

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES – NEW YORK**

**INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE, AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW), AMALGAMATED
LOCAL UNION NO. 509, AFL-CIO
(FIAT CHRYSLER AUTOMOBILES GROUP)**

and

Case 28-CB-144872

JOE MOORE, an Individual

**GENERAL COUNSEL’S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

Respectfully submitted,

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I. INTRODUCTION

The International Union, United Automobile, Aerospace, Agricultural Implement Workers of America (UAW), Amalgamated Local Union No. 509, AFL-CIO (Respondent or Union) violated the Act when it attempted to cause, and did cause, Fiat Chrysler Automobiles Group (Employer) to terminate Joe Moore (Moore) for engaging in Union activities.

The Employer operates an automotive proving ground where it tests specialized builds of vehicles and systems, performs endurance testing on various vehicles, and other specialized operations. The custom nature of the work involves increased safety risks as employees drive vehicles at speeds of over 150 miles per hour, perform heavy load testing, and perform specialized brake testing, among other tasks. Further, the unique nature of the Employer’s operations creates risks that drivers may be exposed to harmful substances such as carbon monoxide. The Employer and Respondent recognize the importance of health and safety in their collective-bargaining agreements. On October 2, 2014,¹ Moore became ill while driving

¹ All dates are 2014, unless otherwise stated.

a vehicle, including headache, nausea, and vomiting, all of which are signs of carbon monoxide poisoning. A carbon monoxide leak was later found on the vehicle he was driving. Moore went to the Employer and the Union to avoid future carbon monoxide poisoning. He complained to the Union's Health and Safety Representative, Mike Watson (Watson) on October 29, about the carbon monoxide issue. It is undisputed that the conversation was short, involved carbon monoxide detectors, and that each said "fuck you" to the other. No supervisors, managers, or other employees were present for the conversation. After Moore walked away from the conversation, Watson went to the Employer and reported the conversation. Moore, a 15-year employee with no prior discipline, was suspended that day as a result of Watson's report. The Employer talked to three other employees in the area, but none noticed anything out of the ordinary in the conversation between Watson and Moore. Relying on Watson's statement of events, the Employer terminated Moore on November 12.

Watson knew that his report could lead to Moore's discipline, including termination. Accordingly, the Union, by Watson, attempted to cause, and did cause, the Employer to terminate Moore for engaging in his Union activities of addressing a contractual Health and Safety issue with the Union and the Employer. By the Union's actions, the Respondent violated Section 8(b)(1)(A) and 8(b)(2) of the Act.

Counsel for General Counsel (CGC), therefore, respectfully requests that the ALJ find that Respondent committed the violations alleged in the Complaint and recommend an appropriate remedy to the Board, including that Respondent cease and desist from such violations, take certain affirmative steps, and pay joint liability for backpay due to Moore, including reimbursing the Employer for payments it made which exceeded its joint liability.

II. BACKGROUND

A. Jurisdiction

The Employer operates its Arizona Proving Ground in Yucca, Arizona, where it purchased and received goods valued in excess of \$50,000 directly from points outside the State of Arizona, and is an Employer engaged in commerce. (GCX 1(h)(2) GCX 1(n)(2))² Respondent represents a variety of employees at the Employer's facility who are covered under the Engineering Office & Clerical collective-bargaining agreement. (GCX 3) Respondent is a labor organization within the meaning of Section 2(5) of the Act. (GCX 1(o)(1))

B. Respondent's Operations

At its Yucca, Arizona facility, the Employer performs vehicle testing at over 150 miles per hour, endurance testing, brake testing and certification, accelerated durability testing, heat soaking, hot weather testing, fuel testing, trailer tow testing, heavy load testing, in addition to the facility's use by Harley Davidson. (Tr. 31-32; 35:14-16; GCX 1(n); GCX 4) Testing is not limited to current production vehicles, but also includes prototype vehicles and modified production vehicles outfitted with possible future components. (Tr. 36:17 to 37:1)

In October, Watson was the Respondent's Health and Safety representative appointed by the International Union. (Tr. 22:17; 23:5; GCX 1(h)(3), 1(o)(1)) He was responsible for identification and investigation of all health and safety issues and trying to resolve those issues for the safety of the membership, including filing health and safety grievances if necessary. (Tr. 23:8; 23:24; 26:1-2; 30:1-2) Some of the health and safety issues encountered by Watson included gasses, fumes, and potentially-fatal carbon monoxide. (Tr. 37:17-38:1)

² GCX __ refers to General Counsel's Exhibit followed by the exhibit number; RX__ refers to Respondent's Exhibit followed by the exhibit number; "Tr. _:_" refers to transcript page followed by line number(s), unless the Transcript cite covers multiple pages, of the unfair labor practice hearing held on July 28, 2015.

Some symptoms of carbon monoxide exposure include headache, nausea, tiredness, and fatigue. (Tr. 38:2-6) Human Resources Employee Relations Generalist Scott Campbell (Campbell) was The Employer's Health and Safety Co-Chair in a joint program with the Union. (Tr. 26:15-24; 59:19) Chris Moreland (Moreland) has been the Union's Unit Chairman since 2011. (Tr. 88:14-17) Moore previously held positions with the Union, was elected as Union Vice-Chair in 2005, the local bargaining committee in 2008, and 2011, and had run for elected offices at the same time as Moreland. (Tr. 88:24-89:5; 136:19-21) Moore was nominated, but did not run, for several Union positions for an election held in May 2014. (Tr. 137:3-15)

C. Collective Bargaining Agreements

Respondent and the Employer have collective-bargaining agreements at the national and local levels. (GCX 2, 3) Each agreement contains health and safety language, including language addressing vehicle fumes and odors, and provides a means to address issues with the Local Joint Health and Safety Co-Chairs. (Tr. 25:4-11; Tr. 27:22-24; GCX 2 at 11; GCX 3 at 199-213) It is undisputed that health and safety is the highest concern to the Union and the Employer and is a contractual issue between the Respondent and the Employer. (Tr. 28:17-20; 31:2-4) Memorandum of Understanding M-13 specifies that "WHEREAS, no subject is of greater concern to the Company and the Union than the physical well-being of employees in Chrysler's facilities, and in our recent negotiations no subject received or deserved a higher priority than promoting safe and healthful working conditions in the facilities." (Tr. 28:7-20; GCX 3 at 199) The Employer also maintains a standard operations manual which addresses health and safety issues. (Tr. 25:12-17)

The Employer generally utilizes progressive discipline for bargaining unit members, starting with verbal warning, written warning, one day disciplinary layoff, three day

disciplinary layoff, five day disciplinary layoff, ten day disciplinary layoff, 30 day disciplinary layoff, and then discharge. (Tr. 92:8-25)

D. Moore's Attempts to Address Carbon Monoxide Poisoning

On October 2, Moore was driving one of the Employer's high performance vehicles when he became ill with headache and nausea. (Tr. 47-49; 138:9-16) He informed his supervisor, completed his Driver's Road Report for the vehicle³ and Accident Report, and left for the day. (Tr. 138:18-139:19; GCX 6, 7) Moore made it to the first exit on the freeway before pulling over to vomit several times. (Tr. 139:21-23; 140:6) He returned to work the following day, and a carbon monoxide leak was subsequently found in a band clamp after another driver had a spike of carbon monoxide while driving the same vehicle. (Tr. 50:7-13; 74:1-13; 75:10; 140:10; GCX 19) Moore was not satisfied with fixing this single leak, and informed Watson that he wanted to prevent future exposure including the use of personal meters. (Tr. 51:24 to 52:9; 61:23-62:1) Moore was not satisfied with the carbon monoxide testing, and wanted additional meters for carbon monoxide testing, which Watson acknowledged was a Union health and safety issue. (Tr. 55:14-21; 56:2-5) He requested a meeting with the Employer regarding possible exposure, and the meeting was held on October 8. (Tr. 93:20-25)

E. Moore's October 29 Conversation with Watson

On the morning of October 29, Moore and Watson discussed the carbon monoxide monitoring; Moore asked for an update on carbon monoxide monitoring, and Watson replied that he did not know. (Tr. 55:10-15; 150:7-8) Moore informed Watson of his meeting with the Employer, that it was discovered that they did not know where to place the carbon

³ The vehicle is identified as L5LDD0431. (GCX 6)

monoxide meter, and there was no policy including when to turn the meter off. (Tr. 150:9-15) According to Watson, instead of responding as to personal meters, Watson responded by telling Moore about policies and upcoming training. (Tr. 60:14-24; 61:7-14) Watson asked how that includes him, and Moore told Watson that he (Watson) knows the location of the device, but “we don’t know where to put it. We don’t know when to turn it off, when not to[.]” (Tr. 150:17-19) Watson then stuck his finger out at Moore, said he was trying to talk, that it was his turn to talk, and told Moore that “he’s doing what he can but look, dude, I’m not going to put a carbon monoxide meter in every vehicle we have.” (Tr. 150:20-25) Moore informed Watson that employee Vern Vanotti told him that the vehicle was “through the roof in carbon monoxide[.]” and that Moore was concerned because he got sick, went home, and vomited on the freeway. (Tr. 57:10-58:1; 151:3-9) Watson responded that Moore was not really sick, and chuckled, to which Moore responded that he did not think it was funny, started to get upset, and turned around to walk away. (Tr. 151:9-12) When Moore was about 20 feet away, Watson said fuck you. (Tr. 151:14-15) Moore stopped, turned around, and walked toward Watson as Watson walked toward Moore. (Tr. 151:15-19) They walked to within a foot of each other, and Moore said fuck you. (Tr. 151:20) Watson responded by pushing his chest out, said do it, do it and started shaking. (Tr. 151:21-23) Moore said do what, and noticed Watson shaking with a funny look, said my God, turned around and walked away from Watson a second time. (Tr. 151:23-24) Watson made comments to Moore as he walked away, but Moore could not recall what was said, although it was not polite. (Tr. 151:25-152:1) Moore looked back at Watson and said fuck you to Watson, and believes that he called Watson an asshole, but kept walking away. (Tr. 152:2-5) Watson then walked into the Union office. (Tr. 152:6) The conversation involved only Watson and Moore, with no

supervisors or managers present. (Tr. 56:6-17) Watson generally approached Moore very close, “right up by my face” in prior conversations. (Tr. 194:7-12) Afterward, Watson reported the conversation to Campbell, asserting that there was an altercation which got very heated, and that he was concerned that it was very close to getting personal, and documented the conversation by a written statement he provided to the Employer. (Tr. 58-59; 66:21-67:6; Tr. 83:13-15; GCX 8) Watson informed Campbell that Moore asked him about the carbon monoxide policy, asked what was being done about carbon monoxide in the test vehicles, asked where things were at with the incident where he became ill, and asked if there were any plans to buy personal carbon monoxide meters for drivers, but that Watson wanted to report the escalation during the conversation. (Tr. 95:9-13; GCX 8)

Watson was unaware of any policy requiring him to report any instance where an employee yells at him, but knew that his report could result in discipline, and was aware of the Employer’s zero tolerance policy regarding harassment and violence. (Tr. 65:15-66:3; 68:16-69:9) Some of Watson’s health and safety discussions have been confrontational, with yelling and cursing. (Tr. 41:3-6; 45:7-20) Watson is not unaccustomed to cursing, as he and supervisors have cursed at each other as part of their discussions. (Tr. 46:19-23) Other than his conversation with Moore, Watson had not reported any heated conversations to the Employer other than an instance where a supervisor pinched his nipple and goosed him in front of several people. (Tr. 46:9; 70:19-71:11)

Less than two hours after the conversation, Moore was told to bring his vehicle back, and First Shift Union Steward Roberto Martinez (Martinez) told Moore that “generally when they have you take your bag with you up to security[,] you’re not coming back.” (Tr. 152:19-25; 153:9-15) Moore met with Campbell, Supervisor Stanley Kinder (Kinder), and Martinez

in security, and told them that both Watson and Moore said fuck you, but that Moore was the person who walked away twice. (Tr. 99:9; 153:19-20; 154:2-4; GCX 20) The Employer suspended Moore because Watson allegedly felt physically intimidated by Moore on October 29. (Tr. 95:23-96:14; GCX 9) Martinez walked him off the property with no security present. (Tr. 155:20-156:1) While Moore was completing his statement, Martinez told Moore that he was there because of his complaints. (Tr. 154:17-18)

The Employer took statements from employees Randall Dulin, Sarah Newman (Newman), and Stephen Redman. Each employee was in the south parking lot where Watson and Moore were on October 29, but did not see or hear anything unusual. (Tr. 100-101; GCX 10, 11, 12) Specifically, there was no corroboration that Moore screamed at Watson; Newman saw Watson and Moore talking, but did not hear them even though they were about 35 feet away. (Tr. 103:11-15; GCX 11) Watson received no discipline although he said fuck you to Moore. (Tr. 70:14-15; 105:16-22)

The Employer prepared an Executive Summary dated November 3, in which it summarized the results of its investigation. (Tr. 97:11-20; GCX 13) Even though the Employer found no corroborating witnesses that saw or heard anything out of the ordinary, and Newman could not hear Watson and Moore talking, the Employer credited Watson's version of events, including crediting Watson that Moore screamed "fuck you" at Watson even though the Executive Summary and Newman's statement shows that she did not see or hear anything out of the ordinary. (Tr. 103:11-21; GCX 13) Similarly, the Employer credited Watson that there was a likely possibility of imminent physical assault, and that Moore had an "emotional outburst" even though none of the other three witnesses corroborated Watson's version of events. (Tr. 106:11-17; GCX 13(a)) By letter dated November 12, the Employer

informed Moore that he was terminated based on his conversation with Watson (Tr. 104:1-9; GCX 14)

Moore had worked for the Employer for over 15 years as an endurance driver and had no performance issues or prior discipline which was considered in the decision to terminate him. (Tr. 104:16-19; 136:2-5; GCX 15(a)-(w)) Similarly, Moore's work appraisals were not a factor in the decision to terminate him, as his work was acceptable. (Tr. 104:20-105:8) Watson even characterized his relationship with Moore as very good, and that Moore was a top-tier worker. (Tr. 85:24-86:4) The Union filed a grievance regarding Moore's termination, continued to process the unresolved grievance and communicated various status updates to Moore. (RX 1-4) Notwithstanding the grievance, the Employer was scheduled to reinstate Moore with a portion of his backpay.⁴

Several other employees have been disciplined, but not terminated, for confrontations. Endurance driver Richard Charlesworth (Charlesworth) was suspended but not terminated after he harassed temporary employees in the workplace. (Tr. 107:20-108:19; GCX 16(a)) Charlesworth told an employee that he was "going to get these fucking temp's," aggressively tailgated temporary employee Angela Stolberg-Johnson who thought Charlesworth was going to hit her, closely approached temporary employee Virginia Medina, and was observed by another employee tailgating another vehicle in addition to calling Supervisor Kinder a "dick weed." (GCX 16(a))

Endurance driver Robert Fry (Fry) was suspended, but not terminated after he committed acts of violence against co-worker Mytina Eckhaus (Eckhaus), including allegedly throwing chairs in the break room, aggressively approaching and yelling at Eckhaus which

⁴ The companion case against the Employer in 28-CA-141151, was settled and severed. (Tr. 9:22; GCX 18) No liability against the Employer is requested in this proceeding.

required physical restraint by other employees to prevent him from inflicting harm. (Tr. 64:4; 109:5-110:4; GCX 17(a)) His behavior was corroborated by three employees. (GCX 17(a)) Although Watson denied specific knowledge of the situation, he was aware by October 29, that Fry had allegedly engaged in harassment and aggressive behavior for which he received discipline. (Tr. 65:5-7)

III. ARGUMENT

A. Respondent Unlawfully Attempted to Cause, and Caused, the Employer to Terminate Joe Moore Because of His Union Activities.

In evaluating alleged violations of Section 8(b)(2), the Board has “primarily applied either a duty-of-fair-representation framework or the framework established in *Wright Line*.” *Good Samaritan Medical Ctr.*, 361 NLRB No. 145, slip op. at 2 (2014). A union violates the Act when it applies indirect pressure to discipline, and no direct demand needs to be made to find a violation. *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB 1042, 1043 (1997) (adopting the finding that the union unlawfully caused or attempted to cause an employee to be disciplined notwithstanding no direct or express demand that the employee be disciplined) (citing *Avon Roofing & Sheet Metal Co.*, 312 NLRB 499 (1993) (“direct evidence of an express demand by the Union is not necessary where the evidence supports a reasonable inference of a union request.”); *Quality Mechanical*, 307 NLRB 64, 66 (1992). It is sufficient that a union knows that an employer issues discipline for alleged violations of the conduct reported. *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB at 1044; *Quality Mechanical*, 307 NLRB at 66. Similarly, it is adequate that the union reasonably knew that the employee would be disciplined. *Good Samaritan Medical Ctr.*, 361 NLRB No. 145, slip op. at 3.

Here, Respondent violated the Act under the duty-of-fair-representation framework and the framework of *Wright Line*. Under either scenario, the Union applied indirect pressure to the Employer notwithstanding any direct or express request for discipline. Although Watson testified that he was aware of the zero tolerance policy for harassment or violence and claimed that he did not know whether discipline could result under that policy, he had already testified that he knew something negative could happen to Moore based on his report (Tr. 68:16-19; 69:10-15) Further, he later confirmed that he was aware by October 29, that Fry had allegedly engaged in harassment and aggressive behavior for which he received discipline. (Tr. 65:5-7) Accordingly, Respondent knew that the Employer issues discipline for alleged violations of the conduct reported by Watson, and reasonably knew that Moore would be disciplined as a result, thereby satisfying any requirement that the Union applied indirect pressure to cause Moore's discipline. *Good Samaritan Medical Ctr.*, 361 NLRB No. 145, slip op. at 3; *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB at 1044; *Quality Mechanical*, 307 NLRB at 66.

1. Respondent Violated the Act under the Duty-of-Fair-Representation Standard.

“[W]hen a labor organization ‘causes the discharge of an employee, there is a rebuttable presumption that [the labor organization] acted unlawfully because by such conduct [it] demonstrates its power to affect the employees’ livelihood in so dramatic a way as to encourage union membership among the employees.’” *Good Samaritan Medical Ctr.*, 361 NLRB No. 145, slip op. at 3. A union can rebut this presumption by showing that it acted pursuant to a valid union-security clause or that its actions were necessary to the “effective performance of its function of representing its constituency.” *Id.*, slip op. at 2 fn. 8.

Here, there is no claim that Respondent acted pursuant to a union-security clause. Further, no evidence was presented that Watson's actions were necessary to the effective performance of the Union's function of representing its constituency based on this one-time conversation between Moore and his Union Health and Safety Representative about a contractual and potentially lethal safety issue that could affect the membership. Instead, Respondent, by Watson, went to the Employer to report the conversation Watson had with Moore. Notwithstanding the undisputed fact that the conversation involved a contractual health and safety discussion between Moore and his Union Health and Safety representative, the Employer relied upon Watson's statement to terminate Moore. Watson's report of the conversation was in no way connected to a union security clause, or to the necessary and effective performance of the Union's functions in representing its constituency. Accordingly, the ALJ should find that Respondent violated the Act under the duty-of-fair-representation standard when it attempted to cause the discharge of Moore based on the one-time conversation between Moore and his Union representative.

2. Respondent Violated the Act under the *Wright Line* Standard.

Based on an analysis of the Board's decisions, in order to establish unlawful discrimination under Section 8(a)(3) and (1) of the National Labor Relations Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), *clarifying NLRB v. Transportation Management*, 462 U.S. 393,

395, 403 n.7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).⁵

Evidence that may establish a discriminatory motive - i.e., that the employer's hostility to protected activity "contributed to" its decision to take adverse action against the employee -includes: (1) statements of animus directed to the employee or about the employee's protected activities (see, e.g., *Austal USA, LLC*, 356 NLRB No. 65, slip op. at p. 1 (2010) (unlawful motivation found where HR director directly interrogated and threatened union activist, and supervisors told activist that management was "after her" because of her union activities)); (2) statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee (see, e.g., *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 616 (1996) (unlawful motivation found where employer unlawfully threatened to discharge employees who were still out in support of a strike, and then disciplined an employee who remained out on strike following the threat)); (3) close timing between discovery of the employee's protected activities and the discipline (see, e.g., *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (immediately after employer learned that union had obtained a majority of authorization cards from employees, it fired an employee who had signed a card)); (4) the

⁵ The *Wright Line* standard upheld in *Transportation Management* and clarified in *Greenwich Collieries* proceeds in a different manner than the "prima facie case" standard utilized in other statutory contexts. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-143 (2000) (applying Title VII framework to ADEA case). In those other contexts, "prima facie case" refers to the initial burden of production (not persuasion) within a framework of shifting evidentiary burdens. In the NLRA context, by contrast, the General Counsel proves a violation at the outset by making a persuasive showing that the employer's hostility toward protected activities was a motivating factor in the employee's discipline. At that point, the burden of persuasion shifts to the employer to prove its affirmative defense. Because *Wright Line* allocates the burden of proving a violation and proving a defense in this distinct manner, references to the General Counsel's "prima facie case" or "initial burden" are not quite accurate, and can lead to confusion, as General Counsel's proof of a violation is complete at the point where the General Counsel establishes by a preponderance of the evidence that employer's hostility toward protected activities was a motivating factor in the discipline.

existence of other unfair labor practices that demonstrate that the employer's animus has led to unlawful actions (see, e.g., *Mid-Mountain Foods*, 332 NLRB 251, 251 n.2, passim (2000), enf. mem. 11 Fed. Appx. 372 (4th Cir. 2001) (relying on prior Board decision regarding respondent and, with regard to some of the alleged discriminatees, relying on threatening conduct directed at the other alleged discriminatees)); or (5) evidence that the employer's asserted reason for the employee's discipline was pretextual, e.g., disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless (see, e.g., *Lucky Cab Company*, 360 NLRB No. 43 (Feb. 20, 2014) ; *ManorCare Health Services – Easton*, 356 NLRB No. 39, slip op. at p. 3 (Dec. 1, 2010); *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556-557 (1994), enf. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)).

Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision, the employer can nevertheless defeat a finding of a violation by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. See *NLRB v. Transportation Management*, 462 U.S. at 401 ("the Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation"). The employer has the burden of establishing that affirmative defense. *Id.*

It is clear that Moore was engaged in a discussion with his Union Health and Safety representative on October 29, about a contractual health and safety issue, that the Employer knew that the carbon monoxide testing was the subject of the discussion, and that Moore was terminated solely for the October 29 conversation. (Tr. 95:9-13; GCX 8, 20) Accordingly, CGC has established that Moore was engaged in Union activity, the Employer was aware, and the activity was a motivating factor in the Employer's decision to terminate him. Neither the Respondent nor the Employer will be able to show that Moore would have been terminated in the absence of his Union activity in the carbon monoxide discussion with Watson. Moore was treated disparately when he was terminated in comparison to Charlesworth and Fry who were suspended for more egregious and corroborated conduct. Accordingly, the ALJ should find that the Respondent violated the Act under the *Wright Line* standard when it attempted to cause, and did cause Moore's discharge because he engaged in a protected Union discussion with his health and safety representative about a Union health and safety issue.

B. *Atlantic Steel* Does Not Apply.

Respondent is not aided by any claim that Moore's discussion with Watson removed him from the Act's protection. *Atlantic Steel Co.*, 245 NLRB 814 (1979). This case involved misconduct which removes an employee from the protection of the Act. However, the Board has held that *Atlantic Steel* is not the applicable standard for evaluating a member's conversation with a union official. *Longshoremen Local 333*, 267 NLRB 1320, 1320, 1324 (1983). In that case, the Board found that the union violated Section 8(b)(1)(A) and 8(b)(2) and that the administrative law judge erred in invoking *Atlantic Steel* to evaluate a confrontation between a member and the union's delegate, notwithstanding the judge's characterization of the confrontation as an "insubordinate attack on a union official who was enforcing the Union's rotation procedure" and was "rebellious conduct" when the member

ignored the delegate's instructions. The judge also found that the member's conduct was "intended to belittle a union official in the performance of his duties and to undercut that authority" and "jeopardized the Union's ability to perform one of its most important obligations under its labor contract – to provide a stable labor force when and where needed." The Board stated "[i]t is well established that an employee has a statutory right to voice dissatisfaction with a union's conduct and its policies, regardless of their propriety, without suffering reprisal by being deprived of work for so doing." *Id.* at 1320. The Board reasoned that the situations are completely different - the case did not involve an employee's record and work performance; it involved his protected right to question the union's authority. *Id.* "That [the individual] resorted to strong language which is not unusual [in the area], albeit not in conformity with Emily Post standards of etiquette customary in more genteel surroundings, cannot justify the Union's reprisal[.]" *Id.* Accordingly, Respondent cannot avoid liability by relying on *Atlantic Steel's* standards to remove the Act's protection.

C. Respondent's Post-Termination Advocacy is Irrelevant.

"The general rule is that an employer and union are jointly and severally liable for backpay where the employer and the union have violated Section 8(a)(3) and (1) and Section 8(b)(1)(A) and (2) of the Act, respectively." *Tri-County Roofing*, 311 NLRB 1368, 1369 (1993) Respondent will likely argue that the ALJ should consider its post-termination actions in determining whether it should be held to have violated the Act. (RX 1-4) However, a union's post-discipline conduct is not relevant in establishing or excusing liability. *Regional Import & Export Trucking*, 323 NLRB 1206, 1206-1207 (1997).

IV. CONCLUSION

Respondent violated the Act under the duty-of-fair representation standard and under the *Wright Line* Standard. In its most basic summary, this case involves the termination for a

discussion between an employee and his Health and Safety representative about a Union contractual Health and Safety issue. When Respondent reported the conversation to the Employer, it attempted to cause, and caused, the Employer to discriminate against Moore because he engaged in Union activities of discussing a contractual health and safety issue with the Union's health and safety representative, and thereby violated Section 8(b)(1)(A) and 8(b)(2) of the Act. Based on the foregoing, CGC respectfully requests that the ALJ find that Respondent committed the violations as alleged in the Complaint and recommend an appropriate remedy, including that Respondent cease and desist from such violations, take certain affirmative steps, including providing its joint liability share of the backpay due to Moore, and reimbursing the Employer for payments it made which exceeded its backpay joint liability, and posting a Notice to Members and Employees, a proposed copy of which is attached.

Respectfully submitted this 28th day of August 2015.

/s/ Larry A. Smith

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(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with your employer 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 do anything to prevent you from exercising the above rights.

WE WILL NOT report employees to the Employer with the intent to have them disciplined and/or terminated.

WE WILL make **JOE MOORE** whole for the wages and other benefits he lost because we caused his termination from the Employer.

WE WILL reimburse the Employer for any amounts which exceed the Employer's share of joint liability for the wages and other benefits that **JOE MOORE** lost because we caused his termination from the Employer.

WE WILL reimburse, within 14 days from the date of this Order, remove from our files, and ask the Employer to remove from the Employer's files, any reference to the unlawful report that **JOE MOORE** threatened or intimidated Mike Watson, and **WE WILL**, within 3 days thereafter, notify **JOE MOORE** in writing that we have done so and we will not use such a report against him in any way.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

**UNITED AUTOMOBILE, AEROSPACE,
AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA, AMALGAMATED LOCAL 509**

(Labor Organization)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

2600 N CENTRAL AVE, STE 1400
PHOENIX, AZ 85004-3019

Telephone: (602) 640-2160
Hours of Operation: 8:15 a.m. to 4:45 p.m.

CERTIFICATE OF SERVICE

I hereby certify that **GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE** in Case 28-CB-144872 was served via E-Gov, E-Filing, and E-Mail, on this 28th day of August 2015, on the following:

Via E-Gov, E-Filing:

Joel P. Biblowitz, Associate Chief Administrative Law Judge
National Labor Relations Board
Division of Judges – New York
120 West 45th Street, 11th Floor
New York, NY 10036-5503

Via Electronic Mail:

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