Taylor Motors, Inc. *and* American Federation of Government Employees (AFGE), AFL–CIO, Local 2022. Cases 10–CA–141565, 10–CA–141578, 10–CA–145467, and 10–RC–137728

March 13, 2017

DECISION AND ORDER REMANDING PROCEEDING

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On July 14, 2015, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order Remanding.

The Board conducted an election in a unit of the Respondent's employees on November 6, 2014. Thereafter, the parties agreed to set aside this election, and a second election was held on January 15, 2015. The judge found that the Respondent violated Section 8(a)(1) of the Act by suspending employee Anthony Williams on November 7, 2014, and discharging him on November 13, 2014, for protected conduct Williams engaged in on the day of the 2014 election. The judge further found that the Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory confidentiality/nondisclosure agreement (the "Agreement"), which required employees to keep confidential certain types of information, including "[c]ompensation data," "personnel/payroll records," and "conversations between any persons associated with the company." The judge recommended setting aside the 2015 election on the basis that these unfair labor practices occurred during the critical period.

The Respondent argues that it lawfully suspended and discharged Williams because he made racially charged comments to employees and threatened them with physical violence on the day of the 2014 election. As discussed below, because the judge failed to make a properly reviewable determination as to whether Williams in fact engaged in the misconduct, we remand this case for further proceedings consistent with this decision.

As more fully recounted in the judge's decision, Williams attempted to persuade his coworkers to vote for the Union on the day of the 2014 election. On the basis of employee complaints, the Respondent suspended and ultimately discharged him for alleged misconduct that he engaged in during the course of his electioneering activity. More specifically, according to the written complaint of employee Janice Schwenz, Williams "was saying to us if we didn't vote yes they were gonna get rope and hang us like the joke on Litwin St and the way we did them (the Blacks) in the 60's."[2] Similarly, employee Terri Nolen stated that "Williams was threatening people that if they left before they voted yes he was going to come after them,"[3] and that "y'all had better vote yes if y'all don't I will put a rope around your neck and hang y'all from a tree like they did on Litwin St. for the Halloween joke and the way y'all did us back in the 60's."[4]

For his part, Williams denied making the "hanging" statement or ever trying to stop people from leaving. Employees Beate Poston, Mary Dotson, and Sandra Fenwick testified that they did not hear such a statement. Williams, Poston, and Dotson, like Schwenz and Nolen, submitted to the Respondent written statements recounting what they witnessed that day.

The judge resolved the evidentiary conflict by finding that Williams did not make the statements attributed to him. As a result, he concluded that the Respondent violated the Act by suspending and discharging Williams. We have decided to remand this case based on the judge's confusing resolution of this key factual issue, which depends in part on credibility determinations, in

[1] There are no exceptions to the judge's dismissal of complaint allegations that the Respondent violated Sec. 8(a)(1) by (1) interrogating employees Larry Cruthis and Sandra Fenwick on separate occasions on August 22, 2014, Cruthis on August 25, employee Anthony Williams on October 21, and Cruthis on October 22; (2) giving employees the impression that their union activities were under surveillance on August 22 and 25; and (3) instructing Cruthis not to pass out union authorization cards on October 22.

[2] Unit employees were aware that a Halloween display depicting the hanging in effigy of an African-American family had been erected, one week prior to the election, in front of a residence on Litwin Street in Fort Campbell, Kentucky.

[3] The language quoted above is from Nolen's written complaint. Nolen similarly testified that Williams said "you cannot leave, you cannot leave, because if you leave I'm going to get you."

[4] Two other instances of Williams' alleged misconduct during the 2014 election are no longer at issue in this proceeding. First, the record reveals that the Respondent did not rely on the complaints of employees Beate Poston, Mary Dotson, and Karla Livingston that Williams harassed them by showing them his cellphone screen, which displayed the message "Union" followed by a check mark and the word "Yes." Second, Dotson asserted that Williams told a bus aide who had indicated an intention to leave without voting that he would block the driveway so the aide could not get out. The judge found that any such statement would not reasonably be considered intimidating in the absence of any evidence that Williams actually tried to block the driveway. There are no exceptions to this finding.

addition to his inconsistent application of the legal standard.[5]

As the judge correctly stated, the applicable standard for determining whether Williams' suspension and discharge were unlawful is that set forth in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).[6] The Court there explained that

> [Section] 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

Id. at 23. Under *Burnup & Sims*, the employer has the burden of showing that it held an honest belief that the discharged employee engaged in misconduct. If the employer meets its burden, the burden shifts to the General Counsel to show that the employee did not, in fact, engage in the asserted misconduct. See *Pepsi-Cola Co.*, 330 NLRB 474, 474 (2000).

Applying the framework articulated in *Burnup & Sims*, we agree with the judge that Williams was engaged in protected activity when he attempted to persuade his coworkers to vote for the Union on the day of the 2014 election. There are no exceptions to the judge's finding that the Respondent met its burden of showing that it honestly believed Williams had engaged in misconduct in the course of that activity. Therefore, the burden shifted to the General Counsel to show that Williams did not, in fact, engage in the asserted misconduct. Because the legality of the Respondent's actions turn on whether the General Counsel met his burden, we discuss in detail the judge's determination that Williams did not, in fact, threaten to hang his coworkers if they did not vote for the Union.

The judge began his discussion of the issue by summarizing the relevant evidence: (1) two employees, Schwenz and Nolen, heard Williams make the "hanging" statement; (2) Williams denied making the statement; and (3) three employees—Poston, Dotson, and Fenwick—testified that they did not hear such a statement. Weighing the conflicting evidence, the judge expressly disavowed reliance on demeanor: "All the witnesses appeared to be telling the truth." Thus, on the one hand, the judge explained that Schwenz' testimony was "similar enough to corroborate Nolen's testimony but not so similar as to suggest collusion." On the other hand, the judge found that Poston and Dotson would have been unlikely to forget the disputed statement, as they both complained to the Respondent about other statements Williams made during the election.

Ultimately, the judge found that Williams did not make the statement, reasoning that three witnesses—Poston, Dotson, and Fenwick—were in range of Williams' loud voice, and two of them filed complaints against Williams, yet they testified that they did not hear the provocative "hanging" statement.[7]

If this is where the judge's analysis ended, it may well have been appropriate for us to weigh the evidence and resolve the issue without need to remand. However, later in his decision, the judge expressly cast doubt on his own resolution of the issue. One paragraph after purportedly resolving the issue, he stated that he "might well be wrong." Several pages later, he noted that "some doubt persists," before affirming his initial determination that Williams did not threaten his coworkers.[8] By these statements, the judge "employed a most equivocal procedure for resolving the conflicting testimony regarding what actually happened." *Roto Rooter*, 283 NLRB 771, 773 (1987) (remanding where the judge "undercut his own analysis" by, inter alia, failing to make a clear cred-

[5] Because we have decided to remand the question whether Williams uttered the statements attributed to him, we find it unnecessary to pass at this time on the judge's alternative finding that the alleged statements, if made, would not constitute serious threats or intimidation.

[6] Contrary to the Respondent's contention, *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 445 U.S. 989 (1982), is inapplicable to cases like this one, where the employer has discharged the employee because of alleged misconduct in the course of protected activity. See *La-Z-Boy Midwest*, 340 NLRB 80, 80 (2003), enfd. in relevant part 390 F.3d 1054 (8th Cir. 2004); *Shamrock Foods Co.*, 337 NLRB 915, 915 (2002), enfd. 346 F.3d 1130 (D.C. Cir. 2003). The judge cited the Board's decision in *Fresenius USA Mfg.*, 358 NLRB 1261, 1264 fn. 7 (2012), in support of this principle, but properly recognized that that decision was not precedential in light of the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). We note that subsequently, the Board modified its decision in *Fresenius*. See 362 NLRB No. 130 (2015).

[7] Other evidence, some of which the judge failed to adequately discuss, also apparently contributed to his credibility determination. On remand, the judge should expressly weigh this evidence, in addition to all other relevant record evidence.

For example, the judge noted that although Schwenz testified that Poston responded to Williams by asking him to leave, Poston testified that she did not hear Williams' statement. Similarly, though *not* noted by the judge, Nolen testified that Poston, Dotson, and Schwenz exchanged a "look" with her (Nolen) after Williams' alleged threat, but Dotson testified that she did not hear the statement. The judge should address these apparent conflicts in the testimony.

In addition, the judge stated that Poston, Dotson, and Fenwick were within "earshot" of Williams at all relevant times, and therefore would have heard the statement had Williams made it. The judge should evaluate and explain the evidentiary support for his determination.

[8] Based on these statements in particular, we disagree with our dissenting colleague that the judge "made clear findings on all pertinent issues."

ibility determination), opinion after remand 288 NLRB 1025 (1988).

Compounding the difficulty of our review, the judge at times made statements that appear at odds with the *Burnup & Sims* burden-shifting framework. Certainly, the judge initially articulated the standard correctly, stating "Once the employer establishes that it had such an honest belief, the burden shifts to the General Counsel to affirmatively show that the misconduct did not in fact occur." And his ultimate conclusion—that the "government has carried this burden"—also reflects a correct understanding of the law. However, in the course of his analysis, the judge stated: "I cannot conclude that the evidence makes it 'more likely than not' that Williams made the 'hanging' statement;" "a preponderance of the evidence does not establish that Williams made any statement about hanging people;" and, "the entire record did not persuade me that it was more likely than not that Williams made the statements attributed to him." These statements suggest a misunderstanding of which party bore the burden of proof here. As we have explained, under the circumstances, the General Counsel had the burden of proving that Williams did not make the statement attributed to him.

The judge similarly erred by stating that the General Counsel met his burden because the testimony of Schwenz and Nolen that Williams made the disputed statement was not *further* corroborated by other witnesses, i.e., by Poston, Dotson, and Fenwick. As explained, it was not the Respondent's burden to prove that Williams made the statement; it was the General Counsel's burden to prove the contrary. Thus, the absence of additional evidence that Williams *did* make the disputed statement does not help the General Counsel's case.

In view of the judge's confusing discussion of the crucial credibility issue, together with his inconsistent application of the *Burnup & Sims* framework, we are unable adequately to evaluate whether, on the present record, the General Counsel carried his burden of showing that Williams did not make the statement attributed to him. In *Pepsi-Cola Co.*, 330 NLRB 474, cited above, the Board considered a similarly inadequate *Burnup & Sims* analysis. The judge in *Pepsi-Cola*, like the judge in this proceeding, made contradictory statements about key testimony. As a result, the Board found that the judge failed to clearly determine whether each party met its burden. For example, in analyzing the employer's burden, the judge found that a manager honestly believed that he overheard the alleged discriminatee engage in misconduct, but in the very next sentence said he was not persuaded that a "reasonable person could have been all that certain." Id. at 475. In view of these "contradictory statements," the Board stated that it was "uncertain" as to whether the judge found that the employer met its burden. Id. And in discussing the General Counsel's burden, the judge found that the alleged discriminatee's testimony raised insufficient purported discrepancies "to conclude that the opposite of [his] testimony *must* be true." Id. (emphasis in Board decision). According to the Board, the judge failed to make a specific credibility finding concerning the alleged discriminatee's testimony. The Board concluded that the judge's decision did not contain the proper findings and analysis under the *Burnup & Sims* test, and thus remanded the proceeding.[9] Like the Board in *Pepsi-Cola*, we find it necessary to remand to the judge for further findings and analysis. See also, e.g., *Roto Rooter*, 283 NLRB at 773 (remanding because the judge's "avoidance of a clear credibility resolution deprives us of the necessary factual basis to determine whether any misconduct occurred," and because the judge failed to apply the legal test appropriately).[10]

Our dissenting colleague contends that the relevant evidence and the judge's erroneous *Burnup & Sims* analysis require the Board to conclude, contrary to the judge, that the suspension and discharge of Williams were lawful. We disagree. As we have explained, some portions of the judge's analysis suggest that he misallocated the burden of proof. However, other portions, such as his (reluctant) decision to credit Williams, and his overall conclusion that the General Counsel carried his burden, suggest that he made a permissible credibility determination and correctly applied the *Burnup & Sims* test. The result is that we are left wondering which version of the story is most reliable. In those circumstances, we are not persuaded by our colleague's view that it is appropriate simply to conclude that the evidence is in equipoise.[11]

[9] The Board noted that the General Counsel failed to call any witnesses to corroborate the alleged discriminatee's testimony, and explained that the absence of corroborating witnesses was a factor for the judge to consider in his determination of whether to credit him. Id. at 475 & fn. 9. The judge in his supplemental decision, which the Board upheld, discredited the alleged discriminatee's denial and concluded that the General Counsel failed to meet his burden, largely because he called no witness to corroborate the denial. See *Pepsi-Cola Co.*, 333 NLRB 87, 87 & fn. 1, 88 (2001). Here, by contrast, more than one witness stands on each side of the factual dispute: some witnesses say they heard Williams make the statement, while others say they did not. These circumstances make a remand in this case even more advisable.

[10] There is no indication in *Pepsi-Cola* or *Roto Rooter* that a party requested that the Board remand the case.

[11] This case is distinguishable from *Samsung Electronics America, Inc.*, 363 NLRB No. 105 (2016). In that case, the judge found that between the conflicting testimony of an employer and an employee witness concerning an allegedly unlawful instruction not to discuss the employee's lawsuit, neither was clearly more credible than the other about what was said during the conversation. The judge credited the

Rather, because we find that the judge's decision does not permit adequate review, we conclude that a remand is the most prudent disposition.[12]

On remand, consistent with our decision, the judge should take into account all of the relevant record evidence and should make a clear and reasoned determination of whether the General Counsel carried his burden to prove that Williams did not make the statement attributed to him.

We also direct the judge, on remand, to consider whether the 2015 election should be set aside. In reaching this determination, the judge should consider the Respondent's suspension and discharge of Williams—should he again find that these actions were unlawful—in addition to the Respondent's maintenance of the Agreement, which the judge found violated Section 8(a)(1) of the Act.[13]

ORDER

IT IS ORDERED that this proceeding is remanded to the Administrative Law Judge for further appropriate action as set forth above.

IT IS FURTHER ORDERED that the judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. March 13, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

ACTING CHAIRMAN MISCIMARRA, dissenting.

Employee Anthony Williams reportedly stated that if employees did not vote for the Union, he would "put a rope around your neck and hang y'all from a tree like they did . . . back in the 60's." At the time, the Respondent's employees were waiting to vote in a Board-conducted representation election that took place on November 6, 2014. The Respondent suspended Williams, thoroughly investigated employees' complaints about Williams' conduct, and discharged Williams after determining that he made the statement in question. Two different employees reported that Williams made the statement, the judge found that they appeared to be telling the truth, and it is undisputed that the Respondent reasonably believed Williams made the offending statement. Nevertheless, the judge concluded that Williams' suspension and discharge were unlawful. According to the judge, because other witnesses did not corroborate that Williams made the "rope around your neck/hanging" statement, because Williams denied making the statement (among other threatening statements), and because the

employee witness based on the judge's inference that the employer witness' subsequent email supported the employee's version. Discerning no indication that the judge relied on demeanor, the Board found that the employer's explanation of the meaning of the email was equally as persuasive as the meaning inferred by the judge. As a result, the Board concluded that the evidence was in equipoise, reversed the judge's credibility determination, and dismissed the relevant allegation. Here, the judge's analysis of the varying accounts of several witnesses hardly leads to a clear inference as to what actually occurred. We trust that the judge on remand will provide a clear analysis so we can make a reasoned determination, which the Board was able to do without need to remand in *Samsung Electronics America*.

[12] Contrary to the dissent's suggestion, the documentary evidence in the record does not establish that Nolen's and Schwenz' version of the events in question is more reliable than that of other employee-witnesses. Williams, Poston, and Dotson, like Schwenz and Nolen, also submitted written statements that corroborate their testimony.

Moreover, our dissenting colleague notes that "where credibility resolutions are not based primarily upon demeanor, it is well settled that the Board itself *may* proceed to an independent evaluation of credibility." *Electrical Workers, Local 38*, 221 NLRB 1073, 1074 (1975) (emphasis added). The Board is not *required* to undertake an independent evaluation of credibility in such circumstances, however. This is particularly true here where there is evidence from multiple witnesses to support *and* contradict that Williams uttered the statement. Attempting to reconcile all of the conflicting evidence in the first instance, moreover, would require the Board to draw factual inferences and conclusions that may or may not be justified, as shown by our colleague's attempt to do so. In addition, the judge applied the legal framework inconsistently and failed to expressly weigh certain evidence. See supra, fn. 7. We therefore find this case more similar to the cases discussed above than to *Samsung Electronics* and *Universal Truss*, relied on by the dissent. Compare *Samsung Electronics America, Inc.*, 363 NLRB No. 105, slip op. at 2–3 (2016) (finding that the employer's explanation of the meaning of an email was equally as persuasive as the meaning inferred by the judge, the Board concluded that the evidence was in equipoise, reversed the judge's credibility determination, and dismissed the relevant allegation), and *Universal Truss, Inc.*, 348 NLRB 733, 737–738 (2006) (deciding not to remand where the judge failed to resolve a credibility dispute) with *Pepsi-Cola Co.*, 330 NLRB at 475 (remanding because the judge failed to include the "appropriate analysis and findings," which were "necessary" to determine whether the employer violated the Act), and *Roto Rooter*, 283 NLRB at 773 (remanding where the judge failed to resolve a credibility dispute and to apply the legal test appropriately).

[13] The judge found that the Respondent violated Sec. 8(a)(1) of the Act by interrogating Williams about his union activity on August 22, 2014, before the election petition was filed. The Respondent excepted. This finding is not part of our remand, and we decline to reach it at this time.

judge found that "the scales appear about evenly balanced" between Williams' denial and the contrary testimony of two other witnesses, the Respondent did not prove that Williams made the "rope around your neck/hanging" statement. On this basis, the judge found in favor of the General Counsel's case.

I agree with my colleagues that the judge's analysis in this respect was fundamentally flawed. Thus, the judge (i) failed to apply the correct legal framework, (ii) improperly relieved the General Counsel of his burden of proving that Williams did not make the statements, and (iii) erroneously relied on the absence of further corroboration that Williams made the statements as support for the General Counsel's case. Moreover, although my colleagues do not reach the issue, it is also clear that the judge erred in dismissing the significance of the statements, opining that they would not justify Williams' discharge even if made.

The majority addresses these errors by remanding the case to the judge so that he can try again. I believe that a remand is unwarranted. Contrary to my colleagues, it is not the case that, in their words, "the judge's decision does not permit adequate review." Rather, once the correct legal standard is applied, the judge's own findings make clear that the General Counsel has not shown that Williams' suspension and discharge were unlawful. A remand in these circumstances merely offers the General Counsel a second opportunity to make his case after he failed the first time. Because there is no justification for this second bite at the proverbial apple, I respectfully dissent.

Facts

As noted above, an election was held in the Respondent's facility on November 6, 2014 (the 2014 election).[1] That same day, several employees complained to the Respondent that Williams harassed and threatened them as they stood in line to vote in the bus bay.[2] Specifically, employee Janice Schwenz stated that Williams "was saying to us if we didn't vote yes they were gonna get rope and hang us like the joke on Litwin St and the way we did them (the Blacks) in the 60's."[3] Similarly, employee Terrie Nolen stated that "Williams was threatening people that if they left before they voted yes he was going to come after them" and that "y'all had better vote yes if y'all don't I will put a rope around your neck and hang y'all from a tree like they did on Litwin St. for the Halloween joke and the way y'all did us back in the 60's." Based on the complaints of Schwenz, Nolen, and a different complaint by employee Mary Dotson, the Respondent suspended Williams on November 7.[4] After investigating these complaints and determining they were valid, the Respondent discharged Williams on November 13 for violating its Rule 4.3, which prohibits discrimination and harassment in the workplace.

Williams, Schwenz, and Nolen all testified at the hearing. The judge found that "[a]ll the witnesses appeared to be telling the truth" and that witness demeanor "provides no assistance here." The judge also found that Schwenz' testimony was "similar enough to corroborate Nolen's testimony but not so similar as to suggest collusion." No party has excepted to these findings.

On the other hand, Williams denied making the statements attributed to him by Schwenz and Nolen. The judge credited Williams' denials, but only because the mutually corroborative testimony of Schwenz and Nolen was not *further* corroborated by other witnesses. Specifically, according to the judge, employees Poston and Dotson and another employee, Sandra Fenwick, "were within earshot of Williams," and these three employees testified they did not hear Williams make the "rope around your neck/hanging" statement. For this reason, the judge determined that he could not conclude "it was more likely than not" that Williams made the statements attributed to him. Therefore, according to the judge, Williams "did not make them." Incredibly, the judge also dismissed the significance of the statements attributed to Williams, reasoning that they "did not constitute threats of physical violence and did not create a racially charged atmosphere or intimidation." As described below, I believe these findings were clearly erroneous.

[1] All further dates are in 2014 unless otherwise stated. The 2014 election was set aside by agreement of the parties, and a second election was held on January 15, 2015. At issue in this case in addition to the unfair labor practice allegations is whether the 2015 election should be set aside. Because my colleagues remand the case to the judge, the resolution of that issue must await another day.

[2] The election was held in a break room off a large bus bay. Employees lined up to vote in the bus bay.

[3] There had been widespread publicity in the area about a Halloween display in front of a residence on Litwin Street depicting effigies of a black family hanging by ropes from a tree. A photograph of this display was admitted into evidence as R. Exh. 1.

[4] Dotson stated that she overheard Williams tell another employee, "I will block the driveway and you can't get out[.]" Employees Beate Poston and Karla Livingston each complained that Williams harassed them while they were standing in line to vote by showing them a "vote yes" message displayed on his phone. The Respondent did not rely on Poston's and Livingston's complaints as a basis for Williams' suspension and discharge. Accordingly, I will not consider them further. In addition, the Respondent does not except to the judge's finding that any comments Williams may have made about blocking the driveway to prevent employees from leaving were not intimidating in the absence of any evidence suggesting that he actually tried to block the driveway. In the absence of relevant exceptions, I will not further consider the "block the driveway" statement that Dotson said Williams made.

Discussion

In *Burnup & Sims*,[5] the Supreme Court set forth the standard that governs whether an employer violates Section 8(a)(1) of the Act when an employee is discharged for misconduct that was allegedly committed in the course of NLRA-protected activity. The Court stated that the discharge is unlawful only

> if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.[6]

Under this analytical framework, the Board must first determine whether the Respondent met its burden to show that it had an honest belief that Williams had engaged in misconduct. If the Respondent sustains this burden, the burden shifts to the General Counsel to prove that Williams did *not*, in fact, engage in the misconduct. See, e.g., *Pepsi-Cola Co.*, 330 NLRB 474, 474 (2000), opinion after remand 333 NLRB 87, 87–88 (2001); *Wittek Industries*, 313 NLRB 579, 579 fn. 2 (1993).

It is uncontroverted that the Respondent honestly believed Williams made the "rope around your neck/hanging" statement and engaged in the other misconduct described above. Moreover, threatening to hang employees from a tree or to retaliate against them in other ways if they fail to vote for the Union constitutes serious misconduct. Here, I strongly disagree with the judge's finding that Williams' statements were unobjectionable because he had a "jolly" demeanor and was merely being "boisterous and attention seeking"—his "normal Anthony self"—on the day of the 2014 election, and therefore employees would not believe he intended to follow through on his threats. My colleagues do not pass on this finding "at this time," but it was plain error all the same. See, e.g., *Gem Urethane Corp.*, 284 NLRB 1349, 1353 (1987) (Board applies objective test in assessing verbal threats directed at fellow employees in the course of protected activity); *Clear Pine Mouldings,* 268 NLRB 1044, 1046 (1984) (same), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986). The judge's disregard for the serious nature of Williams' alleged threats is particularly troubling since the threats were directed against eligible voters in a Board-conducted election and were uttered on the day of the election itself as employees were waiting to vote. This conduct goes to the very heart of the election process, the primary instrument chosen by Congress to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of employment or other mutual aid or protection."[7]

Because the Respondent believed in good faith that Williams engaged in the actions described above, the Supreme Court's decision in *Burnup & Sims* establishes that Williams' suspension and discharge were lawful unless the General Counsel satisfies his burden of proving that Williams did *not* engage in the misconduct. In other words, Respondent's honest belief that Williams engaged in the misconduct attributed to him defeats the complaint allegations challenging Williams' suspension and discharge "unless it *affirmatively* appears that such misconduct did not in fact occur." *Rubin Bros. Footwear, Inc.*, 99 NLRB 610, 611 (1952) (emphasis in original; cited with approval in *Burnup & Sims*), enf. denied on other grounds 203 F.2d 486 (5th Cir. 1953).

As the majority recognizes, the judge failed to apply the standard set forth in *Burnup & Sims*. Although the judge correctly stated at the outset of his analysis that the General Counsel had the burden of proving that Williams did not engage in the reported misconduct, he erroneously analyzed each piece of evidence based on a premise that the Respondent was required to prove that Williams *did* make the disputed threats.[8] Equally erroneous is the judge's summary of his findings, where he stated that "the entire record did not persuade me that it was more likely than not that Williams made the statements attributed to him. Therefore I found that he did not make them." Had the judge properly applied the burden of proof required by *Burnup & Sims*, he would have evaluated whether the record evidence established, or made it more likely than not, that Williams did *not* make the disputed statements.

This misallocation of the burden of proof eviscerates the judge's conclusion that the General Counsel carried his burden of showing that Williams did not make the "rope around your neck/hanging" statement. As discussed above, the judge found that Nolen and Schwenz both testified believably that Williams made the "rope

[5] 379 U.S. 21 (1964).

[6] Id. at 23.

[7] NLRA Sec. 1.

[8] Specifically, the judge stated that a "preponderance of the evidence does not . . . establish that Williams told people who were about to leave that he would 'get' or 'come after' them"; the judge stated that he "cannot conclude that evidence makes it 'more likely than not' that Williams made the 'hanging' statement which Nolen and Schwenz attributed to him"; and the judge repeated that "a preponderance of the evidence does not establish that Williams made any statement about hanging people or any reference to the Halloween display on Litwin Street." See judge's opinion, infra, slip op. at 21 and 24.

around your neck/hanging" statement and that they corroborated each other. Nonetheless, the judge credited Williams' denial that he made the statement solely because three other employees (Poston, Dotson, and Fenwick) who, according to the judge, were within earshot of Williams "did not corroborate the testimony of Schwenz and Nolen."[9] However, while additional corroboration for the testimony of Nolen and Schwenz might help prove that Williams made the "rope around your neck/hanging" statement, the Respondent was not required to prove that Williams made the statement. Rather, under *Burnup & Sims*, the Respondent's burden was to show that it reasonably believed Williams made the statement, whereupon the General Counsel had to prove that Williams did *not* make the disputed statement. The absence of the additional corroboration—the fact that the record fails to contain more evidence like Nolen's and Schwenz' testimony—does not constitute proof that Williams never made the statement. Because the judge credited Williams' denial based on his erroneous assumption that Nolen's and Schwenz' testimony required further corroboration, his conclusory statement that the General Counsel carried his burden of proof cannot withstand scrutiny.

To the contrary, the judge's own findings, viewed in light of the correct legal standard, establish that the General Counsel did not carry his burden to prove that the "rope around your neck/hanging" statement was never made. As noted, Nolen and Schwenz believably testified that Williams made the statement. The judge found that they corroborated each other, with no evidence of collusion. The testimony of Nolen and Schwenz was also supported by the written complaints they submitted—separately and independently—to the Respondent shortly after Williams' alleged misconduct. See *Domsey Trading Corp.*, 351 NLRB 824, 836 fn. 56 (2007) (finding that documentary evidence was "entitled to greater weight than contradictory testimonial evidence"), enf. denied on other grounds 636 F.3d 33 (2d Cir. 2011). Furthermore, the judge found that the evidence regarding whether Williams made the statement was "about evenly balanced," or in equipoise. If the evidence concerning whether Williams made the statement is in equipoise, the outcome turns on *which party bears the burden of proof*. Under *Burnup & Sims*, the Respondent prevails unless the General Counsel sustains his burden of proving that Williams did not make the statement. If, as the judge found, the evidence was "about evenly balanced" as to whether the statement was made, the General Counsel did not satisfy his burden of proof. In these circumstances, the Board cannot reasonably find that the General Counsel proved Williams did not make the statements.

This becomes even more apparent when the testimony of Poston, Dotson, and Fenwick is properly analyzed. As noted, they testified that they did not hear Williams make the "rope around your neck/hanging" statement. My colleagues correctly acknowledge that the failure of Poston, Dotson, and Fenwick to further corroborate the testimony of Nolen and Schwenz "does not help the General Counsel's case." Nonetheless, the majority does not rule out the possibility that the judge, on remand, may still rely on the testimony of Poston, Dotson, and Fenwick to bolster the credibility of Williams' denial. This possibility rests on a false premise—namely, that if Williams made the "rope around your neck/hanging" statement, then Poston, Dotson, and Fenwick each would have testified that they heard it. However, the record establishes that the bus bay was extremely loud, making it unlikely that employees could hear everything Williams said. Moreover, even if these employees were within "earshot" of Williams the entire time, it is unlikely that while waiting in line for 30 to 60 minutes, each of them would have focused on everything stated by everyone else who was within "earshot" and would have remembered it at the time of the hearing.

Furthermore, and importantly, the record does *not* support the judge's finding that Dotson, Fenwick, and Poston were all within earshot of Williams at all relevant times and would have heard the "rope around your neck/hanging" statement had Williams made it. The following considerations are relevant here.

- The judge stated that Dotson "denied that she heard Williams say anything about the Halloween display," but he made no finding regarding Dotson's proximity to Williams at the relevant time. Indeed, the record evidence shows that Dotson was within earshot of Williams only some of the time. Dotson testified that she heard Williams say that he was going to block the driveway with his car so nobody could get out. But she also testified that Williams was walking up and down the line speaking to many people and that she did not hear everything Williams said. Moreover, Dotson testified that it was "very loud" (Tr. 342), so even when Williams was nearby, she would not necessarily have heard what he was saying.

[9] Once again misapplying *Burnup & Sims*, the judge stated that "if Williams really had made the 'hanging' statement, five witnesses would have testified to that effect rather than just two. Therefore, *I cannot conclude that evidence makes it 'more likely than not'* that Williams *made* the 'hanging' statement . . . ." See judge's opinion, infra, slip op. at 24 (emphasis added).

- The judge based his finding that Fenwick was within earshot of Williams on Fenwick's testimony that Williams was standing behind her in line. However, the record shows that Williams arrived to the bus bay at approximately 8:30 a.m., but he did not get in line to vote until approximately 9:30 a.m., and the judge failed to mention that Fenwick testified she was sitting at a mechanic's table in the bus bay with another employee most of the time until she got in line with Williams. Before Williams got in line, he was walking up and down the line talking to employees. There is no evidence that Williams made the "hanging" statement after he got in line behind Fenwick, as opposed to the more likely scenario that he made the statement while walking up and down the line. Thus, the mere fact that Williams ultimately ended up standing in line behind Fenwick does not support the judge's finding that Fenwick was within earshot of Williams when Williams made the "hanging" statement.
- The judge's finding that Poston was within earshot of Williams was based solely on his finding that "Poston was standing close to Schwenz"—one of the employees who reported the "hanging" threat to the Respondent—and therefore "should have heard the 'hanging' comment if Williams actually made it." However, Poston testified that she was standing in line behind Schwenz "by the time we stepped up to vote."[10] When asked whether she remembered Schwenz standing in front of her in line "when it was near the back of the line," Poston answered, "I couldn't swear to it."[11] In addition, Poston left the voting line altogether at one point and "stepped into the office" to complain about Williams' conduct (showing employees the "vote yes" message on his phone).[12] Thus, the evidence does not show that Poston was continually within earshot of Williams, and it affirmatively shows that for a period of time—i.e., when she left the voting line and went to the office—she was not within earshot of Williams. Accordingly, as with Fenwick and Dotson, the evidence fails to support the judge's finding that Poston was within earshot of Williams when he made the "hanging" statement.

In short, the record does not show that either Poston, Dotson, or Fenwick would necessarily have heard Williams make the "rope around your neck/hanging" statement, and this disposes of the sole basis upon which the judge relied to credit Williams' denial that he made that statement.

The majority elects to remand the case despite these clear indications that the General Counsel did not meet his burden of proof. In support of their decision, my colleagues cite the judge's erroneous failure to place the burden of proof on the General Counsel, his improper reliance on the absence of further corroboration for the testimony of Nolen and Schwenz as supporting the General Counsel's case, and his statements casting doubt on his own resolution of witness credibility in favor of the General Counsel. Respectfully, I believe that none of these reasons withstands scrutiny.

First, it should be obvious that there is no need to remand the case to correctly apply *Burnup & Sims* or to correct the judge's erroneous reliance on the lack of further corroboration for the testimony of Nolen and Schwenz. The Board can correct these errors itself.

Second, the judge's doubts about his credibility determinations in favor of the General Counsel also do not warrant a remand. It is true that the judge stated that "the scales appear to be about evenly balanced and my decision not to credit the testimony of Nolen and Schwenz may well be wrong," and he also stated that "some doubt persists" that his decision to credit Williams' denial was correct.[13] As shown above, his decision regarding these matters *was* wrong. But the judge's lack of certainty that the General Counsel met his burden of proof—particularly his finding that "the scales appear to be about evenly balanced" between Nolen's and Schwenz' testimony that Williams made the disputed threat and Williams' denial that he did so—militates in favor of dismissing the complaint allegation. Again, if the evidence regarding whether Williams made the threat is in equipoise, the General Counsel failed to sustain his burden of proving that the statement was not made. See

[10] Tr. 191 (emphasis added).
[11] Id.
[12] Tr. 187.

[13] I disagree with my colleagues' finding that the judge's doubts about his credibility determinations are comparable to the "most equivocal procedure" employed by the judge in *Roto Rooter*, 283 NLRB 771 (1987), "for resolving the conflicting testimony regarding what actually happened" in that case. Id. at 773. *Roto Rooter*, which dealt with alleged striker misconduct, is inapposite. In that case, the judge credited "for the sake of analysis" a nonstriking employee's testimony that the misconduct occurred, while at the same time finding the striker's competing denial that he engaged in the misconduct more credible "in some respects." 283 NLRB at 773. In this case, in contrast, the judge credited Williams' denial. That determination was not made solely "for the sake of analysis," as in *Roto Rooter*, even if the judge expressed "some doubt" that it was correct.

Samsung Electronics America, Inc., 363 NLRB No. 105, slip op. at 2 (2016) (reversing judge's credibility determination, finding evidence in equipoise as to whether disputed statement was made, and dismissing relevant complaint allegation); see also *Universal Truss, Inc.*, 348 NLRB 733, 738 (2006) (General Counsel did not meet his burden under *Burnup & Sims* where judge failed to credit employee's denial of misconduct; remand unwarranted where General Counsel did not argue that one was necessary).

If this were a case where demeanor-based credibility determinations were in question, a remand might well be appropriate. But this is not such a case. As noted above, the judge has already made specific credibility determinations: he found that "[a]ll the witnesses appeared to be telling the truth" and that Schwenz' testimony was "similar enough to corroborate Nolen's testimony but not so similar as to suggest collusion." The judge also found that "nothing in the demeanor of either witness suggested untruthfulness" and that witness demeanor "provides no assistance here." There are no exceptions to these findings.[14] Moreover, the "Board has consistently held that 'where credibility resolutions are not based primarily upon demeanor . . . the Board itself may proceed to an independent evaluation of credibility.'" *J. N. Ceazan Co.*, 246 NLRB 637, 638 fn. 6 (1979) (quoting *Electrical Workers, Local 38)*, 221 NLRB 1073, 1074 (1975)). See, e.g., *Samsung Electronics America, Inc.*, supra (reversing judge's credibility determination not based on demeanor, and stating that where the judge does not rely on demeanor, "the Board is as capable as the judge of analyzing the record and resolving credibility issues"). As shown, the Board can readily perform that evaluation here.[15] Accordingly, a remand is unwarranted, and the record evidence, when properly evaluated under the burden allocations dictated by *Burnup & Sims*, compels a finding that Williams' suspension and discharge were lawful.

Accordingly, for all of the foregoing reasons, I respectfully dissent from the majority's decision to remand this case to the judge.

Dated, Washington, D.C. March 13, 2017

Philip A. Miscimarra, Acting Chairman

NATIONAL LABOR RELATIONS BOARD

Katherine Miller, Esq., for the General Counsel.
Christopher Caiaccio, Esq. and *Michael G. Johnson, Esq. (Christopher Caiaccio, Esq.),* of Atlanta, Georgia, and Nashville, Tennessee, for the Respondent.
Ms. Judy Hansford, of Fort Campbell, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. Respondent unlawfully discharged an employee because of a mistaken belief that he had engaged in misconduct while trying to persuade other employees to vote for the Union in a representation election that day. This unfair labor practice, and two others, require that the election be set aside.

Procedural History

On September 29, 2014, the American Federation of Government Employees (AFGE), AFL–CIO, Local 2022, AFL–CIO (here called the Union or the Charging Party) filed a petition in Case 10–RC–137728, seeking to represent certain employees of Taylor Motors, Inc. (the Respondent).

Thereafter, the Union and the Respondent entered into a Stipulated Election Agreement which described the appropriate unit as follows: "All full time and regular part-time bus driv-

[14] The majority opinion highlights certain aspects of Poston's and Dotson's testimony that my colleagues appear to believe may cast doubt on the credibility of Nolen and Schwenz. But I believe that neither the Board nor the judge on remand is free to make credibility determinations inconsistent with the unexcepted-to findings discussed above.

[15] Cases relied on by my colleagues in support of their remand are distinguishable. In *Pepsi-Cola Co.*,supra, 330 NLRB 474, a manager testified that he overheard an employee calling for a boycott of a meeting called by the employer, while the employee denied making the statement. Notably, in his initial decision, the judge did not make any credibility determination regarding the employee's denial, nor did he give any indication that he had considered demeanor with respect to the testimony of any witness. The judge also failed to make any clear finding whether the employer met its burden of proving it had an honest belief that the employee engaged in the misconduct, or whether the General Counsel proved that he did not. In these circumstances, the Board remanded the case to the judge. On remand, the judge clarified that he credited the manager based largely on demeanor, and he found that the employee's denial was not reliable. 333 NLRB at 87–88. In *Roto Rooter*, 283 NLRB at 771, a nonstriking employee testified that while he was driving a company van, a striker cut him off and threatened him with physical violence, and the striker denied doing so. Like the judge in *Pepsi-Cola Co.*, the judge in *Roto Rooter* altogether failed to make any credibility determination regarding the testimony of one witness, stating that he was crediting the nonstriker's testimony "for the sake of analysis" only. Id. at 777. On the other hand, the judge stated that he found the striker's testimony more credible than the nonstriker's "in some respects"—a hopelessly opaque finding. Id. Moreover, there was no indication whether the judge had considered demeanor with respect to the testimony of either witness. In light of the judge's failure to make a clear credibility resolution, the Board could not determine whether any misconduct occurred and, if it did, whether it was sufficiently egregious to deprive the striker of his right to recall under the Act. Id. at 773. The Board thus remanded the case to the judge.

In this case, in contrast, the judge made clear findings on all pertinent issues, albeit many of those findings are erroneous for the reasons detailed herein; and he expressly ruled out witness demeanor as a basis for resolving any issues regarding witness credibility.

ers, aides, mechanics, and clerical employees, employed by the Employer at its Fort Campbell, Kentucky facility but excluding all other employees, professional employees, confidential employees, guards and supervisors as defined by the Act."

The Board conducted an election on November 6, 2014. The tally of ballots showed 33 votes cast for the Union and 32 votes against. On November 12, 2014, the Respondent filed objections. On December 8, 2014, the Union and Respondent entered into a stipulation to set the election aside and to conduct a second election on January 15, 2015.

Between the November 6, 2014 election and the December 8, 2014 stipulation to set it aside, the Union filed the first of the unfair labor practice charges which are consolidated in the present complaint. Specifically, on November 24, 2014, it filed charges docketed as Cases 10–CA–141565 and 10–CA–141578. The Union amended each of these charges on January 30, 2015, and further amended the charge in Case 10–CA–141565 on February 12, 2015. The Union also filed an unfair labor practice charge, docketed as Case 10–CA–145467, on January 30, 2015.

The Board conducted the second election in Case 10–RC–137728 on January 15, 2015. The tally of ballots showed that 28 employees had cast ballots in favor of the Union and 33 had voted against. The Union filed objections.

On February 20, 2015, the Regional Director for Region 10 issued a report on objections and order directing hearing. On February 23, 2015, the Regional Director issued an order consolidating cases, consolidated complaint, and notice of hearing. (For brevity, this pleading, as amended at the hearing,[1] the General Counsel orally amended Complaint paragraph 10 to allege that Respondent discharged employee Anthony Williams on November 13, 2014, rather than November 30, 2014, will be referred to as the Complaint.) The Respondent filed a timely answer.

On April 19, 2015, the Union filed a request to withdraw two of its objections, and the Regional Director approved this request on April 21, 2015. As a result, the only objections remaining in issue in this proceeding concern matters also alleged to be unfair labor practices.

On April 22, 2015, a hearing opened before me in Nashville, Tennessee. The parties presented evidence on that date and on April 23 and 24, 2015. After all sides rested, I adjourned the hearing until June 5, 2015, so that counsel would have time to receive and review the hearing transcript and prepare for oral argument. On June 5, 2015, the hearing resumed by telephone conference call, counsel presented oral argument and the hearing closed.

Admitted Allegations

Based upon admissions in the Respondent's Answer, I find that the General Counsel has proven the allegations raised in complaint paragraphs 1(a), 1(b), 1(c), 2, 3, 4, 6, 9, and 10. More specifically, I find that the unfair labor practice charges were filed, amended, and served as alleged.[2]

Further, I find that at all material times, the Respondent has been a corporation with an office and place of business in Fort Campbell, Kentucky, and that it furnishes school bus services. Additionally, I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it satisfies both the statutory and discretionary standards for the Board's assertion of jurisdiction.

Additionally, I find that its owner, Peggy Taylor, its general manager, Robert Gregory DeLancey, and its transportation director, Charlotte Moore, are Respondent's supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act.

Respondent has admitted that it suspended employee Anthony Williams on November 7, 2014, as alleged in complaint paragraph 9. I so find.

Respondent amended its answer at hearing to admit that the Union is a labor organization within the meaning of Section 2(5) of the Act. I so find.

Complaint paragraph 10, originally alleged that Respondent discharged employee Anthony Williams on November 30, 2014. Respondent's answer admitted that allegation.

However, at hearing, the General Counsel moved to amend the complaint to allege that Respondent discharged Williams on November 13, 2014. I granted that unopposed motion. Williams' termination notice and all other evidence in the record indicates that the discharge took place on November 13, 2014, and I so find.

Unfair Labor Practice Allegations

The Respondent's answer denies that it committed any unfair labor practices. Likewise, it denies that the alleged unfair labor practices affected commerce within the meaning of Section 2(2), (6), and (7) of the Act. The individual allegations will be discussed in the order they appear in the complaint.

Complaint Paragraph 7(a)

Complaint paragraph 7(a) alleges that on about August 22, 2014, on its parking lot, the Respondent, by Charlotte Moore, (i) interrogated an employee about the employee's union activities, and (ii) gave its employees the impression that their union activities were under surveillance by Respondent by telling the employee that Respondent knew the employee had union authorization cards and had distributed the cards to other employees.

The Respondent denies these allegations. It also denies the conclusion alleged in complaint paragraph 12, that these actions violated Section 8(a)(1) of the Act.

Transportation Director Charlotte Moore is in charge of Respondent's facility at Fort Campbell, Kentucky. There, the Respondent keeps the school buses driven by some of the employees in the unit described above, and maintained by other employees in that unit.

[1] During the hearing, the General Counsel orally amended complaint par. 1(a) to reflect that the Charging Party filed a second amended charge in Case 10–CA–141565 on February 12, 2015, and served it on the Respondent the next day. The record supports this allegation and I so find.

[2] At hearing, the General Counsel moved to amend complaint par. 1(a) to reflect that the unfair labor practice charge was amended a second time, on February 12, 2015, and that this amended charge was served on Respondent on February 13, 2015. The Respondent did not oppose this amendment, which I granted.

On August 22, 2014, Moore received a report from a driver, Sharon Moore, that two other drivers, Larry Cruthis and Anthony Williams, were in the parking lot passing out something. Although Director Moore testified that Driver Moore said that Cruthis and Williams were passing out "materials," I find that Driver Moore said they were passing out union cards. My reasons for this conclusion are discussed below.

After receiving this information, Transportation Director Moore walked out on the parking lot, saw Williams sitting in his car, and approached him. Moore testified as follows about her conversation with Williams:

Q. What did you do next?
A. I asked Anthony if he was passing out materials, and I asked him could I see it.
Q. How did Anthony respond?
A. He said I was not, Ms. Charlotte.

Williams' account of this conversation differs in one quite significant respect. He recalled Moore asking him not about "materials" but union cards:

Q. What did Charlotte say to you?
A. She came to me as I was on my phone. She came outside. She had a cell phone in her hand. And I was kind of hanging off the door a little bit talking to somebody, and I said, well, I got to go. I said, my—somebody's —I said, Charlotte's coming out. She came to me and said she's, I heard that—she said, I got a call that you and Larry was handing out union cards. And she said—she demanded me to hand over those cards immediately.
Q. Did you give her any response?
A. Yes. I told her I didn't have them. I didn't have no cards.
Q. Did she—when she asked you about this, did she use the word "union"?
A. Yes, she did.

The difference between the testimony of Williams and Moore presents a conflict requiring resolution: Did Moore say "materials," as she claimed, or did she say "union," as Williams testified?

To examine this question, I begin by considering what information Moore had received before she went out on the parking lot and spoke with Williams. If Moore only had heard that Williams was handing out "materials," it would seem less likely that she mentioned union cards when she talked with him. However, if she had received a report that Williams was distributing union cards, it would be somewhat more likely that she used the word "union" when asking him about it.

Sharon Moore, the driver who made the report to Transportation Director Charlotte Moore, did not testify, so the latter's testimony provides the only direct information about this conversation. However, this rather confusing testimony leaves open whether Driver Sharon Moore came to Charlotte Moore's office or telephoned her on the afternoon of the latter's conversation with Williams.

A portion of this testimony suggests that Sharon Moore actually gave Charlotte Moore the union card that afternoon, and shortly before Charlotte Moore went to speak with Williams. However, as the following part of Charlotte Moore's testimony illustrates, it is not possible to be certain about the sequence of events:

Q. Ms. Charlotte, when was the first time that you became aware of any union activity at Taylor Motors in Fort Campbell?
A. The first time when I was actually made aware was the morning that Sharon Moore gave me a card.
Q. I believe that you had testified on Wednesday that you had gone out into a parking lot?
A. Yes.
Q. Do you recall about when that would occur?
A. It would be around 4 o'clock in the afternoon, maybe, about that time. I went to the parking lot—
Q. I'm going to stop you really quick. Do you remember what day that was and what year?
A. It was in 2014, and it was in August.
Q. And so I'm sorry to interrupt you. You were saying it was around 4 o'clock, and if you would, what made you—why did you decide to go in the parking lot?
A. Sharon Moore told me that Larry Cruthis and Anthony Williams was passing out materials on the parking lot.
Q. Did she tell you what kind of materials that they were passing out?
A. No.
Q. So it's about 4 o'clock. And she's come into your office. She said what she said. What did you do next?
A. I walked outside on the parking lot to see what was going on.

Moore's chronology is confusing. She first testified that Driver Sharon Moore gave her the union card in the morning, but her testimony a few questions later indicates that Sharon Moore visited her office about 4 o'clock in the afternoon. Moreover, Transportation Director Moore's later testimony, on cross-examination, suggests that Driver Sharon Moore merely telephoned Moore that afternoon and did not come to Moore's office, or show her the card, until at least the next day:

Q. You testified that one of the drivers, Sharon Moore, actually showed you her union authorization card, correct?
A. That was the day after she had called me.
Q. But she showed you a card, correct?
A. She gave me a card.

Moore's testimony on cross-examination thus suggests she had been alerted by a telephone call from Driver Sharon Moore, and did not see the union card until the next day. This sequence of events would be consistent with Williams' testimony, quoted above, that Moore was holding a cellphone when she spoke with him in the parking lot, and that Moore told him she had received a call that he and Cruthis were handing out union cards.

However, even if driver Sharon Moore had merely telephoned Charlotte Moore on August 22, 2014, and did not visit her in person until the next morning, it still seems likely that the driver described exactly what she saw Cruthis and Williams handing out. It is difficult to believe that Sharon Moore would

accept a union card from Cruthis or Williams and then report only that she saw them handing out unspecified "materials."

Moreover, at 5:02 p.m. on August 22, 2014, less than an hour after her conversation with Williams in the parking lot, Transportation Director Moore sent an email to Respondent's owner, Peggy Taylor. The email stated:

> It was bought to my attention this evening that Larry Cruthis & Anthony Williams have been passing out cards and asking people to sign a petition for a union. I talked to them both and Anthony denied it. Larry would not deny it but said he would talk to me later.
>
> Just wanted to let you know.

Based on this email, I reject the theme implicit in Moore's testimony, that she only had heard that Williams and Cruthis were passing out some kind of "materials" and was trying to find out what the materials were. To the contrary, I find that before Charlotte Moore went out on the parking lot to speak with Williams, Driver Sharon Moore already had told her that Cruthis and Williams were passing out union cards.

Considering the confusing nature of Charlotte Moore's testimony, I do not consider it to be as reliable as that of Williams. To the extent that the testimony conflicts, I credit Williams. Based on that credited testimony. I find that Moore did tell Williams that she had received a call that he and Cruthis were handing out union cards.

Additionally, Williams testified that Moore demanded that he give the cards to her. Although Moore's August 22, 2014 email does not mention her demanding the cards, Williams' testimony to that effect is consistent with a "Complainant Form" he completed for the Union 3 days after the conversation. On that form, Williams wrote:

> I Anthony Williams on Friday 08–22–2014 Mrs. Charlotte came by my car and ask me to hand over the union cards. I ask her what is she talking about Mrs. Charlotte said she got a call stating that I was passing out union cards in the parking lot. Anthony Williams and Larry Cruthis. She demanded me to hand over those union cards but I told her I didn't have them.

This nearly-contemporaneous document is consistent with Williams' testimony. Based on that testimony, I conclude that Moore did demand that Williams turn over the union cards.

Moore testified that after she spoke with Williams, she walked over to Cruthis, who was about 200 feet from Williams:

> Q. So you approached his vehicle. What happened next?
> A. I approached his vehicle, and I asked him the same question as I did Mr. Williams.
> Q. What was that question?
> A. I asked him was he passing out materials on the parking lot and could I see them.
> Q. How did he respond to you?
> A. He told me, no, he wasn't.
> Q. Was that the end of your conversation with him?
> A. That was the end of my conversation. He said a few other things, and he said, Ms. Charlotte, and I don't know the exact conversation, but he mentioned the word "union" and he said it's a good thing.
> Q. Did you ask him any questions about what he meant about his comment about the Union being a good thing?
> A. I don't recall asking him anything about that. He said I'll tell you later, and that was the end of the conversation.

It is somewhat difficult to accept both Moore's claim that she did not use the word "union" but only referred to "materials" and her further claim that Cruthis then brought up the Union on his own. It seems unlikely that Cruthis would volunteer such information at this early point in the organizing campaign. The Union had not yet filed a representation petition with the Board and would not do so until September 29, 2014, more than a month later.[3]

Moore testified that she did not recall asking Cruthis about the union, but even if her memory faded between August 22, 2014, and the hearing 8 months later, the email she sent to Taylor that afternoon indicates she did discuss the subject with Cruthis. Indeed, in that email Moore raised the subject of soliciting employees to sign a petition for the Union and then stated that "Larry would not deny it but said he would talk to me later."

However, there is a difficulty. Cruthis himself testified that this discussion about the Union never took place:

> Q. And at some point while you were out in the parking lot, Charlotte Moore came out and talked to you, didn't she?
> A. She never talked to me.

Cruthis denied even being present in the parking lot when Moore spoke with Williams. He testified that he heard about it later, but had already left the lot when the conversation took place. This testimony directly conflicts with that of Moore that she left Williams and walked over to Cruthis, who was about 200 feet away. However, Cruthis' testimony on this point did not waver during cross-examination:

> Q. Do you deny that you volunteered to Charlotte that you were handing out union cards?
> A. Do I deny—
> Q. Do you deny that you told that to Charlotte?
> A. That I told her I wasn't passing them out?
> Q. That you were handing out union cards.
> A. She never asked me if I was handing them out.
> Q. Do you deny that you told Charlotte, the Union's a good thing. We need to talk about it later.
> A. Yeah, I didn't talk to Charlotte anything about the Union.

Cruthis spearheaded the Union's organizing drive. Accordingly, it was not in his interest to deny that this conversation took place. That fact weighs in favor of crediting his testimony. Of course, it was not in Moore's interest, as one of Respondent's managers, to testify that she did ask Cruthis about handing out "materials."

As noted above, portions of Moore's testimony were confus-

[3] Moreover, as discussed below in connection with complaint par. 7(c), Cruthis testified that at one point Moore telephoned him and asked about the cards he was passing out but that he feigned ignorance: "I didn't want to tell her I was passing out union cards. I knew she'd be upset."

ing, which raised doubts about its reliability. Therefore, I did not credit Moore's testimony regarding her conversation with Williams to the extent that it conflicted with Williams' testimony.

It is well established that a decision not to credit part of a witness's testimony does not preclude the judge from crediting other parts of it. However, were I to credit Moore's testimony regarding her conversation with Cruthis, it would lead to the odd conclusion that she made a possibly coercive statement to an employee who denied hearing it.

Because Cruthis denied not only the statement but even that the conversation took place, I hesitate to conclude that Moore's testimony about speaking with Cruthis is any more reliable than her testimony about her conversation with Williams. In sum, I conclude that the General Counsel has not established, by a preponderance of the evidence, that Moore asked Cruthis if he was passing out "materials" or union cards, or that she asked to see them.

However, credited evidence does establish, and I have found, that Moore stated to *Williams* "I got a call that you and Larry was handing out union cards." Also, crediting Williams, I have found that Moore demanded that Williams hand over the union cards to her. Therefore, I will analyze with these statements violated Section 8(a)(1) of the Act.

In *Smith and Johnson Construction Co.*, 324 NLRB 970 (1997), the Board affirmed the administrative law judge's analysis of certain statements alleged to violate Section 8(a)(1) of the Act. The judge had described the framework for that analysis in these terms:

> In deciding whether interrogation is unlawful, I am governed by the Board's decision in *Rossmore House*, 269 NLRB 1176 (1984). In that case, the Board held that the lawfulness of questioning by employer agents about union sympathies and activities turned on the question of whether "under all circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act." The Board in *Rossmore House* noted the [test set forth in *Bourne Co. v. NLRB*, 332 F.2d 47 (2d Cir. 1964)] was helpful in making such an analysis. The *Bourne* test factors are as follows:
>
> 1. The background, i.e. is there a history of employer hostility and discrimination?
> 2. The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?
> 3. The identity of the questioner, i.e. how high was he in the Company hierarchy?
> 4. Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality"?
> 5. Truthfulness of the reply.

With respect to the first factor, the record does not establish that the Respondent had demonstrated any hostility to the Union before this conversation on August 22, 2014. The first factor therefore weighs against finding a violation.

As to the second factor, Moore specifically sought information about the union organizing effort but the record does not establish that Moore appeared to be seeking the information so that she could take disciplinary action against employees. Nonetheless, because the information sought related directly to employees' exercise of rights protected by the Act, I conclude that the second factor weighs somewhat in favor of finding a violation.

Moore was Respondent's highest-ranking official at this particular facility and in charge of it. The third factor therefore weighs in favor of finding a violation.

With respect to the fourth factor, the interrogation took place in the parking lot, not in the manager's office. This factor weighs slightly against finding a violation.

Williams denied having any cards. I infer that his denial reflects some concern, if not fear, that Respondent would punish him if it found out about his union activity.

In addition to these factors, I also note that Moore did more than simply ask Williams if he were handing out union cards. She demanded that he turn them over. This demand added considerably to the coercive import of the interrogation. Therefore, I conclude that the interrogation was unlawful.

However, I do not conclude that Moore's statement to Williams, that she had received a report that he was passing out union cards, also created an unlawful impression of surveillance. The statement indicates that another employee had volunteered information to management but reasonably would not convey that the Respondent had placed the employees under surveillance. See, e.g., *North Hills Office Services, Inc*, 346 NLRB 1099 (2006).

In sum, I recommend that the Board find that Respondent violated Section 8(a)(1) by unlawfully interrogating an employee about that employee's union activity.

Paragraph 7(b)

Complaint Paragraph 7(b) alleges that on about August 22, 2014, in the hall way of its facility, the Respondent, by Charlotte Moore, interrogated an employee about the employee's union activities. The Respondent denies this allegation and further denies that it thereby violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 12.

Employee Sandra Fenwick testified concerning a brief conversation she had with Transportation Director Moore in one of the hallways at Respondent's facility. Although Fenwick said that the conversation took place before the election, presumably meaning the November 6, 2014 election, she could not be more specific as to the date. She did not remember whether it took place before or after her birthday on September 9, 2014. Fenwick further testified as follows:

Q. And you were in this hallway when Charlotte asked you a question?
A. Yes.
Q. What did Charlotte ask you?
A. She asked me had I heard about the labor or did I know anything about the labor.
Q. Was there anybody else around you when she asked you this?
A. No, there was people in the other rooms.
Q. But nobody right near you in the hallway?

A. No.
Q. What did you say back to her?
A. I told her no.
Q. At that point, had you heard anything about the labor?
A. No.

Moore specifically denied this conversation and the statements Fenwick attributed to her.

The vagueness of Fenwick's testimony causes me to doubt its reliability. Although the General Counsel argues that another witness, Linda Collins, "further corroborated Sandra Fenwick's testimony by explaining that Fenwick had told Collins about this question by Director Moore," this type of "corroboration" really amounts to hearsay, because Collins herself did not hear the statement which Fenwick attributed to Moore.

Moreover, the statement which Fenwick attributed to Moore is so nebulous that it reasonably would not be understood to be an inquiry about Fenwick's union activities or sympathies or those of any other employee.

Accordingly, I recommend that the Board dismiss the allegations raised by complaint paragraph 7(b).

Complaint Paragraph 7(c)

Complaint paragraph 7(c) alleges that Respondent, by Charlotte Moore, during a telephone call on about August 25, 2014 (i) interrogated an employee about the employee's union activities and (ii) gave its employees the impression that their union activities were under surveillance by Respondent by asking the employees if the employee was passing out union authorization cards. The Respondent denies these allegations. It also denies the conclusion alleged in complaint paragraph 12, that these actions violated Section 8(a)(1) of the Act.

It appears that this complaint paragraph refers to a conversation which the General Counsel sought to prove through the testimony of Cruthis. However, the record does not provide a firm basis for concluding that the conversation took place around August 25, 2014.

As discussed above, Cruthis denied that Moore had approached him on the parking lot on August 22, 2014. At one point, however, he did testify that Moore called him at home.

This testimony presents a problem both because it does not specify a date and because it appears more likely to relate to the allegation raised in complaint paragraph 7(e), concerning a telephone call from Moore on October 21, 2014. Obviously, this testimony cannot refer to two telephone calls 2 months apart.

Although I will return to this testimony in discussing complaint paragraph 7(e), I quote it here because it appears to be the only evidence which might support the allegations in complaint paragraph 7(c). Cruthis testified as follows:

Q. Thank you. Did Ms. Charlotte ever ask you about union cards?
A. She called me at home.
Q. What did she talk to you about?
A. She wanted to know what kind of cards—union cards I was passing out.
Q. Did you—how did you respond to her?
A. I just told her, I just said, what cards are you talking about?
Q. Because you didn't—why did you say that?
A. Well, I didn't want to tell her I was passing out union cards. I knew she'd be upset.

Moore squarely denied making such a call. Therefore, I must determine which testimony to credit. Cruthis' continuing testimony was somewhat vague and he could not recall certain facts:

Q. After Charlotte asked you about the cards, did you tell anybody else about that incident?
A. I probably told several other people.
Q. Do you remember who you may have told?
A. I don't remember exactly who, because so many people were coming up to me.
Q. Was that the only time that Charlotte asked you about union cards?
A. I thought she called me twice, but she could have asked me in person 2 or 3 days later. I don't really recall, because at that point, I didn't think it was really important.
Q. Another—this other time that Charlotte asked you about cards, do you remember what she said to you?
A. She wanted to know if I'd give her the cards. And I said, what cards are you talking about?
Q. Did she ever ask you anything else about the union cards?
A. I don't recall.
Q. Did you ever make any kind of record about the conversation with Charlotte regarding these union cards?
A. Written records, you mean?
Q. Uh-huh.
A. Gosh, I really don't know because I've written so many things down, but I don't recall writing anything that she had said.

Cruthis started the union organizing effort and was the main force behind it. Additionally, he testified at one point that he did not want to tell Moore that he was distributing union cards because he feared she would be upset. In these circumstances, his inability to remember whether Moore ever asked him anything else about the union cards is difficult to understand. Even more difficult to understand is the explanation he gave at one point for being unable to recall: "I didn't think it was really important."

Moreover, on cross-examination, Cruthis admitted that he had stated, in his pretrial affidavit, that Moore had told him he would be fired if she knew he was supporting the Union. However, the complaint does not allege that Moore make such a threat and Cruthis did not testify that she did.

This disparity between his pretrial affidavit and his testimony at the hearing reverses the more typical pattern of a witness testifying at hearing to statements not mentioned in his pretrial affidavit. However, it raises just as much doubt about the reliability of his testimony.

For these reasons, I do not have confidence in Cruthis' testimony and do not credit it. Therefore, I find that the government has not proven the allegations raised in complaint para-

graph 7(c) and recommend that the Board find that Respondent did not violate the Act as alleged in that paragraph.

Complaint Paragraph 7(d)

Complaint paragraph 7(d) alleges that on about October 21, 2014, in its parking lot, the Respondent, by Charlotte Moore, interrogated an employee about the employee's union sympathies and the union sympathies of other employees. The Respondent denies this allegation as well as the allegation, in complaint paragraph 12, that it thereby violated Section 8(a)(1) of the Act.

Employee Anthony Williams testified that he was standing in the parking lot, talking with two other employees, when Charlotte Moore called to him. According to Williams, he walked over to Moore, who was in a white truck. Williams further testified:

Q. And what did she say next?
A. She said—when I came to her, she said, I heard that you was talking about me. I heard you was talking about my husband. I heard you was talking about my family.
Q. Did you say anything in response?
A. Yes, I did. I said, no. I said, no, Ms. Charlotte, I never said anything about your family. I asked her where she got her information from.
Q. What did she say?
A. She didn't say nothing. Then she went on to another subject.
Q. What did she talk about next?
A. I don't understand why you all want a union.
Q. Did she ask you questions about the Union?
A. Yes, she did.
Q. What did she ask?
A. She asked me—she said, I'm not understanding, why do you all want a union?
Q. Did you give her any response?
A. And yes, I did.
Q. What did you say?
A. And I asked her, I said, because this—it'll be a better workplace where there wouldn't be a whole lot of harassment.

Moore admitted having a conversation with Williams on this occasion. Her testimony indicates that she did so because of a report that Williams had made comments about members of her family:

Q. I'm going to ask you some more questions about that conversation. Why did you speak with Anthony on that day?
A. I spoke to him not as a Taylor Motors employee, but as a wife and a mother. I had just received information that he had made some derogatory statements about my family.
Q. When you say you received that information, can you tell me who provided you with that information?
A. Deidre Curtis (ph.) was telling me that Anthony said that my husband was a pervert and that my son liked young girls.

Moore specifically denied ever bringing up the Union in this conversation. She also denied that Williams brought up the Union.[4] Therefore, I must decide which testimony more reliably reflects what happened.

For reasons discussed above in connection with complaint paragraph 7(a), I credit Williams' testimony. Therefore, I find that Moore did ask him why the employees wanted a union.

To analyze the lawfulness of this statement, I return to the *Rossmore House* criteria discussed above. With respect to the first factor, the Respondent previously engaged in one instance of unlawful interrogation, which was alleged in complaint paragraph 7(a) and described above. However, the record does not establish that the Respondent had embarked on any orchestrated campaign to oppose the Union. Accordingly, I conclude that the first factor weighs, but only weakly, towards finding that the question was violative.

Moore did not seek to learn the identities of union supporters or other specific information about union activities. I conclude that the second *Rossmore House* factor does not weigh in favor of finding a violation.

The third factor weighs towards a finding that the question was coercive because Moore was in charge of the Respondent's facility.

However, the fourth factor, regarding place and method of interrogation, weighs against finding a violation. Moore asked the question not in her office or in an atmosphere of unnatural formality but rather in the parking lot.

Williams' reply to Moore's question, stating that the employees sought a better workplace, one free of harassment, presumably was honest and sincere. I conclude that this fifth factor weighs against finding the question violative.

Additionally, at this point, the Union already had filed the representation petition. If the Respondent had embarked on some antiunion campaign not apparent from the present record, Moore's question might have appeared to be in furtherance of such an effort, but in the circumstances present here, employees reasonably could ascribe it to benign curiosity.

Considering the totality of the circumstances, I conclude that Moore's question did not constitute unlawful interrogation. *John W. Hancock, Jr., Inc.*, 337 NLRB 1223 (2002). Therefore, I recommend that the Board dismiss the allegations raised in complaint paragraph 7(d).

Complaint Paragraph 7(e)

Complaint paragraph 7(e) alleges that on about October 22, 2014, in a telephone call, the Respondent, by Charlotte Moore (i) interrogated an employee about the employees union activities, and (ii) instructed the employee that employees may not pass out union authorization cards to other employees. The Respondent denies these allegations. It also denies the conclu-

[4] Williams denied that Moore asked him about the specific statements attributed to him: "She never asked me about her son. She said I was talking about her family. She didn't say anything about no pervert." Considering that Moore might have been reluctant to repeat the specific statements which Curtis had attributed to Williams, it seems likely that Moore simply told Williams not to say things about her family and that Williams denied having done so. Moore testified that conversation didn't last very long.

sion, alleged in complaint paragraph 12, that it thereby violated Section 8(a)(1) of the Act.

It appears that the General Counsel rests this allegation on the testimony of Larry Cruthis discussed above in connection with complaint paragraph 7(c). Clarity will be better served, I believe, by quoting this testimony again rather than only making a reference to it,

Employee Larry Cruthis testified that Transportation Director Moore telephoned him on two occasions and asked about his passing out union cards. However, Cruthis' testimony is rather vague:

> Q. Thank you. Did Ms. Charlotte ever ask you about union cards?
> A. She called me at home.
> Q. What did she talk to you about?
> A. She wanted to know what kind of cards—union cards I was passing out.
> Q. Did you—how did you respond to her?
> A. I just told her, I just said, what cards are you talking about?
> Q. Because you didn't—why did you say that?
> A. Well, I didn't want to tell her I was passing out union cards. I knew she'd be upset.

Cruthis' testimony does not establish a date, even an approximate date, for this conversation with Moore. Cruthis was not certain concerning how many times Moore asked him about the union cards or even whether such conversations took place by telephone or face-to-face. Thus, he further testified:

> Q. Was that the only time that Charlotte asked you about union cards?
> A. I thought she called me twice, but she could have asked me in person 2 or 3 days later. I don't really recall, because at that point, I didn't think it was really important.
> Q. Another—this other time that Charlotte asked you about cards, do you remember what she said to you?
> A. She wanted to know if I'd give her the cards. And I said, what cards are you talking about?
> Q. Did she ever ask you anything else about the union cards?
> A. I don't recall.
> Q. Did you ever make any kind of record about the conversation with Charlotte regarding these union cards?
> A. Written records, you mean?
> Q. Uh-huh.
> A. Gosh, I really don't know because I've written so many things down, but I don't recall writing anything that she had said.

In fact, at some point Cruthis did make a note, which I received into evidence over the Respondent's objection. Although it bears the notation "2014" it bears no other indication of when it was written. It states:

> Around Oct the 22th [sic] Miss Charlet Moore called me at home and ask me about union cards. I ask her what cards she was talking about. She called me a second time and told me we could not pass out union cards. I again asked her what cards she was talking about and she ended our conversation and hung up.

Considering Cruthis' testimony that he didn't recall putting anything in writing, and considering Cruthis' uncertainty about other facts, I will not assume that he wrote this note soon after receiving a telephone call from Moore, who explicitly denied making any such call. Neither Cruthis' testimony nor his note persuades me that Moore asked him, either by telephone or face-to-face, about union cards.

Moreover, Cruthis did not testify that Moore told him not to distribute union cards. Such a statement appears only in the note. However, the record clearly reveals Cruthis, who made the initial contact with the Union, to be the driving force behind the Union's organizing effort. Someone so motivated certainly would be likely to remember if someone in management prohibited him free distributing union cards. Cruthis' failure to mention such a statement when he testified therefore raises some doubts either about the accuracy of his note or the reliability of his memory.

Further, it seems somewhat improbable that Moore would forbid passing out union cards on October 22, which was more than 3 weeks after the Union filed its representation petition. Typically, union supporters solicit employees to sign authorization cards before the filing of a representation petition, so that the cards can be submitted with the petition as the union's showing of interest. Issuing an instruction not to distribute cards well after the filing of the petition would accomplish little.

Other reasons to doubt Cruthis' testimony have been discussed above in connection with complaint paragraph 7(c). For all these reasons, I do not credit it. Similarly, in the absence of testimony regarding when Cruthis wrote the note, I conclude it is not entitled to any evidentiary weight. Crediting Moore, I find that she never asked Cruthis about the union cards, either by telephone or in person, and never told him not to distribute them.

Concluding that the government has not proven the allegations raised in complaint paragraph 7(e), I recommend that the Board dismiss those allegations.

Complaint Paragraph 8

Complaint paragraph 8 alleges that since about August 2, 2014, Respondent has required employees to sign the following confidentiality/nondisclosure agreement:

> Taylor Motors, Inc.
> Confidentiality/Non Disclosure Agreement
>
> When you begin work with Taylor Motors, Inc. you will have access to information that the company considers confidential. This includes proprietary information, trade secrets, marketing strategy and intellectual property to which the company holds rights.
>
> The purpose of this agreement is to inform you of your obligation to keep company information confidential. We also wish to remind you about the types of information that the company considers privileged. The following are types of information that you are bound to keep confidential:

> Compensation data, financial information, pending projects and proposals, any information related to students and their transportation troop movement or any transportation process with regard to troop transportation, personnel/payroll records, and conversations between any persons associated with the company.
>
> You may already have been advised of your obligations in this matter. This letter is intended to remind you of your obligation to keep privileged information confidential and to restate our seriousness in this matter.
>
> Taylor Motors, Inc. and its management do not wish to cast doubt regarding your integrity or honesty. All employees are required to read and understand this obligation.
>
> If you have any questions regarding this policy, please contact your local.

The Respondent denies both this allegation and complaint paragraph 12's conclusion that it thereby violated Section 8(a)(1) of the Act.

The record includes copies of a Confidentiality/Nondisclosure Agreement signed by Anthony Williams and dated 09/15/09. It also includes similar agreements signed by two other employees. Each of these is dated 9/9/14.

The wording of each of these documents is identical to the language in the other two. The language also is the same as that set forth in the complaint and quoted above, except that in the last paragraph of these agreements, the word "manager" follows the word "local."

The record establishes, and I find, that at some point the Respondent required employees to sign agreements with the language alleged in complaint paragraph 8. However, this complaint paragraph also includes an allegation about *when* the Respondent maintained such a requirement.

Complaint paragraph 8 alleges that the Respondent has maintained the requirement since about August 2, 2014. However, Williams signed the confidentiality/nondisclosure agreement almost 5 years earlier, on September 15, 2009. Moreover, Respondent contends that it did not begin but instead ended the requirement in August 2014 when it issued a new employee handbook.

In resolving the "when" issue, the analysis below will depart from the usual sequence. Ordinarily, an analysis would begin by considering the lawfulness of the language in question, and then would address a respondent's defense. In this instance, to ascertain the relevant dates, I begin with the Respondent's repudiation argument.

The Respondent's general manager, Robert Gregory DeLancey, testified that the Respondent no longer requires employees to sign the confidentiality/nondisclosure agreement which is in evidence. In August 2014, a new employee handbook went into effect which explicitly rendered void previous personnel policies. General Manager Delancey testified that the new handbook does not include a nondisclosure policy:

> Q. To your knowledge, does the new handbook have a new confidentiality/non-disclosure agreement?
> A. It does not. The new policy just basically wipes out all the past policies.

However, the text of the new employee handbook appears to contradict DeLancey, at least partially. Although the new handbook does not include a section captioned "confidentiality/non-disclosure *agreement*" it does include a section titled "Non-Disclosure/Confidentiality." That section states as follows:

> 3.2 NON-DISCLOSURE/CONFIDENTIALITY
>
> The protection of confidential business information and trade secrets is vital to the interests and success of Taylor Motors, Inc. Such confidential information includes, but is not limited to, the following examples:
>
> Financial information,
>
> Marketing strategies,
>
> Pending projects and proposals,
>
> Proprietary processes.
>
> All employees are required to sign a non-disclosure agreement as a condition of employment, a copy of which is located in the addendum.
>
> Employees who improperly use or disclose trade secrets or confidential business Information are subject to disciplinary action, up to and including possible termination and/or legal action, even if they do not actually benefit from the disclosed information.

Thus, the Respondent continues to maintain a nondisclosure policy, the breach of which can result in discharge. Moreover, the new policy specifically states that all employees are *required* to sign a nondisclosure agreement as a condition of employment. In sum, I find that Respondent's issuance of a new handbook in August 2014 did not nullify or repudiate its existing requirement that each employee must sign a confidentiality/nondisclosure agreement as a condition of employment. Based on the agreement signed by Anthony Williams, I further conclude that this requirement was in effect at least as early as September 2009.

The August 2014 employee handbook specifically mentions this requirement and no evidence indicates that Respondent abandoned the requirement at any time after issuance of the handbook. Accordingly, I find that at all times material to this case, the Respondent has maintained and continued to maintain at the time of hearing a requirement that each employee sign a confidentiality/nondisclosure agreement as a condition of employment.

Having concluded that Respondent has not abrogated its requirement that employees sign a confidentiality/nondisclosure agreement, I turn to the question of whether Respondent nullified or repudiated the specific agreement given to employees before the August 2014 handbook went into effect. In other words, did Respondent's issuance of the handbook in August 2014 release employees from the terms of the then-existing agreement, the one signed by Williams in 2009?

Initially, it may be noted that the handbook's confidentiality/nondisclosure provisions, after stating that all employees are required to sign such an agreement as a condition of employment, continues with the words "a copy of which is located in

the addendum." However, the copy of the handbook which is in evidence does not include such an addendum.

No evidence establishes that the Respondent has drafted a new or revised confidentiality/nondisclosure agreement to supplant the language in the agreement signed by Williams and described in complaint paragraph 8. However, evidence does establish that two employees signed the old agreement in September 2014, the month after issuance of the new handbook. One of these employees was Regina Pollack. General Manager DeLancey testified that Pollack was given the form by mistake:

> Q. What is the date of Ms. Regina's signature?
> A. It is September the 9th, 2014.
> Q. Which is after the August 2014 handbook, correct?
> A. It is. It was a mistake. It was in a packet of employment applications. And the documents that new employees have to sign these days on a military base are quite thick, and it was accidentally signed.

Even if Pollack and the other employee signed the agreements in September 2014 by mistake, there is no evidence that the Respondent took any action to correct the mistake. Thus, DeLancey testified:

> Q. Was any communication specifically sent to these two employees informing them that this policy was a mistake?
> A. Not to my knowledge.

This evidence and the conclusions to be drawn from it may be summarized as follows: (1) The August 2014 employee handbook reiterated and continued the requirement that employees sign confidentiality/nondisclosure agreements; (2) A month after issuance of the handbook, two employees signed confidentiality/nondisclosure agreements, which is consistent with a conclusion that the confidentiality/nondisclosure agreement requirement in the employee manual was, in fact, being enforced; (3) Notwithstanding Respondent's claim of mistake, it took no corrective action; (4) The employee handbook's requirement that employees sign confidentiality/nondisclosure agreements, together with the absence of evidence of any new agreement to replace the older one, suggests that the older agreement remains in effect.

The Respondent further argues that language in the August 2014 constitutes an effective repudiation of the confidentiality/nondisclosure agreement. Analysis of the handbook will follow a principle which also applies when considering the lawfulness of the language in the confidentiality/nondisclosure agreement itself: The meaning and significance of the words must be assessed from the viewpoint of the employees who read them.

In other words, I am not looking at the language as a court would examine a document in a breach of contract lawsuit. Rather, I must determine what message the documents reasonably would communicate to an employee.

Moreover, context is important. Examining words in isolation would not lead to a reliable conclusion concerning how employees reasonably would understand them. Rather, the totality of the circumstances must be considered.

Therefore, in determining whether employees reasonably would consider the new handbook to abrogate or nullify the nondisclosure agreements they previously had signed, I look first to language at the beginning of the handbook which announces its purpose and effect. The cover page of the handbook shows its official title to be "Personnel Policy Manual & *Conditions of Employment*." (Italics added.) Nonetheless, further down on the cover page appears the following: "This Manual and the policies within *are not to be considered a condition of continued employment*." (Italics added.)

On the next page, the handbook includes four paragraphs printed in all capital letters and underlined, presumably to stress their importance. Two of those provisions are relevant here. The first paragraph states, in part, as follows:

> THE MANUAL IS FOR INFORMATION ONLY, AND IS NOT A CONTRACT OF EMPLOYMENT. ANY COMPANY PROCEDURE OR POLICY, INCLUDING ANY POLICY, PROCEDURE, OR PROVISION IN OR REFERRED TO IN THIS MANUAL, MAY BE MODIFIED, AMENDED, INCREASED, DECREASED, OR DELETED BY THE COMPANY AT ANY TIME, WITH OR WITHOUT NOTICE.

The second paragraph states:

> THIS MANUAL SUPERSEDES AND REPLACES ALL OTHER MANUALS OR SIMILAR MATERIALS WHICH HAVE BEEN PUBLISHED OR DISTRIBUTED. EFFECTIVE IMMEDIATELY, ALL (1) PRIOR MANUALS, (2) PRIOR POLICY MANUALS, AND (3) PRIOR POLICIES OR PRACTICES COVERING TOPICS NOW ADDRESSED IN THIS MANUAL, ARE HEREBY REVOKE AND DECLARED NULL AND VOID.

Significantly, this language says nothing about agreements, and the language at issue here appears in an agreement which the employee must sign. The handbook itself does not refer to the confidentiality/nondisclosure provision as a "policy" but rather as an "agreement." Moreover, the handbook's statement that employees must sign the agreement "as a condition of employment" distinguishes the agreement from the handbook, which disclaims such status. The handbook's cover page states that the manual itself "and the policies within are not to be considered a condition of continued employment. . ."

An employee reading the handbook would take particular account of the statements which the Respondent had capitalized and underlined. These statements include that the Respondent could change any policy in the manual, or referred to in the manual, at any time, and without notice. They also include the disclaimer that the manual was not a contract.

By comparison, an employee reasonably would understand the nondisclosure agreement to be a contract. Even the word "agreement" suggests a contract, and the employee had to sign it. Moreover, as noted above, the manual referred to the agreement as a "condition of employment" whereas the manual itself claimed not to be a condition of employment.

Thus, an employee reasonably would understand the nondisclosure agreement to outrank the manual in status and permanence. A statement that prior manuals and policies were null and void reasonably would not be understood to mean that the

nondisclosure agreements had been voided. Additionally, in view of the manual's statement that signing a nondisclosure agreement was a "condition of employment," an employee who did not receive a new agreement to sign reasonably would assume that the old agreement remained in effect.

Accordingly, I conclude that issuance of the handbook in August 2014 did not effectively repudiate the confidentiality/nondisclosure agreements which the employees previously had signed. Moreover, the record does not establish that the Respondent otherwise communicated to employees that the confidentiality/nondisclosure agreements were no longer binding. Even the employees who signed these agreements after issuance of the handbook did not receive such notification, In sum, there has been no effective repudiation of these agreements. *Lily Transportation Corp.*, 362 NLRB No. 54 (2015).

Concluding that employees would not reasonably believe that the August 2014 handbook nullified or repudiated the confidentiality/nondisclosure agreements they had signed, I will now consider whether certain provisions in those agreements are lawful under the Act. The Board has stated that the appropriate inquiry is whether such language would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the language is likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998); *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004).

In *Battle's Transportation, Inc.*, 362 NLRB No. 17 (2015), the respondent required its employees to sign a document stating that the employee "hereby covenants and agrees that he or she will at no time. . .disclose or divulge to others" information which the document described as confidential. The description included "human resources related information, drug and alcohol screening results, personal/bereavement/family leave information, insurance/worker/s compensation. . .investigations by outside agencies. . ."

The Board concluded that some of the prohibitions in this agreement unlawfully infringed on the employees' right to engage in activity the Act protects. The Board stated:

> Contrary to the judge, we find the confidentiality agreement overbroad to the extent that it bars employees from discussing "human resources related information" and "investigations by outside agencies," because employees would reasonably construe those phrases to encompass terms and conditions of employment or to restrict employees from discussing protected activity such as Board complaints or investigations.

362 NLRB No.17, slip op. at 2 (footnote omitted).

In the present case, the employees signed confidentiality/nondisclosure agreements prohibiting them from disclosing, among other things, "compensation data" and "personnel/payroll records, and conversations between any persons associated with the company." Employees reasonably would understand "compensation data" to include their pay rates and benefits. Moreover, employees reasonably would believe that they could not discuss many, if not most matters related to terms and conditions of employment because of the prohibition on disclosing personnel and payroll records and "conversations between any persons associated with the company."

Accordingly, I find that these provisions unlawfully chill employees in the exercise of their Section 7 rights.[5] I recommend that the Board find that the Respondent thereby violated Section 8(a)(1) of the Act.

Suspension and Discharge of Anthony Williams

As noted above, the Respondent has admitted that it suspended employee Anthony Williams on November 7, 2014, as alleged in complaint paragraph 9. Additionally, Respondent has admitted that it discharged Williams, as alleged in complaint paragraph 10. This discharge took place on November 13, 2014.

However, the Respondent denies that it took those actions because Williams formed, joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities, as alleged in complaint paragraph 11. It also denies the conclusion, alleged in complaint paragraph 13, that the suspension and discharge of Williams violated Section 8(a)(3) and (1) of the Act.

Williams' Actions at the First Election

Williams, a bus driver, began working for Respondent in July 2009 and thus had been employed more than 5 years at the time of his discharge. However, the Respondent does not base the discharge decision on anything other than Williams' actions at the first representation election, November 6, 2014. According to the discharge notice, Respondent terminated Williams' employment because of "harassing and intimidating behavior." It claimed that Williams had threatened employees with physical violence and that employees "clearly felt intimidated by your statements creating a hostile environment."

Therefore, I will focus on the events at this election, which began at 9 a.m. and lasted until 10:30 a.m. Before the polls opened, employees began lining up to vote and, as they stood in line, a union official offered them ballpoint pens bearing the Union's logo.

When the polls opened, the union official left the area after giving the bag of pens to Williams. He continued to distribute the pens to the voters waiting in line, and also showed them his cellphone, which displayed "Vote Yes" on its screen.

Employees who worked with Williams consistently described him as loud and none suggested that he was an introvert.[6] As discussed above, Williams had solicited employees to sign authorization cards, so the election represented the fruition of his efforts. Whether or not excitement added decibels to his voice, Williams was in high spirits—the union official who gave him the pens described Williams as jolly, like Santa

[5] The complaint does not allege that anything in the August 2014 edition of the employee handbook violated the Act and I express no opinion on the lawfulness of the confidentiality/nondisclosure provisions in that handbook. My consideration of this handbook is limited to the question of whether it effectively repudiated the confidentiality/nondisclosure agreements, as the Respondent contends. For the reasons stated above, I have concluded that it did not.

[6] One bus driver, Janice Schwenz, testified that on the day of the election, Williams was "being his normal Andrew self." When asked what she meant by Williams' "normal self," she explained "Loud, boisterous. Attention seeker, I guess is the word."

Claus—as he went up and down the line.

The voters divided almost evenly between supporters and opponents of the Union, and those against did not share the supporters' enthusiasm. From the record, I infer that some of the opponents regarded the election as an imposition on their time and resented it.

During the election and later that same day, some employees complained to Transportation Director Moore, who asked them to submit their complaints in writing. Bus driver Mary Dotson responded, in part, as follows:

> I am writing this letter to express my total disgust regarding the election procedures that took place today, November 6, 2014. We, all employees of Taylor Motor Company, were told during the meeting held on Monday November 3, 2014 that on election day that no one would be permitted to discuss the election or try to persuade anyone to vote either for or against the union. The election was scheduled to take place between 9:00 and 10:30 am. I arrived at the shop at 8:25 am and knew that I had to wait to vote. While waiting, one of the bus aides made a comment that they were going to leave. I overheard Anthony [Williams] tell the aide that "I will block the driveway and you can't get out". Why did this happen? Who was in control? I wanted to leave myself but after hearing what Anthony said I was a little intimidated so I just got in line to vote,
>
> While several of us were in line waiting to vote, Anthony started handing out ink pens as a bribe in support of the union. He also was telling everyone In line to "smile" that he was taking their pictures. When you looked at his phone screen the caption "Vote YES" appeared across the screen. Also during this time two ladies, that I do not know, were taking pictures of all the personnel in line. I did not give anyone permission to take my picture and feel that everything that happened today was totally illegal. How can one be granted to pass out propaganda in support of the union and no one else could pass out items against the union? How can my picture be taken without my permission? As far as I know, they may use my picture as advertisement to support the union in other locations. Why was I asked personal question about my past jobs and current job while I was waiting to vote by someone trying to force me to support something that I do not want.

Dotson concluded her report to Moore with the sentence "I am beginning to believe that after what happened today that this has become a hostile work environment." Both the word "intimidated," which Dotson used in the portion quoted above, and the phrase "hostile work environment" appear in the discharge notice which Respondent gave Williams. Therefore, Dotson's testimony at hearing is particularly relevant.

In her report, Dotson said that she felt "a little intimidated" after hearing Williams tell a bus aide that he, Williams, was going to block the driveway so that the aide could not leave. In her testimony during the hearing, Dotson did not use the word "intimidated" and it is not clear that she felt scared so much as peeved at Williams for not following what she understood to be the rules.

Dotson testified, on direct examination by Respondent, that Transportation Director Moore held a meeting at which she issued rules for the employees to follow while voting. Dotson described the rules as "just get in line, do not talk about the voting at all, whether you're for it or against the Union, and just stand in line, vote, and leave." Dotson further testified:

> Q. It's okay. Would you please give me an example of what you mean by violating the rules, what you saw?
> A. It was, as I said before, the aide. He said he was going to leave. And Anthony said that he was going to park his car there in the driveway.
>
> * * *
>
> Q. How did you react at the time to hearing that statement?
> A. I was a little uneasy, a little bit, because Anthony was just so bold about it. I mean he didn't look like he was kidding. He looked like he was serious.

On cross-examination, Dotson repeated that Williams looked serious, but upon further questioning, admitted that Williams said more than once that it was a good day and smiled when he said it:

> Q. Thank you. You also made some comment about how you were uneasy about hearing this, and then this may have just been something I didn't hear, but did you say that Anthony looked like he was serious or not serious?
> A. He looked like he was very serious.
> Q. When you heard him talking about blocking the driveway and you can't get out, was he saying anything about—did you hear him say anything about how the vote really mattered?
> A. No.
> Q. Did you hear him say anything about how the vote could really count?
> A. No, I did not.
> Q. You did hear Anthony talk about how it was a good day, though, correct?
> A. Yes.
> Q. He was saying that a lot, correct?
> A. Yes, he was.
> Q. Was that one of the things he was saying as he was just passing out the pens?
> A. Yes. As he was going down, you know, we was all in line and he was going down a row, and he was just saying it's just a great day.
> Q. And was he smiling when he was saying this?
> A. Yes.

Dotson did not testify that Williams appeared menacing or threatening but only that he looked "serious." Based on context, I believe it likely that, by "serious," Dotson meant "intending to do what he said and not kidding." It is difficult to understand how Williams reasonably could be considered intimidating simply by announcing that he was going to park his car in the driveway and appearing to mean it.

Even if Dotson used the word "serious" to mean "stern and humorless," a dour visage would not, without more, rise to the level of intimidating. Moreover, the record clearly indicates that Williams' demeanor verged on ebullient. To be sure, it was a noisy ebullience that a number of people considered obnoxious, but cheerful nonetheless.

According to Williams, he merely told people that if they left early, their votes would not count. He denied that he tried to stop people from leaving. No evidence suggests that Williams actually tried to block the driveway and I find that he did not. In sum, I conclude that Williams did nothing which reasonably would have made someone feel intimidated.[7]

Dotson's displeasure with Williams arose, I believe, from his apparent failure to follow the rules which Moore had announced. Additionally, Dotson's annoyance at having to participate in an election may well have colored her perception. For example, Dotson felt annoyed that, while she was standing in line waiting to vote, someone asked her about the benefits she had earned at a previous job. On direct examination, she testified as follows:

Q. In the second paragraph of that statement, you state that someone asked you personal questions about your past job. Can you elaborate on that statement?
A. Yes. I used to work for Montgomery County, and they have benefits. And that's what they was asking me about, because they know I used to work for Montgomery County. Like they have retirement benefits. They have sick days, vacation days. And so they was asking me about that.
Q. When you say "they," who are you—
A. It was the person in front of me, and then there was a person behind me, because they knew I used to work for Montgomery County.

As Dotson made clear on cross-examination, it was not Williams who asked her about these matters but some other employee. However, it is appropriate to take Dotson's mood into account in considering her description of Williams' conduct, and similarly instructive to discover the sources of her displeasure.

Although Williams did not ask Dotson about her wages and benefits at the prior job, and although the record does not establish the identity of this questioner, Dotson apparently considered this person to be another union supporter and regarded the question as an unwelcome attempt to persuade her to vote yes. Thus, her complaint to Moore stated: "Why was I asked personal question about my past jobs and current job while I was waiting to vote by someone trying to force me to support something that I do not want."

Another employee, Beate Poston, also expressed annoyance that people were talking in favor of the Union while waiting to vote. She testified, in part, as follows:

Q. Did you have any complaints about the election?
A. Yes, because we were—I mean, we were told how it was supposed to go. We were supposed to get in line, not discuss the election or the vote. You know, you go in one by one, place your vote, and then you leave without discussing it.
Q. And based on what you had been told, the election didn't go how you thought it would?
A. No.
Q. What was your complaint?
A. Well, for one thing, my understanding was that the union people didn't have any business being there. I guess there is some other—you know, some policies a little different on a post installation. And there was one lady with a car with a sign by the side of the road. There were at least two ladies in there. One lady at one point was taking pictures with her phone. Not real sure what she was taking it of. So, I mean, it just didn't, you know, feel right.

In addition to these annoyances, Poston became irritated that Williams was showing people his cellphone with "Vote Yes" on the screen. She testified that she became so upset that she left the waiting line and went to the office of Transportation Director Moore, who asked her to put her complaint in writing. Her resulting November 7, 2014 complaint stated, in part, as follows:

> I felt very much harassed yesterday, while waiting in line to vote. We were advised not to talk about the matter while waiting to vote. However, a coworker, Anthony Williams, was campaigning the entire time which was extremely irritating. He had a screen on his phone that read "Union" spelled on top, underneath was a box with a check mark next to a yes. He kept showing that to people in line which in my opinion is totally unacceptable and made me really mad.
>
> Here is what his phone screen looked like.
>
> [Sketch showing a box representing the cellphone screen, within which the word "Union" appears above a smaller box with a check mark and the word "yes."]
>
> It all made me feel very uncomfortable and I don't think I should have been subjected to it!

Although Poston's written complaint focused on Williams' actions, her testimony made clear that the actions of others also annoyed her. More generally, she was upset because people did not follow the announced rules. Poston explained her motivation for filing the complaint with Moore:

Q. Because you were upset about Anthony, correct?
A. Anthony and the whole way it—this was not—I mean, it was the first time I've ever been in an election like that. But from what we were told, this was not how it was supposed to go. I mean, I can get in line and I can go in there and vote whichever way I want to vote, but I shouldn't be, you know, harassed or intimidated or anything like that. So that's what I had an issue with.

Poston's statement that she should not be "harassed or intimidated" warrants a closer look in view of similar language in Williams' discharge notice, which claimed that he had violated Respondent's policy against "harassing and intimidating behav-

[7] A preponderance of the evidence does not, in my view, establish that Williams told people who were about to leave that he would "get" or "come after" them and I find that he did not. Moreover, the words are sufficiently ambiguous that, even if Williams had used them, the message reasonably conveyed would depend upon factors, such as his tone of voice and body language. The record does not indicate that Williams had a threatening tone or demeanor when he spoke with employees about to leave, and I find that he did not.

ior." After giving the testimony quoted above, Poston continued as follows:

Q. And you felt that you were being harassed.
A. Yeah, because, at that point, if I'm in line to vote, I know which way I'm going to vote. You shouldn't be talking to me, especially if you're knowingly for it.
Q. So, when you left the line, Anthony had already shown you the picture in your face.
A. Yes. I don't think at that point that he's offered me the pen yet. I think that was maybe after I came back.

Based on Poston's testimony, I find that Williams did nothing to her except show her the cellphone with the "vote yes" message, offer to give her a pen with the union logo and urge her to vote for it. Neither Poston's testimony nor other evidence indicates that Williams persisted in displaying the "Vote Yes" cellphone screen to her or that he offered her a pen more than once.

In other words, Poston's testimony does not indicate that Williams pestered her and I find that he did not. Poston's complaint that she felt harassed reflected her exasperation with the entire situation.

According to Transportation Director Moore, another employee, Karla Livingston, also complained to her. At Moore's request, Livingston put the complaint in writing. This document, dated November 6, 2014, states:

> I witnessed Anthony holding his phone with a picture of Vote Yes and looking at me holding the phone to where he made sure I seen it, then would move on to another person.
>
> I was also confronted by Linda wanting to know what my vote was after the vote was over, & she asked me in front of several co-workers.
>
> Karla Livingston
>
> The Lady was taking pictures of us in the bay. She was with the Union. I also saw a lady from Union holding a sign @ the road of our parking lot.[8]

However, Livingston's statement does not indicate either that there was a "confrontation" or that he was "holding the phone up intimidating" or "holding it in someone's face." Livingston only stated that Williams "made sure I seen it, then would move on to another person." Similarly, Livingston's statement reasonably would not be read to describe a "charged atmosphere."

Livingston did not testify, so it is not possible to identify the employee named Linda with certainty. However, that person may be the employee who served as the Union's election observer, Linda Collins.

Two other employees also complained to Moore, and their complaints attributed to Williams a statement which the Respondent characterized as a racially-charged threat. Some background information will help place it in context.

The November 6 election came just one week after Halloween. A local resident had displayed, in front of his home, decorations so offensive that they became the subject of news coverage: Effigies with black faces, hanging from ropes as if in a lynching.

It should be stressed that no evidence establishes any connection between this display and anyone associated with either the Respondent or the Union. The record only indicates that one of the bus drivers passed by this residence, which was on Litwin Street, in the course of taking children to and from school. However, because of the news stories about the effigies, they had become a topic of conversation.

On November 6, 2014, about three to four hours after the representation election ended, an employee, Donna Laumb, beckoned for Moore to come into the breakroom, where Moore spoke with Laumb and another employee, Terrie Nolen. The record does not indicate that Laumb, who did not testify, provided Moore with any information about Williams.[9] Rather, it appears that the only role she played in this matter was to put Moore in touch with Nolen.

Moore asked Nolen to put her complaint in writing. Nolen prepared and gave to Moore the following one-paragraph statement:

> While we were out in the bay waiting to vote Anthony Williams was threatening people that if they left before they voted yes he was going to come after them and when we was in the line to vote Mr. Williams said y'all had better vote yes if you don't I will put a rope around your neck and hang y'all from a tree like they did on Litwin St for the halloween joke and the way y'all did us back in the 60's.

Before the polls opened, some employees went to their cars. Nolen testified that Williams told these employees "you cannot leave, you cannot leave, because if you leave I'm going to get you."

Nolen further testified that while she was standing in line waiting to vote, Williams said "if you do not vote yes, I'm going to hang—I'm going to take a rope and hang you. I'm going to take a rope and hang you all by the neck like they did over on Litwin Street and like you all did to us back in the '60s."

Williams expressly denied making this statement. However, I will defer resolution of this credibility issue until later in the decision, after describing all the relevant facts. In the next few paragraphs, which concern how an employee reasonably would understand the words attributed to Williams, it will simplify the discussion to assume for the moment, but without deciding, that Williams actually made the statement.

During cross-examination by Respondent, Nolen testified that she had felt threatened by Williams' remark:

Q. What specifically about it made you feel threatened?

[8] It is not clear what role, if any, Livingston's statement played in the decisions, by General Manager Robert Gregory DeLancey, to suspend and, later, to discharge Williams. He testified that the statement "was only included because this individual made a comment that, of the confrontation inside of the facility, holding the phone up intimidating—what I took her statement as holding the phone up and holding it in someone's face to see something is what I kind of took away from the tenor of what I would call the charged atmosphere."

[9] From the record, it appears that Laumb did not favor the Union. As noted above, the Union won this election by one vote. Union supporter Cruthis testified that after the votes were counted, Laumb threw a pen on the floor and stomped it.

A. I mean him looking at me and telling me if I don't vote yes, he's going to hang me. Yes, I was threatened by that.

However, Nolen's reaction at the time does not suggest fear for her safety. She testified as follows:

Q. Did you say anything in response to Anthony making this threat?
A. I told him it wasn't very funny.
Q. Did he say anything in response to that?
A. He laughed.

From Nolen's reply that it "wasn't funny" and William's laughter it would appear that both of them understood the remark as attempted humor. Moreover, if Nolen really had felt threatened at the time, she likely would have reported it to her supervisor, Transportation Director Moore. However, Nolen did not. Moore learned about it later from a third person and then approached Nolen.

The record suggests that, several hours after the election, Nolen was in the break room talking with Donna Laumb. As noted above, Laumb's antiunion sentiments ran so strong that, reportedly, when she heard that the Union had won the election, she threw a pen on the floor and smashed it. Laumb brought Moore to speak with Nolen.

Based on this sequence of events, and assuming for the sake of analysis that Williams actually spoke the words attributed to him, I am not persuaded by Nolen's testimony that she felt threatened. Rather, I conclude that she felt annoyed and vented her annoyance to Laumb, that Laumb alerted Moore and that Moore, in turn, asked Nolen to write a statement.

Moore also asked driver Janice Schwenz to write a statement. Schwenz had not complained to Moore, but she did voice her annoyance to other employees and Moore found out. In response to Moore's request, Schwenz wrote and gave to Moore the following statement:

> 11-6-2014
>
> Taylor Motors and To Whom it may concern
>
> As I stood in line to vote today on the union, one of the guys for the union Anthony Williams #13 was saying to us if we didn't vote yes they were gonna get rope and hang us like the joke on Litwin St and the way we did them (the Blacks) in the 60's.

As noted above, Schwenz testified that on the day of the election, Williams was being his "normal Anthony self," meaning loud and boisterous. According to Schwenz, he was walking up and down the line of employees waiting to vote, handing out Union pens, and his voice was loud enough to hear even when he wasn't up close. Schwenz further testified:

Q. You mentioned he was saying that it was going to be like going to Burger King and have it our way.
A. Yes, right.
Q. Did he seem to be in a good mood, in your opinion?
A. Yes.
Q. Did he hand you a pen?
A. He tried to hand me a pen, but I didn't take it.

Schwenz did attribute to Williams a remark to the effect that if they did not vote for the Union he would get rope and "hang us like the joke on Litwin St." However, the following portion of her testimony leads me to suspect that the underlying reason for her annoyance was simply Williams' support for the Union:

Q. While you were in line around Terrie and Bea and Mary, and Anthony is walking up and down the line, did you hear Anthony say anything that troubled you?
A. He, well, yes, because he was trying—it seemed to me that he was trying to get people to vote yes for the Union.

Thus, when asked about seeing anything that "troubled you," Schwenz answered by mentioning Williams' advocacy for the Union rather a comment about hanging. This response is consistent with my impression that it was the union organizing campaign itself, and the prospect of having a union in the workplace, which vexed Schwenz and others. Considering their strong opposition to the Union, Williams' enthusiastic "Burger King" remark—that employees would "have things our way"—did not ring bells of celebration but alarm. Schwenz' testimony continued as follows:

Q. Can you elaborate a little bit on what you mean by that?
A. Well, when he was saying the stuff about we're going to Burger—it's going to be like Burger King and we're going to have it our way, and then one of the girls asked him, well, what if it doesn't go your way. And he said some troubling things then. That's when everything started about, well, we'll just have to get some rope and do you guys like the Halloween thing over on Litwin and kind of like you guys did us back in the '60s.
Q. When he said that, did he address that statement to anybody in particular?
A. No, he just said it out.

Later in her testimony, Schwenz described how the listeners reacted to that comment. According to Schwenz, no one said anything except Beate Poston. Schwenz testified:

Q. I just want to make sure. You heard Bea tell him to just—
A. Yes.
Q. Again, in your own words, what did you—
A. She just told him, Anthony, I think it would be best if you just got away from us, and went on and got in line, because we're going to vote the way we want to, and you vote, you do the same.

This testimony raises a credibility issue. Poston testified that she did not hear Williams make the "hanging" comment which Schwenz attributed to him. Similarly, Poston denied hearing Williams say anything about Litwin Street.

Moreover, Poston testified that Williams was "always on the loud side," which is consistent with Schwenz' testimony that she could hear what Williams was saying even when he was not nearby. Poston was standing close to Schwenz and, considering Williams' loud voice, should have heard the "hanging" comment if Williams actually made it.

Additionally, the statement which Poston prepared for Moore described Williams as "extremely irritating." In that

statement, Poston's statement described how Williams had displayed his cellphone with the "Union Yes" image to the employees waiting to vote, and said that such conduct "in my opinion is totally unexceptable [sic] and made me really mad." In her statement, Poston also said that Williams' "campaigning" for the Union "extremely irritating."

Clearly, Poston considered Williams' actions to be obnoxious, and obnoxious actions tend to stick in memory. If she had heard Williams make the "hanging" comment Schwenz attributed to him, she would be unlikely to forget it. However, her statement to Moore did not mention such a statement and, at the hearing, she explicitly denied hearing Williams say anything about hanging or the Halloween display on Litwin Street.

Another bus driver, Mary Dotson, also denied that she heard Williams say anything about the Halloween display. The statement which Dotson gave to Transportation Director Moore, and quoted above, complained about Williams' statement that he would block the driveway and about Williams displaying his cellphone with the "Union yes" message, but said nothing about Williams making a remark about hanging or the Halloween display. Considering Dotson's annoyance, I believe it almost certain that she would have remembered and reported the "hanging" statement attributed to Williams if she had heard him make it.

Additionally, employee Sandra Fenwick testified that she was standing near Williams as she waited to vote but she did not hear him make the "hanging" statement. Her testimony included the following:

Q. And you said Anthony was in line near you?
A. He was behind me in line.
Q. While you were near Anthony, did you ever hear him say anything about Litwin Street?
A. No.
Q. Did you ever hear him say anything about hanging anybody?
A. No.
Q. Did you hear him say anything that you would consider to be a threat in any way?
A. No.
Q. Is Anthony a loud person?
A. Yes.

On that last point—that Williams was loud—all witnesses agree. In general, the fact that a witness did not hear a statement does not rule out the possibility that the other person indeed made it. However, the loudness of Williams' voice, which could be heard even when he was not up close, increases the likelihood that what he said would be heard.

To summarize, two witnesses—Nolen and Schwenz—testified that Williams made a comment about hanging. According to Nolen, Williams said "if you do not vote yes, I'm going to hang—I'm going to take a rope and hang you. I'm going to take a rope and hang you all by the neck like they did over on Litwin Street and like you all did to us back in the '60s."

Schwenz' testimony is similar but not identical. It is similar enough to corroborate Nolen's, but not so similar as to suggest collusion. According to Schwenz, when someone asked "what if it doesn't go your way," Williams replied "we'll just have to get some rope and do you guys like the Halloween thing over on Litwin and kind of like you guys did us back in the '60s."

However, Williams expressly denied making the statement. Poston, Dotson, and Fenwick, who were within earshot of Williams, testified that they did not hear him make such a statement.

This conflict in the testimony raises two possibilities: Either Nolen and Schwenz were not telling the truth when they testified that Williams made the "hang you" remark or Williams was not telling the truth when he denied it. Not all lies require the same amount of effort or require the same amount of motivation. Making up a story about someone entails more work and planning than a simple untrue "I didn't do it." Typically, some rather significant motivator must exist for a person to manufacture a story out of whole cloth. However, the motivation to make an exculpatory denial—to escape consequences—is both common and obvious.

These principles suggest that false exculpatory denials may occur more often than fabrications, but other factors must be taken into account. Here, the record suggests that Nolen and Schwenz not only disfavored the Union but also resented the union organizing drive. Williams' loud delight that employees soon would run things "their way" antagonized employees who did not want the company to be run Williams' way.

The level of resentment may well have been high enough to constitute a motivation for fabrication, so the possibility of a made-up story seems roughly equivalent to that of a false exculpatory denial. At the least, I conclude that, even if some circumstances might make it appropriate to consider likelihood when resolving a credibility issue, those circumstances are not present here.

Another factor commonly considered, witness demeanor, provides no assistance here. All the witnesses appeared to be telling the truth.

However, I do believe it is significant that three witnesses who were in range of Williams' voice did not hear him make the "hanging" statement. It also may be noted that two of these three were annoyed at Williams and submitted statements to Moore describing other things Williams did. Almost certainly, they would have remembered and freely testified about the hanging statement if they had heard Williams make it.

Stated another way, if Williams really had made the "hanging" statement, five witnesses would have testified to that effect rather than just two. Therefore, I cannot conclude that evidence makes it "more likely than not" that Williams made the "hanging" statement which Nolen and Schwenz attributed to him.

It should be stressed that the scales appear about evenly balanced and my decision not to credit this testimony of Nolen and Schwenz might well be wrong. However, a decision must be made. In my view, a preponderance of the evidence does not establish that Williams made any statement about hanging people or any reference to the Halloween display on Litwin Street. Therefore, I find that he did not.

Williams' Suspension and Discharge

The first election took place in the morning on November 6, 2014, and some time that afternoon, Transportation Director

Moore contacted her superior, General Manager Robert Gregory DeLancey, who works at the Respondent's administrative offices in Murray, Kentucky. According to DeLancey, Moore "indicated that Anthony Williams had threatened some ladies and said that he was going to hang them with a rope." When Moore told DeLancey about the statements she had received from employees, he asked her to send him copies. DeLancey testified that after he read the statements, he decided to suspend Williams:

Q. What are the reasons that Taylor Motors suspended Anthony?
A. What are the reasons?
Q. Yes.
A. For the remarks that were racially charged. Those were taken very seriously. Our policy says that if anyone were to threaten anyone with physical violence, that there is a provision that we can at any time move to an immediate suspension. And the policy also allows for a 3-day period to conduct such. And we wanted to make sure that we followed our policy.

Three of the statements which DeLancey reviewed before deciding to suspend Williams—the statements of Mary Dotson, Karla Livingston and Beate Poston—did not mention the "hanging" remark. When asked about these statements, DeLancey's answer suggested that he defined the term "threat of physical violence" broadly:

> Q. So out of the three statements you just reviewed, Mary's, Karla's, and Beate's, are there any things from the statement that became part of the reasons that you suspended Anthony?
> A. The statement from Mary Dotson confirms that—let's see, I overheard Anthony tell the aide that I will block the driveway and you can't get out. And that was independent of the other statements. That was, as I took it, a physical act to try to prevent someone from doing something.

DeLancey testified that he made the decision to suspend Williams. Operations Director Moore corroborated this testimony. Based on that credible and uncontradicted testimony, I find that DeLancey alone was responsible for this decision. Further, I credit the following testimony of DeLancey concerning his reasons for the decision:

Q. So after going through all of those statements, would it be fair to say that the reasons for Anthony's suspension were racially charged remarks, threats of physical violence that are included in the first two statements, General Counsel's Exhibits 3 and 4, and the threat statement included in General Counsel's Exhibit 5 about blocking a driveway and can't get out.
A. No question.
Q. And are those the only reasons for Anthony's suspension?
A. The only reason.

On November 7, 2014, Moore met with Williams to notify him that he was being suspended, with pay, pending an investigation. DeLancey did not attend this meeting. Moore read to Williams from the suspension notice, which stated, in part, as follows:

> Your conduct and statements on November 6, 2014 have been called into question as to whether such conduct violated Taylor Motors' Rule 4.3 relating to harassing and intimidating behavior in the workplace. Multiple employees complained about your threats and intimidating conduct while outside in the bay yesterday morning, as well as while you and other employees were waiting in the line to vote. These type of threats and racially-charged comments are completely unacceptable in the workplace. The Company intends to immediately commence an investigation into this alleged misconduct and violation of Company policy.

The suspension notice was written on a standard form. In the section pertaining to applicable company policies, the notice stated:

> Under Rule 4.3, Taylor Motors strictly prohibits all forms of harassment and intimidating conduct in the workplace. The Company's Standards of Conduct also prohibit sexual or other unlawful or unwelcome harassment. As noted above, Taylor Motors will conduct an investigation into your conduct and statements on November 6, 2014, and make a determination of whether your conduct violated these standards and policies.

Even though the suspension notice referred to threats, "harassment and intimidating conduct," Respondent did not inform Williams of the specific statement attributed to him. Williams credibly testified as follows:

Q. What happened when she came back to the office?
A. When we came back in the office, she had another lady in there that was present, named Ms. Ann Metcalf (ph.), in there. She shut the door, and she told me that—she said multiple people, multiple people had filed a complaint. And I asked her who. And I said, what did I do wrong? She said, oh, I can't tell you that.

Moore's own testimony confirms that she provided Williams little information about the accusations against him:

Q. When you met with Anthony to suspend him, did you in any way describe the nature of the threat that he had made to him?
A. Again, I read from the paper.
Q. For the suspension?
A. From the suspension, also, I read from the paperwork.
Q. So did you say anything to him during that meeting about hanging or—
A. No.
Q. —a rope, a noose?
A. No.

Even though Moore did not inform Williams of the specific allegations, Williams emphatically denied any wrongdoing. Notwithstanding that Respondent had informed Williams that it would be investigating the allegations, no one contacted him.

Neither Moore nor DeLancey did any further investigation.

According to DeLancey, the Respondent's legal counsel conducted the investigation. DeLancey testified that, after conferring with counsel, he decided to discharge Williams:

> Q. The reasons you gave for the suspension, the racially charged remarks that include a threat of physical violence and the statement to block a driveway so that an employee could not get out, were these the reasons for terminating Anthony Williams?
>
> A. It was.
>
> Q. Were these the only reasons for terminating Anthony Williams?
>
> A. The only reason.

The termination notice which Respondent issued to Williams described the reasons for his discharge as follows:

> Several employees were interviewed during an investigation calling into question your conduct and statements November 6, 2014. We have concluded after speaking with them that you have violated Taylor Motors Rule 4.3 relating to harassing and intimidating behavior in the workplace. Multiple employee's indicated you made racially-charged comments, threatening them with physical violence. Employees clearly felt intimidated by your statements creating a hostile environment. This was inappropriate and violates our policy.

Legal Analysis

The parties disagree about which analytical framework I should follow in examining the evidence. The General Counsel argues that the facts should be analyzed in accordance with *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964), and its progeny. This framework applies when an employer honestly but mistakenly believes that an employee has engaged in misconduct during the course of activity protected by the Act, and discharges or disciplines the employee for the supposed misconduct.

Thus, Williams was speaking to employees about the Union, which is protected activity. Respondent received and believed reports that Williams made threats to employees while he was talking to them about the Union, and discharged him for making the threats.

Contrary to the General Counsel, the Respondent contends that the case should be analyzed under the framework which the Board established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The Respondent argues that the *Burnup & Sims* framework should not be used because Williams was not engaged in protected activity. Although talking with fellow employees about a union ordinarily is protected activity, Respondent contends that in this instance, where the conversation involved employees waiting in line to vote in a Board-conducted election, such talk constituted prohibited electioneering and therefore lies outside the scope of the Act's protection.

Respondent cites *Michem, Inc.*, 170 NLRB 362 (1968), in which the Board set aside an election because the Union's secretary-treasurer had stood and talked with employees waiting to vote and had sustained conversations with them. The Board concluded that the potential for distraction, last minute electioneering or pressure, and unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots was of sufficient concern to warrant a strict rule against such conversations, without inquiry into the nature of the conversations.

However, the *Michem* case solely involved representation issues, not the question of whether an employee's prounion activity enjoyed the protection of the Act. It does not suggest that conduct which is objectionable—that is, which warrants setting aside the election—is therefore outside the Act's protection. The Board sets exacting standards for its elections to assure that employees enjoy free and uncoerced choice, but establishing such laboratory conditions does not create a Section 7-free zone where the Act's protections do not apply.

Moreover, the Board's *Michem* rule only applies to conduct of a party that involves prolonged conversations with employees waiting in line to vote. *Lowe's HIW, Inc.*, 349 NLRB 478, 479 (2007). Williams was not a party and the record does not establish that he was acting as an agent of a party. Accordingly, I reject the Respondent's argument that Williams was not engaged in protected activity.

In arguing that the *Wright Line* framework should be followed, Respondent cites *Sutter East Bay Hospital v. NLRB*, 687 F.3d 424 (D.C. Cir. 2012). However, in that decision, the Court focuses primarily on how the administrative law judge performed the *Wright Line* analysis rather than on the judge's decision to use the *Wright Line* rather than the *Burnup & Sims* framework. The Court specifically stated that it did not decide which test, *Wright Line* or *Burnup & Sims*, was correct under the circumstances.

The Respondent also cites *Fresenius USA Mfg.*, 358 NLRB 1261 (2012), to support its argument that the *Wright Line* standard and framework should be applied here. In view of the Supreme Court's decision in *NLRB v. Noel Canning*, 573 U.S. ___ (2013), I will not rely on *Fresenius USA Mfg.* as binding precedent.[10] However, Respondent cited *Fresenius* during oral argument because it summarized existing law, and for that purpose, as an analysis and discussion of prior cases, the opinion speaks with the same authority as would a law review article by distinguished professors.

So, it may be noted that the Board, in *Fresenius*, did not adopt the judge's alternative *Wright Line* analysis: "As the Board has previously explained, however, *Wright Line* is inapplicable where, as here, an employer undisputedly takes action against an employee for engaging in protected conduct. . ." *Fresenius USA Mfg.*, 358 NLRB 1261, 1264 fn. 7, citing *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1322 (2006).

As discussed above, I have concluded that Williams was engaged in the protected activity of trying to persuade fellow employees to vote for the Union, and Respondent has admitted it discharged Williams for statements he made as part of that effort to persuade. Therefore, a *Wright Line* analysis is not

[10] In *Noel Canning*, the Supreme Court held that the President had not appointed three Board members in a manner consistent with the Constitution's recess appointments clause, rendering those appointments invalid. Two of these Board members sat on the panel which issues *Fresenius USA Mfg.*

appropriate. *St. Joseph's Hospital*, 337 NLRB 94, 95 (2001); *Saia Motor Freight Line, Inc.*, 333 NLRB 929 (2001); *Phoenix Transit System*, 337 NLRB 510 (2002).

Having ruled out a *Wright Line* analysis, we come to another fork in the decision tree. Violations involving employees who were discharged for conduct associated with their protected activity can be divided into two categories: (1) Cases involving employees who were discharged because their employers honestly but mistakenly believed that they had engaged in misconduct during the course of the protected activity and (2) Cases involving employees who did, in fact, mingle some misconduct with the protected activity, but the misconduct was not opprobrious enough to forfeit the protection of the Act. The Board evaluates cases in the first category using the *Burnup & Sims* framework. For cases in the second category, the analysis focuses on the factors the Board set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979), and its progeny.

Here, the General Counsel's theory of the case falls within the first category. In agreement with the General Counsel, I conclude that *Burnup & Sims* provides the correct analytical framework. The steps of that analysis may be summarized as follows: When an employer discharges an employee for misconduct arising out of a protected activity, the employer has the burden of showing that it held an honest belief that the employee engaged in serious misconduct. Once the employer establishes that it had such an honest belief, the burden shifts to the General Counsel to affirmatively show that the misconduct did not in fact occur. *Pepsi-Cola Co.*, 330 NLRB 474 (2000), citing *Rubin Bros. Footwear, Inc.*, 99 NLRB 610, 611 (1952), enf. denied on other grounds 203 F.2d 486 (5th Cir. 1953).

The testimony of Respondent's general manager DeLancey, quoted above, establishes that he made the decisions to suspend and discharge Williams and that the only reasons for these actions were DeLancey's beliefs that (1) Williams had made racially charged remarks that included a threat of physical violence and (2) Williams had said he would block a driveway so that an employee could not get out. DeLancey relied on the statements written by a number of employees who voted in the election, and he also consulted with legal counsel. Therefore, I find that he held honest beliefs, in good faith, that Williams had engaged in this misconduct.

However, parts of the employee statements misled DeLancey. Their authors disliked the entire union organizing campaign and resented having to participate in the election. In contrast, Williams had worked hard to bring about the election. For him, the sight of employees lined up to vote created a moment of triumph tempered by the fear it might be momentary, a fear spurring him to campaign. Both his glee and his advocacy grated on the antiunion employees and he became the focus of their resentment.

The record does not reflect the extent to which DeLancey, who worked at the corporate offices rather than at the Fort Campbell facility, understood the depth of employee hostility to the Union, or how it could distort their reports. Taking the employees' statements at face value, he mistakenly concluded that Williams had said the words which some of the statements attributed to him. Thus, I conclude that the Respondent has established that it acted from an honest, good faith belief that Williams had engaged in misconduct.

Under the *Burnup & Sims* framework, the burden now shifts to the General Counsel to prove that Williams actually had not engaged in the reported misconduct. For the reasons discussed above, I conclude that the government has carried this burden.

My decision to credit Williams' denials rested to a considerable extent on the fact that other witnesses did not corroborate the testimony of Schwenz and Nolen. Considering Williams' loud voice and his proximity to the other witnesses, it seems quite likely that they would have heard the "hanging" comment if Williams actually had made it. Moreover, these witnesses did not favor the Union and would have been inclined to remember and report any such "hanging" remark.

Although this absence of corroboration led me to credit Williams' denial, some doubt persists. My finding that Williams did not make the "hanging" remark requires me to conclude that Schwenz and Nolen went to the trouble of making up a story and giving false testimony under oath. No evidence of any such collusion exists in the record. Nothing in the demeanor of either witness suggested untruthfulness.

Notwithstanding these concerns, the entire record did not persuade me that it was more likely than not that Williams made the statements attributed to him. Therefore, I found that he did not make them.

However, it may be noted that even if I had credited Nolen and Schwenz, and found that Williams made the statements in question, that would not change my conclusion under the *Burnup & Sims* analysis. Respondent discharged Williams because DeLancey held the honest belief that Williams had threatened employees with physical violence and made racially charged comments. Considering the totality of the circumstances and applying an objective standard, I would conclude that the comments attributed to Williams did not constitute threats of physical violence and did not create a racially charged atmosphere or intimidation.

In reaching this conclusion, I would not be applying an *Atlantic Steel* analysis. In other words, I would not be concluding that Williams engaged in misconduct but that the misconduct was not so opprobrious it forfeited the Act's protection. Rather, assuming that Williams had, in fact, made the "hanging" remark attributed to him, I would conclude that the employees who heard it would not reasonably have understood it to be a threat and would not reasonably have felt intimidated or feared for their safety. Therefore, even if Williams had made the remark, it would not have constituted the threat or resulted in the intimidation which DeLancey believed occurred.

The record clearly reflects that Williams was in a cheerful mood—one witness described it as jolly, like Santa Claus—when the November 6, 2014 election took place. Indeed, to those employees who opposed the Union and resented the election, Williams might well have appeared to be disgustingly cheerful. They would not have mistaken attempted humor for a serious threat.

Thus, although Nolen claimed that Williams made the "hanging" remark, her reaction to it does not suggest that she feared for her safety. She testified as follows:

Q. Did you say anything in response to Anthony making

this threat?
A. I told him it wasn't very funny.
Q. Did he say anything in response to that?
A. He laughed.

Nolen's reply that "it wasn't very funny" indicates she recognized an attempt at humor. Although in some circumstances a joke can disguise a threat, those circumstances are not present here.

However, the one-paragraph statement which Nolen submitted to Moore, and upon which DeLancey relied in deciding to discharge Williams, did not mention Nolen's "wasn't very funny" response or Williams' laughter. Even if the facts recited in Nolen's terse note were true, leaving out other facts causes the report to be misleading.

Nolen's note also states that "Williams was threatening people that if they left before they voted yes he was going to come after them." The use of the word "threatening" suggests that Williams had a menacing demeanor, but credible evidence establishes just the opposite. Even assuming that Williams told someone that "if you leave I'll come after you" or "if you leave I'll get you"—which Williams credibly denied—the record would not support a conclusion that Williams uttered these ambiguous words in a menacing way."

Employees who worked with Williams would not mistake banter for malice and would not confuse exuberance with intimidation. Janice Schwenz testified that on the day of the election Williams was being his "normal Anthony self," meaning boisterous and attention seeking. However, the brief note which Schwenz provided to Moore, and upon which DeLancey relied, did not include this context.

The discharge notice which Respondent provided to Williams stated, in part, that he had made "racially-charged comments." If Williams did, in fact, make the "hanging" remark," it certainly did raise the subject of race and race relations. By referring not only to the Halloween display but also to "the way y'all did us back in the 60's" (the words Nolen's note attributed to Williams) the remark raises the subject of race in a potentially divisive way.

Williams' discharge notice stated that his actions violated Respondent's Rule 4.3. That rule states, in pertinent part:

> Taylor Motors is committed to providing a work environment that is free of discrimination and unlawful harassment. Actions, words, jokes or comments based on an individual's sex, race, ethnicity, age, religion, or any other legally protected characteristic will not be tolerated.

The rule thus makes no exception for humor or attempted humor. If Williams had, in fact, made the hanging comment, it fairly would fit the description of a comment based on an individual's race and would be proscribed by Rule 4.3.

However, Respondent did not discharge Williams just for making a racial remark but rather for making, in the words of the discharge notice, "racially-charged comments, threatening them with physical violence. Employees clearly felt intimidated by your statements creating a hostile environment." Even assuming that Williams made the "hanging" remark, no evidence indicates any listener believed he was going to get a rope and attempt such a deed and, considering the totality of circumstances, no listener would reasonably interpret the statement as a threat.

Additionally, the record does not establish either that employees felt intimidated or that the remark, if made, created a hostile environment. The record does indicate some hostility, but it was hostility to the Union organizing drive.

Thus, although the hanging comment, if made, would violate the Rule 4.3 ban of jokes based on race, it would not reasonably create the racially charged intimidating environment Respondent claimed and it would not constitute or be understood as a threat. The record does not persuade me that Respondent would have discharged Williams for a racial comment alone, in the absence of the supposed threats of physical violence and intimidation.

Accordingly, I conclude that even if Williams had made the remarks attributed to him, the Respondent held an honest but mistaken belief about the gravamen, circumstances and effects of those remarks and based its discharge decision on that mistaken belief. Therefore, even if Williams had made an attempted joke about hanging, his suspension and discharge would violate Section 8(a)(1) of the Act.

However, as discussed above, I find that Williams did not make the "hanging" remark attributed to him and also did not say that he would block the driveway or go after employees who left. Therefore, the *Burnup and Sims* analysis leads me to conclude that Respondent's suspension and discharge of Williams violated Section 8(a)(1) of the Act. I recommend that the Board so find.

Summary of Unfair Labor Practice Findings

Here is a summary of the unfair labor practice findings and conclusions discussed above:

COMPLAINT PARAGRAPH	DESCRIPTION	HOLDING
7(a)(i)	interrogation	violation
7(a)(ii)	impression of surveillance	no violation
7(b)	interrogation	no violation
7(c)(i)	interrogation	no violation
7(c)(ii)	impression of surveillance	no violation
7(d)	interrogation	no violation
7(e)(i)	interrogation	no violation
7(e)(ii)	prohibition on distribution	no violation
8	confidentiality agreement	violation
9	suspension of Williams	violation
10	discharge of Williams	violation

The Objections

On December 8, 2014, the Respondent and Union executed, and the Regional Director for Region 10 approved, a stipulation to set aside election, which nullified the results of the November 6, 2014 election. On January 15, 2015, pursuant to this

stipulation, the Board conducted a second election.

The tally of ballots, prepared immediately after this election, showed that of about 67 eligible voters, 28 cast ballots for the Union and 33 against. Additionally, there were 3 challenged ballots, too few to affect the outcome.

The Union filed objections. On February 20, 2015, the Regional Director issued a report on objections and order directing hearing, which designated 5 of the objections for hearing. Three of these objections concerned matters which also were alleged to be unfair labor practices but the other two, Objection 5 and Objection 7, did not. However, the Union withdrew Objection 5 and 7 before the hearing.

The remaining objections concern the conduct alleged in Complaint paragraphs 8, 9, and 10. For the reasons discussed above, I have concluded that the Respondent violated the Act in each instance. Specifically, I have recommended that the Board find that Respondent violated Section 8(a)(1) of the Act by maintaining the overly broad confidentiality/nondisclosure agreement alleged in complaint paragraph 8, and by suspending and discharging employee Williams, as alleged in complaint paragraphs 9 and 10, respectively.

Conduct which violates Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election. *Arkema, Inc.*, 357 NLRB 1248, 1250 (2011), citing *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786–1787 (1982).

Accordingly, I find merit to the Union's objections and recommend that the Board set aside the January 15, 2015 election.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix A. In addition to physical posting of paper notices, the notice shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondents customarily communicate with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010).

Respondent must offer Anthony Williams immediate and full reinstatement to his former position or to a substantially equivalent position if his former position is no longer available, and make him whole, with interest, for all losses he suffered because of the unlawful discrimination against him. The make-whole relief shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The Respondent also must (1) submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate calendar quarters, and/or (2) reimburse the discriminatee for any additional Federal and State income taxes the discriminatee may owe as a consequence of receiving a lump-sum backpay award in a calendar year other than the year in which the income would have been earned had the Act not been violated. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

The Respondent must also rescind the overly-broad confidentiality/nondisclosure agreement and notify all employees that it is no longer binding or in effect.

The complaint seeks, as part of the remedy, an order requiring that the Respondent reimburse Williams for all search-for-work and work-related expenses regardless of whether he received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period. However, in the Board's bifurcated hearing process, matters related to a discriminatee's interim expenses normally are litigated after the issuance of a compliance specification defining the matters potentially in dispute.

Such a compliance specification alleges, and therefore offers a respondent the opportunity to challenge, the entire formula used to compute the make-whole remedy. Thus, Section 102.55 of the Board's Rules and Regulations provides that a compliance specification "shall specifically and in detail show, for each employee, the backpay periods broken down by calendar quarters, the specific figures and basis of computation of gross backpay and interim earnings, the *expenses for each quarter*, the net backpay due, and any other pertinent information." (Italics added).

In many cases, the parties are able to agree on what constitutes full compensation and such agreement makes issuance of a compliance specification unnecessary. If parties cannot agree, both the appropriate formula and the monetary amount can be litigated in a compliance proceeding. However, the present case is still in the liability stage and no compliance specification has issued. It would be premature, I believe, to litigate one issue related to the backpay formula—the appropriate treatment of interim expenses—when no complete backpay formula has been alleged.

In the complaint, the government also seeks an order requiring that the Respondent convene a meeting of employees to hear the notice read either by the Respondent's representative or by a Board agent in the presence of the Respondent's representative. This remedy goes beyond the Board's customary one. Although it can be necessary in extraordinary cases, I do not believe such circumstances are present here.

CONCLUSIONS OF LAW

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

2. The Charging Party, American Federation of Government Employees, Local 2022, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union activities; by requiring employees to sign an overly-broad confidentiality/nondisclosure agreement which reasonably would cause employees to believe that they could not engage in certain activities, such as the discussion of wages and working conditions, protected by Section 7 of the Act; and by suspending and discharging employee Anthony Williams.

4. The Respondent did not violate the Act in any other man-

ner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[11]

ORDER

The Respondent, Taylor Motors, Inc., Fort Campbell, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities or sympathies or those of other employees.

(b) Requiring employees to sign any agreement which they reasonably would understand to limit their right to discuss wages or other terms and conditions of employment or to engage in other activities protected by the National Labor Relations Act.

(c) Discouraging employees from engaging in protected activity by suspending, discharging, or taking other adverse action against employees who have engaged in such activity and did not engage in serious misconduct during the course of that protected activity.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

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

(a) Rescind its confidentiality/nondisclosure agreement and provide each employee who received and/or signed this agreement a written notification that the agreement has been rescinded.

(b) Offer Anthony Williams immediate and full reinstatement to his former job, of, if that position is no longer available, to a substantially equivalent position.

(c) Make Anthony William whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension discharge of Anthony Williams and, within 3 days thereafter, notify him in writing that this has been done and that neither the suspension nor the discharge will not be used against him in any way.

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

(f) Within 14 days after service by the Region, post at its facilities in , copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 24, 2014. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C., July 14, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT interrogate our employees about employees' Union or protected, concerted activities.

WE WILL NOT require employees to sign a confidentiality agreement which limits or reasonably could be understood to limit their right to discuss wages, hours, or other terms and conditions or to engage in other activities protected by federal law and WE WILL NOT enforce any such agreements that employees already have signed.

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

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT suspend or discharge employees for discussing the Union with employees or engaging in other activities protected by federal law.

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

WE WILL immediately rescind the confidentiality agreements which employees have signed and notify these employees that it no longer is in effect.

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

WE WILL make Anthony Williams whole, with interest, for all losses of earnings and other benefits he suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any references to the unlawful suspension and discharge of Anthony Williams and WE WILL, within 3 days thereafter, notify him that the discharge will not be used against him in any way.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/10-CA-141565 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.