

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

W.B. MASON CO., INC.

and

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 25**

Cases 01-CA-161120
 01-CA-161428
 01-CA-161697
 01-CA-162391
 01-CA-162884
 01-CA-177383

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN PARTIAL SUPPORT OF
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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I. STATEMENT OF THE CASE

This case was heard before Administrative Law Judge Mark Carissimi (the ALJ or Judge) on June 13 through 17 and June 21, 2016, in Boston, Massachusetts.

On November 4, 2016, Judge Carissimi issued his Decision (the ALJD), finding that W.B. Mason's (Respondent or Employer) extreme and pervasive conduct warranted multiple remedial actions, including a *Gissel* bargaining order.

Judge Carissimi correctly determined that Respondent violated Section 8(a)(1) of the Act by:

- (a) Soliciting grievances and impliedly promising to remedy them.
- (b) Interrogating employees regarding their union activity.
- (c) Threatening employees with a loss of direct access to it if the employees selected International Brotherhood of Teamsters, Local 25 (the Union) as their bargaining representative.
- (d) Informing employees of the futility of selecting the Union as their bargaining representative.
- (e) Creating the impression that the employees' union activities were under surveillance.
- (f) Offering employees transfers, raises and promotions in order to discourage them from supporting the Union.
- (g) Attributing the loss of a wage increase to the Union.
- (h) Interrogating an employee about his NLRB subpoena.

Judge Carissimi correctly determined that Respondent violated Section 8(a)(3) and (1) of the Act by:

- (a) Granting benefits to employees by improving the efficiency of its warehouse, delivery routes, and truck loading, and assisting employees in the performance of their duties, in order to discourage them from supporting the Union.
- (b) Laying off Kerby Chery, Jason Cobbler, and Elton Ribeiro because of their union activities.
- (c) Suspending and discharging Marco Becerra and Sean Brennan because of their union activity.
- (d) Withholding an expected annual wage increase from employees in December 2015 in order to discourage them from supporting the Union.
- (e) Granting a wage increase to employees in May 2016 in order to discourage them from supporting the Union.

Finally, Judge Carissimi correctly determined that Respondent violated Section 8(a)(5) and (1) of the Act by:

- (a) Since September 28, 2015, failing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time supply drivers, supply driver helpers and supply shuttle drivers employed by Respondent at its Summer Street, South Boston, Massachusetts facility, but excluding all other employees, managers, guards, and supervisors as defined in the Act.

- (b) Unilaterally failing to grant an annual wage increase in December 2015.

- (c) Unilaterally granting an annual wage increase in May 2016.¹

This brief is submitted in support of those findings of fact and conclusions of law.²

II. STATEMENT OF THE ISSUES

A. Did the ALJ correctly decide that Respondent violated Section 8(a)(1) by soliciting employee grievances and impliedly promising to remedy them; interrogating employees; threatening employees with loss of direct access if they selected International Brotherhood of Teamsters, Local 25 (the Union) as their bargaining representative; informing employees that it would be futile to select the Union; creating the impression that employees' union activities were under surveillance; offering employees promotions, raises, and transfers to discourage them from supporting the Union; attributing the loss of a wage increase to the Union; and interrogating an employee about his NLRB subpoena?

B. Was the ALJ correct in deciding that Respondent violated Section 8(a)(3) and (1) by granting benefits to employees by improving the efficiency of its operation and by assisting them in the performance of their duties in order to discourage them from supporting the Union; by laying off Kerby Chery, Jason Cobbler, and Elton Ribeiro

¹ ALJD-69-70. Citations to the administrative record will be designated "ALJD-(page number)" for references to the ALJ's decision, "T-(page number)" for transcript references, "GC-(exhibit number)" for General Counsel exhibits, and "R-(exhibit number)" for Respondent's exhibits.

² The General Counsel respectfully urges the Board to adopt the ALJ's detailed credibility findings, all of which are well-supported by the record.

because of their union activities; by suspending and discharging Sean Brennan and discharging Marco Becerra because of their union activity; by withholding employees' annual wage increase in December 2015 in order to discourage them from supporting the Union; and by granting employees a wage increase in May 2016 in order to discourage them from supporting the Union?

C. Did the ALJ correctly determine that Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union as the representative of employees in the unit; by unilaterally withholding a wage increase in December 2015; and by unilaterally granting a wage increase in May 2016.

D. Was the ALJ correct in finding that Respondent's unfair labor practices were so serious and substantial that traditional remedies are unlikely to erase their effects and ensure a fair election, and in ordering Respondent to recognize and bargain with the Union?

III. BACKGROUND

A. The Employer's Operations

Respondent is a national distributor of office furniture, office supplies, and related products. Its South Boston facility, the only one at issue in these cases,³ includes a warehouse, which is part of Respondent's distribution and delivery functions. The Unit involved in this matter is comprised of supply drivers and helpers,⁴ who drive trucks and deliver products to customers in the Greater Boston area. Supply drivers typically work Monday through Friday, from about 7 a.m. until their delivery routes are finished, usually by about 5 to 6 p.m. Driver helpers assist the drivers with the delivery routes. The drivers and helpers are supervised by "Goldstars," who in turn report to Transportation Manager Marianne McIntyre ("McIntyre"). McIntyre reports to Branch Manager Carlos DeAndrade ("DeAndrade"), who oversees the distribution side in South Boston. DeAndrade is not directly responsible for Boston warehouse operations or for furniture sales and delivery (T-924).

³ South Boston is a section of the City of Boston, and the two are often used interchangeably in the record (T-268).

⁴ The term "supply drivers" was used to distinguish the petitioned-for employees from other drivers, such as furniture delivery drivers, tractor trailer drivers, and coffee drivers (T-265).

Michael Meath (“Meath”) is Mason’s regional vice president of distribution (T-604). He divides his time between Boston and Brockton, spending about 60 percent of his time in Boston. Joel Burkowsky (“Burkowsky”) is Respondent’s director of human resources (T-268). Based at corporate headquarters in Brockton (T-269), Burkowsky has overall responsibility for Respondent’s human resources function. Timothy Hallinan (“Hallinan”), the Boston human resources manager, reports to Senior Regional Human Resources Manager Laura Sullivan (“Sullivan”).⁵ Sullivan reports directly to Chief Operating Officer Chris Meehan (“Meehan”), who spends about 60 percent of his time in Boston (T-268).⁶

B. The Organizing Campaign

On September 28, 2015,⁷ the Union filed a petition in Case 01-RC-160788, seeking to represent the Boston supply drivers and helpers. The parties executed a Stipulated Election Agreement, agreeing to an election on October 22 in the following unit (the Unit):

All full-time and regular part-time supply drivers, supply driver helpers, and shuttle supply drivers employed by Respondent at its Summer Street, Boston, Massachusetts facility, but excluding all other employees, managers, guards, and supervisors as defined in the Act.

The ALJ correctly found that there were 45 employees in the Unit as of September 28, the date of the Union’s demand for recognition.⁸ The Union had been gathering authorization cards from unit employees since about March 2015. By September 28, the Union had received signed cards from 38 of the Unit employees. Thirty of those cards were properly authenticated and admitted into evidence without objection (GC-4a and b; GC-6a, b, c, and d; GC-8a through j; GC-9; GC-10a, b and c; GC-12; GC-13; GC-15a and b; GC-16; GC-17a and b; GC-21; GC-31; and GC-72).

⁵ AKA Laura Paciulan (T-269).

⁶ Branch Manager Carlos DeAndrade (DeAndrade) also reports to COO Meehan (Meehan).

⁷ All dates are in 2015 unless otherwise noted.

⁸ The voter list included only 42 names, but the ALJ determined that three driver helpers who were unlawfully terminated on October 2 should have been included in the unit (ALJD-64).

On September 28, Union Organizer Chris Smolinsky (Smolinsky), along with Business Agent Robert Aiguier (Aiguier), hand-delivered the petition to Respondent (T-72) and requested recognition (T-72-73). The Employer declined to recognize the Union, and Smolinsky left a copy of the petition (GC-23), as well as a flyer that included two pictures of employee Union supporters (GC-19). Smolinsky filed the petition with the Regional Office the same day.

On September 29, about 20-25 drivers and helpers rallied outside Respondent's Boston warehouse before the start of their work day. Another 10-15 sympathizers from outside the company also participated, as did Smolinsky. The group carried signs calling for recognition and a contract, walked in a circle, and chanted (T-79-80, 470). Several of Respondent's managers, including Mike Meath (Meath), DeAndrade, and Tim Hallinan (Hallinan), witnessed the rally and interacted with participants (T-80, 365, 470).

As discussed in detail below, Respondent started its aggressive anti-union campaign on the day the petition was filed, holding multiple mandatory driver meetings at which several high-level managers were present. On October 6, Labor Consultant Michael Penn (Penn) began holding a series of mandatory meetings for drivers and helpers. Employees were divided into small groups, and each group was required to attend two meetings a week over a two-week period.

Soon after Penn's meetings began, the campaign started to flounder. During the period between the filing of the petition and about October 10, employees had been actively participating in numerous group text messaging threads, including one called "Still United" (T-88; GC-25). By October 12, when the next Union meeting was held, the text messages dwindled (T-95), and only six employees – two of whom had already been fired – showed up to the meeting. Employees reported to Smolinsky that others were afraid to continue supporting the Union (T-100-102). Formerly strong supporters stopped returning Smolinsky's phone calls (T-95). The once-solid campaign was in disarray.

On October 14, after work hours, employees Rob Coppola (Coppola), John Edwards (Edwards), and Carlos Pina (Pina) – once the most ardent Union supporters –

met with Managers DeAndrade and Jeff DePaul (DePaul). According to DeAndrade, the three drivers requested the meeting in order to discuss the process for asking the Union to walk away from the campaign (T-929). DeAndrade brought in Penn, who told the three drivers that they could draft a petition, have employees sign it, and present it to the Union (T-930). The next day, Coppola, Edwards, and Pina solicited employees to sign the petition (T-579), telling them that everyone was signing it, and that they should sign it so they could get their raises (T-195).

On October 15, a mere 17 days after the petition was filed with the support of a large majority of the unit, employees presented Organizer Smolinsky with a petition, signed by 30 employees (T-102; GC-28), requesting that the Union withdraw its petition and unfair labor practice charges. As the ALJ concluded, this sudden and catastrophic loss of employee support, as discussed below, was the direct result of Respondent's serious and substantial unfair labor practices.

Based on the employee petition, the dramatic loss of employee support, and the unfair labor practices he had been hearing about and filing charges on for the previous two weeks, Smolinsky made a decision in consultation with counsel to request that the representation proceeding be blocked (T-105-106). It remains blocked.

IV. THE SECTION 8(a)(1) ALLEGATIONS⁹

The basic test for a violation of Section 8(a)(1) is whether, under all the circumstances, an employer's conduct reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed by the Act. *Mediplex of Danbury*, 314 NLRB 470 (1994); *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992), citing *American Freightways Co.*, 124 NLRB 146, 147 (1959).

As Judge Carissimi concluded, Respondent committed numerous 8(a)(1) violations on the heels of the Union's demand for recognition.

⁹ All alleged violations of Section 8(a)(1) will be addressed in this section, except those involving the wage increase, which are addressed below.

A. Solicitation of Grievances and Promises to Remedy

On the very day the Union's petition for representation was filed, Respondent's managers began soliciting employees' grievances and impliedly promising to remedy them.

Shortly after the Union's demand for recognition, Branch Manager DeAndrade approached driver Robert Froio (Froio)¹⁰ in his truck and asked what the drivers' issues and problems were. DeAndrade also told Froio he had an open door, and that employees could talk to him anytime (T-148). DeAndrade made a similar statement during a captive audience meeting on September 29 or 30, when he told drivers to come see him if they had any questions or needed anything (T-564). During a captive audience meeting on about September 29, DeAndrade told employees the company was trying to fix the routes and get help for the drivers (T-425).

Around October 1, DeAndrade approached driver Marco Becerra (Becerra) at his truck and asked if there were any stops that could be taken off his route to make it easier or more manageable (T-474). Becerra promised to think about it, and texted DeAndrade the following Monday. Becerra suggested three stops – 75 State Street, 53 State Street, and 10 Post Office Square – that could be taken off his route to make it more manageable.

Senior Regional HR Manager Laura Sullivan (Sullivan) also solicited employee grievances. Froio testified that Sullivan approached him on the loading dock shortly after the Union rally. Sullivan told Froio she was not aware that drivers had so many complaints, and asked if he knew what was going on or what the problems were. Sullivan also asked why the drivers had gone to the Union or signed union cards (T-149, 178).

The ALJ properly found that DeAndrade and Sullivan, through their conduct described above, solicited employee grievances and impliedly promised to remedy them in violation of Section 8(a)(1).

¹⁰ Froio, one of the leaders of the organizing campaign, is a long-time and current employee who testified reluctantly under subpoena. The ALJ correctly credited his testimony, noting that Froio is a current employee testifying against his employer under subpoena. Judge Carissimi properly credited Froio's testimony in its entirety. *Avenue Care & Rehabilitation Center*, 360 NLRB No. 24, slip op. at 1 fn. 2 (2014); *Stanford Realty Associates*, 306 NLRB 1061, 1064 (1992).

Employers run afoul of well-settled Board law when they solicit employee grievances “in a manner that interferes with, restrains, or coerces employees in the exercise of Section 7 activities.” *American Red Cross Missouri-Illinois*, 347 NLRB 347, 351 (2006). Where an employer solicits employee complaints, the promise to remedy them need not be independently demonstrated: “[T]he solicitation of grievances in the midst of a union campaign *inherently* constitutes an implied promise to remedy the grievances. Furthermore, the fact an employer’s representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved.” *Capitol EMI Music*, 311 NLRB 997, 1007 (1993), *enfd.* 23 F.3d 399 (4th Cir. 1994). It is the promise to remedy the grievances – whether express or implied – that “constitutes the essence of the violation.” *Id.* Moreover, as the ALJ noted, the Board has held that an employer violated 8(a)(1) by telling employees that management’s doors were always open, that they could bring their complaints to management anytime, and that management would “listen and help.” *Reno Hilton Resorts Corp.*, 319 NLRB 1154, 1169 (1995).

On this basis, Judge Carissimi correctly found that DeAndrade and Sullivan unlawfully solicited employee grievances and impliedly promised to remedy them in violation of 8(a)(1) (ALJD-11).

B. Interrogation

Shortly after the Union’s demand for recognition, Regional HR Manager Sullivan asked Froio why everyone was upset, and why the drivers had gone to the Union or signed union cards (T-178). Froio admitted that he had one or two such conversations with Sullivan about the Union (T-178).

On about June 1, 2016, Branch Manager DeAndrade questioned former supply driver Kenny DeAndrade (no relation, now working in Respondent’s Stamps department), regarding his participation in the upcoming hearing and the basis for his subpoena (GC-80; T-199-201). Carlos DeAndrade testified that this conversation with Kenny DeAndrade about Kenny DeAndrade’s subpoena and testimony would have been “inappropriate” but that it was “offered to me by him” (T-924) despite clear evidence to the contrary.

As Judge Carissimi noted, in determining whether questions asked of an employee constitute unlawful interrogation, the Board considers whether under all the circumstances the interrogation of an employee reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act. *Bloomfield Health Care Center*, 352 NLRB 252 (2008), quoting *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984) *enfd. sub nom NLRB v. Hotel Employees Local 11*, 760 F.2d 1006 (9th Cir. 1985). Among the factors that may be considered are the identity of the questioner, the place, and method of the interrogation, the background of the questioning and the nature of the information sought, and whether the employee is an open union supporter. Here, as the ALJ found, Sullivan's questioning of Froio and Carlos DeAndrade's questioning of Kenny DeAndrade unquestionably tend to restrain, coerce, and interfere with employee rights. First, Respondent was clearly hostile to the organizing effort. Second, Sullivan sought to discover what problems had driven employees to seek representation, while DeAndrade was attempting to find out whether Kenny DeAndrade was still a Union supporter at the time of the hearing. Third, both Sullivan and DeAndrade are high ranking company representatives within the Boston facility. Finally, the Judge found that the fact that the interrogations took place in the warehouse rather than in an office was outweighed by the other factors (ALJD-12). As a result, he properly concluded that the interrogations violated 8(a)(1).

C. Statement Threatening Loss of Direct Access

The ALJ correctly found that Respondent threatened drivers with loss of direct access to company management if they elected the Union to represent them. At a meeting a few days after the September 29 rally, Branch Manager DeAndrade told the drivers they would "have no voice, that everything has to go to a second party" (T-566). Froio recounted DeAndrade making a nearly identical statement during a company meeting with drivers about the Union's impact on the drivers' access to management: "you're leaving your negotiations to a second party" (T-156). Respondent provided no evidence disputing this witness testimony.

The Board has held that it is unlawful to tell employees that they will lose flexibility in their working conditions if they select a union as their bargaining

representative. *Allegheny Ludlum Corp.*, 320 NLRB 484 (1995). The ALJ properly distinguished *Tri-Cast, Inc.*, 274 NLRB 377 (1985) (ALJD-12), noting that DeAndrade's statements occurred in the context of other unlawful statements and conduct, and that they "contained no discussion of the process of collective bargaining as it relates to existing terms and conditions of employment" (ALJD-13). As a result, Judge Carissimi determined that DeAndrade's statement violated 8(a)(1).

D. Statement of Futility

The ALJ correctly found that Respondent informed employees it would be futile to select the Union as their bargaining representative. In particular, the Judge properly credited the testimony of former driver Claudio Brandao, who recalled a meeting at which Branch Manager DeAndrade passed around a newspaper with a photograph of Teamster officials and told the employees: "Those are the thugs, if you want to work for the thugs, but W.B. Mason will not work with the thugs, and those are the guys that are attacking employees" (T-565). Judge Carissimi correctly noted that DeAndrade's statement conveyed the message that Respondent "would not deal with the Union," and therefore indicated that it would be futile to select the Union, citing *Equipment Trucking Co.*, 336 NLRB 277, 283 (2001); *Outboard Marine Corp.*, 307 NLRB 1333, 1335 (1992) (ALJD-14).

E. Impression of Surveillance

On September 28, the very day the Union demanded recognition, COO Meehan told employees the company would find out who was behind the union campaign (T-183-4).¹¹ Respondent introduced no evidence refuting this allegation, even though Meath and Carlos DeAndrade, who were both present at the meeting, testified on other issues. Meehan did not testify at the hearing.

The ALJ correctly found that Meehan's statement violated Section 8(a)(1). The Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement in

¹¹ It was clear during the hearing that employees did not know who Respondent's top managers were, frequently confusing Mike Meath and Chris Meehan (T-183, 245, 205). The ALJ properly found that COO Meehan made this statement, crediting Kenny DeAndrade despite his confusion about the name of the speaker. As the Judge noted, Kenny DeAndrade was consistent on direct and cross-examination.

question that his union activities had been placed under surveillance. *United Charter Service*, 306 NLRB 150 (1992). The ALJ noted that the organizing campaign was covert, and that Respondent had no knowledge of it until September 28, when the Union requested recognition (ALJD-14). In these circumstances, the Judge found, it was reasonable for employees to assume that their activities were under surveillance. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1183 (2011); *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1276 (2006), *enfd.* 181 Fed. Appx. 85 (2d Cir. 2006). As a result, Meehan's statement constituted a violation of 8(a)(1).

F. Offers of Transfer, Promotion, and Raises

The ALJ correctly concluded that Respondent made unlawful promises of transfers, promotions, and raises to three employees in violation of Section 8(a)(1).

About two or three days after the Union's demand for recognition, Respondent offered driver Damon DeRosa (DeRosa) a transfer he had been requesting for some time. DeRosa has been a Boston supply driver for about four years, and was an active supporter of the Union campaign, participating in the September 29 rally and appearing in photographs of Union supporters (T-536-37). He testified pursuant to a subpoena (T-535). DeRosa lives in Burlington, Massachusetts, about five minutes from Respondent's Woburn facility. In 2013 and 2014, DeRosa asked Supervisors Ryan Clifford (Clifford) and Jaimy Rodriguez (Rodriguez) four to five times about a transfer to Woburn (T-538-40). Shortly after the union rally, Clifford approached DeRosa in the warehouse and asked if he would be interested in a transfer to Woburn (T-541). DeRosa declined (T-541). Clifford did not testify at the hearing.¹²

¹² Three managers are alleged to have made unlawful offers: Carlos DeAndrade (to Edwards), Ryan Clifford (to DeRosa and Brennan), and Joseph Leo (to Brennan). Significantly, Respondent called only DeAndrade, who did not rebut Edwards' testimony on the offer of a promotion. As the ALJ noted, the failure of a witness to testify about a fact of which he has knowledge permits an inference that the witness' testimony would be unfavorable to the party which called him as a witness. *Bay Metal Cabinets, Inc.*, 302 NLRB 152, 175 n. 69 (1991) (employer's witness who testified on some issues but not others permitted adverse inference that, had he testified on those issues, his testimony would not have supported Respondent). Likewise, the failure of Respondent to call Leo and Clifford entitles General Counsel to adverse inferences that they made the coercive offers to DeRosa and Brennan. It is well-settled that "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *Master Security Services*, 270 NLRB at 552..

Around the same time, former driver Sean Brennan (Brennan) was also offered a transfer to Woburn, something he had been asking about for months. About two or three days after the rally, Goldstar Clifford and Woburn Manager Joseph Leo (Leo) asked Brennan to meet them in a conference room, where Clifford offered Brennan a \$3 per hour raise, a transfer to Woburn, and his choice of routes, but insisted Brennan give an immediate answer (T-368-69). Brennan turned down the offer, saying he could not make the decision on the spot (T-369).

Within days of the Union's demand for recognition, driver John Edwards (Edwards) was promised a promotion to a Goldstar position. Edwards has worked at the Boston facility since 2010 (T-700), and was a vocal supporter of the union campaign (T-715-16; GC-25). He testified at the hearing pursuant to subpoena. During a four-hour, private conversation with Branch Manager DeAndrade, the two discussed the union campaign, as well as Edwards' future with the company (T-719). Toward the end of the conversation, DeAndrade offered Edwards a promotion to Goldstar supervisor, something Edwards had expressed interest in for years. Edwards testified: "Carlos asked me if in the future I could be a Goldstar would I want it. I told him I could not answer that now." (T-721).

The Judge properly credited Edwards' testimony, noting that he is a current employee who was obviously reluctant to testify against his employer. The Judge further noted that Edwards' testimony was corroborated by a text message he sent to other employees the same day.¹³ Finally, the ALJ noted that DeAndrade did not testify regarding this conversation with Edwards, and Edward's testimony was therefore uncontradicted (ALJD-16).

An employer violates Section 8(a)(1) when, during a union organizing campaign, it grants pay increases or other benefit improvements "for the purpose of inducing employees to vote against the union," or is reasonably calculated to impinge on employees' freedom of choice for or against unionization, *NLRB v. Exchange Parts Co.*,

¹³ Edwards wrote: "I talked to Carlos for 4 hours Fri all he offered me was to be a goldstar and at the same time he promised me no one would be fired then minutes later I hear about 3 guys fired ... obviously they are fine with lying straight to our face. Fuck em, mgmt, fuck em all." (GC-25, p. 19) Here and in all other text message exhibits presented by General Counsel, all names of participants in the group thread as well as all language errors are preserved exactly as found.

375 U.S. 405, 409 (1964), or “with an eye toward achieving union disaffection.” *Acme Bus Corp.*, 320 NLRB 458 (1995). The Board has found that offers of promotions made to Union supporters to influence their support for the Union are hallmark 8(a)(1) violations supporting a *Gissel* bargaining order. *NLRB v. Jamaica Towing*, 632 F.2d 208 (2d Cir. 1980).

The Judge properly concluded that Respondent had failed to establish any legitimate business reason for the timing of the offers described above. As a result, he found that Respondent had not rebutted the inference, as required by well-settled Board law,¹⁴ that the offers “were intended to induce employees to abandon their support for the Union” (ALJD-18). Having so found, Judge Carissimi properly concluded that the offers made to DeRosa, Brennan, and Edwards were coercive and violated 8(a)(1).

V. THE GRANTING OF BENEFITS

Immediately upon learning of the union campaign, Respondent began to grant the drivers and helpers benefits that made their work easier, suddenly addressing numerous problems that were negatively affecting the work environment – problems that had driven the employees to the Union in the first place.¹⁵ Specifically, Respondent improved the efficiency of its warehouse, delivery routes, and truck loading system, and assisted employees in the performance of their duties.

Immediately after the Union requested recognition, Respondent enlisted top managers and supervisors to address various problems and to help drivers and helpers with their work. To coordinate this effort, Jeff DePaul, known to drivers as a top manager from the Woburn branch (T-149, 916), arrived in Boston right after the petition for election was filed and remained there for some time (T-149). DePaul told drivers that he was there to try to fix the problems with the warehouse and to improve the loading of drivers’ same day delivery loads (T-420). Driver Froio recalled that “DePaul was trying to fix some of the problems we were having before like over the summer with

¹⁴ *Donaldson Bros. Ready Mix., Inc.*, 341 NLRB 958, 961-62 (2004); *Niblock Excavating, Inc.*, 337 NLRB 53 (2001)(citations omitted).

¹⁵ On this subject, as well as many others, Respondent conspicuously failed to question its own employee witnesses, permitting an inference that those witnesses would have testified adverse to Respondent’s position.

paperwork, like loads getting put on the right trucks, routes that were misrouted” (T-150).¹⁶ Driver Caminero described the significant impact DePaul’s efforts had on the drivers’ working condition after the petition was filed:

Paperwork got improved. Like usually sometimes it comes out late. It was coming out on time. Trucks were sometimes loaded. Now they were loaded correctly (T-232).

DePaul’s efforts to remedy warehouse and delivery problems were completely unprecedented at the Boston facility (T-420).

Like DePaul, other top level managers, including COO Meehan, Human Resources Managers Hallinan and Sullivan, Branch Manager DeAndrade, and VP Meath began appearing in drivers’ work areas and assisted drivers with their work. Their presence occurred with a frequency never before observed by the drivers (T-143-144, 147, 149, 420, 421). After the union rally, Sullivan spent time on the loading dock every day, talking with all of the drivers; prior to the rally she appeared there once or twice every two to three weeks (T-421). Meath and Meehan, top executives whose interactions with drivers were so rare that many drivers could not tell the two apart (T-183, 205, 245), suddenly rolled up their sleeves and worked alongside their employees. Froio’s experience was typical: Meath helped Froio load his truck, something Froio acknowledged had never happened before during his 14-year tenure at W.B. Mason (T-147). After the rally, Froio saw Meehan on loading dock three or four times in two weeks; prior to that time, Froio almost never saw Meehan on the dock – only once every couple of months (T-147). Meath himself admitted during cross examination that, on average he was in Boston once a week prior to when the petition was filed, then in late September and October 2015, he was there two to three days each week (T-616).

About two weeks after the union rally, Respondent shortened the delivery route of driver Kenny DeAndrade by eliminating all of his stops in the town of Newton, the result of which was “less work, less stops to do” (T-184-85). Before the rally,

¹⁶ Carlos DeAndrade acknowledged that DePaul’s role was to streamline paperwork (T-916).

DeAndrade had complained about his route and asked for help from Ryan Clifford, his supervisor, and Eric, another supervisor (T-186).¹⁷

The most obvious change was the unprecedented use of outside supervisors with drivers' delivery routes. These "linebackers" (T-607) arrived in early October, just days after the Union filed its representation petition. They came from various locations, including Connecticut, New York, and New Jersey, and assisted drivers with deliveries, loaded trucks, and made deliveries on their own (T-160-61, 185, 187, 215, 232, 575-76).

Respondent enlisted at least six linebackers to assist in the Boston operation. Despite its insistence that this was consistent with company practice (T-607, 615, 676, 685-86, 916-17), Meath could not recall a specific instance in which so many linebackers were utilized at one time in one location (T-619). Nor did Respondent produce any documentary evidence suggesting that the linebackers' presence in Boston was typical. The only circumstance in which large numbers of linebackers have been sent to a facility is when the company has opened a new facility (T-619). According to driver Brandao, a linebacker from Albany explained to him that he and the other linebackers had come to Boston because of the "situation going on" in early October (T-577).

The Board regards granting benefits to employees to be one of the highly coercive "hallmark" violations supporting the issuance of a bargaining order. *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212-213 (2d Cir. 1980). Recognizing that "[t]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove," the Board has found that "[e]mployees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

The Board's standard for evaluating a pre-election grant of benefits is objective: whether a benefit would reasonably tend to have a coercive effect on employees such

¹⁷ Although Branch Manager DeAndrade claimed that Kenny DeAndrade's route was changed in June 2015 (T-861), Respondent provided no documentary evidence to substantiate DeAndrade's testimony. In the absence of such evidence, the ALJ properly credited Kenny DeAndrade and rejected Carlos DeAndrade's unsubstantiated claim that Respondent changed Kenny DeAndrade's route before the Union campaign (ALJD-21, fn.18).

that that they would feel impaired in their exercise of free choice. See *Gulf States Cannery*, 242 NLRB 1326, 1327 (1979). In considering whether the granting of a benefit during a union campaign is unlawful, the Board draws an inference of improper motivation and interference with employee free choice from all the evidence and from the respondent's failure to show a legitimate reason for the timing of the benefit. *Holly Farms Corp.*, 311 NLRB 273, 274 (1993). Among the factors considered by the Board are: (1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit. *B&D Plastics, Inc.*, 302 NLRB 245, 245 (1991).

First, the improvements made in Respondent's operations were directly targeted at employee complaints, which the company had unlawfully solicited. Warehouse efficiency and excessive workloads were among the issues that had driven employees to seek union representation. As a result, the improvements and assistance were of great value to employees. Second, every driver and driver helper benefitted from the improvements. Third, employees reasonably viewed the improvements as unprecedented and extraordinary, with even long-time employees stating that the assistance provided by the "linebackers" was something they had never seen before. Finally, the arrival of DePaul and the linebackers occurred immediately after the Union demanded recognition and filed its petition, strongly supporting an inference of unlawful motivation.

Importantly, Respondent offered no explanation for the sudden improvements.¹⁸ In the absence of any contrary explanation from their employer, the drivers' only logical conclusion was that that the operational improvements were the result of the Union campaign. Within twenty-four hours of the Teamsters' filing of the petition for election, Respondent began improving all the things they had been complaining about.

¹⁸ See *Speco Corp.*, 298 NLRB 439, fn 2 (1990), citing *Montgomery Ward*, 288 NLRB 126 fn. 6 (1988) (drawing "an inference of interference with employee free choice from all the evidence presented and the Respondent's failure to establish a legitimate reason for the timing of the announcement" of improved medical benefits).

As the ALJ concluded, Respondent did not meet its burden of showing that it would have conferred these benefits in the absence of the organizing campaign (ALJD-22-23). In particular, the Judge noted that the purchase of NEOS, upon which Respondent relied in explaining the extraordinary use of linebackers, had occurred well before the Union filed its petition. The Judge further noted that, while Respondent had occasionally used supervisors and others to assist in Boston, the substantial increase in this practice occurred only after the Union filed its representation petition. Similarly, the ALJ found that, while Kenny DeAndrade had been requesting assistance with his route for some time, help was provided only after the Union appeared on the scene.

For these reasons, the Judge correctly held that Respondent violated 8(a)(3) and (1) by granting the above-described benefits to employees.

VI. THE WAGE INCREASE

Respondent's actions regarding the 2015 wage increase are perhaps the most egregious of all its unfair labor practices. First, as discussed above, Respondent repeatedly told employees during the campaign that their annual wage increase was being delayed and blamed the delay on the Union's filing of its petition and unfair labor practice charges. Second, Respondent unlawfully withheld the wage increase with absolutely no business justification, while placing the blame for the delay squarely on the Union. Finally, in a stunning move intended to ingratiate employees and curry their favor on the eve of the ALJ hearing, Respondent granted them an unprecedented 21.7 percent wage increase, along with retroactive pay ranging from \$3000 to \$11,000 per employee.

A. The Withholding of the 2015 Wage Increase

Respondent's South Boston supply drivers receive annual wage increases, which are typically given in or about December and made retroactive to October (T-282, 162). The increases are based, at least in part, on employees' performance reviews, which are usually conducted between October and December each year (T-281, 937). Prior to the fall of 2015, supply drivers received an annual wage increase every year for at least the past five years. In fact, any doubt as to the annual nature of the wage increase is

erased by Respondent's own records, which classify the increase as ANR, or Annual Raise (T-954, R-18).

In FY 2011, supply drivers and helpers received an annual increase averaging 4.4 percent, with the average hourly wage increasing by \$0.78 (GC-31a at 4707MH). In FY 2012, supply drivers and helpers received an annual increase averaging 3.3 percent, with the hourly rate increasing by an average of \$0.60 (GC-31a at 4708MH). In FY 2013, supply drivers and helpers received an annual increase averaging 3.5 percent, with the average hourly wage increasing by \$0.63 (GC-31a at 4709MH). In FY 2014, supply drivers and helpers received an annual increase averaging 3.67 percent, with the hourly rate increasing by an average of \$0.68 (GC-31a at 4704MH). In FY 2015, supply drivers and helpers received an annual increase averaging 3.3 percent, with the hourly rate increasing by an average of \$0.64 (GC-31a at 4705).

Throughout the organizing campaign, employees were told that they would not be receiving the anticipated increase because of the upcoming election and the instant unfair labor practice charges. On about October 14, Labor Consultant Penn told employees during a captive audience meeting that they would not be getting their annual raise because of the Union's unfair labor practice charges (T-570).¹⁹ According to former supply driver Claudio Brandao (Brandao), Penn told employees that the Union "fucked [them] over," and was responsible for the postponement of the wage increase (T-574). Penn went on to assure the drivers and helpers that they would be happy with the increase when they got it, but that it would be illegal for him to say more (T-575). Other employees reported similar statements by Penn. In particular, former supply driver (and current warehouse employee) Kenny DeAndrade attended a meeting in about early October, after which Penn told him the company could not give supply drivers their wage increases because the Union had blocked the election and the company's hands were tied (T-194). Similarly, supply driver Miguel Caminero

¹⁹ The Board has been found Penn to have made similar statements in the past: In *Jensen Enterprises*, 339 NLRB 877 (2003), the Board held:

Respondent, through its agent and labor consultant Michael Penn, violated Section 8(a)(1) of the Act by informing employees that if the Union was voted in, wages would be frozen during negotiations and they shouldn't expect to get any increases in wages or benefits until collective bargaining had concluded.

(Caminero), who still works for Respondent, testified that Penn told employees they could not get their anticipated raises because the Union had pressed charges against the company (T-229).

It is undisputed that the supply drivers and helpers received no increase between October 2015 and May 2016.

Branch Manager DeAndrade attempted to explain Respondent's decision not to grant the 2015 wage increase according to its usual practice. He testified:

December was an interesting month for W.B. Mason. Although we were growing, we had overstaffed ourselves in anticipation of the consolidation of the competition, or Staples and Office Depot. We looked at it in two different ways in which if the merger took place there would be a lot of chaos and they wouldn't be able to focus on their business. On the adverse side, the merger was blocked. They would have to kind of go back to the drawing board and there would be a lot of customers that would be available for us to capture. Due to the fact that the time line in which we thought that would come to fruition hadn't taken place as soon as we thought, we were overstaffed and our profitability wasn't where we needed it to be. Therefore, we weren't in a position to make any changes. In fact, we had to do a reduction in force company-wide to stabilize ourselves and look at the forecast for the next 90 days as to how this was going to play out with the SEC and the Staples and Office Depot Merger (T-865).

Respondent offered no profit and loss statements, no revenue figures, not a single shred of evidence to support DeAndrade's convoluted explanation of why supply drivers could not have received their annual raises as expected. Nor did Respondent offer any evidence of a reduction in force affecting Boston employees in late 2015. In view of the many statements employees heard concerning the fate of their wage increase, the absence of any records corroborating Respondent's asserted defense, and the size and timing of the eventual raise, the ALJ appropriately rejected DeAndrade's explanation (ALJD-58).

An employer that threatens to withhold a scheduled wage increase, withholds the increase, and blames its actions on the union seeking to represent its employees violates the Act. When confronted by a union organizing campaign, an employer must

proceed as it would have done if the union had not been present. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB at 961-962. An employer may, during an organizing campaign, lawfully withhold a wage increase that is wholly discretionary, as long as the employer does not blame the loss on the union, the Board, or the election process. *Somerset Welding & Steel, Inc.*, 304 NLRB 32, 47 (1991). However, when the wage increase is a regular, recurring event, it becomes part of employees' terms and conditions of employment, and an employer violates 8(a)(3) and (1) by withholding it. In *Times Wire & Cable Co.*, 280 NLRB 19 (1986), in a situation similar to the one at issue here, the Board held that the employer violated 8(a)(1) and (3) by failing to grant a normal and expected wage increase and by attributing the loss to the union. Like W.B. Mason, the employer had previously followed a practice of reviewing employees' wages and making adjustments at the same time each year. The Board rejected the employer's argument that it lacked an established policy of granting wage increases because it had not yet decided on the amounts of the raises. The fact that the amount of the raise was discretionary did not alter the essential fact that annual wage increases were a term of employment. As the Board noted, "The legality of withholding a wage increase turns of whether the employer is manipulating benefits in order to influence its employees' votes in the election." *Id.* at 29.²⁰

An employer also violates the Act when it tells its employees it cannot give them a scheduled wage increase because of a pending representation petition or because of pending unfair labor practice charges. *Wellstream Corp.*, 313 NLRB 698, 707 (1994) (supervisor's statement that there would be no raise because NLRB would not permit employer to give raises during labor dispute was unlawful). In *Laidlaw Waste Systems*, 307 NLRB 52 (1992), the Board found the employer violated 8(a)(1) when its representatives told employees that they could not give them a scheduled raise because it was tied up in court. As the Board stated, "By erroneously claiming that the law did forbid such an increase, and by linking that circumstance to the union's presence at the facility, Laidlaw coerced, restrained, and interfered with the employees

²⁰ See also, *Centre Engineering, Inc.*, 253 NLRB 419, 421 (1980) (an employer that withholds a wage increase because of employees' union activities, and informs employees it is doing so, violates the Act).

in the exercise of their Section 7 rights.” Similarly, the Board held in *Centre Engineering, Id.* at 420, that the employer violated Section 8(a)(1) by telling employees that its “hands were tied,” a statement identical to the one made here by Penn.

Here, there is no doubt as to the regularity of employees’ wage increase. Notwithstanding Respondent’s denial in its Answer to the Complaint that the wage increase was an annual one, Respondent’s own records refer to the increase as “ANR” or annual raise. Moreover, Respondent’s payroll records clearly establish that the increase is given every year, usually in December but occasionally as late as January. Finally, the testimony of every employee witness presented by the General Counsel, as well as several W.B. Mason managers, supports findings that Respondent gave its supply drivers and helpers a wage increase every year, that the increase varied as to amount but not timing, and that the increase is always retroactive to the first week in October.²¹

As a result, the ALJ correctly found that, by withholding employees’ annual wage increase, Respondent violated 8(a)(3) and (1)(ALJD-59); and that, by attributing the loss of the wage increase to the Union, Respondent violated 8(a)(1)(ALJD-57-58).

B. The June 2016 Wage Increase

On May 19, 2016, for no discernible business reason, DeAndrade met with supply drivers and helpers to announce that they would soon be receiving their wage increases retroactive to October 5, 2015 (T-939). Within a day or two, Penn met with the same employees to tell them about the upcoming trial, to explain the charges that were about to be litigated against the company, and to inform them that some of them may be subpoenaed to testify. During that meeting, Penn told the drivers and helpers that the company was now free to give them their pay raises because it would no longer appear to be a bribe (T-165-166, 227-228, 231).²²

²¹ It is worth noting that the amount of the increase did not vary significantly from year to year, remaining between \$0.60 and 0.78 an hour since 2011.

²² Carlos DeAndrade also made a clear connection between Kenny DeAndrade’s wage increase and his testimony at this hearing. Between March and June 2016, Kenny sent DeAndrade several text messages asking about his annual review and pay raise. DeAndrade put him off, stating that no decision had been made, despite the fact that DeAndrade himself makes those decisions (GC-80, pages 9-10; T-200-201; T-808, 939). On June 1, 2016, Kenny texted DeAndrade to tell him he had received a subpoena to testify in this proceeding (GC-80, page 10). That very afternoon, DeAndrade orally told Kenny that his raise had

In announcing the increase, Respondent offered no explanation regarding the reason for its delay. The increase appeared in employee pay checks on about June 3, 2016, ten days before the start of the hearing (R-18; T-164),²³ and resulted in an average increase of 21.7 percent. The average dollar amount of the most recent wage increase was \$4.18, with some employees receiving wage increases of more than \$8 an hour, and more than 40 percent of their previous rate (GC-31a at 4706MH).

Respondent offered no legitimate business reason for the timing of the wage increase (ALJD-61).²⁴ DeAndrade's testimony on the timing of the raise was as convoluted as his explanation for its withholding. When asked on direct examination why the supply drivers did not receive their wage increases until May 2016, DeAndrade testified:

January, the warehouse, is a large group, it takes a huge toll on the P&L. And then in March, it's a quieter month for us, so we did the smaller group, which was the Coffee Bench, the WhataBargain team, the stamps and signs, which you know, in total is about 30 people. Not even, probably like 22-ish. And then in May we did the final group, which is a – was a – better month for us inherently in

been approved, but did not tell him when he would receive it or how much he would be getting (T-201). The timing of DeAndrade's announcement is corroborated by a follow-up text from Kenny on June 6, asking when he would get his raise and how much it would be (GC-80, page 10). DeAndrade never answered him, and testified on June 21 that he still had not made any decisions about Kenny's raise, despite having approved it three weeks earlier (T-922). The failure to grant Kenny DeAndrade his approved wage increase is now the subject of a Complaint in Case 01-CA-180518, scheduled for hearing on January 31, 2017.

²³ The impact of the timing of these payments cannot be overstated: they came at a critical moment in the litigation of these cases, as employees were being subpoenaed and prepared for trial by the General Counsel. For an employee who received an \$8.25 per hour wage increase, the retroactive payment itself totals more than \$11,000, based on a conservative 40-hour work week for the 34-week period between October 5, 2015 and May 27, 2016. Even for a driver receiving the \$2.25 per hour increase at the low end of the scale, the retroactive payment would have been over \$3,000. On average, the retroactive payment for drivers and helpers was more than \$5,600.

²⁴ The vast majority of Boston employees, including the entire complement of warehouse employees, had received their raises on January 19, 2016, a timeframe within the normal parameters of Respondent's past practice (R-18). A much smaller group (about 22 employees) received their raises on March 22, 2016 (R-18). CDL and furniture drivers had received their annual increases in November and September 2015, respectively (R-18, R-19). In an attempt to show that the wage increase granted to bargaining unit employees was in line with those given to other employees, Respondent introduced evidence that its nine furniture drivers received a wage increase in September 2015 that was within a percentage point of the supply drivers' increase (R-19). However, Respondent offered no documentary evidence regarding the historical timing or amounts of furniture drivers' wage increases.

May, and makes more sense to bury that cost in that P&L month (T-955).

When asked why May was a better month, DeAndrade responded:

The amount of days in the month for us is better for us. We have more days for the – business days.

Judge Carissimi properly rejected Respondent's incredible explanation for the timing of the supply drivers' wage increase (ALJD-60).

As discussed above, it is well established that a grant of benefits made during a union organizing campaign violates the Act unless the employer can demonstrate that its action was governed by factors other than the pending election, and that it would have conferred the same benefits in the absence of the union. *Donaldson Bros. Ready Mix*, 341 NLRB at 961-962. To meet its burden, an employer must establish that the benefits were conferred as part of a previously established company policy and that the employer did not deviate from that policy on the advent of the union. *Id.* In *ManorCare Services-Easton*, 356 NLRB No. 39 (2010), enfd. 661 F.3d 1139 (D.C. Cir. 2011), the Board also noted that it had long held that “[a]bsent a showing of a legitimate business reason for the timing of the grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act.” See also, *Latino Express, Inc.*, 358 NLRB No. 94 (2012), reafhd. 361 NLRB No. 137 (2014) .

Here, as the Judge found, Respondent failed to demonstrate that the timing and scale of the wage increase were governed by factors other than the blocked election and the trial of the instant cases. Respondent produced no evidence demonstrating that the increase was part of a “previously established company policy.” Indeed, the increase represented a sharp deviation from its prior practice. Given the absence of any legitimate business reason for the timing or size of the raise, Judge Carissimi properly inferred an improper motive and determined that the wage increase violated 8(a)(3) and (1)(ALJD-61).²⁵

²⁵ The withholding and granting of the wage increase also violate Section 8(a)(5) and (1) in view of the Union's demonstrated majority on September 28, 2015. Because the 8(a)(5) violations derive from the request for a bargaining order, they will be discussed below.

VII. THE SUSPENSIONS AND DISCHARGES

A. Sean Brennan

Sean Brennan was a supply driver from March 2014 until October 2015, when he was suspended and then terminated shortly after the election petition was filed (T-363). Brennan became involved with the organizing campaign in about July 2015, when he signed an authorization card (GC-8b) and began attending union meetings (T-364). He volunteered to be a leader in the organizing effort (GC-18), appeared in group photographs of union supporters, and participated in the Union's rally in front of W.B. Mason on September 29, carrying a sign and chanting (T-365).

Brennan drove Route 307, covering South Boston (T-363), and was supervised by Benjamin Pitre (Pitre) (T-363), who drove part of Brennan's route before becoming a Goldstar (T-374). Brennan typically worked from about 5:30 a.m. until about 4:00 or 5:00 p.m. (T-373). He drove a very busy route, with about 70-85 stops in the morning and 30-45 same-day deliveries in the afternoon (T-373).²⁶ Brennan was trained on his route by Supervisors Leo and Pitre, who had each driven parts of the South Boston route before Brennan was hired (T-373). When Pitre trained Brennan he instructed Brennan not to do same-day deliveries on Morrissey Boulevard (T-374), a heavily trafficked area of Boston, especially between the rush hours of 2 p.m. and 5 p.m. (T-374). Pitre told Brennan not to make same-day deliveries to this area because it could inhibit Brennan from making his other same-day deliveries to areas where Brennan typically had more stops than he had on Morrissey Boulevard (T-374). Although Pitre denied giving Brennan such an instruction, the ALJ properly credited Brennan and discredited Pitre.

For the 19 months of his employment as a supply driver, pursuant to Pitre's instruction, Brennan rarely made same-day deliveries on Morrissey Boulevard (T-375). The only exception was if an order was marked "urgent" in which case Brennan made the delivery (T-375). As a result, Brennan typically returned to the warehouse at the end of his same day delivery route with product left on his truck (T-375). Respondent's

²⁶ Pitre acknowledged that Brennan was extremely fast on his route (T-801), and often expressed surprise at how many deliveries Brennan was able to make (GC-77, pp. 8-9).

records bear this out. In an apparent attempt to show that Brennan did, in fact, make same-day deliveries on Morrissey Boulevard, Respondent produced a document purporting to show all same-day deliveries to Morrissey Boulevard customers between October 2, 2014 and December 29, 2015 (R-16). For the 12-month period that Brennan worked for Respondent within that timeframe, he made only 12 same-day deliveries on Morrissey Boulevard (R-16, sheet 1).²⁷ Moreover, in the seven-week period before his suspension and discharge, Brennan did not make a single same-day delivery on Morrissey Boulevard (R-16, sheet 1).

Respondent was well aware that Brennan routinely skipped his same day deliveries to Morrissey Boulevard. Every day, Brennan's supervisor texted him with a single question: how many missed stops today (T-787-788). Every day, Brennan texted Pitre back with a number (T-376-377). Pitre acknowledged that he was aware on a daily basis of how many stops his drivers missed, based on his communications with drivers and his review of their logs (T-791).²⁸ He also knew precisely *which* stops had been missed, something he needed to know in order to ensure that those deliveries were the first ones made the next morning (T-792, 798-799). In fact, Pitre specifically admitted that he was aware that Brennan regularly missed deliveries (T-793).

For a year and a half, in spite of this knowledge, neither Pitre nor any other manager spoke to Brennan about Brennan's practice of skipping Morrissey Boulevard (T-377).²⁹ Only after learning that Brennan and other employees had gone to the Union did his longstanding practice become a problem. Likewise, it was only after the Union filed its election petition that Brennan's work hours became an issue. According to Respondent's records, Brennan punched out at or before 4:30 p.m. 66 times in 2015 (R-17). He never filled out paperwork or scanned anything that indicated he had made

²⁷ R-16 indicates that Brennan made 16 same-day deliveries on Morrissey Boulevard between October 2014 and July 2015. However, four of those deliveries were made in the morning and thus could not have been same-day deliveries, which are always made in the afternoon, according to DeAndrade (T-932).

²⁸ Pitre followed the same practice with all the drivers he supervised, either texting or calling every day to find out how many deliveries they had missed (see, e.g., GC-76, pp.1-2.). Driver Claudio Brandao corroborated that his supervisor, Eric Porter, also followed this practice (T-578). Brandao also testified that he missed deliveries almost every day without repercussion (T-579).

²⁹ Nor was Brennan disciplined for anything else during his tenure with the company (T-377).

deliveries when he had not (T-375). Yet, until October 5, no supervisor or manager ever spoke to him about finishing before 5 p.m. while product remained on his truck (T-383).³⁰

Brennan admittedly did not always follow the delivery procedure required by Respondent. Drivers were expected to scan the barcode on each packing slip and obtain the customer's signature (T-378). Brennan admitted that he often neglected to obtain the customer's signature on his deliveries (T-378). When Brennan had a helper working with him, the shared scanner allowed for two deliveries to be scanned simultaneously by pressing a button that says "multi-scan" (T-379). In such a situation it would look as though two deliveries were being made at the same moment (T-379). Brennan's practices regarding customer signatures and scanner use never varied during his tenure at the company (T-378-379). He was never disciplined for either practice (T-378-379).

On October 5, Brennan received a call from Branch Manager DeAndrade asking if he wanted help with his deliveries (T-380). Around 2:45 p.m., DeAndrade dropped off Sales Manager Joel Kershner (Kershner) at Brennan's truck while Brennan was making deliveries in South Boston (T-380). Kershner helped Brennan make his deliveries for the rest of the day (T-380-381).³¹ During their time together, Kershner and Brennan spoke about the company, including some of Brennan's dissatisfactions, and about how the number of same-day delivery stops can get out of control (T-381). As was typical for Brennan, they did not make any deliveries on Morrissey Boulevard (T-382). When Kershner asked Brennan about missing those stops, Brennan responded that he never makes same-day deliveries there (T-382). They returned to the warehouse together, finishing around 4 p.m. (T-382). Brennan punched out at 4:15 (R-17). For Brennan, it

³⁰ Pitre testified in a conclusory fashion about having spoken to Brennan about this (T-801), while Brennan flatly denied it. Respondent produced no documentary evidence showing any record of verbal counseling or any other discipline for Brennan's well-established practice, and the ALJ properly discredited Pitre's testimony.

³¹ This was the first time Kershner or any other sales manager had ever helped Brennan with deliveries (T-381). Moreover, Kershner acknowledged that he has gone out on driver routes only 25-30 times in 10 years, with at least half of those occurring since September 2015 (T-684-685). He also acknowledged that he never previously called a manager after a ride-along to report how it went before or after October 5, 2015 (T-687).

was an ordinary afternoon, except for the presence of Kershner.³² As soon as they returned to the warehouse, Kershner reported to DeAndrade that Brennan had skipped a stop on the fish pier and all his Morrissey Boulevard stops (T-680). Significantly, no customer complained to the company about Brennan skipping its delivery on that day or any other (T-932).

Nevertheless, the next day, Brennan was summoned to Human Resources Manager Hallinan's office, where he met with DeAndrade, Hallinan, and someone named "Joel," whom Brennan had never seen before (T-385).³³ DeAndrade asked Brennan why he had missed four same-day deliveries on Morrissey Boulevard (T-386), and why he came back before 5 p.m. with stops remaining (T-387). Brennan told DeAndrade that he always missed same-day deliveries on Morrissey Boulevard (T-386). Joel told Brennan there would be repercussions, and that Brennan would be suspended while the company investigated (T-386-387). DeAndrade asked Brennan to write a statement, which Brennan did, pleading: "I, Sean Brennan, will never miss my same day stops before 5 p.m.!" (T-386; GC-69).³⁴ No one mentioned Brennan's scanning practices, his record-keeping, or his use of profanity at that meeting (T-387-388).

These became an issue, however, in his next conversation with Hallinan, DeAndrade, and Joel, who called him by speaker phone on Friday, October 9 (T-388-389). In this conversation, DeAndrade asked if Brennan had ever said that he "fucking hate[s] same-days" and "fuck Morrissey Boulevard," to which Brennan responded that he probably had (T-389).³⁵ DeAndrade also asked Brennan if he knew the scanning protocol, in particular the company's target for scan percentages (T-389), and Brennan

³² Even DeAndrade acknowledged that, for Brennan, there was nothing abnormal about his delivery practices on October 5 (T-934).

³³ Presumably Joel Burkowsky, Respondent's director of human resources. Burkowsky's omnipresence during the weeks after the petition was filed, and his involvement in the early stages of discipline, even before discharge determinations being made, suggests that he was there to help generate justifications for unlawful terminations.

³⁴ On October 6, following his suspension, Brennan also sent text messages to Pitre, begging him to admit that he had directed Brennan to skip Morrissey Boulevard same-days and also pleading for his job (GC-25, p. 15).

³⁵ It is undisputed that the workplace was rife with coarse language, from supervisors as well as employees.

replied that he did not know what the protocol was (T-390). DeAndrade told him it was supposed to be 80 or 90 percent, and that Brennan was not reaching that target (T-390). The call ended when Brennan asked what the status of his employment was, and DeAndrade told him the investigation was still ongoing (T-391). Ten minutes later, Brennan received a call from Hallinan, who told Brennan he was terminated (T-392). When Brennan asked why, Hallinan told him it was because of what they had just discussed minutes before in the call with DeAndrade and Joel (T-393).

B. Marco Becerra

Marco Antonio Becerra Pozo (Becerra) worked as a supply driver for Respondent from about April 6, 2015 until his termination on October 6, 2015 (T-465; GC-55). Becerra was supervised by Ryan Clifford (T-466), and typically worked with helper Jovariel Feliciano (T-466). When he began at the company, Becerra had about 60 delivery stops on his route (T-472); by the time he was fired he had about 70 (T-473).

Becerra was an open supporter of the Union. He learned about the organizing campaign from Feliciano sometime in June 2015 (T-466), and signed an authorization card, which was given to him by driver Oscar Castro, on August 28 (T-467). Becerra attended numerous union meetings, appeared in a picture taken of union supporters, and actively participated in group text messages for union supporters (T-468-469). He also participated in the union rally on September 29, holding a sign that said “stop the war on workers” with a Teamsters 25 logo (T-469-470).

On October 5, the same day Sean Brennan was accused of shirking his delivery duties, Branch Manager DeAndrade called Becerra in at the end of the day to meet in Human Resources Manager Hallinan’s office (T-474). Present at the meeting were Becerra, Hallinan, and someone Becerra had never seen before, whom he believed to be Labor Consultant Penn (T-475).³⁶ DeAndrade asked Becerra if he remembered an interaction with a customer at Boston Private Bank and Trust. Becerra said yes (T-

³⁶ During the hearing, the identity of this individual was disputed, and it became clear it was probably Burkowsky, who sat in on the meetings for all the named discriminatees. Becerra had never met Burkowsky, and the meetings with Penn had not yet begun. By the time he gave his affidavit and testified at the hearing, Becerra had heard Penn’s name constantly, and likely assumed that it was Penn who was present during the meeting.

475).³⁷ Then DeAndrade read to Becerra from an email received from Boston Private Bank and Trust complaining about Becerra (T-476; GC-53). The customer's e-mail read, in its entirety:

I just spoke to the WB Mason Del driver and he said if I order 15 Cases of Paper again he is only delivering 10 to 12 and returning the rest. This is cause our ramp is a problem for his delivery. I do not want to cut the order, cause we use the paper each day and I don't want to wait for the delivery's. [sic] what can be done? (GC-53).

The customer did not request a new driver, ask that the driver be disciplined or discharged, or threaten to cancel its relationship with W.B. Mason (GC-53).

Becerra took full responsibility for his interaction with the customer. He acknowledged that the customer had accurately described the issue, adding that he had asked the customer to split the order, that is, order ten cases of paper on the morning delivery and the remaining five later in the day or the next day (T-477). Becerra further explained that the customer's delivery ramp is at a sharp angle, 45 degrees, and is not flush with the sidewalk, making it difficult for Becerra to get all of the paper into the building at one time (T-477). He testified that he had repeatedly asked the customer to work with him, but the customer refused (T-477). Frustrated, Becerra told the customer he would deliver ten cases of paper and leave the rest on the truck until the next time he was there (T-477).³⁸ In his testimony, Becerra acknowledged that he could understand why Respondent might have a problem with the way he handled the situation with Boston Private Bank and Trust (T-484). Nevertheless, he refused to write a statement about his interaction with the customer, explaining that the company had the customer's e-mail, as well as their own notes of the meeting, and that he did not want to sign anything (T-476). Hallinan told Becerra they had no choice but to suspend him, and

³⁷ As discussed above, Boston Private Bank and Trust was one of the customers Becerra had identified in response to an inquiry from DeAndrade as one that could be removed from his route to make it easier (T-475). DeAndrade also made reference during this meeting to his earlier inquiry and Becerra's proposed solutions, stating that logistics was looking into the matter (T-475).

³⁸ Respondent's counsel and witnesses repeatedly mischaracterized Becerra's actions, asserting that he told the customer he would not deliver more than ten cases, but would leave them on his truck. It is clear from the customer's statement that the customer did not want to have to wait for the rest of his order and that Becerra told him he would deliver the order in two parts, with no more than ten cases delivered at one time.

that they would contact him following their investigation (T-477). Up until then, Becerra had no disciplinary action or customer complaints (T-889-890).

On the basis of this single customer complaint (T-360-261), Becerra's employment was terminated. On October 6, the same day Brennan was suspended, Hallinan called Becerra to inform him that the Respondent was terminating his employment because he took it upon himself to change company delivery policy, something he was not authorized to do (T-478). Like Brennan, Becerra pleaded for a second chance, asking Hallinan if there was any chance he could get his job back, but Hallinan said no (T-478).

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981) cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Board established a framework for deciding cases turning on employer motivation regarding an adverse employment action taken against an employee. To prove an employer's action is discriminatorily motivated and violative of the Act, the General Counsel must first establish, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union activity by the employee, employer knowledge of the activity, and union animus on the part of the employer. If the General Counsel is able to establish a prima facie case of discriminatory motivation, the burden of persuasion shifts "to the employer to demonstrate the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra, at 1089. Accord: *Mesker Door, Inc.*, 357 NLRB No. 59, slip op. at 2 (2011).

Here, the evidence establishes that Respondent suspended and discharged Sean Brennan and Marco Becerra in violation of Section 8(a)(3) and (1). First, both Brennan and Becerra engaged in union activities with Respondent's knowledge: they appeared in photographs of supporters delivered to Respondent on September 28 along with the petition for election, and they participated in the union rally on September 29 at which company managers appeared and engaged with participants. Second, Respondent displayed its animus toward the Union by engaging in the conduct

described above in Sections IV and V. Third, the timing of the terminations, coming so shortly after the filing of the election petition, is strong evidence of Respondent's unlawful motive. *DHL Express, Inc.*, 360 NLRB No. 87, slip op. at 7 (2014); see also, *Toll Mfg. Co.*, 341 NLRB 832, 833 (2004).³⁹ For these reasons, the ALJ properly found *prima facie* evidence that the terminations were unlawful (ALJD-39, 50).

In order to meet its burden under *Wright Line*, Respondent must establish that it would have taken the same action in the absence of the employees' protected activity by demonstrating that it has consistently and evenly applied its disciplinary rules. *DHL Express, Inc.*, 360 NLRB No. 87, slip op. at 7; *Septix Waste, Inc.*, 346 NLRB 494, 495-496 (2006). As the ALJ noted, it is not enough for an employer to offer a legitimate reason for its action: it must prove by a preponderance of the evidence that it would have taken the same action in the absence of protected activity (ALJD-43). *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), *enfd.* 99 f.3d 1139 (6th Cir. 1996).

As Judge Carissimi discussed in great detail, Respondent can make no such showing. Respondent repeatedly failed to take disciplinary action on employee misconduct both comparable to and worse than that at issue here.⁴⁰

Employees Devin Allston (Allston) and Matt Cadoff (Cadoff) are of particular relevance to the evaluation of Brennan's and Becerra's discharges, respectively. Allston was a Boston driver with a history of performance and customer service problems. In a three-month period in 2010, Allston received multiple disciplinary actions for repeated performance and delivery issues. In particular, he received a verbal warning for failing to make same-day deliveries, having been counseled multiple times about the need to show up on time, leave the warehouse on time, and make his deliveries on time. He was criticized for lacking a "sense of urgency" with the delivery process. During that same period, Allston was disciplined after customers reported that he had a poor attitude and never made his same-day deliveries to her company. He was also written up for failing to complete his route, and particularly for making only five

³⁹ The timing is especially glaring given that Respondent rarely terminates or even disciplines drivers in Boston. *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 4 (2014).

⁴⁰ Because Judge Carissimi's disparate treatment analysis is so meticulous, it will not be discussed in detail herein. Instead, a summary of the disparate treatment evidence follows.

same-day deliveries on one day. Finally, on December 14, 2010, Allston received a final written warning (GC-35, p. 10) reflecting the myriad performance issues of the previous two months. Among the areas of concern addressed at that time were attendance, poor attitude, customer complaints, incomplete record-keeping, and route productivity. Allston continued working for Respondent despite these problems, and received another final written warning in September 2014 for consistently missing stops, leaving undelivered product on his truck, and incomplete paperwork.⁴¹ While Allston was given multiple chances to improve his performance, Brennan was terminated after missing four same-day deliveries on one occasion. Brennan was given no progressive discipline, but was summarily discharged for doing the same thing he had done virtually every day of his employment without consequence, and despite the fact that no customer complained about the service they received from him.

Like Becerra, Cadoff asked his customer to order less product from the company, although the Judge correctly noted that he did not threaten to split the customer's delivery if it did not comply with his request. As the Judge also noted, however, Cadoff's customer had multiple complaints about his customer service, and requested that another driver make its deliveries. Notwithstanding the seriousness of those complaints, Cadoff was neither disciplined nor discharged, while Becerra was summarily fired for a single similar offense.

For all these reasons, as the ALJ determined, Respondent has failed to establish that it would have terminated Brennan and Becerra in the absence of their union activity, and has not met its *Wright Line* burden. The discharges violate Sections 8(a)(3) and (1) of the Act.

VIII. THE "SEASONAL" EMPLOYEES

On October 2, Respondent terminated the employment of three driver helpers: Kerby Chery (Chery), hired on July 14; Jason Cobbler (Cobbler), hired on May 4; and Elton Ribeiro (Ribeiro), hired on August 26 (R-12, 13 and 14). All three signed Union

⁴¹ It is noteworthy that Andrew Allston, Devin's brother, also received multiple disciplinary actions for customer service and delivery issues, particularly regarding his failure to make same-day deliveries (T-305; GC-38, pp. 1-5). Andrew still drives for the company.

authorization cards,⁴² and all three appeared in pictures on the flyer delivered to Respondent with the election petition on September 28 (GC-18, GC-19, GC-20; T-66, 70).⁴³

Respondent asserts that Chery, Cobbler, and Ribeiro were seasonal employees whose layoffs were dictated by volume of business and consistent with its usual practice. The record evidence is clear, however, that (a) the three employees were not seasonal; and (b) the volume of business was extremely high when they were terminated. Moreover, the record amply demonstrates that, even if they were seasonal employees, their terminations were entirely inconsistent with Respondent's past practice. It is undisputed that, in the past three years, not a single driver helper has been laid off from W.B. Mason's South Boston facility. Finally, as the record makes clear, there is no well-defined "season" that would necessitate or even justify their terminations in early October.

Despite their claim that there was nothing irregular about these seasonal layoffs, (T-809-810, 886) Respondent's managers could not even agree on the duration of its "season." Notably, Branch Manager DeAndrade defined it as June through September (T-809), while HR Manager Hallinan described it as July through October (T-273), and Vice President of Distribution Meath defined it as early July through early October (T-621). Hallinan asserted that the most likely time for Respondent to need driver helpers is between July and October (T-273), but stated that "there is always a lot of work to be done" (T-332-333). Additionally, DeAndrade made it clear that January, not the school season, is Respondent's busiest time (T-952). When asked if the company was currently looking for drivers and helpers, DeAndrade declared, "We're always looking for employees, period" (T-815). According to Hallinan, the volume of work and the need for help determine whether and when driver helpers are needed (T-273-274).

⁴² GC-17(a), GC-17(b), GC-72.

⁴³ Chery, Cobbler, and Ribeiro all engaged in modest union activity. Each of them signed a card, and all three appeared in the photos of Union supporters. The General Counsel does not contend that the three were selected because of the level of their union support, but because they were vulnerable and pro-union. That is, they were lower paid employees with fewer skills than the drivers, and they were among the last employees hired. Respondent selected them for termination in order to "send a message to other employees that union and other concerted activity would not be tolerated." *California Gas Transport, Inc.*, 347 NLRB 1314, 1324 (2006).

Respondent's hiring records corroborate the absence of a true "season" (GC-32). The company hires "seasonal" driver helpers throughout the year, and terminates them throughout the year as well. For example, of the 15 "seasonal" driver helpers hired since 2013, only six were hired during the "season" identified by DeAndrade and Hallinan.⁴⁴ "Seasonal" driver helpers have been hired in January, March, April, May, and December, corroborating the fact that there is no "season."⁴⁵

Respondent's records sharply contradict its contentions that "seasonal" drivers are laid off at the end of the "season," and that the three named discriminatees were treated consistent with that pattern (T-809-810). Of the 15 "seasonal" driver helpers hired in the past three-and-a-half years, only Chery, Cobbler, and Ribeiro were classified as layoffs (GC-32). Of the remaining 12, three returned to school, one resigned, one was terminated for attendance problems, and seven were promoted to permanent positions. Respondent's own records, along with the testimony of its branch manager and human resources manager, amply demonstrate that (a) there is no "season"; (b) "seasonal" driver helpers are never laid off unless there is an organizing campaign in progress; and (c) "seasonal" driver helpers are more often than not transferred to permanent positions within the South Boston location.

Two⁴⁶ of the named discriminatees credibly testified that they were never told by Respondent's management that they were "seasonal" employees, despite Hallinan's insistence that he informs applicants during the hiring process when the job for which they are applying is "seasonal" (T-271-272). First, Chery testified that Hallinan never told him during the interview and hiring process that the position was "seasonal," but only that it was probationary (T-516). Hallinan did not dispute this: despite testifying

⁴⁴ One of those, Daniel Ross (Ross), was hired on September 18, 2014, two weeks before the end of the "season" as defined by DeAndrade.

⁴⁵ Respondent notes that five "seasonal" employees in other departments were also laid off on October 2, 2015 (GC-55). However, as the ALJ noted (ALJD-31), there is no evidence regarding the terms of their employment, or what they were told when hired. Moreover, two of the five (Jesse Jordan and Sofia Wilson) were classified as "school pickers," a clear indication that they were hired only for the school season, and DeAndrade testified that a third (Leonardo Medina) was a school employee (T-944). Finally, warehouse employees are separately supervised (T-313, 924), and there is no evidence that DeAndrade had any input in the decisions to lay them off.

⁴⁶ The third, Elton Ribeiro, did not testify at the hearing.

generally on “seasonal” hires and terminations (T-271-274, 356-357), he never testified about his interview with Chery.⁴⁷ At the time of his interview, Chery was employed in a job to which he has since returned, corroborating his testimony that he never would have left a full-time, regular position for a “seasonal” one (T-515-517). He accepted the position because he sought a future with W.B. Mason, and because he believed he could advance to a driver position based on his discussion with Hallinan during his interview (T-515-516). Following the interview, Hallinan made a notation in his calendar, indicating Chery’s start date and his desire to become a driver (GC-68).

Shortly before his termination, Goldstar Pitre told Chery that he was doing great work and would likely be getting a permanent route soon (T-526). On September 22, Pitre offered to send Chery out with driver Carlos Pina, telling Pina in a text message: “There’s a kid named Kirby he’s good” (GC-76, page 5). During Chery’s termination meeting, no mention was made of his status as a “seasonal” employee. Instead, Hallinan told him the company was going through a difficult time, despite the presence of help wanted signs posted throughout the Boston facility and help wanted ads being placed on the internet (GC-58-65, T-529), and despite the fact that work continued to be busy after Chery and the others were terminated (T-575). Chery’s credible testimony is further corroborated by an incident that occurred a day or two before his termination. Chery asked an unnamed supervisor⁴⁸ when he would be getting his uniforms. The supervisor responded that he had seen a box with Chery’s name on it, and that he would get the uniforms to him that day or the next (T-527). He never received them because he was fired (T-527).

Jason Cobbler told a similar story. Hallinan never told him during his interview that the position was “seasonal,” but only that he would be on probation before becoming a regular employee (T-501).⁴⁹ At his termination meeting, Hallinan told him work was slow (T-500-501). Cobbler further testified that at least two supervisors assured him that he had a future with the company, and that he would eventually get a

⁴⁷ Only one piece of evidence suggests that the three discriminatees were “seasonal” employees: Respondent’s Employee Action Forms (EAFs) for Chery, Cobbler and Ribeiro (R-12, 13, and 14).

⁴⁸ Chery did not know the supervisor’s name because he was not from the Boston location.

⁴⁹ Notably, Cobbler’s testimony on this issue was not rebutted by Hallinan, who testified on other matters.

permanent route (T-502-503). While Cobbler indicated on his union authorization card that he was a “seasonal” driver helper (GC-72), he credibly testified that it was other rank-and-file employees, and not any supervisor or manager, who told him he was “seasonal” (T-501, 506, 507). No manager or supervisor rebutted this testimony.

Importantly, at the time Chery, Cobbler, and Ribeiro were terminated, Respondent was extremely busy. Oscar Castro (Castro) testified that routes were still heavy as a result of the school season and the purchase of NEOS, which added at least 20-25 stops to his route each day (T-418). Similarly, Claudio Brandao testified that work was very busy in early October (T-575), an observation buttressed by the fact that Respondent hung flyers throughout the facility, stating that the company was hiring and encouraging employees to refer family and friends by offering a \$500 signing bonus (T-419, 529, 575).⁵⁰ Even Respondent’s witnesses acknowledged that early October was an unusually busy time at the Boston branch. For example, Meath testified that the purchase of NEOS had resulted in a “huge influx of business” impacting Boston drivers to a greater extent than expected (T-608-609), and that “September was a very big month for us” (T-609). Similarly, Sales Manager Kershner testified that he was asked to help out Sean Brennan on October 5 because the recent merger, and the resulting increase in business volume, had made things very busy (T-676). Finally, in a move that underscored Respondent’s need for help in early October, the company brought in six to eight Goldstars from other facilities to perform the very work the driver helpers had been doing (T-161, 617, 232-233).

Judge Carissimi applied the Wright Line analysis to the three driver helpers, concluding that they had engaged in union activity, that Respondent was aware of their union sympathies, and that Respondent demonstrated its animus toward the Union by committing multiple unfair labor practices as described above. The Judge also noted that the timing of the layoffs, occurring only days after Respondent learned of their union activity, supports a finding that they were unlawfully motivated. *DHL Express*, 360 NLRB No. 87, slip op. at 7. Because the General Counsel presented a *prima facie*

⁵⁰ Respondent also placed help wanted ads on craigslist.com on October 1, 2015 (T-349; GC-65).

case that the layoffs were unlawfully motivated, the burden shifts to Respondent to demonstrate that it would have taken the same action in the absence of union activity.

Respondent asserts that the layoffs of Chery, Cobbler and Ribeiro were consistent with its practice of laying off seasonal employees at the end of its busy school season. However, Respondent's claim that they were laid off in accordance with company practice is completely undermined by the company's own records. First, not a single driver helper has been laid off in the past three years, except the three named discriminatees. Of the remaining 12 helpers hired since 2013, seven have gone on to other, regular positions with the company, including four who became regular supply drivers. Finally, notwithstanding Respondent's assertions, W.B. Mason clearly has no "season" during which driver helpers are typically hired or terminated. Helpers have been hired in January, March, April, May, and December, with only six of the last fifteen being hired during the "season" as defined by Respondent's managers.

Moreover, Respondent's comparison between the laid off helpers and other employees laid off in 2015 was properly rejected. First, the other employees all worked in the warehouse, which has separate supervision and oversight. Branch Manager DeAndrade, who decided to terminate the three driver helpers in October, has no responsibility for warehouse employees, and any hires and layoffs conducted there have no relationship to those among supply drivers and helpers. Additionally, there is no evidence regarding the terms of employment for the laid-off warehouse employees, including what they were told at the times of their hires or layoffs. That two of the laid off warehouse workers were classified as "school pickers" strongly suggests that they were, in fact, hired for a particular season, and distinguishes them from the driver helpers who were terminated at the same time. Finally, the three driver helpers were terminated at a time when Respondent was aggressively advertising for help, and they were replaced by Goldstars who were brought in to perform the very same work. The only plausible conclusion is that their terminations were motivated by something other than volume of work.

As the ALJ noted, the evidence supports a finding that the three named discriminatees were not "seasonal" employees at all. First, the Judge noted that, while

the EAFs classified the three as seasonal employees, that characterization alone does not make them seasonal employees (ALJD-31). The Judge further noted that Respondent had no recent practice of laying off driver helpers in October (ALJD-31). In fact, Chery, Cobbler, and Ribeiro were the only helpers laid off during this timeframe between 2013 and 2015. On those bases, the ALJ correctly concluded that Respondent had not met its *Wright Line* burden of showing that the three would have been laid off in the absence of union activity, and that their layoffs therefore violated 8(a)(3) and (1).

IX. THE REMEDIAL BARGAINING ORDER

Respondent's assault on employees' Section 7 rights renders the Board's traditional remedies ineffective and makes it unlikely that a fair election can be conducted among bargaining unit employees. Only a remedial bargaining order can ensure that employees' free choice of a bargaining representative, under these circumstances best expressed through authorization cards, is honored.

The Board will issue a remedial bargaining order where an employer has committed unfair labor practices so serious and pervasive that they make a fair election unlikely. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Judge Carissimi found that this is a Category II case, characterized by "less pervasive practices which nonetheless still have a tendency to undermine majority strength and impede the election process."⁵¹ *Evergreen America Corp.*, 348 NLRB 178, 180 (2006), enfd. 531 F.3d 321 (4th Cir. 2008), citing *Gissel Packing*, 395 U.S. at 613-614 (1969). In determining the appropriateness of a *Gissel* bargaining order, the Board evaluates "the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future." *Gissel*, 395 U.S. at 614; *Evergreen America*, 348 NLRB at 180.

In order to demonstrate that a bargaining order is appropriate, the General Counsel must first demonstrate that the Union attained majority status through signed authorization cards. Here, the evidence clearly demonstrates that the Union had

⁵¹ Judge Carissimi acknowledged that Respondent's unfair labor practices were extensive (ALJD-64), but elected to characterize it as a Category II *Gissel* case.

obtained the requisite support by September 28, 2015, the date of its request for recognition. On that date, there were 45 employees in the bargaining unit, including the three laid off driver helpers determined by the ALJ to be regular employees with a continued expectation of employment. During the trial, 30 authorization cards were properly authenticated, and their validity was not contested by Respondent. As a result, the Union clearly attained majority status by September 28, the date the bargaining order should become effective.

The Board has held that certain unfair labor practices are so coercive that they are characterized as “hallmark” violations. *Horizon Air Services*, 272 NLRB 243 (1984). Such hallmark violations “support the issuance of a bargaining order unless some significant mitigating circumstances exist.” *NLRB v. Jamaica Towing*, 632 F.2d 208 (2d Cir. 1980). In *Jamaica Towing*, the court stated that “hallmark” violations include, inter alia, the grant of benefits to employees and the discharge of employees in violation of Section 8(a)(3). The court noted that, “In such cases, that seriousness of such conduct, coupled with the fact that it represents complete action as distinguished from mere statements, interrogations or promises justifies a finding without extensive explication that it is likely to have a lasting inhibitive effect on a substantial percentage of the workforce.” *Id.* at 212-213.

Here, as the ALJ concluded, Respondent committed several hallmark unfair labor practices.⁵² First, Respondent violated 8(a)(3) and (1) by suspending and discharging union supporters Sean Brennan and Marco Becerra; and by laying off union supporters Kirby Chery, Jason Cobbler, and Elton Ribeiro. The Board recognizes that the discharge of a union supporter is one of the most flagrant forms of interference with Section 7 rights and is more likely to destroy election conditions for a longer period of time than other unfair labor practices because it tends to reinforce the fear of employees that they will lose their employment if they persist in engaging in union activity. *Michael’s Painting, Inc.*, 337 NLRB 860, 861 (2002); *A.P.R.A Fuel Oil*, 309 NLRB 480, 481 (1992); *Thriftway Supermarket*, 276 NLRB 1450, 1451 (1985), *enfd.* 808 F.2d 835

⁵² In addition to the hallmark unfair labor practices, Respondent also engaged in other serious unlawful conduct, as fully detailed in Sections IV and V above.

(4th Cir. 1986). Additionally, Respondent violated 8(a)(3) and (1) by granting a wage increase to all bargaining unit employees on June 3, 2016, in violation of Sections 8(a)(1) and (3). It is well-established that unlawful wage increases have a long-lasting effect because of their significance to employees and because the Board's traditional remedies do not require the respondent to withdraw benefits it has conferred.

America's Best Quality Coatings Corp., 313 NLRB 470, 472 (1993); *Holly Farms Corp.*, 311 NLRB 273, 281-282 (1993); *Pembrook Management*, 296 NLRB 1226, 1228 (1989).

In determining the appropriateness of a remedial bargaining order, the Board considers the following factors: the size of the unit (*Garvey Marine, Inc.*, 328 NLRB 991, 993 (1999), *enfd.* 245 F.3d 819 (D.C. Cir. 2001); *River West Development*, 311 NLRB 591 (1993)); the impact of the violations on the union's majority (*J.L.M., Inc.*, 312 NLRB 304, 305 (1993), *enf. den. on other grounds* 31 F.3d 79 (2d Cir. 1994); *NLRB v. Horizon Air Services*, *supra*, 761 F.2d at 32); the likelihood that the violations will recur (*General Fabrications Corp.*, 328 NLRB 1114, 1115 (1999), *enfd.* 222 F.3d 218 (6th Cir. 2000)); the identity and position of the individuals committing the unfair labor practices (*Consec Security*, 325 NLRB 453 (1998), *enfd. mem.* 185 F.3d 862 (3d Cir. 1999); *NLRB v. Horizon Air Services*, *supra*, 761 F.2d at 31); the number of employees directly affected by the violations (*Evergreen America Corp.*, *supra*, 348 NLRB at 181; *Cardinal Home Products, Inc.*, 338 NLRB 1004, 1010-1011 (2003); *Aqua Cool*, 332 NLRB 95, 97 (2000)); and the extent of dissemination of the violations among the rest of the workforce (*Abramson, LLC*, 345 NLRB 171, 176-177 (2005); *Garvey Marine*, *supra*, 328 NLRB at 991). Recently, the Board has placed particular significance on the last two factors, i.e., whether a substantial number of unit employees have been directly affected by or have knowledge of Respondent's unlawful actions. See., e.g., *Evergreen America Corp.*, *supra* at 181 (*Gissel* bargaining order warranted where many of the most flagrant violations directly affected all or most of the bargaining unit).

Here, as Judge Carissimi correctly decided, all these factors favor a bargaining order. Regarding the size of the unit, the impact of the violations on the Union's majority, the number of employees directly affected by the violations, and the extent of

dissemination among unit employees, the evidence is particularly compelling. Every bargaining unit employee was directly affected by the withholding of the wage increase in December 2015, as well as the increase granted in June 2016. Moreover, Respondent's unfair labor practices were disseminated widely throughout the bargaining unit via daily text messages. Finally, the impact of the Respondent's unfair labor practices on the Union's majority could not be clearer: two-thirds of the unit signed an antiunion petition just 17 days after the Union requested recognition.

The final two factors also compel issuance of a remedial bargaining order. First, many of Respondent's unfair labor practices were committed by its very highest managers: Meehan, Meath, and DeAndrade. *Milum Textile Services Co., Inc.*, 357 NLRB No. 169, slip op. at 9 (2011) ("when the highest level of management conveys the employer's antiunion stance by its direct involvement in unfair labor practices, it is especially coercive of Section 7 rights and the employees witnessing these events are unlikely to forget them."). Finally, and perhaps most significantly, Respondent has demonstrated a strong proclivity to continue its unlawful conduct. In June 2016, on the eve of the hearing, Respondent granted unit employees a wage increase seven times the average, with no explanation or business justification. The likelihood that Respondent's unlawful conduct will continue is also evident in DeAndrade's interaction with Kenny DeAndrade in the days leading up to the hearing. On the day that Kenny informed DeAndrade he had been subpoenaed to testify, DeAndrade announced that Kenny's raise was finally approved and asked about his participation in the upcoming hearing.⁵³ This tendency to continue violating the law, at a time when the Region was sure to learn about the violations, is especially troubling.

For all these reasons, as the ALJ properly determined, Respondent should be ordered to bargain with Teamsters Local 25 as the exclusive collective-bargaining representative of its supply drivers and helpers.

⁵³ As noted above, the raise approved on June 1 still has not been granted. A Complaint pending in Case 01-CA-180518 alleges that Respondent's withholding of Kenny DeAndrade's wage increase violates Sections 8(a)(3) and (4). That case is set for hearing in January 2017.

X. THE SECTION 8(a)(5) VIOLATIONS

Section 8(a)(5) of the Act prohibits employers from unilaterally changing terms and conditions of employment without first bargaining with the exclusive collective bargaining representative of its employees. Here, Respondent's withholding of the 2015 wage increase and eventual granting of it – both clearly mandatory subjects of bargaining – violated 8(a)(5) because employees had selected the Union as their bargaining representative and because Respondent failed to bargain with that representative over the change in terms and conditions of employment.

It is axiomatic that an employer violates Section 8(a)(5) and (1) of the Act 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); *Ivy Steel & Wire, Inc.*, 346 NLRB No. 41, slip op. at 16-17 (2006); *Mercy Hospital of Buffalo*, 311 NLRB 1150, 1164-65 (1990). Unilateral actions that modify employees' conditions of employment constitute a *per se* violation of Section 8(a)(5), and permit an inference of subjective bad faith. *NLRB v. Katz*, *supra*. The Board has stated that “the vice of the unlawful unilateral change is the change in existing employment conditions itself, and whether the change involves an increase or a decrease, a continuance or a discontinuance, or an alteration or modification is simply not determinative.” *Washington Beef, Inc.*, 328 NLRB 612, 617 (1999). Such unilateral changes are especially egregious when they are made after employees select their bargaining representative but before the certification of the result. *Id.*

Supply drivers and helpers selected the Union as their exclusive collective bargaining representative as of September 28, 2015. As discussed in detail above, and in the decision of the Administrative Law Judge, Respondent was obligated as of that date to bargain with the Union over changes to employees' terms and conditions of employment. It is undisputed that Respondent did not bargain with the Union regarding either the withholding or the granting of the wage increase. As a result, by virtue of the bargaining order recommended by the ALJ, Respondent violated Section 8(a)(5) by failing to do so with respect to the withholding and the granting of the wage increase.

XI. CONCLUSION AND REMEDY

For the reasons discussed above, the Board should adopt the ALJ's findings of fact and conclusions of law as discussed above, and order Respondent to take the actions detailed in the ALJ's recommended Order.

Dated: December 2, 2016

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