the General Counsel's own witness) testified that it is usually clear before a job is assigned, based on the location and type of work (e.g., whether the driver would be exporting or dumping material at or away from the incorporation site), whether the driver would get paid the higher wage (Tr. 625, 637, 1008–1009). Thus, the more relevant inquiry is not whether Britt dispatched the five antiunion drivers to more *potentially* higher-wage jobs, but whether he dispatched them to more jobs that *actually* paid higher wages.

Britt's dispatch sheets are not particularly helpful in answering this question as they do not include all the information necessary to determining whether the higher wage rate applies. Most or all of that information is normally set forth in the drivers' trip sheets, which, as indicated above, were produced to the General Counsel and introduced into the record. As for Britt's prevailing wage sheets, while they may contain additional information that is used by payroll, along with the trip sheets, to determine the proper wage to pay drivers (Tr. 1463), they are not necessary here to determine if the Company actually paid drivers the higher wages.

The documents that are necessary and most reliable in answering this question are the payroll timecard entries, which, again, were produced to the General Counsel and introduced into the record (GC Exhs. 70–71; R. Exh. 45 [flash drive]). And an examination of those entries during the first 4 months of 2013 reveals no disparate treatment in this respect. Indeed, none of the five antiunion drivers were paid any wages whatsoever at the King County prevailing wage or Davis-Bacon rates during that period. In contrast, Tilly was paid 8 hours, and Ozaki 4.5 hours at the higher rates. Other senior drivers such as Bobbitt (18 hours) were also paid some wages at the higher rates. (R. Exh. 55.)⁶⁸

Accordingly, while I agree with the General Counsel that the Company failed to adequately explain or justify its failure to timely produce the electronic dispatch sheets and the prevailing wage sheets,⁶⁹ I find that an adverse inference of unlawful preferential treatment is unwarranted. Indeed, regardless of what

⁶⁷ There appear to be some inconsistencies in the underlying documentation. For example, R. Exh. 57 (the Company's summary chart) indicates that Tilly worked 11.5 hours in April, based on the payroll clerk's computer timecard entry for Sunday April 28, which in turn is based on the driver's trip sheet or timecard (R. Exh. 45 [flash drive]; Tr. 1469–1470). However, it appears that no trip sheet for Tilly on that day was produced in response to the General Counsel's subpoena. See GC Exh. 36–59; and Tr. 442. Nevertheless, as the General Counsel has not disputed the accuracy of R. Exh. 57 or the Company's similar summaries, I have considered the summaries where there is at least some reliable documentation to support them. Thus, in this instance, I find, based on the computer timecard entries, which are audited and used for payroll purposes, that Tilly did, in fact, work 11.5 hours on Sunday, April 28 as indicated in R. Exh. 57.

⁶⁸ Certain drivers who drive truck and trailers rather transfer trucks had even more hours at the higher rates. Thus, Holdener, who prefers to drive a 2000 truck and trailer (323) even though he is the most senior driver and is not identified in the record as pro or antiunion, had 128 hours. And prounion driver Swanson, who is assigned a 1998 truck and trailer (315) had 67 hours. This is consistent with Britt's testimony that truck and trailers are used more often than transfer trucks on most King County prevailing wage and Davis-Bacon jobs (Tr. 1008–1012).

⁶⁹ I credit Williamson and find that the General Counsel has failed to establish deliberate destruction or spoliation of Britt's marked-up paper copies of the dispatch sheets from January to late March 2013. See generally *Champ Corp.*, 291 NLRB 803 (1988), *enfd.* 933 F.2d 688 (9th Cir. 1990), *cert. denied* 502 U.S. 957 (1991); and *BP Amoco Chemical-Chocolote Bayou*, 351 NLRB 614, 636 (2007). See also *Bracey v. Grondin*, 712 F.3d 1012, 1019 (7th Cir. 2013); and *Carderella v. Napolitano*, 471 Fed. Appx. 681, 683 (9th Cir. 2012).

those documents would show, in the final analysis it appears that the five antiunion drivers, rather than the other drivers, have the greater grievance against the Company in this respect.

c. Other desirable work

Finally, the General Counsel asserts that Britt also favored the five antiunion drivers by assigning them earlier start times and desirable jobs such as long hauls and all day jobs. However, the General Counsel's posthearing brief cites no specific examples or other record basis for making such a finding. Rather, it again requests an adverse inference based on the Company's failure to produce the above-described documents.

I find that such a broad adverse inference would clearly be improper, particularly in light of the abundance of other documents produced by the Company that contain similar information. See *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995). I also again find that these documents and the other record evidence fail to establish preferential treatment.⁷⁰

Accordingly, the allegation is dismissed.

CONCLUSIONS OF LAW

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

- (a) Interrogating employees about whether they or other employees support the Union.
- (b) Telling employees that the representation campaign was futile.
- (c) Threatening to never enter into a collective-bargaining agreement with the Union.
- (d) Threatening to sell the business before entering into a contract with the Union.
- (e) Threatening employees that a strike is inevitable.
- (f) Threatening to assign or reassign employees to particular trucks based on their union sympathies.
- (g) Threatening to isolate prounion employees.
- (h) Threatening to deny employees raises because they selected the Union as their collective-bargaining representative.

⁷⁰ In so finding, I have not relied solely on the failure of the General Counsel's posthearing brief to cite to any evidence or examples from the record. Rather, whether required or not, I have searched for any unmentioned "truffles buried in the record" (*Rabin v. Flynn*, 275 F.3d 628, 635 (7th Cir. 2013)), that would sufficiently prove such preferential treatment. I found too few, at least not enough that withstood scrutiny or comparison to how drivers were dispatched before the representation campaign and election. Proving a violation of this kind is no simple matter, particularly where, as here, dispatching decisions must consider numerous factors. And the evidence in this case falls short.

(i) Threatening employees that their union activities are under surveillance.

(j) Threatening to retaliate against prounion drivers.

(k) Threatening to discharge employees for engaging in activities that it perceives as prounion.

(l) Threatening to fire all of the union supporters.

(m) Threatening to consider and evaluate transfer requests and other personnel matters based on an employee's union sympathies.

2. By removing Jeff Cope from his assigned transfer truck because of his support for the Union, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

3. By discharging Don Sturdivan because he supported the Union and testified on its behalf in the pre and postelection hearings, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3), (4), and (1), and Section 2(6) and (7) of the Act.

4. The Company did not otherwise violate the Act as alleged in the second consolidated complaint.

REMEDY

The standard and appropriate remedy for the violations found is an order requiring the Company to cease and desist from its unfair labor practices and to take certain affirmative action.⁷¹ Specifically, the Company shall be required to offer Jeff Cope reassignment to transfer truck 337, displacing if necessary the driver currently assigned to that truck.⁷² With respect to Don Sturdivan, the Company shall be required to offer him reinstatement to his former position and to make him whole for any loss of earnings and other benefits as a result of his unlawful discharge. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest compounded daily as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Company shall also be required to file a report with the Social Security Administration allocating Sturdivan's backpay to the appropriate calendar quarters, and to compensate Sturdivan for the adverse tax

⁷¹ No extraordinary remedies have been requested by either the General Counsel or the Union.

⁷² There is no allegation that the Company constructively laid off Cope by removing him from truck 337 and no request that he be awarded backpay.

consequences, if any, of receiving a lump-sum backpay award covering more than 1 year. See *Latino Express, Inc.*, 359 NLRB 518 (2012). In addition, the Company will be required

to expunge any reference to Sturdivan's discharge from its files, and to notify him that this has been done.

[Recommended Order omitted from publication.]