UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VOITH INDUSTRIAL SERVICES, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	**PETITION FOR REVIEW**
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	Case No. _____
Respondent.	)	

Voith Industrial Services, Inc. ("Petitioner"), hereby petitions for review of the Decision and Order of the National Labor Relations Board ("Board") in *Voith Industrial Services, Inc. and General Drivers, Warehousemen & Helpers, Local Union 89, affiliated with The International Brotherhood of Teamsters*, Case No. 09–CA–097589, published at 363 NLRB No. 109, which was issued on February 17, 2016, and published on the National Labor Relations Board website, nlrb.gov.

The Board's February 17, 2016, Decision and Order is attached hereto.

WHEREFORE, Petitioner requests that the Court review the above-referenced Decision and Order, set it aside and grant Petitioner such other relief as is deemed just and equitable.

Dated February 26, 2016.

Respectfully submitted,
VOITH INDUSTRIAL SERVICES, INC.

By: /s/ Gary A. Marsack

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CERTIFICATE OF SERVICE

Gary A. Marsack, attorney for Petitioner, Voith Industrial Services, Inc., hereby certifies that he has caused a true and correct copy of the foregoing Petition for Review to be served upon the following representatives of the parties in identified in this Petition for Review:

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Voith Industrial Services, Inc. *and* General Drivers, Warehousemen & Helpers, Local Union No. 89, Affiliated with the International Brotherhood of Teamsters. Case 09–CA–097589

February 17, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On January 23, 2014, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief. The General Counsel filed a reply brief in support of the judge's decision. The Respondent filed an answering brief to the Charging Party's and General Counsel's briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions (as modified),[2] to amend his remedy,[3] and to adopt the recommended Order as modified and set forth in full below.

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

In his decision, the judge cited certain Board cases decided at a time when the composition of the Board included two persons whose appointments the Supreme Court subsequently held were not valid. See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). In affirming the judge's findings here, we have not relied on any of those cases.

[2] Since about April 2012, the Respondent has furnished vehicle processing and yard management services to Ford Motor Company at Ford's Louisville Assembly Plant (LAP). Previously, those services were provided by Cooper Auto Handling. In concluding that the Respondent is a legal successor to Cooper Auto Handling, the judge relied on the successorship finding of Administrative Law Judge Bruce D. Rosenstein in *Voith Industrial Services, Inc.*, 09–CA–075496 et al., which was affirmed by the Board in *Voith Industrial Services* (*Voith I*), 363 NLRB No. 116 (2016), also issued today. Based on the Board's decision affirming Judge Rosenstein's finding that the Respondent is a legal successor to Cooper Auto Handling, we find that the Respondent may not relitigate that issue in this case. See *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393, 393 fn. 1, 394–395 (1998), enfd. 215 F.3d 1327 (6th Cir. 2000).

The collective-bargaining representative of Cooper Auto Handling's unit employees was Teamsters Local 89. As Cooper Auto Handling's legal successor, the Respondent is obligated to recognize and bargain with Teamsters Local 89. It has refused to do so, and the record in this case and in *Voith I* contains abundant evidence of the Respondent's animus toward the Teamsters. For example, shortly after the Respondent began furnishing services at LAP, its facility manager, Jason Wilson, stated in a managers' meeting that the Respondent was at "war against the Teamsters" and was "in this facility to uproot them."

For the reasons stated by the judge, we agree that the Respondent violated Sec. 8(a)(1) and (3) of the Act when it disciplined and discharged Teamsters-affiliated employees Patti Murphy and Kelly Stein. We also agree with the judge that the discipline and discharge of Murphy and Stein violated Sec. 8(a)(4). Regarding the 8(a)(4) violations, we note in particular that Murphy and Stein served as witnesses for the General Counsel at the hearing in *Voith I*, which occurred during the same time period as the events at issue here. In finding that the General Counsel established the Respondent's animus toward use of the Board's procedures, a necessary component of the General Counsel's prima facie case of a 8(a)(4) violation, we do not rely on the judge's factual finding, disputed by the Respondent, that during that hearing, Facility Manager Wilson sent a text message to the Respondent's regional manager reporting that "[f]ukin [sic] [supervisor Jason] Miller is here to testify on behalf of the Teamsters." Nevertheless, we find that this error is harmless, as it is uncontested that Wilson sent the text to management personnel, albeit not during the hearing, and that the text reveals the Respondent's hostility to witnesses who testify in a Board proceeding. In addition, the judge found further evidence of animus in Wilson's instructions to Miller to be "lenient to the Teamsters" during the hearing so it "wouldn't . . . give them any more ammunition," but that after the hearing, "we needed to get rid of them."

We modify the judge's Conclusions of Law 7 and 8 in the following respect. In those conclusions of law, the judge concluded in part that the Respondent "violated Section 8(a)(5) and (1) by failing and refusing to recognize and bargain with Teamsters Local 89." However, the judge's analysis found, and we agree, that the Respondent violated Section 8(a)(5) by unilaterally implementing changes to its attendance policy and unilaterally adopting a new requirement that employees load rail cars during non-daylight hours. In other words, the 8(a)(5) violations alleged and found in this proceeding are *Katz*-type violations, see *NLRB v. Katz*, 369 U.S. 736 (1962), not a general refusal to recognize and bargain on request with Teamsters Local 89. We note, however, that the Respondent *was* found, in *Voith I*, to have refused to recognize and bargain generally with Teamsters Local 89, and we remind the Respondent that it is subject to the affirmative bargaining order issued in that decision.

[3] In addition to providing the relief ordered for employees Murphy and Stein, we amend the remedy to provide make-whole relief for all unit employees who may have suffered losses as a result of the Respondent's unlawful changes in attendance and rail car loading policies during non-daylight hours, to be determined in compliance. To the extent, if any, that employees experienced cessation of employment as a result of the Respondent's application of its unlawful changes to attendance and rail car loading policies, backpay shall be computed in accordance with *F. W. Woolworth*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). For employees who suffered losses but no cessation of employment, backpay shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. To the extent that the Respondent maintains that adversely affected unit employees would have been disciplined or discharged even in the absence of its unlawful unilateral changes, the Respondent is entitled to litigate that issue in the compliance proceeding. See, e.g., *Heartland Human Services*, 360 NLRB No. 101, slip op. at 3 (2014); *Uniserv*, 351 NLRB 1361, 1361 fn. 1 (2007). We shall also order the Respondent to remove from its files any reference to unlawful discipline issued to or discharge of any unit employees as a result of the Respondent's unlawful chang-

ommended Order as modified and set forth in full below.[4]

ORDER

The National Labor Relations Board orders that the Respondent, Voith Industrial Services, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the terms and conditions of employment of its unit employees without first notifying General Drivers, Warehousemen & Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters (Teamsters Local 89) and giving it an opportunity to bargain about those changes, including but not limited to its attendance policy and its policies for rail car loading during non-daylight hours.

(b) Threatening employees by warning them not to tell supervisors or others at the facility that they would bring complaints about employees' terms and conditions of employment to the attention of the NLRB or OSHA.

(c) Disciplining, discharging or otherwise discriminating against employees for joining, supporting or assisting Teamsters Local 89 or any other union.

(d) Disciplining, discharging or otherwise discriminating against employees for voicing or otherwise making concerted complaints about working conditions.

(e) Disciplining, discharging or otherwise discriminating against employees for testifying or otherwise participating in a proceeding of the Board.

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

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

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with Teamsters Local 89 as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All employees as set forth in Article 3 of the National Master Automobile Transporters Agreement, Central and Southern Area Supplemental Agreements and the Job Descriptions provisions of the Local Rider.

(b) Rescind any departures from the policies regarding attendance and rail car loading during non-daylight hours that existed immediately before the Respondent's predecessor, Cooper Auto Handling, ceased operations at the facility, and retroactively restore the preexisting policies until the Respondent negotiates in good faith with Teamsters Local 89 to agreement or impasse.

(c) Within 14 days from the date of this Order, offer any and all unit employees discharged as a result of the unilateral changes in attendance and rail car loading policies during non-daylight hours 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.

(d) Make all affected unit employees whole for any losses suffered as a result of the unilateral change in attendance and rail car loading policies during non-daylight hours in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to discipline and/or discharge imposed on unit employees as a result of its unilaterally altered attendance and rail car loading policies, and within 3 days thereafter notify each affected employee in writing that this has been done and that any such discipline or discharge will not be used against the employee in any way.

(f) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(g) Make Patti Murphy and Kelly Stein whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth

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es, and to notify each of these employees that this has been done and that the discipline or discharge shall not be used against the employee in any way.

Further, in the complaint and in his post-hearing brief to the judge, the General Counsel requested that a responsible management official be required to read the notice aloud to employees, and that the Respondent permit a representative of Teamsters Local 89 to be present at the reading. The judge failed to rule on the request, and he did not include such a provision in his recommended Order. We find that this remedy is appropriate to dispel the effects of the Respondent's serious and widespread unfair labor practices, especially in light of the Respondent's repetition of some of the same types of misconduct previously found unlawful and to warrant such a remedy in *Voith I*. See, e.g., *Ozburn-Hessey Logistics, LLC*, 361 NLRB No. 100 (2014) (incorporating by reference 359 NLRB No. 109 (2013)). At the Respondent's option, the notice may be read by a Board agent in the presence of a responsible management official.

Finally, we shall amend the remedy in accordance with our decision in *Don Chavas LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

[4] We have modified the judge's recommended Order to conform to his unfair labor practice findings and the Board's standard remedial language, and in accordance with *Excel Container, Inc.*, 325 NLRB 17 (1997). We have also modified the judge's Order consistent with the amended remedy. We shall substitute a new notice in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014) and to conform to the Order as modified.

in the remedy section of the judge's decision as amended in this decision.

(h) Within 14 days from the date of this Order, offer Patti Murphy and Kelly Stein full 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.

(i) Compensate Patti Murphy and Kelly Stein for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(j) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline and discharge of Patti Murphy and Kelly Stein, and within 3 days thereafter notify them in writing that this has been done and that the discipline and discharges will not be used against them in any way.

(k) 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.

(l) Within 14 days after service by the Region, post at its facility in Louisville, Kentucky, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 31, 2012.

(m) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice, marked Appendix, is to be read to the employees by a responsible management official or, at the Respondent's option, by a Board agent in that official's presence. The Respondent shall also afford Teamsters Local 89, through the Regional Director, reasonable notice and opportunity to have a representative present when the notice is read to employees.

(n) Within 21 days after service by the Region, file with the Regional Director for Region 9 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.

Dated, Washington, D.C. February 17, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL) 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.

[5] 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."

WE WILL NOT change your terms and conditions of employment without first notifying General Drivers, Warehousemen & Helpers, Local 89, affiliated with the International Brotherhood of Teamsters (Teamsters Local 89) and giving it an opportunity to bargain.

WE WILL NOT threaten you by warning you not to tell supervisors or others at the facility that you will bring complaints about your terms and conditions of employment to the attention of the National Labor Relations Board (NLRB) or the Occupational Safety and Health Administration (OSHA).

WE WILL NOT discipline, discharge or otherwise discriminate against you for joining, supporting or assisting Teamsters Local 89 or any other union.

WE WILL NOT discipline, discharge or otherwise discriminate against you for voicing or otherwise making concerted complaints about working conditions.

WE WILL NOT discipline, discharge or otherwise discriminate against you for testifying or otherwise participating in a proceeding of the NLRB.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before making any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with Teamsters Local 89 as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All employees as set forth in Article 3 of the National Master Automobile Transporters Agreement, Central and Southern Area Supplemental Agreements and the Job Descriptions provisions of the Local Rider.

WE WILL rescind any departures from the policies regarding attendance and rail car loading during non-daylight hours that existed immediately before our predecessor, Cooper Auto Handling, ceased operations at the facility, and restore the preexisting policies until we negotiate in good faith with Teamsters Local 89 to agreement or impasse.

WE WILL, within 14 days from the date of the Board's Order, offer any and all unit employees discharged as a result of the unilateral changes in attendance and rail car loading policies during non-daylight hours 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 all affected unit employees whole, with interest, for any losses suffered as a result of our unlawful change in attendance and rail car loading policies during non-daylight hours.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to discipline or discharge imposed on any unit employees as a result of our unilaterally altered attendance and rail car loading policies, and WE WILL, within 3 days thereafter, notify each affected employee in writing that this has been done and that any such discipline or discharge will not be used against the employee in any way.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL make Patti Murphy and Kelly Stein whole for any loss of earnings and other benefits suffered as a result of our unlawful discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, offer Patti Murphy and Kelly Stein full 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 compensate Patti Murphy and Kelly Stein for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

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

WE WILL, within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which this notice is to be read to you by a responsible management official or, at our option, by a Board agent in that official's presence. WE WILL also afford Teamsters Local 89 reasonable notice and opportunity to have a representative present when the notice is read to you.

VOITH INDUSTRIAL SERVICES, INC.

The Board's decision can be found at www.nlrb.gov/case/09-CA-097589 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.

Jonathan Duffey, Esq., for the General Counsel.
Gary A. Marsack, Esq., and *Stephen Richey, Esq.*, of Milwaukee, Wisconsin, and Cincinnati, Ohio, for the Respondent.
James F. Wallington, Esq., and *Robert M. Colone, Esq.*, of Washington, D.C., and Louisville, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Louisville, Kentucky, on June 18–19 and August 20–21, 2013. General Drivers, Warehousemen & Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters (the Charging Party, the Union, or Teamsters Local 89) filed the charge on February 4, 2013, and the Regional Director for Region 9 of the National Labor Relations Board (NLRB or Board) filed the complaint on April 15, 2013. The complaint alleges that Voith Industrial Services, Inc. (the Respondent or Voith), discriminatorily disciplined and discharged two employees, Patti Murphy and Kelly Stein, in violation of Section 8(a)(1), 8(a)(3), and 8(a)(4) of the National Labor Relations Act (the Act). The complaint further alleges that the Respondent violated Section 8(a)(5) and (1) by making unilateral changes to policies regarding attendance and loading rail cars in the dark. In addition, the complaint alleges that the Respondent violated Section 8(a)(1) by threatening employees with unspecified reprisals for making complaints to the NLRB and engaging in other protected concerted activities. The Respondent filed a timely answer in which it denied that it had committed any of the violations alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, provides cleaning, transportation, and logistical services to customers in the automobile manufacturing industry. It has an office and place of business in Louisville, Kentucky, where it annually purchases and receives goods valued in excess of $50,000 directly from points outside the Commonwealth of Kentucky. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. PRIOR LITIGATION AND MOTION IN LIMINE

On February 13 and March 1, 2012, the Respondent entered into agreements to provide vehicle processing and yard management services to Ford Motor Company (Ford) at Ford's Louisville Assembly Plant (LAP). Prior to that time, this work had been performed by Auto Handling, Inc., a subsidiary of Jack Cooper Transport (Cooper Auto Handling). The Teamsters have been the exclusive bargaining representative of the vehicle processing and yard management employees at the LAP for a period of about 60 years, including during the period when Cooper Auto Handling was providing those services. This status has been recognized in successive collective-bargaining agreements, the most recent of which was executed between Teamsters Local 89 and Cooper Auto Handling, and sets forth effective dates of June 1, 2011, to August 31, 2015. After the Respondent took over the vehicle processing and yard management work at the LAP in 2012, Teamsters Local 89 demanded continued recognition as the collective-bargaining representative of the employees. The Respondent, however, declined to recognize Teamsters Local 89, and instead granted recognition to the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO and Local 862 (UAW), which already represented a group of the Respondent's janitorial and cleaning workers at the LAP.

In 2012, a 13-day unfair labor practices trial was held before Administrative Law Judge Bruce D. Rosenstein.[1] Among the questions presented in that litigation were whether the Respondent was a successor to Cooper Auto Handling for purposes of the vehicle processing and yard inventory work and whether the Respondent had an obligation to recognize and bargain with Teamsters Local 89. Approximately nine Teamsters-affiliated employees testified at the trial, including Murphy and Stein—the two alleged discriminatees in the proceeding before me. Jason Miller, a supervisor with the Respondent, also appeared to testify in the prior proceeding. When Jason Wilson, the facility manager at the LAP, discovered that Miller was present as a witness, he sent a text message to Bret Griffin, regional manager for vehicle processing, in which he stated that "Fukin Miller is here to testify on behalf of the Teamsters." The Respondent subsequently terminated Miller's employment in early December 2012, but there is no allegation in this case that Miller's termination was unlawfully based on his testimony in the prior proceeding.

Judge Rosenstein issued his decision on December 21, 2012. He held, inter alia, that the Respondent was a successor to Cooper Auto Handling because "Voith conducted essentially the same business at the same location as [Cooper] Auto Handling and the majority of the newly constituted bargaining unit employees would have consisted of former employees of the predecessor" if Voith had not unlawfully discriminated against the predecessor's employees "because of their affiliation with [Teamsters Local 89]." Judge Rosenstein found that the Re-

[1] The prior trial was held on August 21 to 24, 27, 28, and 30, September 19 to 21, and October 1 to 3, 2012.

spondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Teamsters Local 89 with respect to the unit of employees who the Teamsters represented at Cooper Auto Handling.[2] He further found that the Respondent had violated Section 8(a)(5) and (1) when it unilaterally imposed initial terms and conditions of employment on those employees. The Respondent has filed exceptions to Judge Rosenstein's decision, and the Board has yet to rule on those exceptions.

In the instant matter, the General Counsel filed a Motion in Limine asking that I adopt Judge Rosenstein's findings of fact and conclusions of law regarding the issues of successorship and obligation to bargain, and prohibit the Respondent from raising or relitigating those issues. The Respondent opposed the motion. On May 31, 2013, I granted the General Counsel's motion and issued an order adopting Judge Rosenstein's findings of fact and conclusions of law as they relate to the issues of the Respondent's status as successor to Cooper Auto Handling and the Respondent's duty to bargain with Teamsters Local 89, and precluding the parties from relitigating those issues. I noted that the Board has precluded a party from relitigating determinations of successorship and bargaining obligation reached in a prior proceeding where, as here, the parties in the two proceedings are the same and the factual findings are necessary to support the judgment in the prior proceeding. See *Great Lakes Chemical Corp.*, 300 NLRB 1024, 1024–1025 (1990), enfd. 967 F.2d 624 (D.C. Cir. 1992). The parties do not dispute that once the Board rules on the pending exceptions to Judge Rosenstein's decision, that ruling will be determinative of the successorship and bargaining obligation issues presented to me—meaning that relitigating those issues in this proceeding would be a waste of judicial resources. See *Wynn Las Vegas, LLC*, 358 NLRB No. 81, slip op. at 3–4 (2012) (affirming that a judge may preclude a party from relitigating an issue that was decided in a prior case even where the prior case is still pending before the Board). Moreover, the parties' representations regarding the motion indicated that allowing relitigation of those issues was likely to increase the length of trial by 7 days or more.

Consistent with my ruling on the Motion in Limine, I find that the Respondent is a successor to Cooper Auto Handling at the LAP, and at all relevant times has had an obligation to recognize and bargain in good faith with Teamsters Local 89 as the exclusive collective-bargaining representative of its employees in the bargaining unit described in Judge Rosenstein's decision.

[2] Judge Rosenstein's decision stated that the bargaining unit was "All employees as set forth in Article 3 of the National Master Automobile Transporters Agreement, Central and Southern Area Supplemental Agreements and the Job Descriptions provisions of the Local Rider." This is the same unit definition set forth in the complaint in the instant case. Complaint par. 8. The Respondent's answer admits that this constitutes a unit appropriate for bargaining and was recognized by Cooper Auto Handling, but denies that it has any application to work performed by the Respondent at the LAP.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

Since about April 2012, the Respondent has employed a bargaining unit of employees who perform vehicle processing and yard inventory services for Ford at the LAP. There are approximately 70 to 75 employees in the unit. Some of these employees are assigned to "yard work" crews and drive newly produced vehicles to assigned parking spaces around the facility. Other employees are assigned to "rail work" crews and load the new vehicles onto rail cars. During the relevant time period, the Respondent operated two 12-hour shifts. The majority of the unit employees work on the day shift, which starts at 6 am and ends at 6 pm. The others work on the night shift—from 6 pm to 6 am.

Eleven of the unit employees were identified by management as openly Teamsters-affiliated.[3] These individuals frequently wore clothing that bore messages referencing their affiliation with the Teamsters. Alleged discriminatees Murphy and Stein began working for the Respondent on April 10 and 11, 2012, respectively. They were assigned to perform vehicle processing work at the LAP, a type of work that both had previously been performing for the Respondent's predecessor Cooper Auto Handling. When the Respondent hired them it was aware that Murphy and Stein were affiliated with Teamsters Local 89. The Respondent recruited a significant percentage of its other bargaining unit employees from the ranks of its UAW-represented janitorial and cleaning employees.

The Respondent's highest ranking on-site official at the LAP is Jason Wilson, the facility manager. Supervisors who worked under Wilson at the LAP during the relevant time period include Tom Baker, Charlie Calhoun, Elizabeth Dawson, Dennis Frank, Laura Kitchen,[4] Jason Miller, and Jeremy Spears. Wilson himself reports to Bret Griffin, the Respondent's regional manager for vehicle processing.

Miller, who the Respondent employed from April 2012 until the first part of December 2012, was called as a witness by the General Counsel. He testified that when he first started working at the LAP he participated in a manager's meeting at which Wilson stated that the Respondent was at "war against the Teamsters" and was "in this facility to uproot them." Another manager, who is identified in the record only by the last name Barrett, told Miller during the initial hiring that the Respondent "wanted to keep the majority of their employees UAW." Supervisor Dennis Frank expressed the opinion that the Teamsters employees "would lay down on you" and that "if there's anything going wrong with the vehicles in the yard it's more than likely something that they're doing to hit Voith in the pocketbook." I considered the Respondent's argument that Miller should not be credited because he was involuntarily terminated and therefore is biased against the Respondent. Nevertheless, I credit his testimony that these statements were made by Wil-

[3] Those identified on-the-record as Teamsters-affiliated employees were: Tweety Bernard, Deborah "Suzie" Cheatham, James Flanagan, Brenda Helm, Gregory Johnson, Timothy McCory, Patti Murphy, Sandra Rhodes, Aaron Schott, Kelly Stein, and Brenda Swift.

[4] This individual's last name is sometimes spelled "Ketchum" in the transcript.

son, Barrett and Frank since that testimony was not contradicted by other witnesses, was given in a clear and certain manner, and was not undermined on cross-examination. I also note that, over two months before the Respondent terminated his employment, Miller was present to give testimony adverse to the Respondent in the prior trial before Judge Rosenstein. Thus Miller's testimony about alleged misconduct by the Respondent cannot be easily discounted as the product of nothing more than ill-will stemming from his discharge.

For a brief period of time after taking over the vehicle processing operation at the LAP, management required Teamsters-affiliated employees to wear "Voith UAW clothing." In an email dated December 15, 2012, the Respondent's vice president of operations, Darrin McElroy, commended Griffin and Wilson on the job they were doing at the LAP given the "Teamster nonsense."

B. Respondent Begins requiring Employees to Load Rail Cars During Non-Daylight Hours and Employees Complain that this is Unsafe

Prior to July 31, 2012, the unit employees were not required to load vehicles onto rail cars during non-daylight hours. This had been the case since at least 1997 under a variety of employers including Cooper Auto Handling and, at least initially, the Respondent. Employees were not required to load rail cars during non-daylight hours even when they were working on shifts that encompassed such hours. This rule was established because the yard area at the LAP is not equipped with "night loading lights"—that is, lights situated between the rows of railroad tracks that provide both overhead, and mid-level lighting. Although these special lights are not provided at the LAP, some lights are present in the yard area.

On the night shift that began on July 31 and ended on August 1, supervisor Calhoun reassigned one of the crews from yard work to rail car loading work. This meant that the crew members would, for the first time, load rail cars during non-daylight hours. Teamsters-affiliated employees Murphy, Stein and Rhodes, were on this crew and discussed among themselves their concerns that the new practice was unsafe. According to Murphy's uncontradicted and credible testimony, when an employee exits a vehicle after driving it onto a rail car at night, it is so dark that he or she "cannot see anything." The employee has to "shuffle around" the rail car, with "metal all around," while feeling his or her way along the vehicles that have been loaded. During their first work break after being assigned to load the rail cars during non-daylight hours, Murphy, Stein, and Rhodes brought their safety concerns about this assignment to Calhoun's attention. Calhoun told them that they would have to do the rail car loading work anyway. Murphy asked to be reassigned to yard work and Calhoun responded: "No, you will do this or you'll leave. And if you leave, we're going to say you quit." Later on that shift, another supervisor, Baker, told Murphy, Stein, and Rhodes that he had discussed the matter with Calhoun and that the Respondent was sending them home for the day, but that they would not be fired or viewed as having resigned. Then Baker transported the three employees to the area where their personal vehicles were located. During the drive, Murphy, Stein, and Rhodes discussed contacting the Occupational Safety and Health Administration (OSHA) to "see what they think about loading in the dark." Baker informed them that the next day they would again be assigned to load rail cars during non-daylight hours. On August 1, Murphy contacted the Kentucky Labor Cabinet's Division of Occupational Safety and Health Compliance, and transmitted to them, by facsimile, a written allegation that the Respondent was creating a safety hazard by requiring employees to load rail cars in the dark.

Despite what Baker and Calhoun had told employees, the Respondent did not immediately thereafter require Murphy, Stein, and Rhodes to load rail cars during non-daylight hours. Instead, the Respondent had the crew load rail cars from 6 p.m. until nightfall, and then allowed them to return to the yard work assignment. In early September, Murphy, Stein, and Rhodes were reassigned to the day shift, and to rail car loading work. Most of that shift, which started at 6 a.m., fell during daylight hours, and all the employees loaded rail cars during that time. Depending on the time of year, some of the early part of the shift took place before daylight. The Respondent did not require Murphy, Stein, and Rhodes to load rail cars during that non-daylight period, but rather assigned them various janitorial and cleaning duties. Most of the crew, however, continued to load rail cars even during the non-daylight portion of the day shift.

When a state investigator visited the LAP to evaluate the August 1 allegation that requiring employees to load rail cars in the dark created a safety hazard, Calhoun reassigned Murphy, Stein, and Rhodes to do yard work away from the area where the investigator would be. Murphy asked Calhoun why this was being done and Calhoun responded "you know why." Subsequently, in late October or early November 2012, the investigator informed Murphy that he had not found a safety violation. As part of a settlement reached without a finding of wrongdoing, Murphy, Stein, and Rhodes received checks from the Respondent to reimburse them for wages they had lost as a result of being sent home early on August 1 when they complained about loading rail cars during non-daylight hours.

At some point prior to December 19, supervisor Dawson reported to Wilson that there was dissension among employees over the fact that Murphy, Stein, and Rhodes were excused from loading rail cars during the non-daylight portion of the shift. As a result of that conversation, Wilson discussed the issue with more senior officials of the Respondent, including Erwin Gebhardt, director of labor relations, and Bret Griffin, regional manager. The upshot of those discussions was that Wilson was told to "move forward and mandate that they start to do this work, and if . . . they refused, to send them home for the day, present them with this write-up . . . and move forward from there." Wilson testified that he directed that a disciplinary notice be issued to Stein and Murphy for refusing to load rail cars during non-daylight hours, but that the date when he "thought" this refusal "was going to happen was a day that they weren't scheduled to work." On December 21, the Respondent informed Murphy, Stein, and Rhodes that they would no longer be permitted to perform janitorial and cleaning duties during the non-daylight portion of their shifts, and would have to load rail cars for the entire shift. The employees complied with that

direction and never subsequently refused to load rail cars.

During the period of their employment by the Respondent, Murphy and Stein complained to company officials about working conditions at the facility and stated that they were going to contact OSHA or the NLRB. The undisputed testimony was that in some instances these complaints were raised in the presence of coworkers and staff. None of these instances were described at trial with specificity.

C. *Changes in Attendance Policy*

Policy under Predecessor Cooper Auto Handling: While the bargaining unit was employed by Cooper Auto Handling, unit employees were subject to the attendance policy set forth in the Teamsters' National Master Automobile Transporters Agreement that took effect on June 1, 2008 (Master Agreement),[5] and in the local rider that was negotiated by Teamsters Local 89 and which took effect on February 16, 2009. The Master Agreement sets forth a system of progressive discipline for various types of attendance infractions. The contract provision on excessive absenteeism states:

> (c) Excessive absenteeism where notice is given (after meeting with employee).
>
> 1st offense – reprimand.
> 2nd offense – 1-week layoff.
> 3rd offense – subject to discharge.

The Master Agreement does not define "excessive absenteeism," but the record shows that, in practice, Teamsters Local 89 and Cooper Auto Handling defined "excessive absenteeism" as an employee's absence on three scheduled work days during a rolling 30-day period. In addition, the language stating that the progressive discipline steps listed above were only triggered "after meeting with employee" was interpreted to mean that an employee's first instance of "excessive absenteeism" was handled with a meeting between the Respondent and the employee, and it was not until the next infraction that the "1st offense" level was reached. The practice under Cooper Auto Handling was that any attendance offenses were expunged from the employee's record once 6 months had passed from the offense.

The Master Agreement also sets forth the following disciplinary steps for instances when an employee is absent on a scheduled work day without providing the required notice.

> 1st offense – reprimand
> 2nd offense – 24-hour layoff
> 3rd offense – 3-day layoff
> 4th offense – 1-week layoff
> 5th offense – subject to discharge.

The local rider applicable at the LAP contains provisions that excuse employee absences under certain circumstances. One such provision states that "[a]bsences due to medical condition are non-chargeable under attendance with documentation from a medical doctor." When the bargaining unit employees were working for Cooper Auto Handling, there was no limit on the number of absences that would be excused if the employee presented a doctor's note showing medical inability to work. Doctors' notes were accepted both when employees were absent because of their own medical condition and when they were absent because of the medical condition of a family member.

Policy under Respondent: When the Respondent took over the bargaining unit work in early 2012, management did not initially enforce any attendance policy at all. In general, employees were not held accountable for absences. Subsequently, excessive absenteeism became a problem for the Respondent at the LAP. In July or early August 2012, Wilson consulted with senior officials of the Respondent about this problem, and the Respondent decided that it would implement the attendance policy set forth in the agreement between Ford and the UAW rather than use the Teamsters attendance policy. Wilson allowed employees "a couple weeks of grace period before . . . start[ing] to track" their absences under the new attendance system.

The new policy was not provided to employees or posted at the facility.[6] Miller, was assigned to oversee the attendance

[5] The relevant terms of this contract remained in effect under a subsequent agreement, effective from June 1, 2011, to August 31, 2015.

[6] There was conflicting testimony on the question of whether the Respondent provided the new attendance policy to the unit employees. Wilson testified that after the decision was made to implement the new attendance policy, the Respondent began to meet with groups of unit employees to present the policy to them and "within a week's time was able to get through everybody." He also stated that the policy was posted next to the time clock that employees were required to use. Supervisor Kitchen stated that in June 2012 she personally posted the policy and did so not only at the time clock, but at numerous other locations at the facility. Kitchen also testified that Murphy and Stein had signed to acknowledge receipt of the attendance policy during their initial orientation. These accounts were contradicted by Miller, who stated that the new attendance policy was never posted at the facility and that even he had difficulty obtaining a copy of it. Miller stated that he was forced to resort to "mining" conversations with the LAP's office manager for information regarding the terms of the attendance policy. According to Miller, there was not even a single copy of the policy at the building used by the unit employees until he received an email copy, printed it out, and placed the printed copy in a binder. Murphy and Stein both testified that the new attendance policy was not given to them and that they never saw it posted. Stein asked supervisor Dawson to provide her with a copy of the attendance policy, but Dawson failed to do so. Murphy testified that she did not attend any meeting at which the Respondent presented the new policy to its full-time employees.

After considering the record, I conclude that the new attendance policy was not presented to employees in any systematic fashion and that Murphy and Stein did not receive the policy in advance of the ostensibly attendance-based discipline that they were subjected to in December 2012 and January 2013. Based on the witnesses' demeanor and testimony, and the record as a whole, I consider Kitchen's testimony less credible than that of Miller, Murphy, and Stein on this subject. I note that Kitchen went beyond even Wilson's claims by stating that the policy was posted not only at the time clock, but at numerous other locations, and also by stating that Stein and Murphy signed forms acknowledging receipt of the attendance policy during their initial orientations. It is clear that Kitchen's testimony was inaccurate to the extent that she claimed that Murphy and Stein signed to acknowledge receipt of the attendance policy during their orientation in April, since the Respondent did not even select that policy until the following July or August. Moreover, neither Murphy's nor Stein's personnel files contain any form in which they acknowledge receipt of the attendance policy. In addition, I note that the Respondent did not present the testimony of a single unit employee—either UAW-affiliated or Teamster

program beginning in August, but even he had trouble obtaining a copy of the written policy or information regarding its precise terms. According to Miller, the practice was that employees who arrived late or left early were assessed half a point. Those who were absent for a full day were assessed one point if they gave proper notice, and two points if they did not give such notice (no-call/no-show). Employees received a verbal warning when they reached a total three attendance points, a written warning at four points, a suspension at seven points, and were terminated at eight points. Miller recorded the employees' attendance and attendance-related discipline in a computer system. That system summarizes each employee's attendance record in a document known as the employee's "attendance matrix."

Under the attendance policy implemented by the Respondent, employees can have their absences excused (and attendance points nullified) for a number of reasons. However, there is conflicting evidence regarding how those exceptions work in practice. The record is clear that an employee can seek to have a number of absences excused, without the assessment of points, by presenting a doctor's note showing that he or she was medically unable to work during the period in question. Miller testified that an employee has the right to three excused absences based on the submission of appropriate doctors' notes, and that the Respondent may, in its discretion, excuse medical absences in excess of that number. However, when Wilson discussed attendance with Murphy and Stein on December 21, he told them that the Respondent would only excuse *two* periods of absence per year based on the submission of a doctor's note. Yet another version of the rule is described in the written attendance provision in the UAW contract with Ford. That provision states that "Employees may appeal *four* times in a rolling twelve month period by providing evidence of inability to work." Respondent's Exhibit Number (R. Exh.) 5 at Page 35 (emphasis added). Based on the evidence, I credit the testimony of Miller on the issue of how the attendance policy was actually enforced, since he was the official who oversaw the administration of the attendance discipline policy and the entry of points and attendance/absence events into the attendance system during most of the time period addressed at trial.[7] I find that, as stated by Miller, the Respondent's practice during the relevant timeframe was to automatically excuse an employee's first three medical absences if the employee presented medical documentation showing an inability to work during the time in question, and that additional medically-necessitated absences were not excused except at the discretion of supervisors and managers. The record indicates that it was not uncommon for the Respondent to exercise its discretion to excuse medical absences in excess of three. For example, the attendance matrix for Phillip Profumo, who was not a Teamsters-affiliated employee, shows that he had a total of seven medical appeals granted between July 24, 2012, and February 7, 2013. The attendance matrix for Bradford Thompson, also not a Teamsters-affiliated employee, shows that he had absences excused for medical reasons on four separate occasions between September 13, 2012, and May 8, 2013. Where the employee was not excused entirely for a multi-day medical absence, the Respondent would still assess only one point if the absence resulted from a single illness or medical incapacity.

The testimony of Miller, as well as of Murphy and Stein, indicated that both Miller and the employees' direct supervisors could excuse an employee's absence, without the assessment of points, based on the submission of medical evidence of inability to work. Wilson contradicted this, testifying that an employee could not simply submit evidence of medical inability to work, but had to "appeal" the attendance violation. I reject Wilson's testimony on this point and credit the testimonies of Miller, Murphy, and Stein. Neither Wilson, nor any other witness, identified anything specific beyond the submission of the doctor's note that was required to initiate an appeal of attendance points. The evidence did not show that an appeal form of some kind was required or that employees routinely took any specific action (beyond the submission of medical documentation) to initiate an appeal. To the contrary, the attendance provision in the Ford-UAW contract provides that "Employees may appeal . . . *by* providing evidence of the inability to work," (emphasis added) which supports the testimony indicating that the submission of the medical evidence, on its own, institutes the appeal. The record does not show that management is bound by any fixed standards when deciding whether to entertain appeals in excess of three.

Wilson stated that only himself and service managers were able to grant an appeal to reduce attendance points or discipline. Miller's testimony was to the contrary. He stated that the direct supervisors of an employee could grant the employee's request to have his or her attendance points or discipline reduced based on the submission of a medical note. I consider Wilson's testimony less reliable than that of Miller on this score since Miller actually made the attendance system entries adding or removing points and noting attendance events. Wilson, on the other hand, conceded that he did not control the entry of information into the employee's attendance records and was not even aware of attendance points or discipline that had been entered for specific employees until the discipline reached the level of suspension or termination. Even then, Wilson based his decision solely on review of the attendance matrices that were prepared by Miller or others. I find that during the relevant time period, an employee could appeal the imposition of attendance points or discipline simply by providing a medical note to his or her direct supervisor, or to an official higher in the chain of command. The same official to whom the medical note was presented could decide the appeal.

The record also shows that there are other absences for which the Respondent does not assess points. For example, an employee can call the Respondent on the day of an absence and state that he or she is using a vacation day. As long as the employee has accrued the necessary vacation time, a point will not be assessed. Apart from normal vacation days, employees are

affiliated—to corroborate the claim that the new attendance policy was posted in the workplace and explained to unit employees during group meetings. On the other hand Murphy's and Stein's testimony that the policy was not provided to employees was corroborated by Miller, a former supervisor.

[7] The Respondent discharged Miller in December 2012, but the reasons for his discharge were unrelated to his performance administering the attendance policy.

granted two "emergency vacation" days every 12 months that they can invoke on the day of an absence to avoid the assessment of points. In addition, employees accrue a "banked holiday" if the Respondent requires them to work on holiday provided by the contract. An employee has the right to use a banked holiday to excuse an absence and avoid the assessment of points. The Respondent also excuses, without the imposition of points, an employee's absence for funeral leave and an employee's prearranged absence for medical appointments, childcare issues, and court appearances. These excuses can be approved by direct supervisors, and also various general supervisors and managers without bringing the matter to a superior's attention. The evidence also showed that the Respondent excused the absences of Phillip Profumo, a non-Teamsters employee, for days that he was ostensibly on vacation even though it was later discovered the he lacked accrued vacation time to cover those days.

Miller also described the procedure he followed when assessing discipline. He stated that he would meet with the employees when they reached a point total for which discipline was indicated. If the employee was affiliated with the UAW, Miller would include Sharita Blackmon, a UAW steward, at the meeting. It was not unusual for Blackmon to convince Miller to reduce an employee's point total and waive or modify the proposed discipline. In some instances Blackmon did this by arguing that the action was not in conformity with applicable company procedures and in others she simply negotiated a more favorable outcome. The attendance matrices show that a number of non-Teamsters employees significantly benefited from these negotiations. Bradford Thompson had attendance points negotiated away at least five times between October 5, 2012, and March 1, 2013. Another example involved Tyler Forman, a non-Teamsters employee on whose behalf the UAW negotiated away attendance points for absences on August 14 and December 29, 2012. Teamsters-affiliated employees did not receive the benefit of such representation with respect to discipline because UAW steward Blackmon declined to represent them, and the Respondent would not permit the participation of a Teamsters representative.

D. Disciplinary Meetings with Murphy and Stein on December 21

The General Counsel's allegations in the case include that the Respondent discriminated against Murphy and Stein on December 21, 2012, when it presented them with discipline based on attendance and refusal to perform work, and on January 4, 2013, when it terminated them based on attendance. I find that the pre-December 2012 evidence regarding the treatment of Teamsters-affiliated and UAW-affiliated employees does not show any discrimination during that period that is relevant to the question of whether the complaint allegations were proven with respect to the December 21 discipline and January 4 discharge of Murphy and Stein.[8] As noted above, the Respondent did not meaningfully apply any attendance restrictions at all to the unit employees prior to July 2012. In July or early August, the Respondent began enforcing attendance rules, and from that time until early December 2012, Miller was the individual who administered the attendance policy. Miller gave testimony generally favorable to the General Counsel, and is a witness on whose credibility the General Counsel's case depends, but he denied that during the period he was administering the attendance policy he ever treated Murphy and Stein, or other Teamsters-affiliated employees, more harshly because of their union affiliation. I considered the evidence that Miller sometimes gave favorable treatment to one or more employees who were friends of his, but that evidence does not rebut Miller's testimony that his actions were not based on the union affiliation of the employees. I also considered evidence suggesting that Wilson encouraged Miller to treat Teamsters-affiliated employees more harshly.[9] Nevertheless, Miller credibly testified that during his period overseeing the attendance program he did not base decisions on union affiliation and the General Counsel has not offered a persuasive rationale for discrediting that testimony, while crediting the other portions of his testimony on which the General Counsel relies.

By the time Miller stopped overseeing the Respondent's attendance policy in early December 2012, Murphy and Stein had each accumulated a number of attendance points. Murphy had 5.5 points and Stein had 6.5 points. During the weeks leading up to Murphy's and Stein's discharges, each was charged with multiple additional absences. Murphy was charged with one point for an absence on December 20. This is curious because December 20 was one of Murphy's scheduled days off. Wilson testified that he added December 20 to Murphy's schedule. However, the evidence does not show that the Respondent informed Murphy of the schedule change in time for her to appear for work on December 20. According to Wilson, employees were notified of the change in schedules in late December by way of a notice posted at the facility on about December 20 or 21. However, Wilson was unable to locate a copy of the posting and did not explain how he expected Murphy to know that she was scheduled to work on December 20 when the notice setting forth the added days was not posted until December 20 at the earliest. Nevertheless, the Respondent assessed an attendance point against Murphy for her absence on that day, bringing her total to 6.5. The same is true for Stein. Stein was absent on December 20, a scheduled day off for her under the regular schedule. Moreover, Stein provided the Respondent with medical documentation stating that her 11-year old son had been seen at a medical facility on December 20 and could not return to school for 48 hours. Nevertheless the Respondent

[8] The complaint does not allege that any of the attendance violations, or points assessed, against Murphy and Stein prior to December 2012 were violations of Sec. 8(a)(1), (3), or (4) of the Act.

[9] As discussed above, Wilson told Miller that the Respondent was at "war" against the Teamsters and was at the facility to "uproot" them. In addition, the evidence showed that, at some point in October 2012, Wilson told Miller that the Respondent had to "get rid" of their "problems." Miller believed that by "problems," Wilson meant the Teamsters-affiliated employees, but at trial Miller conceded that it was possible that Wilson was actually referring to employees with attendance problems. In addition, I considered that subsequent to the close of the hearing before Judge Rosenstein, Wilson told Miller that he "didn't have to dance around" discipline for the Teamsters employees anymore and could write them up for anything they did wrong.

assessed an attendance point against Stein for her absence on December 20, bringing her total to 7.5.

On December 21, 2012, supervisor Dawson met with Murphy, Stein, and Rhodes.[10] Dawson told Murphy and Stein that they would no longer be assigned to non-loading work before sunrise, but would have to load rail cars during their entire shift. She presented them each with a disciplinary action form stating that they were being suspended for refusing to load rail cars on December 19. The record shows that December 19 was a day when those employees were neither working nor scheduled to work. Murphy pointed this out to Dawson, and further stated that she had not refused to load rail cars. Murphy and Stein indicated to Dawson that they needed union representation, but Dawson provided no representation to them.

Later on December 21, Murphy and Stein were summoned to meet with Wilson. After Stein arrived, but before Murphy did, Wilson stated that the write-ups were not coming from Dawson or himself, but from "higher up." When Murphy arrived, she requested union representation, but Wilson responded that he just needed "to talk" to her. Wilson confirmed that, as previously stated by Dawson, the employees were going to be required to load rail cars during non-daylight hours from that day forward. Murphy reiterated her concerns about possible injury, and Wilson responded by providing her with a headlamp and saying that he would "try to work something out." Then the employees brought up the suspension paperwork that Dawson issued to them earlier, and explained to Wilson that they had not even been working on the date of their supposed refusal to load rail cars. Wilson said that the write-up "was a mistake" and they were not being suspended based on it.

Then Wilson told Murphy and Stein to "refrain from [making] threats of calling OSHA and the NLRB" and not to make such statements to "supervision and, in general, in the office building." In the past, Murphy and Stein had made such statements in the presence of managers, supervisors, administrative staff, and coworkers. Murphy answered, "I'll stop calling OSHA when you all stop being unsafe." Wilson responded "Well, I need for you all to stop doing that." Following this admonition, Wilson continued the meeting by presenting Murphy and Stein with disciplinary action forms regarding their attendance, and stating that they should be suspended because of their absences. Murphy and Stein objected to these disciplinary actions. One or both told Wilson that they had submitted doctors' notes showing an inability to work on some of the days in question. Wilson stated that the Respondent was no longer accepting doctors' notes. Then Wilson revised his statement, and stated that employees could only use two doctors' notes per year to appeal attendance infractions. Stein responded that this was the first time she had ever heard of this limited "appeal" process. Wilson said to "consider [the suspension] waived" "until we get it straightened out." The record includes disciplinary paperwork for Stein, which states that she was being suspended for reaching 7.5 attendance points based on the absence occurring on December 20, 2012. A hand-written notation on that mostly typed document states that the "date of suspension" is "waived," but the document also states that the next attendance violation will result in termination, indicating that the attendance point assessed for December 20 was not waived. Murphy's and Stein's attendance matrices also indicate that their attendance point totals continued to carry the attendance points assessed for December 20.

E. Termination of Murphy and Stein on January 4, 2013

The Respondent did not require either Murphy or Stein to serve a suspension after the December 21 disciplinary meeting with Wilson. However, within less than a week of the December 21 meeting, the Respondent had assessed sufficient additional attendance points against Murphy and Stein to put each at the level required for termination. The evidence shows that Murphy was absent on December 22, a regularly scheduled work day, due to a medical condition. She called to give the Respondent the required preshift notification that she would be absent. She did not present the Respondent with a doctor's note to excuse that absence, but, as discussed above, a day earlier Wilson had told her that no additional doctor's notes would be accepted. The Respondent assessed a point, bringing Murphy's total to 7.5, above the 7-point threshold for which a suspension is indicated.

Murphy was not assigned to work on December 23 and had December 24 and 25 off, along with most of the workforce, in observance of the Christmas holiday. Murphy's regular schedule did not call for her to work on December 26 or 27, however, the Respondent altered employees' work schedules so that Murphy's crew was scheduled for those days. It is not clear what the Respondent did to convey this schedule change to employees. Wilson testified that on *about* December 20 or 21, the Respondent posted notice of modifications to the schedule, but he did not state whether that notice included the change affecting Murphy on December 26 and 27, and he could not produce a copy of the notice. According to Stein, it was not until December 24 that the Respondent made the change. Stein testified that on December 27 she realized Murphy had not been at work on the day that the Respondent added December 26 and 27 to the crew's work schedule and therefore would not know she was supposed to be at work on those days. Stein called Murphy to inform her of the change. Murphy was unaware of the change prior to receiving that call, and after receiving it attempted to contact the Respondent by telephone. She

[10] December 21 was the same day that Judge Rosenstein issued his decision finding that, inter alia, the Respondent was a successor to Cooper Auto Handling, had violated Sec. 8(a)(5) of the Act by refusing to recognize and bargain with Teamsters Local 89, and had discriminated in hiring against individuals affiliated with Teamsters Local 89. The evidence did not show, however, that the Respondent was aware of that decision on December 21 when Dawson, and later Wilson, met with Stein and Murphy. The evidence shows that on December 28, the office of Erwin Gebhardt, the Respondent's director of labor relations, received a letter from Teamsters Local 89, in which the Union's president referenced Judge Rosenstein's decision and again demanded recognition. Gebhardt was present at his office on December 28, but was uncertain if he saw the letter that day. Gebhardt believes that he was informed about Judge Rosenstein's decision on about December 29 or 30, 2012. It is clear that the Respondent's regional manager Bret Griffin knew about Judge Rosenstein's decision by January 2, 2013, because on that day he announced to employees that the Respondent was appealing the decision and that no changes would be made in the meantime.

did not reach a person, but was able to leave a voice message, which the Respondent did not return. Murphy stated that she did not go to the LAP at that time since she would be arriving after the start of her shift and, without prior arrangements, there would be no shuttle to transport her from the employee parking lot to the work area at the LAP. The evidence does not show that the schedule change was posted at the facility on any day that Murphy was present at the LAP prior to December 27. Indeed, no official of the Respondent claimed that they communicated to Murphy, or knew that someone else had communicated to her, that she should come to work on December 20 or 27. Nor did they contradict Murphy's statement that, given the Respondent's failure to respond to her call on December 27, Murphy would have been unable to reach the work area that day. Nevertheless, the Respondent added a point to Murphy's attendance matrix for the December 27 absence, bringing her total to 8.5, above the 8-point threshold required to terminate an employee. Although the Respondent's policy was to allow employees to use accrued vacation days to excuse absences and avoid the related points, and although Murphy had 40 hours of unused vacation at the time, the Respondent did not apply the vacation time to reduce Murphy's point total below the termination threshold. Nor did the Respondent show that it ever informed Murphy that doing so was an option for her.

In Stein's case, the evidence showed that she was seen at a hospital emergency room for pneumonia on December 26 and notified the Respondent about her medical situation. Stein was at the hospital on December 26 and 27. The first day that Stein returned to work after her hospital visit, she presented the Respondent with documentation from the hospital stating that she had been seen there on December 26 and was not to return to work for 2 days. Notwithstanding its receipt of this hospital note, the Respondent assessed an attendance point against Stein for her absence on December 26, bringing her point total to 8.5—above the level necessary to justify terminating her. Stein had used only two of the three medical-based appeals that she was entitled to under the Respondent's attendance practices and at the time of her discharge she had 40 hours of unused vacation time. The Respondent did not, however, recognize Stein's submission of the medical note as an "appeal," apply her accrued vacation time to excuse the absence, or otherwise apply its rules to excuse Stein's absence. Nor does the Respondent claim that it informed Stein that it was the Respondent's practice to permit employees to avoid attendance points under such circumstances.

On December 28, the President of Teamsters Local 89, renewed the Union's demand for recognition based, inter alia, on the decision issued by Judge Rosenstein. This was done in a letter to Gebhardt, the Respondent's director of labor relations. The letter was received in Gebhardt's office by facsimile transmission on December 28, a day that Gebhardt was present at work.

On December 29, Wilson and Gebhardt communicated by email regarding the possible termination of Stein. Wilson stated that Stein had not worked since December 21 and that he would proceed with her termination unless instructed otherwise. In this email, Wilson referred to Stein as "a special group employee," a term that Wilson says referred to employees affiliated with Teamsters Local 28. Gebhardt responded, but his response referred not only to the possible termination of Stein, but to the termination of "employees." He advised that if the employees did not have "a legitimate doctor's excuse that would only give them one point for the entire absence period," and if the Respondent had terminated everyone else who reached eight points," then when the employees returned Wilson should "immediately hold a disciplinary meeting with their UAW rep present and explore the issue of the doctor's note." Gebhardt continued "If no note exists, issue the discipline (suspension for that day) for reaching seven points, and issue the discipline (termination, effective the following day) for reaching 8 points."

On January 2, 2013, a day when Murphy and Stein were not assigned to work, they both received calls from Kitchen inviting them to a nonmandatory meeting that day at the LAP. Stein went to the meeting, which was attended by a total of 20 to 30 people. Murphy did not attend. At the meeting, Griffin spoke to the employees regarding the recent decision by Judge Rosenstein. Griffin told the employees that the "Teamsters had not won anything and that nothing was going to change." He stated that the Respondent was going to appeal as far as it could and look for a "more employer friendly judge next time."

The Respondent continued to assign work to both Murphy and Stein after it assessed eight attendance points against them on December 27 and 26 respectively. Both completed most of their shift on January 4 before a supervisor took them to meet with Wilson. When they arrived at the meeting, Murphy and Stein both asked Wilson for union representation. Wilson asked who they wanted to represent them, and Murphy responded "can I have Avral?"—meaning Teamsters official Avral Thompson. Wilson stated that Thompson could not participate, but that once the employees left the facility they could have "all the conversations with Avral that [they] wanted." At trial Wilson testified that labor relations director Gebhardt had instructed him not to allow Thompson to serve as union representative for Murphy and Stein. Wilson did not offer the employees an alternative union representative, despite Gebhardt's December 29 email directing Wilson to include a "UAW rep" at the meeting. Then, Wilson told the employees that they were being terminated and presented them with termination paperwork and copies of their attendance matrices. Murphy and Stein attempted to question the basis for the termination decision, but Wilson refused to discuss the matter with them. On January 4, Wilson informed Gebhardt by email that he had terminated Murphy and Stein.[11]

[11] The parties in this case introduced a number of determinations by Kentucky state agencies that concern the terminations of Murphy and Stein. The Respondent introduced decisions from the Kentucky Labor Cabinet Department of Workplace Standards, dated August 5, 2013, which stated that the Cabinet's investigation had not substantiated allegations that the employer terminated Murphy and Stein in retaliation for the complaints that they filed with the Kentucky Labor Cabinet. The decisions note that the employees had a right to appeal within 15 days, but the record does not disclose whether either Murphy or Stein has filed an appeal. The General Counsel introduced a decision by the Kentucky Division of Unemployment Insurance, mailed on January 28, 2013, which found that Murphy was entitled to unemployment com-

D. Complaint Allegations

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act on December 21, 2012, when Wilson threatened employees with unspecified reprisals for making complaints to the NLRB or engaging in other protected concerted activities.[12] The complaint also alleges that the Respondent discriminated in violation Section 8(a)(1), (3), and (4) of the Act: on December 21, 2012, when it issued disciplinary actions to Murphy and Stein because they engaged in concerted protected activities, joined and assisted Teamsters Local 89, and testified in a prior Board hearing; and on January 4, 2013, when it discharged Murphy and Stein for the same discriminatory reasons. In addition, the complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act since by beginning to require employees to load rail cars in the dark and subjecting them to newly implemented attendance and disciplinary policies without providing Teamsters Local 89 with notice and an opportunity to bargain.

IV. ANALYSIS

A. Section 8(a)(1) and Wilson's September 21 Threatening Statement

The complaint alleges that the Respondent violated Section 8(a)(1), when, on December 21, 2012, Wilson "threatened employees with unspecified reprisals for making complaints to the National Labor Relations Board and engaging in other protected concerted activities." Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." As Wilson himself admitted, on December 21, he warned Murphy and Stein to "refrain from [making] threats of calling OSHA and the NLRB" and not to make such statements to supervisors or others in the office building. When Murphy answered that she would stop when the Respondent stopped being unsafe, Wilson said "I need for you all to stop doing that."

The General Counsel argues that these statements by Wilson establish the complaint allegation that the Respondent violated Section 8(a)(1) by threatening employees with unspecified reprisals for making complaints to the NLRB or engaging in other protected concerted activities. It is not clear to me that Wilson's statements in the exchange recounted above are reasonably understood as a threat based on Murphy's and Stein's complaining to the NLRB. However, I do find that by those statements Wilson threatened Murphy and Stein for "engaging in other protected concerted activities"—specifically, for raising group complaints with the Respondent by expressing a willingness to contact the NLRB or OSHA about those complaints. The Board, with court approval, has concluded that an employee engages in protected activity when he or she "bring[s] truly group complaints to the attention of management." *Meyers Industries,* 281 NLRB 882, 887 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Activities that employees engage in "for the purpose of pressing employee complaints about working conditions" are themselves protected. *Ohio Masonic Home*, 290 NLRB 1011, 1013 (1988), enfd. 892 F.2d 449 (6th Cir. 1989). On December 21, Murphy made clear to Wilson that the statements about contacting federal agencies were in furtherance of complaints about plant safety and Wilson responded by repeating his warning that Murphy and Stein had to stop making such statements. These safety complaints, and in particular the complaints about the safety of loading rail cars during non-daylight hours, were concerted in that they represented the concerns of, at a minimum, employees Murphy, Stein, and Rhodes. *Meyers Industries*, 281 NLRB at 885 (employee's activity is concerted when it is engaged in, with, or on the authority of, other employees). Wilson's December 21 statements to Murphy and Stein about those concerted activities were particularly coercive because Wilson made them in the context of a meeting at which he raised the possibility of taking serious disciplinary action against Murphy and Stein. I conclude that the Respondent coercively threatened employees about protected concerted activities on December 21 when Wilson warned Murphy and Stein not to continue pressing employee complaints by telling the Respondent that they would bring such complaints to federal agencies.

The Respondent argues that Murphy's and Stein's behavior deprived their complaints of any protection that may have existed. Brief of Respondent at pages 14 to 15, citing *Trus Joist MacMillian*, 341 NLRB 369 (2004); *Piper Realty Corp.*, 313 NLRB 1289 (1994); *Media General Operations, Inc. v. NLRB,* 394 F.3d 207 (4th Cir. 2005); *J. P. Stevens v. NLRB,* 547 F.2d 792 (4th Cir. 1976). I disagree. The Board has made clear that protected conduct does not lose that protection unless it is sufficiently egregious or opprobrious. *Random Acquisitions, LLC*, 357 NLRB No. 32, slip op. at 14 (2011); *Nor-Cal Beverage Co.*, 330 NLRB 610, 611 fn.5 (2000). Under this standard, while an employee may forfeit the Act's protection by threatening others with, for example, physical harm, the employee does not forfeit protection by making statements that simply cause other to be annoyed or uncomfortable. *Chartwells, Compass Group, USA*, 342 NLRB 1155, 1157 (2004); *Alpine Log Homes*, 335 NLRB 885, 894 (2001); *RCN Corp.*, 333 NLRB

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pensation because the investigation did not show that Murphy had unsatisfactory attendance, and showed that the "discharge was for reasons other than misconduct connected with the work." The General Counsel also introduced an appeals decision by the Division of Unemployment Insurance, mailed on March 20, 2013, which determined that Stein was entitled to unemployment compensation because the discharge was "for reasons other than misconduct connected with the work." The record does not disclose if appeals have been filed regarding these unemployment insurance determinations.

The Board has held that decisions in state unemployment compensation proceedings are admissible in unfair labor practices hearings, but are not given controlling weight. See *Cardiovascular Consultants of Nevada*, 323 NLRB 67, 67 fn. 1 (1997); and *Whitesville Mill Service Co.*, 307 NLRB 937, 945 fn. 6 (1992). In this instance I do not find the state agency decisions presented by the parties to be persuasive. The decisions do not show that they were reached after hearings at which the parties had a full and fair opportunity to present evidence, nor do they reference the standards of proof applied, the specific evidence relied on, or the nature of any credibility determinations that may have been made.

[12] At the start of the trial, before any evidence had been taken, I granted the General Counsel's motion to amend the complaint to include this allegation.

295, 300 (2001). The Respondent did not show any conduct that begins to approach being so egregious or opprobrious as to strip the complaints made by Murphy and Stein of protected status. The evidence did not show that Murphy or Stein threatened anyone with physical harm or used abusive or otherwise inappropriate language. Nor did the Respondent show that they had made their complaints in a location that they were prohibited from entering or in a manner that was unduly disruptive or harassing. Certainly Murphy's and Stein's statements that they were prepared to use the means provided under federal law to press employees' complaints does not, as the Respondent seems to believe, strip their complaints of the protection of federal law. Cf. *Ohio Masonic Home*, supra. In addition, the Board has held that when an employee's actions come in response to unfair labor practices by the employer, that fact weighs in favor of finding that the employee retained the Act's protection. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). In this case, Murphy's and Stein's complaints to the Respondent were a reaction, at least in large part, to the new rail car loading rule and, as discussed below, the implementation of that rule was an unfair labor practice.

At any rate, when Wilson warned Murphy and Stein to stop talking about bringing workplace complaints to the attention of government agencies, he did not tell them that they only had to stop if such statements were accompanied by egregious or opprobrious behavior. Therefore, even assuming that Murphy or Stein forfeited the Act's protection with respect to one or more of their prior complaints to the Respondent, that would not change the fact that Wilson violated the Act by coercively warning them about pressing employees' workplace complaints in the future.

For the reasons discussed above, I find that the Respondent coercively threatened employees in violation of Section 8(a)(1) when, on December 21, 2012, Wilson warned Murphy and Stein not to tell supervisors or others at the office that they were going to bring employees' workplace complaints to the attention of the NLRB or OSHA.

B. Section 8(a)(1), (3), and (4): Discipline and Discharge of Murphy and Stein

The complaint alleges that the Respondent discriminated in violation of Section 8(a)(1), (3), and (4), when it issued disciplinary actions to Murphy and Stein on December 21, 2013, and terminated them on January 4, 2013. Under the Board's *Wright Line* decision, in cases alleging discrimination in violation of Section 8(a)(3), the General Counsel bears the initial burden of showing that the Respondent's decision to take adverse action against an employee was motivated, at least in part, by antiunion considerations. 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). The General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the Union or other protected activity. *ADB Utility Contractors*, 353 NLRB 166, 166–167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville*, 350 NLRB 1270, 1274–1275 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). Animus may be inferred from the record as a whole, including timing and disparate treatment. See, *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 4 (2011). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra. The Board also applies the *Wright Line* analysis to allegations that an employer violated Section 8(a)(1) by discriminating against an employee for engaging in concerted protected activity, *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB 347, 349 (2006), and to allegations that an employer violated Section 8(a)(4) by discriminating against "an employee because he has filed charges or given testimony" in a Board proceeding, *Verizon*, 350 NLRB 542, 546–547 (2007); *American Gardens Mgmt. Co.*, 338 NLRB 644, 644–645 (2001); *Gary Enterprises*, 300 NLRB 1111, 1113 (1990), enfd. 958 F.2d 368 (4th Cir. 1992) (Table).

The General Counsel has established a prima facie case that the discipline and termination of Murphy and Stein were discriminatory in violation of Section 8(a)(1), (3), and (4). The first two elements of the prima facie case are met since Murphy and Stein both engaged in activities protected under Section 7 and Section 8(a)(1), (3), and (4) of the Act and the Respondent was aware of those activities. Murphy and Stein engaged in union activity by, inter alia, continuing their affiliation with Teamsters Local 89, requesting representation by the vice-president of Teamsters Local 89 during meetings with the Respondent,[13] and frequently wearing clothing at work that bore messages referencing their affiliation with the Teamsters. The Respondent has stipulated that it was aware of Murphy's and Stein's affiliation with Teamsters Local 89.

Murphy and Stein also engaged in protected concerted activity by bringing group safety complaints about loading rail cars in the dark to Wilson and other company officials, see *Meyers Industries*, supra., and by bringing those safety complaints to the attention of the Kentucky Division of Occupational Safety and Health Compliance, see *Salisbury Hotel*, 283 NLRB 685, 687 (1987) (employees engage in protected concerted activity when they complain to the government about group concerns). Wilson testified that he believed that Murphy and Stein were likely involved with the safety complaint before the Kentucky agency, and the Respondent eventually provided backpay to Murphy and Stein as a result of a no-fault settlement of that complaint. Supervisor Calhoun also apparently made the connection between Murphy and Stein and the state agency proceeding because he summarily reassigned them to another part of the facility during the state investigator's on-site inspection of the safety complaint. With respect to the 8(a)(4) allega-

[13] The General Counsel does not allege, and I do not find, that Murphy and Stein were entitled, under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), or any other authority, to have a representative from Teamsters Local 89 present at the meetings with management in December 2012 and January 2013.

However, by requesting such representation Murphy and Stein were expressing their continued support for Teamsters Local 89.

tion, there is no dispute that Murphy and Stein were witnesses for the General Counsel at the prior ULP trial before Judge Rosenstein and that the Respondent was aware of that testimony.

The third element of the prima facie case is met because the evidence shows that the Respondent bore animus towards the Union and the protected activity discussed above. The Respondent's managers and supervisors have expressed animosity towards Teamsters Local 89 in no uncertain terms. During a managers' meeting at the LAP in early to mid 2012, Wilson stated that the Respondent was at "war against the Teamsters" and was "in this facility to uproot them." Wilson was the same management official who later disciplined and terminated Murphy and Stein. Some months after the managers meeting, when Wilson took those actions against Murphy and Stein, the "war against the Teamsters" was ongoing in that the Respondent was continuing to refuse to recognize Teamsters Local 89 and Teamsters officials were continuing to demand recognition. In addition, during the period when the Respondent was staffing up the operation, another manager—Barrett—told a supervisor who was engaged in hiring employees that the Respondent "wanted to keep the majority of the employees UAW." One supervisor, Frank, expressed the view that any problems occurring with vehicles in the LAP yard should be attributed to intentional malfeasance by the Teamsters-affiliated employees. During one period the Respondent directed employees who it knew were Teamsters-affiliated to begin wearing "Voith UAW" clothing. This evidence leaves no doubt that the Respondent's animosity towards the Teamsters was pervasive and that it was expressed by, among others, the very official who took the allegedly discriminatory action against Murphy and Stein.

The evidence also shows that the Respondent bore hostility towards Murphy's and Stein's protected efforts to oppose the new requirement to load rail cars in the dark. When Murphy first objected that the new requirement was unsafe, supervisor Calhoun threatened to terminate her. Later Wilson coercively warned Murphy and Stein not to continue saying that they would bring the Respondent's conduct to the attention of the NLRB and OSHA. The evidence shows that this hostility continued until, and was connected to, the Respondent's disciplinary actions against Murphy and Stein. It was at the same December 21 meeting that Wilson discussed the disciplinary notices and also warned Murphy and Stein not to tell supervisors or others that they would contact the NLRB and OSHA.

The record also demonstrates Wilson's animosity towards cooperation with the Board. When Wilson discovered that Miller was present at the hearing before Judge Rosenstein, he sent a text message to Griffin, the regional manager for vehicle processing, in which he stated that "Fukin Miller is here to testify on behalf of the Teamsters." This evidence is sufficient in my view to show Wilson's animosity towards individuals who, like Miller, Murphy and Stein, participate in the Board's processes in a manner unfavorable to the Respondent. Additional evidence of animus is provided by Wilson's statements to Murphy and Stein that they had to stop telling supervisors that they would bring complaints about the Respondent's conduct to the Board. Those statements suggest that Wilson viewed it as improper for an employee to invoke the Board's processes.[14]

Since the General Counsel has made the required initial showing under *Wright Line*, the burden shifts to the Respondent to show that it would have taken the same action even absent Murphy's and Stein's protected activity. The Respondent cannot meet this burden merely by showing that employee misconduct also factored into the Respondent's decision. Rather, the Respondent's burden is to show that the misconduct would have resulted in the same discipline even in the absence of the employee's union and protected activities. *Monroe Mfg.*, 323 NLRB 24, 27 (1997). In an effort to meet its burden with respect to the December 21 discipline, the Respondent relies on evidence about its attendance policy and the attendance-based discipline it imposed on other employees who were not affiliated with the Teamsters and did not engage in protected activities. Putting aside for the moment that on December 21 the Respondent presented discipline to Murphy and Stein based not only on attendance, but also on the patently false assertion that they had refused to load rail cars on December 19, I find that the Respondent has failed to demonstrate that the regular application of its attendance policies would have caused it to discipline Murphy and Stein absent its discriminatory motivation. When Wilson presented the attendance-based discipline on December 21,[15] the employees responded by objecting that medical notes justifying some of the absences upon which the discipline was based had been presented to the Respondent. Wilson replied to this objection by declaring first that doctor's notes were no longer being accepted, and then that Murphy and Stein could only use two doctor's notes per year to excuse absences. This is a different, and stricter, standard than the 3-per-year automatic note acceptance rule that the Respondent had been applying to others. Moreover, Wilson's statement ruled-out the possibility that Murphy and Stein could, like other employees, present medical notes in excess of three and have them fairly considered. There was evidence that the Respondent had essentially unlimited discretion to grant such requests and had accepted in excess of two doctor's notes to excuse the absences of other employees.

The Respondent's effort to demonstrate that it would have disciplined Murphy and Stein for attendance even absent their protected activity fails for another reason. That discipline was based on attendance infractions assessed for December 20 that the record does not show were consistent with its treatment of other employees. December 20 was not a regularly scheduled workday for Murphy or Stein, and the Respondent has not

[14] The General Counsel made a motion requesting that, in determining whether animus is shown, I rely on the findings made by Judge Rosenstein in the prior litigation, including his finding that the Respondent discriminated in violation of the Act by denying employment to individuals because of their affiliation with the Teamsters. The Respondent opposed that motion. Because I find that ample evidence establishing improper animus was introduced at the trial before me, I find it unnecessary to rule on the General Counsel's request that I rely on the animus finding in Judge Rosenstein's decision.

[15] Although Wilson deferred action on the attendance-based suspension he presented on December 21, he did carry through with the assessment of attendance points and relied on those points to justify the subsequent terminations of Murphy and Stein.

shown that it gave either employee advance notice that the day had been added to their schedules. The record does not show that the Respondent assessed attendance violations against its non-Teamster employees for absences on days when it had not informed them they were expected at work, and indeed it is implausible that the Respondent would do so. To the contrary, the Respondent has demonstrated flexibility in dealing with absences that resulted from miscommunications. For example, the Respondent forgave the absence of a non-Teamsters employee who purported to take vacation at a time when that employee did not have available vacation time. Nor did the Respondent show that it ever assessed points against non-Teamster employees, as it did against Stein, for being absent on a day when the employee documented that he or she could not work due to the illness of a dependent minor. To the contrary, the Respondent had in the past liberally excused absences resulting from childcare issues. Under these circumstances, the Respondent has failed to demonstrate that it would have assessed the December 20 attendance violations against Murphy and Stein absent their protected activities.

I also note that the Respondent provides no reasonable explanation for why, on December 21, Dawson presented Murphy and Stein with disciplinary paperwork for purportedly refusing to load rail cars on December 19, a date when they were neither at work nor expected at work. Wilson's testimony was essentially that the discipline was presented because the Respondent had expected to direct Murphy and Stein to load rail cars in the dark on December 19 and expected (mistakenly as it turned out) that they would refuse such a direction. The fact that Murphy and Stein were not directed to load rail cars in the dark on that day, and did not refuse to do so, then or at any time thereafter, should have been enough to stop the Respondent from presenting that discipline. There was no evidence that the Respondent has ever presented discipline to a non-Teamsters employee because management was *expecting* that employee to engage in misconduct that the employee did not actually commit. Wilson's explanation for this discipline, far from demonstrating a basis for believing it would have been presented absent Murphy's and Stein's protected activity, suggests that the Respondent was singling out those employees.

The Respondent contends that discipline based on the employees' purported refusal to load rail cars cannot be the basis for finding an 8(a)(1) violation because, after Dawson issued the discipline, Wilson told Murphy and Stein that the discipline had been presented erroneously and that a suspension would not be imposed based on it. However, the record does not show that Wilson told the two employees that the discipline would be expunged from their personnel files and have no effect on their future employment. Nor did Wilson give Murphy or Stein assurances that the Respondent would not discriminate on the basis of subsequent Section 7 activity. To the contrary, Wilson followed-up his discussion of the erroneous discipline by asserting an alternative, but also improper, attendance-based justification for the discipline and warning the employees not to engage in certain protected concerted activities. Under these circumstances, I find that the Respondent failed to cure the violation created by its presentation to Murphy and Stein of discipline based on a discriminatory and plainly fictitious basis. See *Passavant Memorial Area Hospital,* 237 NLRB 138 (1978).[16]

For the reasons discussed above, I find that the Respondent discriminated against Murphy and Stein in violation of Section 8(a)(1), (3), and (4), when it presented them with discipline on December 21, 2013.

I also find that the Respondent has failed to meet its responsive burden with respect to the decision to terminate Murphy and Stein on January 4, 2013. The Respondent attempts to show that it would have terminated those employees for reaching eight attendance points even if they had not engaged in protected activity. However, the Respondent relies on attendance points assessed for the December 20 absences—points that, as discussed above, were themselves discriminatorily imposed in violation of the Act. Without including those discriminatorily assessed attendance points the 8-point threshold for termination was not reached with respect to either employee. Even if the attendance points assessed for December 20 were not invalid, the Respondent still has not met its burden because to reach the 8 point threshold it also relies on subsequently assessed points that it has failed to show it would have assessed absent Murphy's and Stein's protected activity. Specifically, to reach the 8 point threshold for Murphy, the Respondent relies on her absence from work on December 27—a day that Murphy was not regularly scheduled to work and which the Respondent has not shown it told her was being added to her schedule. As noted above, the Respondent has not shown that it assessed points against non-Teamsters employees for absences on days that they were not regularly scheduled to work and were not informed they were expected at work.

As for Stein, the Respondent reaches the 8-point threshold by counting the attendance point it assessed for her absence December 26. The evidence showed, however, that Stein was seen in a hospital emergency room that day for pneumonia, that she informed one of her supervisors (Dawson) about the situation, and that, on her first day back at work, she presented the Respondent with medical documentation of her inability to work at the time in question. The evidence also shows that Stein had used only two of her three medical appeals. Under these circumstances, the Respondent was facially required by its own attendance practices to excuse Stein's absence without the assessment of points. The Respondent attempts to defend its failure to do so by arguing that Stein neglected to "appeal" the point assessed for that absence. As discussed earlier, however, when an employee provides the Respondent with medical documentation of inability to work, as Stein did here, that submission itself constitutes the appeal. No additional actions were identified and shown to be necessary to create an appeal.

I find that the Respondent discriminated in violation of Section 8(a)(1), (3), and (4) when it terminated Murphy and Stein

[16] Under *Passavant*, an employer may avoid liability for unlawful conduct in some circumstances by repudiating the conduct. 237 NLRB at 138–139. To be effective, the repudiation must be: timely; unambiguous; specific in nature to the coercive conduct; adequately publicized to the employees involved; free from other proscribed illegal conduct; and accompanied by assurances that the employer will not interfere with employees' Section 7 rights in the future. Id. The employer also must not engage in proscribed conduct after the repudiation. Id.

on January 4, 2013.

C. Section 8(a)(5) and (1): Unilateral Changes Regarding Policies on Attendance and Loading Rail Cars During Non-Daylight Hours

In the prior decision, Judge Rosenstein found that the Respondent was the successor to Cooper Auto Handling and was required to recognize and bargain with Teamsters Local 89 as the exclusive collective bargaining representative of unit employees. I have adopted Judge Rosenstein's finds of fact and conclusions of law as they relate to those matters.

In the proceeding before me, the General Counsel alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes to its attendance policy and unilaterally adopting a new requirement that employees load rail cars during non-daylight hours. The Board has held that an employer violates Section 8(a)(5) and (1) when it unilaterally changes the wages, hours, or other terms and conditions of employment of bargaining unit employees, without first providing the collective-bargaining representative with notice and a meaningful opportunity to bargain. *NLRB v. Katz,* 369 U.S. 736 (1962); *Whitesell Corp.*, 357 NLRB No. 97, slip op. at 53 (2011); *Ivy Steel & Wire, Inc.*, 346 NLRB 404, 419 (2006); *Mercy Hospital of Buffalo,* 311 NLRB 869, 873–874 (1993); *Associated Services for the Blind,* 299 NLRB 1150, 1164–1165 (1990).

Turning first to the changes to the attendance policies, I find that the Respondent violated Section 8(a)(5) and (1) by abandoning the attendance policies that were in place under the Respondent's predecessor—Cooper Auto Handling—and adopting a completely new and different policy. To note only one of the many significant differences between the two, the prior attendance policy placed no limit on the number of employee absences that the employer would automatically excuse if the employee documented medical reasons for the absence, but the Respondent's new attendance policy limited that number to three. It is clear that attendance policies are a mandatory subject of bargaining that an employer cannot change without giving the employees' bargaining representative notice and an opportunity to bargain. *Virginia Mason Hospital*, 357 NLRB No. 53, slip op. at 4 (2011). The Respondent offers no viable argument for escaping that obligation here, and there is no dispute that it made the changes without giving Teamsters Local 89 notice and an opportunity to bargain.[17]

For the reasons discussed above, I find that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to recognize and bargain with Teamsters Local 89 as the exclusive collective-bargaining representative of the bargaining unit and by unilaterally imposing a new attendance policy.

I also find that the Respondent violated its bargaining obligations by unilaterally imposing a new requirement that employees load rail cars during non-daylight hours. The Respondent does not dispute that it made this change without giving Teamsters Local 89 notice or an opportunity to bargain, but contends that the change was not significant enough to give rise to a bargaining obligation. I disagree. The Board has held that a change to working conditions triggers the obligation to bargain if it is "material, substantial, and significant." *Crittenton Hospital*, 342 NLRB 686 (2004); *Bath Iron Works Corp.*, 302 NLRB 898, 901 (1991). The change is measured by the extent to which it departs from the existing terms and conditions affecting employees. *Crittenton Hospital*, supra. The Board has frequently held that changes which, like the one at issue here, concern work conditions relating to employee safety are material, substantial and significant, and give rise to a bargaining obligation. See, e.g., *Castle Hill Health Care Center*, 355 NLRB No. 196, slip op. 28 (2010) ("workplace safety is a mandatory subject of bargaining"); *Public Service Co. of Oklahoma*, 334 NLRB 487, 489 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003) ("work and safety rules" are a mandatory subject of bargaining); *AK Steel Corp.*, 324 NLRB 173, 181 (1997) ("equipment and work rules related to job safety" are mandatory subjects of bargaining); *American National Can Co.*, 293 NLRB 901, 904 (1989), enfd. 924 F.2d 518 (4th Cir. 1991) (health and safety matters are mandatory subjects of bargaining); *J.P. Stevens & Co.*, 239 NLRB 738, 742–743 fn. 6 (1978), enfd. in relevant part 623 F.2d 322 (4th Cir. 1980), cert. denied 449 U.S. 1077 (1981) (substitution of heavier protective equipment for unit employees was a mandatory subject of bargaining); *Gulf Power Co.*, 156 NLRB 622 (1966), enfd. 384 F.2d 822 (5th Cir. 1967) (workplace safety conditions are a mandatory subject of bargaining).

I find that the Respondent's new requirement that employees load rail cars during non-daylight hours significantly impacted employee safety. The uncontradicted testimony was that rail cars were completely dark during non-daylight hours and that in order to maneuver inside them at those times an employee was reduced to shuffling around and feeling his or her way along the vehicles inside, while surrounded by metal. Murphy, Stein and Rhodes discussed with one another, and with multiple company officials, their concerns that this was unsafe and created a risk of injury. Murphy felt strongly enough about the matter to file a complaint with the Kentucky Labor Cabinet's Division of Occupational Safety and Health Compliance. The evidence showed that the reason for the longstanding prior policy against loading rail cars in the dark was that the LAP yard lacked special night loading lights that provide visibility for employees during non-daylight hours. In an effort to show that the change in policy was not significant, the Respondent points out that other bargaining unit employees went along with its direction to load rail cars during non-daylight hours. However, none of those employees were called to testify that load-

[17] In its brief, the Respondent makes a detailed argument that Murphy and Stein would have been discharged earlier under the Cooper Auto Handling attendance policies. That argument has no bearing on the question of whether the Respondent violated Sec. 8(a)(5) and (1) when it unilaterally changed the attendance policies for all unit employees. In addition, since the individual relief the General Counsel is seeking for Murphy and Stein is required based on the finding that the Respondent's treatment of them was discriminatory in violation of Sec. 8(a)(1), (3), and (4), it is not necessary, at least at this juncture, to make a determination about whether the 8(a)(5) violation also warrants that individual relief.

I also note that, while the General Counsel's brief anticipates that the Respondent will argue that the 8(a)(5) allegation regarding the attendance policy is time-barred, the Respondent did not raise that defense in its brief or in its answer to the complaint.

ing at night did not meaningfully impact their safety or heighten their fears of injury. To the contrary, Wilson's own testimony suggests that other employees considered loading rail cars in the dark to be burdensome. He stated that he took action based on a supervisor's report that employees were upset that the Respondent was requiring them to load rail cars during non-daylight periods while permitting Murphy, Stein, and Rhodes to escape doing so.

The Board has held that work rules involving the imposition of discipline constitute a mandatory subject of bargaining. *California Offset Printers, Inc.*, 349 NLRB 732, 733 (2007), citing *Toledo Blade Co.*, 343 NLRB 385, 387 (2004), and *Cotter & Co.*, 331 NLRB 787, 796 (2000); see also *General Die Casters*, 359 NLRB No. 7, slip op. at 1–2 (2012) (employer makes unlawful unilateral change by beginning to discipline employees for misconduct for which it did not previously impose discipline). In this case, the Respondent made clear by the discipline it presented to Murphy and Stein on December 21 that it intended to discipline employees based on the new work rule regarding rail car loading during non-daylight hours. This further supports the view that the new rule was sufficiently material, substantial, and significant to trigger an obligation to bargain.

For the reasons discussed above, I find that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to recognize and bargain with Teamsters Local 89 as the exclusive collective-bargaining representative of the bargaining unit and by unilaterally imposing a new policy requiring employees to load rail cars during non-daylight hours.

Conclusions of Law

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

2. Teamsters Local 89 is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent threatened employees in violation of Section 8(a)(1) of the Act, by coercively warning them not to tell supervisors or others in the office that they were going to press employees' workplace complaints by bringing them to the attention of the NLRB or OSHA.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by issuing discipline to, and then terminating, Murphy and Stein because of their union affiliation and activities.

5. The Respondent violated Section 8(a)(1) of the Act by issuing discipline to, and then terminating, Murphy and Stein for engaging in concerted protected activity.

6. The Respondent violated Section 8(a)(4) and (1) of the Act by issuing discipline to, and then terminating, Murphy and Stein because of their participation in the Board's processes.

7. The Respondent violated Section 8(a)(5) and (1) by failing and refusing to recognize and bargain with Teamsters Local 89 as the exclusive collective-bargaining representative of the bargaining unit and by unilaterally imposing a new attendance policy on unit employees.

8. The Respondent violated Section 8(a)(5) and (1) by failing and refusing to recognize and bargain with Teamsters Local 89 as the exclusive collective-bargaining representative of the bargaining unit and by unilaterally imposing a new policy requiring employees to load rail cars during non-daylight hours.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. In particular, I recommend that the Respondent be ordered to, upon request by the Union, rescind the changes it unilaterally made for unit employees with respect to attendance and rail car loading during non-daylight hours and restore the policies that were in force immediately before the Respondent's predecessor, Cooper Auto Handling, ceased operations at the LAP. The Respondent, having discriminatorily discharged employees Murphy and Stein, must offer them reinstatement and make them whole for any loss of earnings and other benefits. 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 No. 8 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended order.[18]

ORDER

The Respondent, Voith Industrial Services, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith with General Drivers, Warehousemen & Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters (Teamsters Local 89) as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All employees as set forth in Article 3 of the National Master Automobile Transporters Agreement, Central and Southern Area Supplemental Agreements and the Job Descriptions provisions of the Local Rider.

(b) Making any changes to the terms and conditions of employment of unit employees without providing Teamsters Local 89 with notice and an opportunity to bargain.

(c) Threatening employees by coercively warning them not to press employees' complaints by telling supervisors or others at the LAP that they would bring such complaints to the attention of the NLRB or OSHA.

(d) Disciplining, discharging, or otherwise discriminating against employees for joining, supporting, or assisting Team-

[18] 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.

sters Local 89 or any other union.

(e) Disciplining, discharging, or otherwise discriminating against employees for voicing or otherwise making concerted complaints about working conditions.

(f) Disciplining, discharging, or otherwise discriminating against employees for giving testimony, or otherwise participating, in a proceeding of the Board.

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

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

(a) Recognize and bargain with Teamsters Local 89 concerning the terms and conditions of employment of employees in the bargaining unit described above and provide Teamsters Local 89 with notice and an opportunity to bargain regarding any changes to the employees' terms and conditions of employment.

(b) Notify Teamsters Local 89 in writing that the Respondent recognizes it as the exclusive representative of unit employees under Section 9(a) of the Act and will bargain with it concerning terms and conditions of employment for employees in the unit.

(c) At the request of Teamsters Local 89, rescind any departures from the policies regarding attendance and rail car loading during non-daylight hours that existed immediately before the Respondent's predecessor, Cooper Auto Handling, ceased operations at the LAP, and restore the preexisting policies for bargaining unit employees.

(d) Within 14 days from the date of the Board's Order, offer Patti Murphy and Kelly Stein full 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.

(e) Make Patti Murphy and Kelly Stein 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.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discipline and discharge of Patti Murphy and Kelly Stein and within 3 days thereafter notify them in writing that this has been done and that the discipline and discharges will not be used against them in any way.

(g) 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.

(h) Within 14 days after service by the Region, post at its facility in Louisville, Kentucky, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 21, 2013.

(i) 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.

Dated, Washington, D.C. January 23, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you by coercively warning you not press employees' complaints by telling your supervisors or others at the Louisville Assembly Plant (LAP) that you will bring such complaints to the attention of the National Labor Relations Board (NLRB) or the Occupational Safety and Health Administration (OSHA)

WE WILL NOT discipline, discharge or otherwise discriminate against any of you for joining, supporting, or assisting General Drivers, Warehousemen & Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters (Teamsters Local 89) or any other union.

WE WILL NOT discipline, discharge, or otherwise discriminate against any of you for voicing or otherwise making concerted complaints about working conditions.

[19] 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."

WE WILL NOT discipline, discharge, or otherwise discriminate against any of you for giving testimony, or otherwise participating, in a proceeding of the NLRB.

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

WE WILL, on request, bargain with Teamsters Local 89 and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All employees as set forth in Article 3 of the National Master Automobile Transporters Agreement, Central and Southern Area Supplemental Agreements and the Job Descriptions provisions of the Local Rider.

WE WILL recognize and bargain with Teamsters Local 89 concerning the terms and conditions of employment of employees in the bargaining unit described above and provide Teamsters Local 89 with notice and an opportunity to bargain over any changes to the employees' terms and conditions of employment.

WE WILL notify Teamsters Local 89 in writing that we recognize it as the exclusive representative of the unit employees under Section 9(a) of the Act and that we will bargain with it concerning terms and conditions of employment for unit employees.

WE WILL, at the request of Teamsters Local 89, rescind for unit employees any departures from the policies regarding attendance and rail car loading during non-daylight hours that existed immediately before our predecessor, Cooper Auto Handling, ceased operations at the LAP, and restore the preexisting policies.

WE WILL, within 14 days from the date of this Order, offer Patti Murphy and Kelly Stein full 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 Patti Murphy and Kelly Stein whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Patti Murphy and Kelly Stein for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discipline and discharges of Patti Murphy and Kelly Stein, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discipline and discharges will not be used against them in any way.

VOITH INDUSTRIAL SERVICES, INC.