

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

GRAND MEDICAL
TRANSPORTATION, LLC

and

Case 22–CA–140495

MED-LIFE M&M

Tara Levy, Esq., for the General Counsel.
Charles C. Okoro, pro se, for the Respondent.
Eric McLemore, for the Charging Party.

DECISION

Statement of the Case

IRA SANDRON, Administrative Law Judge. This case is before me on a June 26, 2015¹ first amended consolidated complaint and notice of hearing (the complaint) arising from unfair labor practice charges that Med-Life M&M (the Union) filed against Grand Medical Transportation, LLC (the Respondent, the Company, or GMT) concerning a unit of emergency medical technicians (EMTs).

I conducted a trial in Newark Jersey on July 14 and 15, September 16 and 17, and September 25, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The hearing on September 25 was held for the purpose of allowing the General Counsel to call Eric McLemore for rebuttal testimony inasmuch as he had established good cause for his unavailability the week of September 14. I participated by telephone on September 25, rather than in person, to avoid unnecessary expense to the Government. No party objected to this procedure. I noted that I already had ample opportunity to observe McLemore's demeanor when he earlier testified at length before me on direct and cross-examination.

¹ All dates hereinafter occurred in 2015 unless otherwise indicated.

The Respondent filed an answer to the original complaint but failed to address the independent 8(a)(1) allegations in paragraphs 9 and 10. Therefore, under Section 102.20 of the Board’s Rules and Regulations, those allegations were deemed admitted absent a showing of good cause. Okoro explained that he thought the complaint concerned only the named layoffs and the replacement of unit employees. Because Okoro has been pro se at all times, and in the interest of fundamental fairness, I allowed him to address those 8(a)(1) allegations at trial. The attorneys for the General Counsel did not object to this and elicited testimony thereon from their own witnesses. For the same reasons, I allowed him to address the layoff of the alleged discriminatee named in the amended complaint even though he did not file an amended answer regarding her.

Issues

- (1) Did the Respondent select Eric McLemore for layoff on October 22, 2014, because of his union activities and his prior union activities as an employee of GTS Ambulance Transportation, LLC (GTS)?
- (2) Did the Respondent select Samone Allen, Veronica Fraquada, and Jessica Santos for layoff on about January 9 because of their union activities, and without affording the Union an opportunity to bargain with respect to their layoffs?
- (3) Did Owner Charles Okoro aka Charles Kanu:
 - (a) On December 10, 2014, interrogate Fraquada about her and other employees’ union activities and sympathies?
 - (b) On that same date, solicit employee complaints and grievances from Fraquada, and promise her increased benefits and improved terms and conditions of employment if the employees rejected the Union as their collective-bargaining representative?
 - (c) On about January 6, threaten Allen with stricter work rules and other unspecified reprisals because she voted for the Union as her bargaining representative?
- (4) On December 11, 2014, did Oricka Bowlyn, office manager and MAV-T supervisor, and Kalika Hill, scheduler and EMT supervisor, interrogate Santos about her union sympathies?
- (5) Did the Respondent, since January, lay off bargaining unit employees, including Allen, Fraquada, and Santos, without affording the Union notice and an opportunity to bargain with respect to the decision and the effects of this conduct?
- (6) Did the Respondent, since about January, assign bargaining unit work to nonbargaining unit supervisors (a) Okoro, (b) Operations Manager Wanel Pierre, Sr., and (c) Field Supervisor Spencer Fenelus without affording the Union notice and an opportunity to bargain?

Summary of conclusions: The General Counsel has sustained the allegations in the complaint.

Witnesses

5

The General Counsel called Allen, Fraquada, McLemore, and Santos; as well as Union Vice President Kerneel Stewart and Fara Gonzalez, a former GTS employee who has never worked for GMT. Okoro testified on behalf of the Respondent, and he called Bowlyn as a witness.

10

Credibility

Gonzalez, a neutral third-party witness with no stake in the proceeding, had no reason not to testify truthfully. Her testimony was limited to conversations that she had with Pierre in November 2014 regarding McLemore’s layoff. She appeared candid, and I credit her unrebutted testimony.

The other General Counsel’s witnesses were generally credible for the following reasons. None of the alleged discriminatees appeared to exaggerate or embellish statements that management representatives made to them in regard to the Union and/or the election, and I do not believe that they fabricated such statements. Nor did any of the alleged discriminatees show hesitation in answering questions on cross-examination. Moreover, McLemore and Stewart were consistent in their descriptions of their negotiations with Okoro, and the bargaining notes that they took at the meetings supported their testimony.

25

Turning to the Respondent, I note at the outset that I emphasized to Okoro both before and during the hearing that although his being represented by counsel might be helpful, he had the right to represent himself. I explained that this included the right to present documents and witnesses in support of his case, including the right to subpoena witnesses and thereby compel their presence. I also note that Okoro appeared intelligent and perceptive, as reflected by the way he grasped some of the legal concepts that were raised at trial despite his lack of legal training, and his testimony demonstrating that he has business acumen and travels internationally. Viewed in these circumstances, certain aspects of his testimony and the presentation of his case seriously undermine his credibility.

35

Thus, although he did call Supervisor Bowlyn, he failed to call Manager Pierre, who according to both Okoro and Bowlyn was the highest-ranking supervisor at the facility and had the responsibility for hiring, scheduling, and disciplining EMTs. Pierre also had the most communications with the four alleged discriminatees regarding their layoffs, as revealed by both their testimony and the Respondent’s submissions to the Region. This failure was in spite of the fact that Okoro currently employs Pierre as an EMT on an as-needed basis. Okoro offered no explanation of why he did not present Pierre, through a subpoena if necessary. Nor did Okoro offer any explanation of why he did not call EMT Supervisor Hill.

45

Our system of jurisprudence has what is called the “missing witness rule,” which provides that:

5 Where relevant evidence which would properly be part of a case is within the control of the party whose interest it would normally be to provide it, and he fails to do so without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him. 29 Am. Jur.2d §178.

10 Normally, an administrative law judge has the discretion to draw an adverse inference based on a party’s failure to call a witness who may reasonably assumed to be favorably disposed to the party and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party’s agent and thus within its authority or control. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006); see also *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977); *Underwriters Laboratories Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998). In that event, drawing an adverse inference regarding any factual question on which the witness is likely to have knowledge is appropriate. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enf. mem. 861 F.2d 720 (6th Cir. 1988).

20 Accordingly, the Respondent’s unexplained failure to call Pierre and Hill leads to an adverse inference that their testimony would not have been favorable to the Respondent on matters to which the General Counsel’s witnesses testified.

25 Further, although Okoro called Bowlyn as a witness, she did not testify regarding the following. The first was the meeting that McLemore testified they had on October 31, 2014, in which he saw that she had his union business card on her desk. The second was the meeting on December 11, 2014, at which Fraquada testified that Bowlyn was present when Hill made 8(a)(1) statements. When a party does not question a witness about damaging or potentially damaging testimony, it is appropriate to draw an adverse inference and find that the witness would not have disputed such testimony. See *LSF Transportation, Inc.*, 330 NLRB 1054, 1063 fn. 11 (2000); *Asarco, Inc.*, 316 NLR 636, 640 fn. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996). Accordingly, I credit McLemore’s and Fraquada’s un rebutted accounts of those respective meetings.

35 Following are glaring problems with Okoro’s credibility. First, the Respondent does not dispute that Pierre gave McLemore a layoff letter on October 22, 2014.² However, in Okoro’s submission to the Region dated November 17, 2014, he admittedly included a different layoff letter with the same date but with expanded language concerning the recall and the false representation that Bowlyn was present when McLemore received it.³ Okoro explained that after
40 NLRB charges were filed concerning McLemore’s layoff, he sent McLemore’s file to HR Synergies, LLC (SES) (the personnel services company with which GMT contracts). They advised Okoro that the layoff letter needed a signature from either McLemore or a witness, and a more detailed description of the reason for the layoff. As a result, Pierre produced the second layoff letter in November, which letter was sent in to the Region. I discredit Okoro’s evasive

² GC Exh. 8.

³ GC Exh. 32 at 2, 4; see Tr. 449, et. seq.

and unpersuasive testimony that Pierre was responsible for preparing it and did not do so at Okoro’s direction, drawing an adverse inference from Okoro’s failure to call him as a witness.

5 In any event, Okoro's admitted willingness to have a document manufactured and then submitted to the Board as a genuine document in and of itself raises a bright red flag that he was not a trustworthy witness and raises a serious question about the integrity of other documents on which he rests his case.

10 Second, Okoro gave false information to the Region and offered unbelievable explanations for doing so. Thus, the Region has included in his position statement of November 24, 2014, a number of attachments, including two pages purporting to be summaries of EMTs’ dates of employment, pages 8 and 9.⁴ He testified that he did not prepare those two pages, could not recall ever seeing them before, had no idea of how they came into the Region’s possession, and made the preposterous suggestion that someone (presumably an employee of the Region) might have hacked into company records.⁵ Significantly, Okoro admitted that page 8 contains false information that Tanniesha Hall was hired on October 15, 2013, and Gregory McRae was hired on October 13, 2013, whereas the Company’s own records establish they were in fact hired in October 2014—after McLemore and only about a week before he was laid off.

20 Okoro repeated false information in a Board affidavit of December 12, 2014,⁶ by stating that Hall and McRae were hired shortly before McLemore. When asked about this error, Okoro offered the unbelievable explanation that he did not read the affidavit presented to him by Board Agent Benjamin Green but simply signed what Green presented to him. Okoro struck me as far too shrewd to have done this.

25 Shedding further doubt on Okoro’s credibility and the reliability of the documents that he presented was the incompleteness, inaccuracy, and/or misleading nature of some of the documents he submitted to the Region. For example, Okoro acknowledged that he sent in pages 5 and 6 of GC Exh. 31. He wrote the notation “laid off,” “quit,” or “medical leave” by a number of the EMTs who were employed in the period from August 1–November 14, 2014. However, he gave no dates. On the second page, he wrote in, “Some of those people quit because some of their schedules were cut from 5 to 4 days to 2 days.” Okoro claimed that when he returned from Nigeria on October 18, 2014, he implemented a layoff and a general reduction of hours for EMTs because of a major downturn in business. At no point did Okoro indicate that GMT had any layoffs of EMTs in 2014 prior to late October, and his submission to the Region thus clearly implied that at least some of the six employees who quit did so in or after late October 2014. However, after reviewing company records, Okoro stipulated that the last working days for two of the employees who quit were in August, two were in September, and one was on October 4, 2014 (the last day of work for the sixth employee is unknown).

40 Moreover, Okoro’s testimony was inconsistent in many respects with the Respondent’s earlier responses to the Region. As but just one example, when I asked how the four employees laid off in late October 2014 were selected for layoff, Okoro testified that McLemore was chosen

⁴ GC Exh. 31 at 8, 9.

⁵ Tr. 432, et. seq.

⁶ Tr. 422, et. seq. The affidavit was marked as GC Exh. 30 but not offered or admitted.

because of his limited availability, i.e., inability to work days other than Thursday, Friday, and Saturday.⁷ However, when Board Agent Green asked Okoro in a March 13 e-mail, “Do you remember what made you believe that Eric was less available than other EMTs?” Okoro’s answer was equivocal: “I don’t believe Eric ha[d] less availability. He gave us his availabilities which he stuck to. . . .”⁸

Additionally, the Respondent’s November 17, 2014 position statement included a statement by Pierre that “Eric was fairly new so he was one of the first to be effected [sic] by the cuts.”⁹ Pierre said nothing about McLemore’s availability. And, if lack of seniority was the reason for McLemore’s layoff, the Respondent offered no explanation of why Hall and McRae, who were hired after McLemore, were not laid off.

Finally, Okoro appeared evasive throughout his testimony and at times shifted his answers in an apparent effort to make them more favorable to his positions. For all of the above myriad of reasons and others set out in the facts section, I find that he was an unreliable witness, and I credit the General Counsel’s witnesses where their testimony conflicted with his.

Bowlyn, too, was an unreliable witness. She appeared noticeably nervous and ill at ease, and her depiction of the alleged deficiencies in Allen’s and Santos’ performance struck me as scripted, highly exaggerated, and unbelievable. Thus, she testified that Allen and Santos were the only two employees who had “serious” problems with tardiness.¹⁰ According to Bowlyn, the Respondent “always” had problems with Allen in her attendance and work, and she was “always” late to work.¹¹ Similarly, according to Bowlyn, Santos was “never, never on time,” and Bowlyn wrote her up most typically “every day” for lateness.¹² In fact, Bowlyn testified that Santos did not call in even if she arrived an hour or two late.

Both Allen and Santos were employees since 2012 and had their conduct been as outrageous as Bowlyn portrayed, it is inconceivable that they would not have been fired, or at least suspended, far earlier. I note that a summary of employee separations that the Respondent submitted to the Region lists Allen, Fraquada, and Santos as laid off in early January but has another employee “fired” on February 7.¹³

Moreover, Bowlyn testified that she issued written warnings to Allen, Fraquada, and Santos for tardiness or other derelictions, yet Okoro was unable to produce any such documents from the Company’s records, causing me to question whether they ever existed. Without a satisfactory explanation, the Respondent failed to provide documents that would reasonably be assumed to be favorable to its position (i.e., support Bowlyn’s testimony that she issued written warnings to Allen, Fraquada, and Santos). Therefore, I draw an adverse inference against the

⁷ Tr. 371.

⁸ GC Exh. 34.

⁹ GC Exh. 32 at 3.

¹⁰ Tr. 517, 518.

¹¹ Tr. 516.

¹² Ibid.

¹³ R. Exh. 6 at 1.

credibility of Bowlyn’s testimony on this matter. See *PCC Fabricators, Inc.*, 352 NLRB 701 fn. 5 (2008); *Martin Luther King Sr. Nursing Center*, 231 NLRB 15 fn. 1 (1977).

5 With regard to alleged warnings that Pierre issued to Allen, Fraquada, and Santos,¹⁴ the
General Counsel correctly took the position that they lacked authentication because none of the
alleged discriminatees testified that they saw any of them, and neither Pierre nor any persons
who purportedly were present as witnesses testified. However, as I stated, the Federal Rules of
Evidence are helpful guidance but are not required to be strictly applied in our proceedings. See,
10 e.g., *International Business Systems*, 258 NLRB 181, 181 fn. 6 (1981), enfd. mem. 659 F.2d 666
(3d Cir. 1981). I therefore overruled the General Counsel’s objection and admitted the
documents with the caveats that I would not necessarily afford them weight or draw any
inferences that they were in fact given to the discriminatees. In view of Okoro’s failure to call
Pierre, the unreliability of Okoro’s testimony and other documents that he submitted, his
admitted willingness to manufacture a document and provide it as genuine to the Region, and the
15 Respondent’s own evidence indicating that it considered Allen, Fraquada, and Santos to perform
satisfactorily, I give the warnings that Pierre purportedly issued no weight.

20 Assuming arguendo that Pierre did write them, they demonstrate such an extremely lax
policy toward lateness and other types of misconduct that any disciplinary policy was practically
a nullity. Indeed, Okoro admitted that “the truth is that we’re not really too strict on laying off
people.”¹⁵ Significantly, the record reflects no evidence that anyone was ever discharged or
suspended for misconduct with the exception of Santos’ testimony that Manager Bowlyn
received a suspension of possibly a week for a confrontation with Santos in September 2014.
Although Okoro called Bowlyn as a witness, he did not ask her any questions about such
25 incident, and she did not deny Santos’ testimony that she was suspended. Accordingly, I credit
Santos’ account.

30 Allen, Fraquada, and/or Santos may have received more warnings than they admitted at
trial, but I will not engage in conjecture in the absence of reliable evidence contradicting them.
In sum, I do not believe the assertions of the Respondent regarding alleged defects in their job
performance, and I credit them on the subject where their testimony conflicted with Okoro’s and
Bowlyn’s.

Facts

35 Based on the entire record, including testimony and my observations of witness
demeanor, documents, written and oral stipulations, and the thoughtful posttrial brief that the
General Counsel filed, I find the following.

The Respondent’s Business Operation

40 At all times material, the Respondent has been a limited liability company with an office
and place of business in Irvington, New Jersey (the facility or base of operations), engaged in
furnishing ambulances and mobility assistance vehicle transportation services. The Respondent

¹⁴ See R. Exh. 16 (the Respondent’s February 16 submission to the Region), which Pierre submitted after
discussion with Okoro. Tr. 471.

¹⁵ Tr. 221; see also Tr. 569.

has not contested Board jurisdiction as alleged in the complaint, and I find that such has been established.

5 At all times material, Okoro was the sole owner of GMT. Operations Manager Pierre was the highest-level supervisor and reported directly to Okoro. Office Manager Bowlyn reported directly to Pierre, and EMT Supervisor Hill reported directly to Pierre on most matters but to Bowlyn on some.

10 The Respondent has employed two categories of employees: EMTs, who transport stretcher patients, normally in an ambulance; and mobility assistance vehicle drivers (MAV-Ts), who transport patients with wheelchair-related disabilities in that type of vehicle. The EMTs go out on assignments in pairs (driver and nondriver).

15 As discussed above under credibility, Okoro conceded that the Respondent has had a lenient policy in terms of disciplining employees, and there is no evidence that any EMT was ever suspended or discharged for lateness or for any other reason, other than the notation in Respondent’s Exhibit 6 (at 1) that an EMT was fired on February 7 for an unspecified reason. The Company had a very loose policy regarding reporting time vis-à-vis the starting time of the shift; EMTs commonly came in late, sometimes up to 30 – 45 minutes.¹⁶

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Eric McLemore

25 McLemore worked as an EMT for GTS Ambulance Transportation, LLC (GTS) from late 2011 to mid-2013. After he left GTS, he formed the Union, of which he is the president. He organized the EMTs at GTS, and the Union was certified as their representative on August 14, 2014.¹⁷

30 In about September 2014, McLemore applied online for an EMT position. He followed up by calling Pierre, who interviewed him on September 15, 2014, and hired him on the spot. In the employee questionnaire that McLemore submitted,¹⁸ he listed his last employer, Nationwide, where he worked for a year. He did not mention GTS because there was no particular reason to do so. His omission of GTS was not a reason for his layoff.¹⁹

35 McLemore worked for GMT from September 15–October 22, 2014, when he was laid off. GMT had about 30 EMTs throughout his tenure, hiring two new EMTs after him: Taniesha Hall, whose first day of employment was October 15, 2014; and Gregory McRae, whose first day of employment was October 13, 2014. During the duration of his employment, McLemore observed no decrease in the number of patients that he and other EMTs picked up, and no managers or supervisors ever said anything about business slowing down.

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¹⁶ See GC Exh. 39, timecard records of Ashanti Smith from November 3, 2014—January 6, showing that he never arrived at 4:30 a.m. for his 4:30 a.m. shifts, rarely arrived by 4:40, and usually arrived around 4:45 and as late as 5:07.

¹⁷ GC Exhs. 4 – 6.

¹⁸ R. Exh. 1.

¹⁹ Tr. 494 (Okoro).

At the time of his hire, McLemore did not indicate any limitations in terms of his availability to work on various days of the week. Supervisor Hill assigned him Thursday from 4 a.m. – 4 p.m., Friday from 8 a.m. – 8 p.m., and Saturday from 4 a.m. – 4 p.m., as his regular schedule. He was never called to come in on other days to cover someone else’s shift or offered an opportunity to switch dates. He asked Hill about once or twice a week if he could have more hours. She replied that she would try to accommodate him and would get back to him.

McLemore’s calls consisted of basic life support (BLS) or medical calls, as opposed to emergency runs. They included dialysis runs; discharges from hospitals, nursing homes, or rehabilitation centers; or transportation to and from doctors’ appointments. His type of work, his hours, and his number of trips a day (averaging seven to eight) remained constant throughout the course of his employment.

While at GMT, McLemore talked to employees about his position with the Union and his union activities at GTS, and he handed out his business card.²⁰ On an afternoon in October 2014, he was in the parking lot having a telephone conversation with Board Agent Green concerning unfair labor practice charges that he had filed against GTS. As they were talking, McLemore noticed that Pierre was standing about three yards away, and he lowered his voice. After McLemore hung up, Pierre looked at him, said nothing, and went back into the building.

On about October 22, 2014, Pierre called him in the evening. He told McLemore that he had just had a meeting with Okoro, and they were going to lay off some employees, including McLemore. McLemore asked him approximately how many employees and vehicles they planned to cut. Pierre replied six EMTs and three vehicles (out of approximately 20). Pierre stated that they would call him back if work picked up but not to count on it. McLemore was scheduled to work the next day, but Pierre told him not to come in.

On October 30, 2014, McLemore went to the office to get his final paycheck. He saw Bowlyn, who said that he would not receive the paycheck until he returned his uniform, which he did not have with him. He told her that was illegal.

McLemore returned the next morning and turned in his uniform to Bowlyn. When he approached her, he noticed that his union business card was on her desk.²¹ She looked at him and moved a piece of paper over it. She handed him a termination letter that stated, “Not enough work for employee to have hours,”²² and repeatedly asked him to sign it. He refused. Bowlyn said that she was calling Okoro, made a phone call, and told him to wait a few minutes.

Okoro arrived about 10 minutes later. He took McLemore to the break room and pulled out two chairs. In what became a heated exchange, Okoro kept asking McLemore to sign the document and, when McLemore refused, said, “You think I don’t know who you are? I know

²⁰ GC Exh. 7.

²¹ As noted, Bowlyn did not testify at all about this meeting and therefore did not deny having his union business card in her possession at the time.

²² GC Exh. 8.

who you are.”²³ McLemore asked what he meant, but Okoro did not respond, and the conversation ended with Okoro saying that it was fine if McLemore did not want to sign.

5 In November 2014, Fara Gonzalez, had two conversations with Pierre, whom she had known since 2010. I credit her unrebutted accounts as follows.²⁴

10 In the early part of the month, Gonzalez, who worked for GTS at the time, and Pierre were in front of a dialysis center in the early afternoon. She asked Pierre if she could apply to work for GMT as a per diem. He said sure, just put in an application, and he would call her. Gonzalez said that she had a question about what had happened to McLemore; whether he was fired or laid off. Pierre replied that he “really couldn’t get into that. I was just doing my job. I don’t know what’s going on.” Gonzalez asked if it was because of the Union at GTS. Pierre said, “No. I don’t know what to say. I just did what I was told.” She then asked if McLemore was let go because of lack of patients. He said no.

15

In about the middle of the month, they had a second conversation, again at a worksite. Pierre asked her why she had not submitted an application, and she explained her reasons. Gonzalez has never worked for GMT.

20

The Respondent’s Defense

25 Okoro has claimed that he was in Nigeria when Pierre hired Hall, McLemore, and McRae and that he was surprised to learn this when he returned on October 18, 2014. Further, according to Okoro, Pierre had no knowledge when he hired Hall, McLemore, and McRae that GMT had lost clients and was in an economic downturn. Okoro asserts that immediately upon his return, he instructed Pierre to make immediate cuts in EMTs’ hours.

30 Okoro was very vague about the alleged downturn in business. According to his position statement of November 17, 2014 (GC Exh. 32), the Respondent lost clients at the end of September 2014. However, neither during the investigation nor before me did Okoro name such clients or provide any details on what dates their loss of business became effective, when he first learned they would no longer be clients, or how much of GMT’s revenues they represented. He produced no documents or corroborating witnesses to substantiate his claim that McLemore and three other employees were laid off in October 2014 because of loss of business, or to explain the urgency of laying them off only 4 days after his return from Africa.

35

Union Organizing after McLemore’s Layoff

40 After McLemore’s layoff, he continued to pursue organizing EMTs at GMT. His primary employee organizer was Veronica Fraquada. In about early November 2014, he furnished her with blank showing of interest forms,²⁵ and she returned a number of them signed about a week later.

²³ Tr. 50. I credit McLemore’s account over Okoro’s and specifically discredit Okoro’s testimony that McLemore admitted that he knew the volume of work had decreased.

²⁴ Tr. 131–133.

²⁵ See GC Exh. 9.

On November 12, 2014, the Union, by McLemore, filed a petition in Case 22–RC–140821, to represent a unit of all of GMT’s full-time and regular part-time EMTs, excluding all office clerical employees, guards, professional employees, supervisors as defined in the Act, and all other employees.²⁶ Pursuant to a stipulated election agreement, an election was conducted on December 11, 2014, resulting in 10 votes cast for the Union, 5 against, 4 challenges, and 1 void ballot.²⁷ The Respondent filed timely objections, and on January 16, the Acting Regional Director issued a report on objections recommending that all of the objections be overruled and that a certification issue.²⁸ The Respondent did not file timely exceptions to that report, and the Board on February 9 issued a decision and certification of representative.²⁹

The 2015 Layoffs

A large majority of the 29 EMTs who were employed as of January 1 were laid off in January–March. The Respondent asserts that these layoffs were economically necessary. Specifically, in approximately mid-December 2014, Medicare announced a change in its policies for paying for EMT transportation for patients, and ceased making payments for such starting with payments due on about January 1. The General Counsel had the opportunity to review the Medicare denial letters that the Respondent produced and does not dispute GMT’s assertion that the change in Medicare policies had a major impact on the Company’s need for EMTs. In early January, the Company sold five vehicles for \$75,000.³⁰

R. Exh. 6 at 1 contains a list of the Company’s 29 EMTs as of early January and, if applicable, their last working days as of March 26. In reviewing underlying documents, the General Counsel found that the summary was inaccurate as to two employees, whose payroll records Okoro agreed to add to his exhibit. Thus, Esther Eugene is listed as working 1 day a week, but payroll records show that she worked three shifts through February 28, and one shift a week as a per diem until June 20; and although Wlasmith Diejuste’s last day is given as January 7, he worked as a per diem through April 4.

As so modified, the exhibit shows that Samone Allen, Veronica Fraquada, and Jessica Santos were the first EMTs to be laid off, with their last day of employment given as January 7 or 8, even though many EMTs had less seniority than Allen and Santos. The Respondent did not lay off the next three employees until the end of January. The Respondent continued to employ several EMTs on a part-time or per diem basis until June 20.

Samone Allen

Allen started working as an EMT on February 3, 2012. She was regularly scheduled for Tuesday–Thursday, 8:30 a.m.–8:30 p.m. (36 hours). Hill was generally her dispatcher. I credit Allen’s un rebutted testimony that Hill usually arrived after 8:45 a.m., close to 9 a.m.; that EMTs

²⁶ GC Exh. 10.
²⁷ GC Exh. 12.
²⁸ GC Exh. 13.
²⁹ GC Exh. 14.
³⁰ R. Exh. 7(a) and (b).

would normally get their assignments around 9:30 a.m. for pickups at 10 a.m.; and that no one showed up at 8:30 a.m.

Allen testified that at the start of her employment, she had trouble getting in on time but always called and showed up. She received one written warning for lateness, issued by Pierre on May 9, 2012.³¹ It was supposed to be a verbal, but he put in writing. She testified that she received no other warnings for lateness, either oral or written, and although her testimony about an early problem with tardiness might be contraindicative, the Respondent provided no reliable evidence to rebut her.

During the organizing campaign, Fraquada gave Allen authorization cards, which she distributed to other employees. She herself signed one.³² She also spoke in favor of the Union to employees in the parking lot and on breaks at a dialysis center.

I credit Allen’s account over Okoro’s on what was said in their conversation on the late morning of about January 6.³³ Allen was on break on the first floor when Okoro approached her about being late that day. He told her “things were going to change now that I voted the Union in” and that she could not continuing coming in late. Allen said okay. Okoro also stated that the employees should have come to him with any issues that they had instead of voting in the Union.

About 3 days later, Pierre notified Allen by text that she needed to call him. She did so immediately. He told her that they were going to lay her off and, if she wanted, she could reapply later on. They would review her application and get back to her if they had any open position. She asked him about seniority, but he did not answer. Instead, he repeated that she could reapply. She asked why she had to reapply, but he did not respond.

Jessica Santos

Santos started as an EMT on July 23, 2012, when she was still a student. After she graduated from college in approximately the summer of 2013, her hours changed because she had more availability. Her regularly scheduled days became Wednesday, starting at 4 a.m., then at 8 a.m.; Thursday, starting at 8 a.m.; and Saturday, starting at 8:30 a.m. Sometimes, she was assigned extra shifts on Fridays or Mondays. In late October 2014 (at around the time that McLemore was laid off), she was asked to work more Fridays. Her working hours were supposed to be 11 daily, but sometimes she left earlier or later, usually later.

Hill was her normal dispatcher. Santos normally arrived at about 8:45 a.m. for the 8:30 a.m. shift, since the first run was usually about 9:30 – 10 a.m. for her and other EMTs. Santos testified that she was never accused of being a no call/no show and that neither Pierre nor supervisors ever talked to her about problems with her performance.

³¹ GC Exh. 25.

³² GC Exh. 24.

³³ Tr. 207, 208.

Fraquada gave her a showing of interest card that she signed on November 8, 2014.³⁴ On December 11, 2014, she voted in the election, which was held in the old dispatcher’s room on the second floor at the facility. Afterward, she went into the dispatchers’ room next door to pick up her equipment and find out who her partner was. I credit Santos’ un rebutted account of the following conversation.³⁵

EMT Supervisor Hill asked her to come in and to close the door behind her because she (Hill) was not allowed to see the election process. Santos went inside. Manager Bowlyn was also present. Hill said, “[S]o you voted?” Santos replied yes, and Hill said, “[S]o you voted for the Union?” Santos answered yes, hadn’t Hill? Hill responded no, that she was office personnel and not included. Santos asked about the MAV-Ts, and Hill said no, the election was only for EMTs. Hill then stated, “I don’t get why you guys are doing it; this is stupid.”

On about January 9, Pierre called Santos in the late afternoon and told her that she was laid off and not to report tomorrow as scheduled. He said that if she had any questions, she could ask them on Monday when she came in to get a layoff letter.

The following Monday, she went in, and Pierre gave her a letter stating that she was laid off because the Company was “downsizing due to lack of work.”³⁶ He stated that things were just a little slow but she could reapply when work picked up again.

Veronica Fraquada

Fraquada’s started as an EMT on May 14, 2014. Her regular shift was Monday, Wednesday, and Friday, from 8 a.m. to 8 p.m. She was on call on Thursdays, sometimes on Tuesdays, and she picked up extra hours on Fridays.

Prior to October 23, 2014, Hill offered Fraquada 4 to 8 p.m. Thursdays. On about October 23, 2014, when Fraquada learned of McLemore’s layoff, she went to see Pierre in the supervisor’s office and asked if she could have McLemore’s 8 a.m. to 8 p.m. Thursday shift. Pierre replied that he had hired a new employee named Greg (McRae) who would have that shift.

Fraquada discussed union organizing with McLemore, and she and Allen distributed authorization cards to other employees. They obtained about 20–25 signatures. Fraquada herself signed one.³⁷

On December 10, the day before the election, at the end of Fraquada’s shift (at about 8:30 p.m.), she was in the supervisors’ office when Okoro stated that he wanted to talk to her and her partner. Pierre was also present. Okoro and Pierre discussed the upcoming election.

Okoro and Fraquada then had a side conversation between themselves. Okoro said that he wanted her to tell everybody to come and vote. She responded that she did not have to work

³⁴ GC Exh. 22.

³⁵ Tr. 157.

³⁶ GC Exh. 23.

³⁷ GC Exh. 28.

that day. He replied that she should still come in and vote and invite everybody to vote. She said okay.

5 During their conversation, Okoro asked her, “[D]o you know anybody who’s trying to bring in the Union?”³⁸ She replied no, and he then asked, “Well, how are you going to vote?”³⁹ Fraquada replied that she was for the Union and wanted the Union to come in.

10 Okoro questioned her on why the employees wanted to bring in the Union. Fraquada told him that the employees had issues and brought them up to the supervisors and managers, but nothing had changed. Okoro stated that if the employees had problems with the Company or with patients to come see him or Pierre. He asked, “[D]o you know anybody who is trying to destroy the Company and has issues with me. . . .?”⁴⁰

15 Pierre called Fraquada on about January 9. He told her not to report to work the following day because she was laid off and he was preparing a reference letter for her that she could pick up. Fraquada asked why she was being laid off. Pierre replied that he could not give her that information but said that the managers had a meeting and her name was brought up.

20 The Respondent’s Defense as to Allen, Fraquada, and Santos

The Respondent has contended that Allen, Fraquada, and Santos were selected for the first layoffs because of their alleged performance problems, as follows.

25 In his answer, Okoro stated, “Miss Allen was among the first to be laid off because of her inability to get to work on time and sometimes no call/no show record. Miss Allen is also very disrespectful to the clients, dispatchers, and I[sic].” He further stated, “Employees like Miss Allen has[sic] given us a lot of reasons to fire her, but I allowed her to stay because I need[ed] employees to do to the work.”

30 In the Respondent’s February 6 submission to the Region (R. Exh. 16), Pierre stated on the cover page that Fraquada “had problems with clients we were transporting,” specifically mentioning patients Grace McGrath and Patricia McLeod. No supporting documentation was included.

35 On December 10, 2014, Fraquada admittedly had a problem with McLeod, who did not want to be handled by female EMTs. Fraquada complained to Pierre, who encouraged her to write a report and said that he would try not to send her back to McLeod. However, the dispatchers continued to do so, and McLeod’s antagonism continued. Fraquada further admitted on cross-examination that also in December, she “slipped up” and made an inappropriate remark
40 to a patient by the name of Jean Pierre, who got upset when she was on the phone. She apologized to him and told this to Manager Pierre, after the patient apparently complained.

³⁸ Tr. 286.

³⁹ Ibid.

⁴⁰ Ibid.

The record is devoid of any evidence that Fraquada received any warnings, oral or written, for her conduct with McGrath, McLeod, or Jean Pierre, or for any other reason.

5 Okoro stated in his answer that Santos was “among the first to be laid off because of her inability to get to work on time and sometimes no call/no show record.” He also stated, “Miss Santos has given us a lot of reasons to fire her, but she works the Saturday shifts when and if she comes.” In his testimony, Okoro came up with another purported reason—that she had problems with the dispatchers.⁴¹

10 Accordingly, I will cover two incidents to which Santos testified without controversion.⁴² On a date in or before the summer of 2014, Santos was in the parking lot when Bowlyn’s husband or ex-husband yelled at her to move her car so that he could park in her space. He called Bowlyn, who came downstairs and confronted Santos in the hallway near the punch-out clock. Bowlyn cursed at her and had to be restrained by Fenelus and two other men. No one
15 ever later brought up the incident to Santos.

In the summer of 2014, after Santos finished her shift, she left her equipment on the table in the dispatchers’ office because Bowlyn was busy at the computer. She then went downstairs to punch out. Bowlyn followed her and shouted at her about leaving the equipment. Santos
20 admittedly shouted back. The confrontation got physical, and Supervisor Fenelus had to separate them. Following the incident, Santos received no discipline, but Bowlyn was suspended for about a week. Okoro specifically represented that this incident was not a factor in Santos’ termination,⁴³ and neither he nor Bowlyn cited any specific examples that would support a finding that Santos had serious problems with the dispatchers.

25

Failure to Bargain over the Layoffs–Decision and Effects

By e-mail of December 13, 2014, McLemore advised Okoro that the Union now represented a unit of EMTs, and he requested various types of information for bargaining.⁴⁴
30 Okoro did not respond, and by e-mail of January 20, McLemore reiterated that the Union represented a unit of EMTs and repeated the information requests.⁴⁵ This time, he attached Okoro’s objections and the Acting Director’s report thereon.

On about January 9, Fraquada informed McLemore that she and two or three other
35 women EMTs had been laid off. McLemore had received no prior notice of this from the Respondent. By an e-mail of January 20 to Okoro, McLemore demanded to bargain over those layoffs.⁴⁶ McLemore also spoke with Okoro by telephone that day. He asked if Okoro had received his January 20 e-mails. Okoro replied that he intended to file an appeal on the report on objections and did not have to meet with the Union on the layoffs or for anything else.
40 McLemore responded that Okoro did have a bargaining obligation because layoffs were a

⁴¹ Tr.369.
⁴² Tr. 162, et. seq.
⁴³ Tr. 165.
⁴⁴ GC Exh. 15.
⁴⁵ GC Exh. 17.
⁴⁶ GC Exh. 16.

mandatory subject of bargaining, but Okoro repeated his position. During their conversation, McLemore also brought up the subject of setting up an initial bargaining session to establish ground rules for negotiations.

5 After receiving the Board’s certification of February 9, McLemore sent a February 12 e-mail to Okoro, once more repeating the Union’s status as representative and again requesting certain documents.⁴⁷ This time, Okoro responded by e-mail on February 13, attaching several documents.⁴⁸ They agreed to meet on February 16 for an initial bargaining session.

10 On February 16, Okoro and McLemore met for about an hour at the Respondent’s base of operations, where all later bargaining sessions were also held. They discussed the layoffs for approximately 20 minutes. McLemore stated that Okoro’s layoff of employees without negotiations was illegal, to which Okoro responded that it was his company and he had the sole authority over the layoffs. McLemore’s testimony about what they said concerning layoffs was
15 consistent with his bargaining notes on the subject (see GC Exh. 19).

 After the meeting, McLemore followed up with a February 23 e-mail, requesting information regarding the layoffs and any recalls.⁴⁹ Okoro replied by e-mail the same day, providing certain information and attaching certain documents (not included in the exhibit).⁵⁰

20 Further bargaining sessions occurred on April 3, May 1, and June 12. Kerneel Stewart, the Union’s vice president, attended the first and third of those meetings.

 McLemore and Stewart were consistent in their testimony of what was said on layoffs at
25 those meetings, and their testimony was consistent with Stewart’s bargaining notes for the April 3 and June 12 meetings, and McLemore’s notes for the May 1 meeting.⁵¹

 The discussions about layoffs varied little from meeting to meeting. McLemore proposed various methods of handling layoffs and recalls, suggesting that layoffs should have been done in
30 order of seniority and could have been avoided through time-sharing, having all workers part-time, or an across-the-board reduction in wage rates or hours. He also suggested that recall be by seniority. Okoro said no to these suggestions, stating that it was his company.

 Okoro does not deny that he failed to give the Union prior notice of the layoffs and an
35 opportunity to bargain over the decision and its effects. The Respondent’s answer asserts that the Respondent had no obligation to bargain over layoffs until the Union was certified on February 9.

⁴⁷ GC Exh. 18.

⁴⁸ Ibid.

⁴⁹ GC Exh. 20.

⁵⁰ Ibid.

⁵¹ See GC Exhs. 21, 26, and 27.

Nonbargaining Unit Employees Performing Bargaining Unit Work

At the April 3 meeting, McLemore asked for a list of current employees, and Okoro’s response indicated that Okoro, Manager Pierre, and Supervisor Fenelus were performing bargaining unit work. McLemore stated that Okoro could not delegate bargaining unit work to nonbargaining unit employees, including himself, but Okoro responded that was cost effective and would continue.

Okoro does not deny that he, Pierre, and Fenelus have engaged in bargaining unit work since the layoffs. In fact, he testified that as of September 17, all three of them were continuing to perform EMT work on an as-needed basis.⁵²

Analysis and Conclusions

The 8(a)(1) Statements

December 10, 2014—Okoro

On December 10, 2014, the day before the election, Okoro took Fraquada aside in the supervisor’s office. He asked her who was trying to bring in the Union, how she was going to vote, and why the employees wanted a union. He also asked, “Do you know anybody who is trying to destroy the Company and has issues with me. . . .?” He further told her that if the employees had problems with the Company or patients, to come see him or Pierre.

The test for determining whether questioning of an employee violates Section 8(a)(1) of the Act is whether it would reasonably tend to coerce employees in the exercise of their Section 7 rights. *Grand Canyon University*, 362 NLRB No. 13 slip op. 1 (2015), citing *Hanes Hoisery, Inc.*, 219 NLRB 338, 338 (1975). Circumstances considered in evaluating the tendency to interfere include the (1) background, (2) the nature of the information sought, (3) the identity of the questioner, and (4) the place and method of the interrogation. *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985); *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984).

Here, Owner Okoro, a day before the election, took Fraquada aside in the supervisors’ office and flat-out questioned her about her and other employees’ union sympathies and activities. I conclude that this amounted to coercive interrogation in violation of Section 8(a)(1).

As to Okoro’s solicitation of employees’ grievances and complaints, the Board stated in *Traction Wholesale Center Co.*, 328 NLRB 1058, 1058 (1999), citing *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), enfd. 457 F.2d 503 (6th Cir. 1972):

When an employer undertakes to solicit employee grievances during an organizational campaign, there is a “compelling inference,” which the Board can make, that the employer is implicitly promise to correct the grievances and thereby influence employees to vote against union representation. Such conduct violates the Act.

⁵² Tr. 487, 584.

Moreover, in connection with the solicitation of grievances, a statement indicating that the employer is “looking into” making changes desired by employees indicates that action is being contemplated and constitutes an implied promise of improvements. *Purple Communications*, supra, 361 NLRB No. 43 at slip op. at 4 (2014).

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This inference is “particularly compelling” when, prior to the union’s organizing campaign, the employer has not had a previous practice of soliciting grievances. *Garda CL Great Lakes, Inc.*, 359 NLRB No. 148, slip op. at 1 (2013), citing *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004), enfd. 165 Fed. App. 435 (6th Cir. 2006). The record contains no evidence that prior to the Union’s organizing campaign, the Respondent ever engaged in a practice of soliciting employee grievances or complaints. Indeed, the conversation in question occurred only a day before the scheduled election.

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I therefore conclude that Okoro, on December 10, 2014, violated Section 8(a)(1) by unlawfully soliciting employee grievances and complaints, and by implicitly promising improved terms and conditions of employment if the employees voted against union representation.

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December 11, 2014—Hill

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On December 11, 2014, the day of the election, Supervisor Hill called Santos into the office, where Manager Bowlyn was present, and told Santos to close the door behind her. Hill then asked Santos if she had voted for the Union. In the circumstances, I conclude that this constituted a coercive interrogation in violation of Section 8(a)(1). See the cases cited above. Bowlyn was merely present and did not make any statements, so the violation is limited to Hill.

25

On about January 6—Okoro

On about January 6, Okoro told Allen that “things were going to change” now that she voted in the Union and that she could not continue coming in late. This amounted to a threat of both stricter enforcement of work rules and of unspecified reprisals because of what he perceived to be her vote in favor of union representation. As such, I conclude that his statements were coercive and violated Section 8(a)(1). See *DHL Express, Inc.*, 355, NLRB 1399, 1402–1405 (2010) (statement that tardiness policy would be more strictly enforced if union prevailed in upcoming election); *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074, 1084 (2004); *Atlas Logistics Group Retail Services (Phoenix) LLC*, 357 NLRB 353, 353 fn. 2 (2011) (statement that “there would be problems” was a threat of unspecified reprisals).

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Layoffs of McLemore, Allen, Fraquada, and Santos

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

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engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

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

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

McLemore

McLemore was involved in union organizing efforts at GTS, his earlier employer, and initiated organizing at GMT after he began employment in September 2014. Bowlyn’s possession of his union business card by October 31, 2014, 9 days after he was notified of his layoff, leads to the inference that the Respondent had knowledge prior to his layoff that he was a union official. Pierre’s apparent overhearing of McLemore’s phone conversation with Board Agent Green earlier that month concerning union unfair labor charges against GTS also suggests that the Respondent had knowledge of McLemore’s union activities. Express animus is reflected in Okoro’s threats to Allen on about January 6, 2015, as well as his interrogation of Fraquada on December 10—1 day before the election—regarding her and other employees’ union sympathies and activities, his solicitation of grievances, and his implied promise of benefits. McLemore was laid off on October 22.

Based on the above, I conclude that the General Counsel has made out a prima facie case that McLemore’s layoff was unlawful. The burden of persuasion therefore shifts to the Respondent.

Okoro asserted that when he returned from Nigeria on October 18, he immediately directed reductions in EMT staffing because of loss of customers. His claim that he was ignorant of Pierre’s hiring of McLemore in September and of Hall and McRae in October, and that Pierre was wholly unaware of the Company’s financial situation at the time, defies believability,

particularly in this age of instantaneous global communication. As I noted, Okoro provided no specifics of alleged loss of business, such as which customers he lost, when he lost them, and what percentage of his revenues they represented. Moreover, Pierre’s statements to Gonzalez shortly after McLemore was laid off contradict Okoro’s claim that McLemore’s layoff was due to economic reasons. Thus, Pierre denied to Gonzalez that work was slow and even encouraged her to apply for a position as a per diem EMT.

I will give the Respondent the benefit of the doubt and treat this as a dual motivation situation rather than one of pretext. Nevertheless, even if the Respondent had provided evidence of bona fide economic reasons for the October layoffs, it has not established a satisfactory reason for why McLemore was chosen to be one of the four EMTs to be laid off. As noted in the credibility section, the Respondent provided shifting reasons for why McLemore was selected. If it was lack of seniority, as Pierre contended in the Respondent’s position statement of November 17, 2014, then the Respondent offered no explanation for why Hall and McRae were retained even though they were hired after McLemore. As for the other alleged reason that Okoro proffered, McLemore’s unavailability to work days other than Thursday, Friday, and Saturday, Okoro had no firsthand knowledge of this, and he equivocated in his March 13 e-mail to the Region about whether McLemore’s unavailability was a factor in selecting him for layoff. I credit McLemore’s un rebutted testimony that he never told Pierre that he could not work other days, as well as his un rebutted testimony that he asked Hill approximately once or twice a week for more hours.

Therefore, the Respondent has not shown that McLemore was laid off on October 22, 2014, for permissible reasons. See *Palace Sports & Entertainment, Inc.*, supra. Accordingly, his layoff violated Section 8(a)(3) and (1) of the Act.

Allen, Fraquada, and Santos

Allen distributed authorization cards to other employees and spoke to them in favor of the Union. Okoro’s statement to her on about January 6 that things were going to change now that she voted in the Union establishes knowledge. Okoro then threatened her with stricter enforcement of tardiness policies and said that employees should have come to him with any issues instead of voting in the Union. This satisfies the animus element. Allen was laid off on about January 9.

Fraquada discussed union organizing with McLemore, and she and Allen distributed authorization cards to other employees. The day before the election, Okoro asked Fraquada how she was going to vote, and she replied that she was for the Union and wanted representation. Thus, the element of knowledge is established. After she responded, Okoro questioned her on why employees wanted to bring in the Union, told her that employees with problems should come to him or Pierre, and asked her if she knew anybody who was “trying to destroy the Company” I find animus established by these statements, as well as Okoro’s threats to Allen. Fraquada was laid off on about January 9.

Santos signed an authorization card. Almost immediately after Santos voted on December 11, 2014, Hill asked her if she voted for the Union, and Santos said yes. Knowledge

is therefore established. Hill further stated that the employees were stupid for trying to organize. This and Okoro’s statements to Allen and Fraquada establish the element of animus. Santos was laid off on about January 9.

5 Based on the above, I conclude that the General Counsel has established a prima facie case that Allen, Fraquada, and Santos were unlawfully laid off, and the burden of persuasion shifts to the Respondent.

10 The thrust of the Respondent’s defense is that effective in approximately mid-December 2014, Medicare stopped paying for most of the patients that its EMTs transported, resulting in the large majority of EMTs being laid off in January–March. The General Counsel had the opportunity to review the Medicare denial letters and has not asserted that the Respondent’s claim of substantial loss of revenue was bogus.

15 However, the real issue here is not whether Allen, Fraquada, and Santos would likely have been laid off at some point in January–March for valid economic reasons but why they were chosen collectively to be the first layoffs in 2015.

20 Even though Allen and Santos had been employed since 2012 and were among the EMTs with the most seniority, the Respondent has claimed that they and Fraquada were “among the first to be laid off” because of alleged derelictions in their performance: Allen because of her tardiness and disrespect to clients, dispatchers, and Okoro; Fraquada because of problems with clients; and Santos because of tardiness and/or problems with dispatchers.

25 I will not regurgitate here all of the multitude of reasons why the Respondent’s defenses fail. In sum, the Respondent produced no reliable documentation or firsthand witness testimony to establish that Allen, Fraquada, or Santos had performance issues or that any other bona fide reasons existed that justified their being selected to be the first three 2015 layoffs.

30 Therefore, I conclude that the Respondent has not shown that it would have laid off these three employees on about January 9 but for their union sympathies and/or activities. Accordingly, their layoffs violated Section 8(a)(3) and (1).

The January–March Layoffs as 8(a)(5) Violations

35 The Respondent’s sole asserted basis for the layoffs is economic—the loss of revenues due to changes in Medicare reimbursement policies. When an employer decides to lay off employees for “economic reasons” rather than due to a change in the scope of its operations, e.g., complete cessation of business or closure of a particular facility, such a layoff decision is a mandatory subject of bargaining. *Pan American Grain Co.*, 351 NLRB 1412, 1412 (2007), enfd. 558 F.3d 22 (1st Cir. 2009); *Adair Standish Corp.*, 290 NLRB 317, 319 (1988), enfd. in relevant part 912 F.2d 954 (6th Cir. 1990). Therefore, the employer is obliged to provide a collective-bargaining representative with notice and an opportunity to bargain both over the decision and its effects. *Pan American Grain Co.*, *ibid*; *Toma Metals, Inc.*, 342 NLRB 787, 787 fn. 1 (2004);
 45 *McClain E-Z Pack, Inc.*, 342 NLRB 337 (2004).

The Respondent admittedly failed to give the Union prior notice of the layoffs or the opportunity to bargain over the decision and its effects on unit employees. In this regard, the Respondent has contended that it had no obligation to bargain until the Union was certified on February 9. This is wrong as a matter of law because it is well settled that an employer acts at its
 5 peril when, absent compelling economic circumstances, it makes changes in terms and conditions of employment during the period that its objections to an election are pending. *Virginia Concrete Corp.*, 338 NLRB 1181 (2003); *W.A. Krueger Co.*, 1325 NLRB 1225, 1226 (1990); *Mike O’Connor Chevrolet-Buick-GMC Co.*, 209 NLRB 701,703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975). Therefore, if an employer implements layoffs and
 10 changes in work schedules during this period without bargaining over them with the labor organization, it will be held to have violated the Act if the Board later certifies the labor organization. *Krueger Co.*, *ibid*; *Mike O’Connor Chevrolet*, *ibid*.

The Respondent was aware in approximately mid-December 2014 of Medicare’s change
 15 in reimbursement policy and had ample opportunity to bargain with the Union over the 2015 layoffs. Okoro therefore has not established any “compelling economic circumstances” that would have justified his failure to bargain over them. Moreover, the credited testimony of McLemore and Stewart demonstrates that he failed to bargain over the layoffs even after
 20 February 9.

Accordingly, I conclude that the Respondent violated Section 8(a)(5) and (1) by laying
 off employees without providing the Union prior notice and the opportunity to bargain over the decision and its effects.

25 Use of Management to Performing Bargaining Unit Work

Assignment of work is a mandatory subject of bargaining. *WCCO-TV*, 362 NLRB No. 101, slip op. at 2 (2015); *Regal Cinemas, Inc.*, 334 NLRB 304, 304, enf. 317 F.3d 300 (D.C. Cir. 2003) (2001). Thus, an employer violates the Act by reassigning work performed by
 30 bargaining unit employees to supervisors or other individuals outside the unit without providing the collective-bargaining representative notice and an opportunity to bargain. *St. George Warehouse, Inc.*, 341 NLRB 904, 905–906, 924 (2004), enf. 420 F.3d 294 (3d Cir. 2005); *Stevens International*, 337 NLRB 143 (2001); *Regal Cinemas, Inc.*, above. This obligation is not lessened because the transfer is motivated by economic considerations. *Talbert Mfg., Inc.*, 264
 35 NLRB 1051, 1056 (1982).

The Respondent does not dispute that in 2015 it used and has continued to use Okoro, former Operations Manager Pierre, and former Field Supervisor Fenelus to perform work that
 40 was previously performed by unit EMTs.

Accordingly, I conclude that the Respondent violated Section 8(a)(5) and (1) by transferring bargaining unit work to Owner Okoro and other nonbargaining unit employees without providing the Union with notice and an opportunity to bargain.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(11) of the Act.

10 3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act.

(a) Laid off Eric McLemore on October 22, 2014.

15 (b) Laid off Samone Allen, Veronica Fraquada, and Jessica Santos on about January 9, 2015.

20 4. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act.

(a) Laid off Allen, Fraquada, and Santos, and other bargaining unit employees without providing the Union with notice and an opportunity to bargain over the decision and its effects.

25 (b) Transferred bargaining unit work to Owner Charles Okoro and other nonbargaining unit employees without providing the Union with notice and an opportunity to bargain over the decision and its effects.

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

(a) Interrogated employees about their and other employees' union activities and sympathies.

35 (b) Solicited an employee's grievances and made implicit promises of benefits if the employees rejected unionization.

(c) Threatened an employee with stricter enforcement of work rules and unspecified reprisals because she voted for unionization.

40 REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

45 Specifically, the Respondent shall offer Samone Allen, Veronica Fraquada, Eric McLemore, and Jessica Santos reinstatement and make them whole for any losses, earnings, and

other benefits that they suffered as a result of their unlawful layoffs. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

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The Respondent shall also offer reinstatement to other unit employees who were laid off and make them whole for any loss of earnings or other benefits, as set out in the preceding paragraph. See *Santa Barbara News-Press*, 362 NRB No. 26 (2015); *Eugene Iovine, Inc.*, 353 NLRB 400 (2008).

10

The Respondent shall compensate all employees who are the subject of this order for any adverse tax consequences of receiving lump-sum backpay awards and shall file a report with the Social Security Administration allocating the backpay to the appropriate calendar quarters. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

15

To the extent that the Respondent may have less EMT work than it had prior to January, this is a matter for consideration at the compliance stage.

20 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵³

ORDER

25 The Respondent, Grand Medical Transportation, LLC, Irvington, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

30 (a) Laying off or otherwise discriminating against employees for engaging in activities on behalf of Med-Life M&M (the Union) or any other labor organization.

(b) Laying off employees for economic reasons without providing the Union with notice and an opportunity to bargain over the decision and its effects.

35 (c) Transferring bargaining unit work to nonbargaining unit employees without providing the Union with notice and an opportunity to bargain over the decision and its effects.

40 (d) Interrogating employees about their and other employees' union activities and sympathies.

(e) Threatening employees with stricter enforcement of work rules or unspecified reprisals because they voted for union representation.

⁵³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(f) Soliciting employee grievances and problems and making implied promises of benefits if employees reject unionization.

5 (g) 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.

10

(a) Within 14 days from the date of the Board’s Order, offer Samone Allen, Veronica Fraquada, Eric McLemore, and Jessica Santos reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

15

(b) Make Samone Allen, Veronica Fraquada, Eric McLemore, and Jessica Santos whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

20

(c) Compensate Samone Allen, Veronica Fraquada, Eric McLemore, and Jessica Santos for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and submit the appropriate documentation to the Social Security Administration so that when backpay is paid to them, it will be allocated to the appropriate calendar quarters.

25

(d) Within 14 days from the date of the Board’s Order, remove from its files any reference to the unlawful layoffs of Samone Allen, Veronica Fraquada, Eric McLemore, and Jessica Santos, and within 3 days thereafter notify the in writing that this has been done and that the layoffs will not be used against them in any way.

30

(e) Within 14 days of the Board’s Order, offer other employees who were laid off in 2015 reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights previously enjoyed.

35

(f) Make such employees whole for any loss of earnings and other benefits suffered as a result of their layoffs, in the manner set forth in the remedy section of the decision.

40

(g) Compensate such employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and submit the appropriate documentation to the Social Security Administration so that when backpay is paid to them, it will be allocated to the appropriate calendar quarters.

45

(h) At the Union’s request, bargain over the decision to lay off bargaining unit employees in 2015, and its effects.

(i) At the Union's request, bargain over the decision to use nonbargaining unit employees to perform bargaining unit work in 2015, and its effects.

5 (j) 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.

10 (k) Within 14 days after service by the Region, post at its facility in Irvington, New Jersey, copies of the attached notice marked "Appendix."⁵⁴ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet set, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 22, 2014.

25 (l) 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.

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

Dated, Washington, D.C. December 2, 2015

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Ira Sandron
Administrative Law Judge

⁵⁴ 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.

Med-Life M&M (the Union) is the collective-bargaining representative of our full-time and regular part-time EMTs (the bargaining unit).

WE WILL NOT lay you off or otherwise discriminate against you because you engage in activities in support of the Union or any other labor organization.

WE WILL NOT lay you off without affording the Union notice and an opportunity to bargain over the decision and its effects.

WE WILL NOT transfer bargaining unit work to nonbargaining unit employees without affording the Union notice and an opportunity to bargain over the decision and its effects.

WE WILL NOT interrogate you about your or other employees' union activities and sympathies.

WE WILL NOT threaten you with stricter enforcement or work rules or unspecified reprisals because of your support for the Union.

WE WILL NOT solicit your grievances and make implied promises of benefits if you reject unionization.

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

WE WILL offer Samone Allen, Veronica Fraquada, Eric McLemore, and Jessica Santos reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Samone Allen, Veronica Fraquada, Eric McLemore, and Jessica Santos whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, with interest.

WE WILL compensate Samone Allen, Veronica Fraquada, Eric McLemore, and Jessica Santos for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and submit the appropriate documentation to the Social Security Administration so that when backpay is paid to them, it will be allocated to the appropriate calendar quarters.

WE WILL remove from our files any reference to the unlawful layoffs of Samone Allen, Veronica Fraquada, Eric McLemore, and Jessica Santos, and within 3 days thereafter notify them in writing that this has been done and that the layoffs will not be used against them in any way.

WE WILL offer other employees who were laid off in 2015 reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights previously enjoyed.

WE WILL make such employees whole for any loss of earnings and other benefits suffered as a result of their layoffs, with interest.

WE WILL compensate such employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and submit the appropriate documentation to the Social Security Administration so that when backpay is paid to them, it will be allocated to the appropriate calendar quarters.

WE WILL, at the Union's request, bargain with the Union over our decision to lay off bargaining unit employees in 2015, and its effects.

WE WILL, at the Union's request, bargain with the Union over our decision to use nonbargaining unit employees to perform bargaining unit work in 2015, and its effects.

GRAND MEDICAL TRANSPORTATION, LLC
(Employer)

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

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies 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. You may also obtain information from the Board's website: www.nlrb.gov.

20 Washington Place, 5th Floor, Newark, NJ 07102-3110
(973) 645-2100, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/22-CA-140495 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (973) 645-3784.