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Midwest Terminals of Toledo International, Inc. and International Longshoremen's Association, Local 1982, AFL-CIO and Prentis Hubbard. Cases 08-CA-119493 and 08-CA-119535

December 15, 2017

CORRECTED DECISION AND ORDER*

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE
AND MCFERRAN

On January 21, 2016, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent and the General Counsel each filed exceptions, supporting briefs, and answering briefs, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions,

* This Corrected Decision and Order replaces the Decision and Order at 365 NLRB No. 134 (2017).

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

There were no exceptions to the judge's dismissal of the following allegations: that supervisors and nonunit employees performed bargaining unit work; that the Respondent unilaterally discontinued formal crane training, end loader training, and forklift training; that the Respondent unilaterally changed the grievance procedure; that the Respondent unlawfully denied work to and disciplined two employees who presented themselves for work without the required safety glasses; that the Respondent unlawfully threatened employee Don Russell; and that the Respondent unlawfully restricted Russell's movements around the facility while he was acting steward.

Regarding the Respondent's unilateral change to the transfer of aluminum at its facility, we observe that the Sec. 10(k) jurisdictional decision on which the Respondent relies, *Teamsters Local 20 (Midwest Terminals of Toledo International, Inc.)*, 359 NLRB 983 (2013), was invalidated under the Supreme Court's ruling in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). However, neither party has argued that the jurisdictional decision is not binding on the parties to that dispute, and in any event, we find that it provides no support for the Respondent's exceptions in this proceeding.

With respect to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(3) and (1) by issuing a written disciplinary warning to employee Don Russell, we agree with the judge that the Respondent has met its rebuttal burden by demonstrating that it would have issued the discipline to Russell even in the absence of his protected conduct. See *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Specifical-

and to adopt the recommended Order as modified and set forth in full below.²

Our dissenting colleague would dismiss the allegation that the Respondent violated Section 8(a)(5) by unilaterally eliminating informal crane training³ for unit employees who were not formally trained and certified by the National Commission for the Certification of Crane Operators (NCCCO). In his view, the Union never request-

ly, the Respondent established that it would have disciplined Russell for leaving the barge on which he was working without notifying his supervisor irrespective of any protected activity on Russell's part. Accordingly, in affirming the judge's dismissal, we need not pass on his analysis applying *Atlantic Steel Co.*, 245 NLRB 814 (1979), or on his analysis of the General Counsel's initial burden under *Wright Line*.

The administrative law judge relies on *Midwest Terminals of Toledo International*, 362 NLRB No. 57 (2015). On March 21, 2017, the United States Supreme Court issued its decision in *NLRB v. SW General, Inc. d/b/a Southwest Ambulance*, 580 U.S. ___, 137 S. Ct. 929 (2017), holding that, under the Federal Vacancies Reform Act of 1998, Lafe Solomon's authority to take action as Acting General Counsel of the National Labor Relations Board ceased on January 5, 2011, after the President nominated him to be General Counsel. See 2017 WL 1050977. Thereafter, the court of appeals vacated the Board's Decision and Order at 362 NLRB No. 57 (2015) and remanded this case for further proceedings consistent with the Supreme Court's decision. On remand, the Board considered *de novo* the judge's decision and record in light of the exceptions and briefs, and agreed with the rationale set forth in the now-vacated Decision and Order. Accordingly, the Board affirmed the judge's rulings, findings, and conclusions. 365 NLRB No. 157 (2017).

² In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall include the requisite tax compensation and Social Security reporting remedy, and shall modify the judge's recommended Order and substitute a new notice to reflect this remedial change and to conform to the violations found and the Board's standard remedial language. Further, in accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), *enfd.* in pertinent part 859 F.3d 23 (D.C. Cir. 2017), we shall order the Respondent to compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, 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).

For the reasons stated in his separate opinion in *King Soopers*, *supra*, slip op. at 9-16, Chairman Miscimarra would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

³ In finding that the Respondent violated Sec. 8(a)(5) by unilaterally ceasing informal crane training, the judge did not distinguish between training on the Liebherr and Lucas cranes. The Respondent asserts that "the record is clear" that the alleged change pertained only to Liebherr cranes and not "the old, out of service Lucas cranes," and that "[t]he General Counsel controls the Complaint, not . . . judge Bogas." Contrary to the Respondent's assertion, however, the complaint is not confined to Liebherr cranes; it alleges that the Respondent "unilaterally ceased its practice of allowing bargaining unit employees to obtain on the job training . . . on cranes." In any event, we find it unnecessary to decide whether the Respondent unlawfully ceased informal training on the Liebherr cranes only, or on both the Liebherr and the Lucas cranes, because it would not materially affect the remedy.

ed bargaining over this change, the Respondent actually never implemented a “change,” and our finding of a violation conflicts with Section 8(d) of the Act. We are not persuaded by these arguments.

I.

The Board and the courts alike have recognized that a request to bargain “need take no special form, so long as there is a clear communication of meaning.” *Armour & Co.*, 280 NLRB 824, 828 (1986) (internal quotation omitted); see also *NLRB v. Barney’s Supercenter, Inc.*, 296 F.2d 91, 93 (3d Cir. 1961) (“a request to bargain need follow no specific form or be made in any specific words so long as there is a clear communication of meaning, and the employer understands that a demand is being made”); *Sunoco, Inc.*, 349 NLRB 240, 245 (2007) (same); *In re Indian Memorial Hospital, Inc.*, 340 NLRB 467, 469 (2003) (same). Applying these principles, it is clear that the Union made a bona fide demand for bargaining in this case. At a meeting in April or May 2013,⁴ while the parties were discussing training for unit employees, Union President Otis Brown expressed concern that employees would be set up for failure if they were required to attend a formal crane training program and take the NCCCO written and practical examinations without first getting informal “seat time” training.⁵ (Tr. 783–784.) During a follow-up conversation on June 5 between Brown and Director of Operations Terry Leach, Leach asked the Union to suggest two unit employees to participate in a formal crane training program in July.⁶ Brown responded that July was too soon because the employees that he had identified had never been in a

crane before and they would be at a great disadvantage unless they had some seat time first. Brown added that the training committees “need to sit down and work out something to get these guys some seat time.” (Tr. 784.) Shortly after the June 5 conversation, Brown emailed Leach and asked when they could meet. (Tr. 785.) He also tried to call Leach to set up a meeting. (Tr. 787.)

On June 14, after receiving no response from Leach, Brown sent Human Resources Manager Christopher Blakely a letter explaining that the Union could not agree to the July date because the trainees needed seat time before they attended formal training. Brown ended the letter by stating that “once again I am hereby asking the company when our training committees can meet to work out the details for this crane training program. Please, let me know as soon as possible.” (GC Exh. 6.)

In late June, Leach again approached Brown about enrolling the employees in the July training session. Brown reminded Leach that they had discussed the need to first provide the employees with seat time and he requested that they “sit down and work this out about the seat time . . . that we had talked about.” (Tr. 790.) Leach replied that the crane school administrators preferred that the employees have no experience that might “taint their minds.” Brown disagreed and suggested that they set up a conference call with the crane school to discuss the matter, but Leach, who was in his truck, ended the conversation by abruptly driving away. *Id.* Even after Leach brushed Brown off and drove away, Brown continued his efforts to reach Leach to discuss the seat time issue, but his efforts were ignored.⁷

There can be little doubt based on this sequence of events that the Union sought to bargain with the Respondent about providing seat time for crane trainees. Every time the subject arose, Brown expressed the Union’s position that the trainees needed seat time before they attended formal training and he repeatedly requested that the parties meet to discuss the issue. In these circumstances, we find that Brown clearly communicated a desire to bargain over the Respondent’s refusal to provide seat time as opposed to merely objecting to, protesting, or complaining about the Respondent’s decision. See *Armour & Co.*, *supra*, 280 NLRB at 828 (finding a request for bargaining where the union stated that it

⁴ All dates are in 2013 unless otherwise specified.

⁵ Until 2010, the Respondent’s crane operators received only informal, on-the-job training, which consisted of the following: first, the trainee performed maintenance on the crane under the instruction of an experienced operator; second, the trainee sat in the cab of the crane and observed as an experienced individual operated the crane; and third, the trainee operated the crane while an experienced operator was present in the cab to provide oversight. The third step is referred to as “seat time.” The Respondent’s practice has been to allow a senior unit member to provide this informal training.

In 2010, the Respondent began requiring formal crane training through an outside organization to prepare employees for NCCCO certification, which entailed passing written and practical examinations. Between 2010 and 2013, a number of unit employees, including Union President Otis Brown, who had already been trained in crane operations through the informal procedures described above, attended the formal crane training program and became NCCCO certified. Three of these employees, Brown included, were allowed to have informal seat time training on the Liebherr cranes and even to operate the cranes without first receiving NCCCO certification. Although they were experienced crane operators, Brown and other unit employees had to take the NCCCO examination multiple times before they passed.

⁶ The judge incorrectly stated that this conversation occurred in April or May, instead of June 5. We correct the judge’s error, which does not affect our disposition of this case.

⁷ Brown testified that he tried to call Leach multiple times after their late June conversation, but Leach did not respond. (Tr. 791.) We do not rely on an email the judge referred to as having been sent from Brown to Leach after their late June conversation. Brown testified that he sent Leach an email after their June 5 conversation. His testimony is ambiguous concerning whether he also sent Leach an email after their late June conversation, and no such email was made a part of the record.

“would like the opportunity to *discuss* with your company your position”) (emphasis in original).⁸

II.

We also reject our colleague’s view that the Respondent never implemented an actual “change” in its informal training practices. That view is contrary to both credited record testimony and the parties’ past practice, which was firmly rooted in their expired collective-bargaining agreement.

Our colleague asserts that the Respondent asked the Union to identify two employees to undergo the formal training necessary for NCCCO certification, and that the Union did not do so. Thereafter, as he notes, the Respondent did not arrange or provide for training of any kind for unit employees. This, according to our colleague, constituted maintenance of the status quo, not an unlawful unilateral change. We disagree.

Union President Brown in fact identified three potential trainees to Leach, and in early June told Leach that “I got the guys, they’re ready to go.” (Tr. 782–783.) As discussed above, the sticking point was that Leach wanted to send the employees for formal training and

NCCCO certification in July, and Brown maintained that this was too soon; he wanted to sit down and work out with the Respondent how to get some informal seat time for the prospective trainees beforehand. Brown followed up with Leach and also wrote to Human Resources Manager Blakely about getting the employees some informal seat time prior to the formal training (see GC Exh. 6), but this was to no avail.

Then, in late June, when Leach again approached Brown about sending two unit employees to formal crane training in July, Brown told Leach that he had checked on the availability of formal training in September or October, and stated that “we could sit down and work this out about the seat time.” (Tr. 790.) Leach responded that the outside trainers he had talked to were opposed to employees receiving informal seat training before the formal training because it would “taint their minds,” and then abruptly cut off the conversation by simply driving away. From there on in, Leach ignored Brown’s continued efforts to get in touch with him about the matter. The Respondent’s silence plainly closed the door on any possibility of crane trainees receiving informal seat training before going through the formal training and receiving NCCCO certification. In those circumstances, we have no trouble concluding that the Respondent in fact had changed existing terms and conditions of employment by implementing a requirement that employees obtain formal crane training and certification before they could receive any informal seat time training.

Further, that change clearly was a departure from the parties’ past practice under the applicable collective-bargaining agreement. That agreement provided that when conditions of “seniority” and “work availability” warrant it, “a crane operator trainee *will* be placed in the crane along with the crane operator for purposes of training.” (Emphasis added.) Indeed, as the judge noted and the dissent acknowledges, between 2010 and 2013, three of the Respondent’s employees, Brown included, were allowed to have informal seat time training on the Liebherr cranes, and even to operate the cranes, without first receiving NCCCO certification. Nonetheless, in late June 2013, the Respondent reneged on the still-binding terms of the collective-bargaining agreement and told the Union that it would no longer adhere to the parties’ past practice. Thus, contrary to our colleague’s view, there *was* a change to the status quo here. Historically, employees had access to informal seat training without the obstacle of a formal training course and NCCCO certification. Since late June 2013, they have not. That was an unlawful unilateral change under the *Katz* doctrine. See *NLRB v. Katz*, 369 U.S. 736 (1962).

⁸ *Ohio Edison Company; First Energy Generation Corp. v. NLRB*, 847 F.3d 806 (6th Cir. 2017), cited by our dissenting colleague, is distinguishable. In *Ohio Edison*, the employer informed the union’s president of a number of planned changes, including significant reductions in the employees’ 401(k), retiree life-insurance and educational-reimbursement benefits, and also a modest modification to the Employee Service Recognition Program. The union president replied, “Oh no you don’t! Again? Now you know I have to file a board charge honey.” 847 F.3d at 809. He further stated that he would “have to come to Akron [the respondent’s headquarters] for this one.” *Id.* The only change litigated in *Ohio Edison* was the modification to the employee recognition program. The Board found that the union president’s statements constituted a request for bargaining over the changes to the program, and that the union president had sufficiently “expressed a desire to discuss the matter with the decisionmaker.” *Ohio Edison Co.*, 362 NLRB No. 88, slip op. at 1–2 fn. 5 (2015). In denying enforcement, the court agreed that “[a] request to bargain need follow no specific form or be made in any specific words so long as there is a clear communication of meaning, and the employer understands that a demand is being made,” 847 F.3d at 810, quoting *NLRB v. Barney’s Supercenter, Inc.*, supra, 296 F.2d at 93. However, the court found that the union president’s comments merely expressed disapproval and did not clearly communicate a request to bargain over the changes to the employee recognition program. In so finding, the court emphasized the relative insignificance of the employer’s change to the employee recognition program, compared to the more significant financial consequences of the employer’s other simultaneously announced changes. Under those particular factual circumstances, the court was “skeptical that [the union president’s] comments reflected a desire to bargain about [the employee recognition] program in particular” as opposed to the other three “big-ticket” items the employer proposed to change. 847 F.3d at 811. By contrast, here Brown’s repeated requests to meet and “work this out about the seat time” clearly communicated a desire to engage in bargaining and there can be no doubt that Brown was specifically seeking bargaining over the Respondent’s refusal to provide seat training as opposed to some other issue or issues.

III.

Finally, our decision is not, as our colleague asserts, at odds with Section 8(d) of the Act or the Supreme Court's decision in *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). As the Court explained in *H.K. Porter*, Section 8(d) prohibits the Board from "compel[ing] agreement when the parties themselves are unable to agree." 397 U.S. at 108. Our Decision and Order does no such thing. It does not impose a substantive term on the Respondent; it merely requires the Respondent to restore the status quo while it meets its obligation to bargain in good faith with the Union. If, after bargaining in good faith, the parties agree to modify or eliminate informal seat time training, or they reach a valid impasse, the Respondent will be free to implement the change.⁹

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to offer Otis Brown full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. We shall further order the Respondent to make Otis Brown 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), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We shall also order the Respondent to compensate Otis Brown for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. *King Soopers*, 364 NLRB No. 93, supra fn. 2. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In addition, having found that the Respondent unlawfully denied pay to Prentis Hubbard, and unilaterally changed its past practices regarding the transfer of aluminum, the unloading of calcium, and the availability of informal crane training for unit employees, we shall order the Respondent to rescind these unilateral changes

⁹ While the parties are engaged in negotiations for a successor collective-bargaining agreement, the Respondent must refrain from implementing any changes in terms and conditions of employment until the parties have reached an agreement or overall impasse in the negotiations for an agreement as a whole, absent certain exceptions not applicable here. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991).

and make Prentis Hubbard and the other unit employees whole for any loss of earnings and other benefits attributable to its unlawful conduct. These make-whole remedies shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Midwest Terminals of Toledo International, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees without first notifying the International Longshoremen's Association, Local 1982 (the Union) and giving it an opportunity to bargain.

(b) Discharging or otherwise discriminating against employees for supporting the Union or any other labor organization, or for participating in the Board's processes.

(c) Denying pay to employees because of their support for and activities on behalf of the Union or because of their participation in the Board's processes.

(d) Threatening employees with a delay in processing their worker's compensation claims if they engage in activities on behalf of the Union.

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

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

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

"[E]mployees of the Company in stevedore and warehouse operations such as longshoremen, warehousemen, crane operators, power operators, checkers, signalmen, winchmen, linemen, line dispatcher, dock steward and hatch leaders...[but not] office, clerical, professional and supervisory and security employees."

(b) Rescind the change regarding the transfer of aluminum that was unilaterally implemented in August 2013, the change regarding the unloading of calcium that was unilaterally implemented in November 2013, and the change regarding the availability of informal crane train-

ing for unit employees that was unilaterally implemented after June 23, 2013.

(c) Make the unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Within 14 days from the date of this Order, offer Otis Brown full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(e) Make Otis Brown whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify Otis Brown in writing that this has been done and that the discharge will not be used against him in any way.

(g) Make Prentis Hubbard whole for any loss of earnings and other benefits suffered as a result of the unlawful denial of wages to him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(h) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 8, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its Toledo, Ohio facility, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 8, after

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 June 23, 2013.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 8 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 15, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, dissenting in part.

I agree with my colleagues' decision that the Respondent's treatment of Prentis Hubbard violated Sections 8(a)(4) and (3) of the Act.¹ Yet, I disagree with my colleagues' finding that the Respondent violated Section 8(a)(5) based on the claim that the Respondent unilaterally "discontinued" informal crane training (commonly referred to as "seat time") without giving the Union notice and the opportunity for bargaining.

The record establishes that, in about 2010, the Respondent began using two new mobile cranes, known as

¹ I agree that the Respondent violated Sec. 8(a)(4) and (3) with respect to the finding that Hubbard was unlawfully denied pay to which he was entitled. In this regard, however, I would find it unnecessary to pass on the related 8(a)(5) allegation because finding this violation would be cumulative and would not materially affect the remedy.

Liebherr cranes.² In connection with the transition to the Liebherr cranes, the Respondent sought to have employees get certification from the National Commission for the Certification of Crane Operators (NCCCO), which involved attending a 2-week course. It is uncontroverted that the Respondent permitted three incumbent employees/crane operators to operate the Liebherr cranes before receiving NCCCO certification.

In early 2013, representatives of the Respondent and the Union discussed having training for potential new crane operators. In June 2013, the Respondent's representative, Terry Leach, asked Union Representative Otis Brown to identify two unit employees who could attend the course associated with NCCCO training, which the Respondent wanted to occur before the employees had informal "seat time" in the Liebherr cranes. Union Representative Brown took the position that the order should be reversed—that any new employee-trainees should be given informal "seat time" training first, rather than immediately attending a third-party course. After several exchanges, the parties were unable to resolve this difference. The Union never requested bargaining on the issue, and there is no evidence that the Respondent refused to engage in bargaining.

In the circumstances presented here, I believe three considerations render unreasonable my colleagues' finding that the Respondent violated Section 8(a)(5) of the Act in regard to operation and training issues pertaining to the Liebherr cranes.

First, even if the Respondent implemented a change—specifically, whether or when Liebherr crane NCCCO training and informal "seat time" would take place—the record establishes that these issues were raised in advance with the Union, and there is no evidence that the Union requested bargaining. In the absence of a bargaining request, particularly when the Union was given advance notice of an employer's potential changes, the Board cannot find that the employer's unilateral implementation of the changes violated Section 8(a)(5).³ As the Sixth Circuit recently reaffirmed, it is well-established that "the bargaining representative must do more than merely protest the change; it must meet its obligation to request bargaining." *YHA, Inc. v. NLRB*, 2 F.3d 168, 173 (6th Cir. 1993) (quoting *Jim Walter Resources*, 289 NLRB 1441, 1442 (1988)).⁴

² There is no allegation that the Respondent violated any duty to bargain regarding the commencement of using these new cranes.

³ By finding that the Union sufficiently requested bargaining here, my colleagues implicitly concede that the Respondent provided the Union with sufficient notice and an opportunity to bargain over the alleged "change" pertaining to informal crane training.

⁴ *Ohio Edison Co.; First Energy Generation Corp. v. NLRB*, 847 F.3d 806 (6th Cir. 2017), denying enforcement of the Board's order in

I believe the record contradicts my colleagues' conclusion that the Union requested bargaining. Here, the majority relies on Union President Brown's testimony to the effect that he suggested the parties could further discuss "seat time." Yet, the evidence precludes any finding that this constituted a "request" for bargaining. To the contrary, the facts reveal that the parties, through Brown and Leach, had *already* discussed the sequence of the NCCCO certification training and seat time, and Leach made clear that the NCCCO training must come first for prospective new trainees lacking prior Liebherr crane experience. Brown never requested bargaining over this issue. At most, this testimony suggests that Brown merely persisted in the position he had staked out previously regarding this issue; Brown continued to argue for seat time to precede NCCCO training. See *Ohio Edison v. NLRB*, 847 F.3d at 810 ("[T]o protest is to seek change by expressing disapproval; to request bargaining, in contrast, is to seek change by signaling a willingness to offer something in return.").

Second, there is a more fundamental reason that the Board cannot reasonably find that the Respondent's actions regarding the Liebherr cranes violated Section 8(a)(5): the record does not establish that the Respondent implemented any "change" affecting the timing or requirements pertaining to formal NCCCO training and informal crane operator "seat time." It is important to remember that the parties had no past practice regarding the issue of training on the new cranes. Further, the Liebherr cranes are not owned by the Respondent, but rather by the Toledo-Lucas County Port Authority (Port Authority), which permits the Respondent to operate them under specified conditions. The Port Authority's conditions, which are set forth in a March 8, 2011 letter of agreement from the Port Authority to the Respondent, include that all operators of the Liebherr cranes must "be fully trained in the operation of the [Liebherr] Cranes, which shall include, but not be limited to, the requirement that each Crane operator obtain and maintain a NCCCO Crane Operator Certification"

In raising these issues with the Union, the Respondent asked the Union to suggest two employees who could take the course associated with NCCCO training. The record establishes that, after the Union chose not to identify anyone in the bargaining unit who would participate in the NCCCO training without first receiving informal "seat time" training, the Respondent never moved forward with *any* changes or additional training—formal or

Ohio Edison Co., 362 NLRB No. 88 (2015). The court denied enforcement of the Board majority's decision for reasons similar to those expressed in my partial dissenting opinion in the case. See *id.*, slip op. at 3–6 (Member Miscimarra, concurring in part and dissenting in part).

informal—for employees regarding operation of the Liebherr cranes. Without the actual implementation of a unilateral change, the Board cannot reasonably find that the Respondent engaged in unilateral actions that violated Section 8(a)(5). See *Post-Tribune Co.*, 337 NLRB 1279, 1280 (2002) (“[W]here an employer’s action does not change existing conditions—that is, where it does not alter the status quo—the employer does not violate Section 8(a)(5) and (1).”) (citing *House of the Good Samaritan*, 268 NLRB 236, 237 (1983)). See generally *NLRB v. Katz*, 369 U.S. 736, 743 (1962) (holding that a “unilateral change in conditions of employment under negotiation . . . is a circumvention of the duty to negotiate”).

Third, the record establishes that the substance of the parties’ dispute—whether classroom training should occur before or after “seat time” training—remains unresolved, and as to the merits of this dispute, the Board lacks authority to make any particular resolution binding on the parties. Here, the Board’s lack of authority is explicit in our statute: Section 8(a)(5) makes it unlawful for an employer to engage in a refusal to bargain collectively, and Section 8(d)—which defines the phrase “bargain collectively”—states the duty to bargain “does not compel either party to agree to a proposal or require the making of a concession.” See also *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 102, 108 (1970) (“[W]hile the Board does have power under the National Labor Relations Act . . . to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement. . . . [A]llowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.”)

For these reasons, as to the above issue, I respectfully dissent.

Dated, Washington, D.C. December 15, 2017

Philip A. Miscimarra, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT change your terms and conditions of employment without first notifying International Longshoremen’s Association, Local 1982 (the Union) and giving it an opportunity to bargain.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Union or any other labor organization, or for participating in the Board’s processes.

WE WILL NOT deny any of you pay because of your support for and activities on behalf of the Union or because of your participation in the Board’s processes.

WE WILL NOT threaten any of you with a delay in processing your worker’s compensation claims if you engage in activities on behalf of the Union.

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

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

“[E]mployees of the Company in stevedore and warehouse operations such as longshoremen, warehousemen, crane operators, power operators, checkers, signalmen, winchmen, linemen, line dispatcher, dock steward and hatch leaders...[but not] office, clerical, professional and supervisory and security employees.”

WE WILL rescind the change in the terms and conditions of employment for our unit employees regarding the transfer of aluminum that we unilaterally implemented in August 2013, the change regarding the unloading of calcium that we unilaterally implemented in November 2013, and the change regarding the availability of informal crane training for unit employees that we unilaterally implemented after June 23, 2013.

WE WILL make you whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes, plus interest.

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

WE WILL make Otis Brown whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

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

WE WILL make Prentis Hubbard whole for any loss of earnings and other benefits resulting from his denial of pay, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 8, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

MIDWEST TERMINALS OF TOLEDO
INTERNATIONAL, INC.

The Board's decision can be found at www.nlr.gov/case/08-CA-119493 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.



Cheryl Sizemore, Esq., for the General Counsel.
Ronald L. Mason, Esq. and *Aaron T. Tulencik, Esq.*, of Dublin, Ohio, for the Respondent.
Otis Brown, of Toledo, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Cleveland, Ohio, on December 1, 2, and 3, 2014; in Toledo, Ohio, on January 27, 28, 29, and 30, and April 7, 8, and 9, 2015; and in Bowling Green, Ohio, on April 20, 2015. The International Longshoremen's Association, Local 1982, AFL-CIO (the Union, the ILA, or the ILA local) filed the charge in case 08-CA-119493 on December 23, 2013, and amended charges on February 13 and April 30, 2014. Prentis Hubbard, an individual, filed the charge in case 08-CA-119535 on December 23, 2013, and amended charges on February 10, March 18, and April 22, 2014. The Acting Regional Director for Region 8 of the National Labor Relations Board (the Board) filed the Consolidated Complaint (the Complaint) on April 30, 2014. The Complaint alleges that Midwest Terminals of Toledo International Inc. (the Respondent) violated Section 8(a)(5) when it reassigned certain bargaining unit work involving aluminum and calcium to nonunit employees, ceased to provide on-the-job and formal training for unit employees on cranes and mobile equipment, allowed supervisors and other nonunit employees to perform unit work, changed its grievance procedure, and refused to pay union steward Hubbard for a portion of a shift on which he was injured. The complaint also alleges that the change in grievance procedures was inherently destructive of Section 7 rights in violation of Section 8(a)(3) and (1). The complaint further alleges that the Respondent violated Section 8(a)(1) by making threatening statements to Hubbard and Don Russell, and by restricting Russell's movements around the facility.

The complaint also alleges that the Respondent discriminated in violation of Section 8(a)(3) and (1) and Section 8(a)(4) and (1) of the Act when it discharged union steward Otis Brown and when it refused to pay Hubbard for a portion of a shift on which he was injured, and that it discriminated in violation of Section 8(a)(3) and (1) when it disciplined and refused to hire two employees who appeared for an assignment without protective eye glasses and when it restricted Russell's movements around the facility and disciplined him.

The Respondent filed a timely answer in which it denied that it had committed any of the alleged violations. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, provides stevedoring services at its facility in Toledo, Ohio. From these activities, the Respondent derives annual gross revenues in excess of \$500,000. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

Since 2004, the Respondent has provided stevedoring and warehousing services at the Port of Toledo in Toledo, Ohio. Its work includes unloading and loading cargo vessels, railcars and trucks, and moving cargo to and from warehouses. The Respondent and its predecessors at the port facility have a decades-long bargaining history with the ILA. The Respondent also has a separate bargaining relationship with unit of employees that are represented by Teamsters Local 20 (Teamsters). Generally, the ILA unit performs stevedoring and warehouse work on what is known as the “wet side” of the Respondent’s facility, while the Teamsters unit works on the “dry side.” The wet side of the facility runs along the Maumee River where the vessels dock in order to be unloaded or loaded. To do their work, the ILA workers operate a variety of types of equipment, including forklifts, front end loaders (end loaders), and cranes. The “order of call” list for April 2014, lists 36 individuals in the ILA bargaining unit.¹ Of those individuals, six were “skilled list” employees who were generally expected to work on a daily basis during the shipping season. The other employees were on the “regular list,” which meant they worked more intermittently and generally only when there was no skilled list employee available and qualified to do the work. If, after the skilled list and regular list had been exhausted, there were still openings, the Respondent hired from the casual/new-hire list.

The Teamsters unit performs warehouse work on the “dry side” of the facility, which does not about the Maumee River. The dry side of the facility is separated from the wet side by St. Lawrence Drive, a road that runs through the property. There are a total of six warehouses at the facility—three on the wet side and three on the dry side. To do their work, the Teamsters-represented employees generally operate forklifts.

The most recent collective-bargaining agreement between the Respondent and the ILA² covered the period from January 1, 2006, to December 31, 2010. At the time of the hearing, and of all the alleged violations, the Respondent and the ILA continued to be bound by the terms of this expired agreement. The evidence shows that during a period from approximately April 2010 to July 2012, the ILA local was placed in trusteeship based on the perceived failure of the local officers to process grievances and carry out other daily duties. During the trusteeship, officials of umbrella ILA organizations served as the trustees of the ILA local. In July 2012, local leadership took control back from the trustees. Otis Brown, whose discharge is a subject of the complaint, became the new president of the ILA local at that time.

¹ The order of call list is prepared by the Respondent with input from the ILA.

² That collective bargaining defines the unit as comprised of “employees of the Company in stevedore and warehouse operations such as longshoremen, warehousemen, crane operators, power operators, checkers, signalmen, winchmen, linemen, line dispatcher, dock steward, and hatch leaders.”

B. Loading and Transfer of Aluminum

Facts

1. Past Practice: The General Counsel alleges that since about July 1, 2013, the Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally depriving ILA-represented employees of work regarding the loading and/or transfer of aluminum cargo. When barges carrying aluminum dock at the Respondent’s facility, ILA-represented employees unload the aluminum and stage it on the wet side of the dock. The evidence shows that from at least the time the Respondent took over the dock operation in 2004 until August 2013 the established practice was that the aluminum staged on the wet side was transported to warehouses on the dry side using transfer trucks. Those trucks were loaded by ILA-represented employees using forklifts, but driven by non-ILA employees. After the trucks were loaded, the ILA workers would have no further involvement with that aluminum. During some period of time before 2010, the Respondent’s Teamsters-represented employees drove the transfer trucks that ILA members loaded, but during the time period immediately preceding the alleged violation, employees of a third-party trucking company drove the trucks.

The dispute involves the Respondent’s decision to stop using ILA workers to load aluminum onto trucks prior to moving it from the wet side to the dry side, and instead have Teamsters-represented employees enter the wet side of the dock on forklifts, and use those forklifts to scoop up the aluminum and move it to the dry side of the dock. This change meant that the ILA-represented employees were deprived of the work of loading the aluminum for transport to the dry side. Terry Leach, the Respondent’s director of operations since July 2007, testified that the new system allowed him to move the aluminum “ten times faster” than the system that used transfer trucks loaded by the ILA members.

At the hearing, the Respondent contended that before the time of the alleged change, it was already the company’s practice to have Teamsters-represented employees drive forklifts onto the wet side of the dock to pick up the aluminum and carry it back to the dry side of the dock. That contention is rebutted by the credible evidence. Multiple witnesses for the General Counsel, including present and former employees Brown, Christopher Fussell, Kevin Newcomer, and Miguel Rizo credibly testified that it was a change in the established practice when, in 2013, the Respondent began having Teamsters enter the wet side on forklifts to transfer aluminum to the dry side. This testimony from the General Counsel’s witnesses was supported even by the Respondent’s own witness, Charles Erichson, a Teamsters steward who has worked at the facility since before the Respondent took over the operation. Erichson testified that the standard practice had always been for aluminum to be moved from the wet side to the dry side using transfer trucks loaded by the ILA employees. Erichson did recount that, for a period in 2005 and 2006, the Respondent had occasionally used Teamsters-operated forklifts to transfer aluminum from the wet side to the dry side when the quantity was small, but he stated that even during that period the ILA-loaded transfer trucks were the standard means of moving the aluminum. Erichson testified

that even this limited use of Teamster-operated forklifts to transfer aluminum from the wet side had ceased after about 2006.

I find that the testimony recounted above, and the record as whole, outweighs Leach's contrary assertion that having Teamsters members transport aluminum by driving forklifts onto the wet side of the facility was not a change from the past practice. That assertion was contrary to Leach's own prior sworn statement recognizing that the Respondent had previously moved the aluminum by having the ILA members "load[] the material in third-party trucks." See Transcript at page(s) (Tr.) 539 ff. Moreover, Leach's testimony that there was not a change in practice is inconsistent with his contemporaneous efforts, described below, to justify using Teamsters-operated forklifts to transfer aluminum from the wet side by claiming that doing so was a change authorized by a recent—April 30, 2013—decision by the Board.³ Similarly, Brad Hendricks, the Respondent's operations manager, identified the Board's April 30 decision, rather than past practice, as the Respondent's basis for beginning to send Teamsters-represented employees to the wet side on forklifts to transport material. (Tr. 1245–1246.)

2. Prior Jurisdictional Decision: On April 30, 2013, the Board issued a decision in a jurisdictional dispute proceeding under Section 10(k) of the Act regarding the division of work between the ILA unit and the Teamsters unit at the Respondent's facility. 359 NLRB 983 (2013).⁴ In that decision, the

³ In general, I found Leach a less than fully credible witness regarding disputed matters. His testimony was, by turns, unusually evasive, see e.g., Tr. 1790–1794 (avoids answering reasonable questions by repeatedly claiming that he does not understand them, and by interposing his own objection that a document speaks for itself), Tr. 1797–1798 (convenient lapses in memory), Tr. 723 (When asked if he knew whether a maintenance employee requested that an outside mechanic state in his report that an ILA member's error was the cause of damage, Leach did not initially answer, but rather adopted an indignant demeanor and stated "Why would [the maintenance employee] do something like that?") As discussed, *infra*, the record shows that, in fact, the maintenance employee did make such a request to the outside mechanic, and self-contradictory, see, e.g., Tr. 1737–1740 (Leach testifies that Teamsters were "busy bees" on the wet side of facility and used forklifts to transfer cargo from the wet side to the dry side, but in his prior affidavit Leach stated that if product needed to be transferred from the wet side to the dry side the Respondent used transfer trucks), Tr. 1805–1808 (first Leach testifies that Brown did not unload ships using the Liebherr cranes prior to becoming certified, then Leach testifies that he does not recall whether Brown unloaded ships using the Liebherr cranes prior to becoming certified, and then Leach emphatically testifies that Brown did not unload ships using the Liebherr cranes prior to becoming certified). Moreover, some of Leach's behavior on the stand bordered on bizarre. For example, at one point when counsel for the General Counsel directed his attention to portions of an exhibit, Leach dramatically lurched back in the witness stand and raised his hands as if to fend off a physical attack by counsel. In another, he excitedly interrupted counsel for the General Counsel's examination and complained that counsel did not have to "yell at" him, even though counsel was posing questions in a manner that was measured and appropriate in both volume and tone. Tr. 551–552.

⁴ This Section 10(k) decision was issued by the Board during the period when the Supreme Court later held that the Board lacked a valid quorum. See *NLRB v. Noel Canning*, See *NLRB v. Noel Canning*, ___ U.S. ___, 134 S.Ct. 2550 (2014). However, no party to the Section

Board considered the applicable standards and decided to assign work between the ILA unit and the Teamsters unit "in accordance with the Employer's past practice." The Board rejected the Respondent's request to have the disputed work assigned exclusively to the Teamsters unit since the Respondent's request was, in the Board's words, "unsupported by considerations of economy, efficiency, or skill, and it is contrary to the Employer's past and current practice." The Board held that the ILA employees were "entitled to perform, in a manner consistent with past practice, all loading, unloading and movement of cargo and material on the wet side of St. Lawrence Drive . . . including the loading of any trucks used to transfer cargo and materials across St. Lawrence Drive, subject to the proviso set forth below." The Board further stated that the Teamsters employees "are entitled to perform the loading, unloading, and movement of cargo and materials on the east/dry side of St. Lawrence Drive at the Employer's facility; provided, that these employees are also entitled to enter the west/wet side of the facility in order to transport cargo that is to be transferred from the wet side to the dry side across St. Lawrence Drive." "As to the work of transporting cargo from the wet side over to the dry side, currently being performed by the [third-party] trucking company," the Board explained, "we award the work to the Teamsters-represented employees because they are capable of performing this work and did so before the Employer contracted with the trucking company in 2007." The Board in no way suggested that in awarding the existing work of transporting material from the wet side to the dry side to the Teamsters unit, it was authorizing the Respondent to deprive the ILA-represented employees of the work that they had historically done loading the transfer trucks. In fact, the Board's decision makes multiple references to continuing the past practice and to the past practice of using trucks loaded by the ILA unit to perform this work, but make no reference at all to Teamsters members on forklifts entering onto the wet side of the facility. The Respondent's claim that the Board's jurisdictional decision deprived the ILA-represented employees of the right to the aluminum loading work that those employees had performed under the established past practice is consistent with what the Respondent tried to accomplish during that proceeding, but it is not consistent with what it actually did accomplish. That decision did not authorize the Respondent's action and, if anything, is at odds with it, since the Board explicitly awarded the ILA-represented employees the work of loading trucks to transport material from the wet side to the dry side consistent with past practice.

3. Subsequent Confrontations at the Dock Regarding the Use of Teamsters-Operated Forklifts to Transfer Aluminum: On June 1, 2013, the Respondent had Teamsters-represented employees drive three to five forklifts to the wet side of the dock to pick up and move aluminum to the dry side of the dock.

10(k) proceeding appealed the Board's decision. Therefore, the Board's decision regarding how work at the Respondent's facility is to be divided between the ILA unit and the Teamsters is binding on the parties to that dispute. The General Counsel and the Respondent discuss the 10(k) decision in their posthearing briefs in the instant case, but neither contends that the validity of the Board's jurisdictional determination is undermined by *Noel Canning*.

The ILA immediately challenged the Respondent's action and when the Respondent did not cease, the ILA employees stopped staging the aluminum where the Teamsters employees could reach it on their forklifts. Then three ILA unit employees—Hubbard, Fred Victorian Jr.,⁵ and Russell Sims—met with Leach about the matter. Leach told the three employees that the Board's April 30, 2013, decision in the 10(k) proceeding had authorized the Respondent to use the Teamsters to pick up the aluminum on forklifts. Hubbard contradicted that, stating that the Board ruled that the Teamsters could transport the aluminum consistent with the past practice of using trucks loaded on the wet side by ILA-represented employees. Victorian seconded Hubbard's position, and the conversation between Hubbard and Leach became heated. Leach held his thumb and index finger close together and told Victorian, "I'm about this far off your ass." Eventually, Leach told Hubbard that the ILA-represented employees should go back to work and that he had directed the Teamsters-represented employees to stop using forklifts to retrieve aluminum from the wet side of the facility.

Approximately 2 months later, on August 5, Leach raised the issue again—informing Hubbard that Teamsters-represented employees would be driving to the wet side on forklifts that day to pick up and move aluminum. Hubbard responded that this was not permissible, and Leach said that he would contact Brown about the issue. Subsequently, Hubbard talked to Brown, who told Hubbard to have the ILA-represented employees gather where the Teamsters-represented employees were driving forklifts onto the wet side of the facility. The ILA members blocked the path of the Teamsters members and one of the ILA members urged the Teamsters not to "come over here and start no shit." Leach and Brown both arrived at the scene, and Brown stated to Leach, "you can't have them coming over here taking our stuff." Leach showed Brown a copy of the Board's April 30 decision in the Section 10(k) case and told Brown that the decision provided that the Teamsters-represented employees could enter the wet side on forklifts to retrieve the aluminum. Brown disputed Leach's claim about what the decision said, and eventually Leach said, "It's going to stop now. Y'all go on back to work." The ILA members resumed their normal duties. On August 10, the ILA received information that Teamsters members were again moving material from the wet side using forklifts. Since approximately that time, the Respondent has been having Teamsters members use forklifts to move aluminum from the wet side to the dry side of the facility.

Analysis

The General Counsel alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its practice regarding the ILA-represented employees' participation in the transfer of aluminum from the wet side of the facility. As discussed above, in the late summer or early fall of 2013, the Respondent changed how it moved aluminum from

⁵ There are references in the record to four different employees with the surname Victorian. Of those four, Fred Victorian Jr. plays the most prominent role in the litigation and I refer to him in this decision as "Victorian." The only other one of the four who is discussed in this decision is Joe Victorian Sr., and I refer to him as "J. Victorian."

the wet side to the dry side of the facility in a manner that deprived the ILA-represented employees of work loading the aluminum. Where, as here, employees are represented by a union, their employer violates Section 8(a)(5) of the Act by making a unilateral change regarding a mandatory subject of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962); *Whitesell Corp.*, 357 NLRB 1119, 1171 (2011); *Ivy Steel & Wire, Inc.*, 346 NLRB 404, 419 (2006); *Mercy Hospital of Buffalo*, 311 NLRB 869, 873–874 (1993); *Associated Services for the Blind, Inc.*, 299 NLRB 1150, 1164–1165 (1990). The Board has held that such changes include ones that eliminate bargaining unit work or reassign it to nonunit individuals. *Mi Pueblo Foods*, 360 NLRB 1097, 1097–1099 (2014); *O.G.S. Technologies, Inc.*, 356 NLRB 642, 645–647 (2011); *Spurlino Materials, LLC*, 353 NLRB 1198, 1218–1219 (2009), enfd. 645 F.3d 870 (7th Cir. 2011); *Winchell Co.*, 315 NLRB 526 (1994), enfd. 74 F.3d 1227 (3d Cir. 1995). The prohibition on unilateral changes applies to established past practices even if, as in the case of the aluminum work at issue here, the practices are not set forth in a collective-bargaining agreement. *Golden State Warriors*, 334 NLRB 651 (2001), enfd. 50 Fed. Appx. 3 (D.C. Cir. 2002); *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988). In this case, the Respondent did not give, and does not claim to have given, notice and an opportunity to bargain before making a change that deprived the ILA-represented employees of aluminum loading work that they had been performing for many years under the established practice.

In its brief, the Respondent defends its actions by arguing, as it did to the ILA local, that the change was authorized by the Board's prior Section 10(k) decision. As discussed above, that decision awards the Teamsters-represented employees work that at that time was being performed by a third-party trucking company. That work consisted of driving trucks onto the wet side of the facility in order to transport material to the dry side of the facility. The decision discusses the established past practice of having the ILA-represented employees load the aluminum onto those trucks and awards all loading work on the wet side of the facility to the ILA-represented employees. Contrary to the Respondent's contention, there is nothing in that decision stating that any loading work on the wet side is being awarded to the Teamsters-represented employees, nor is there anything that authorizes a change that would deprive the ILA members of loading work that it was the established past practice for them to perform. I reject the Respondent's defense and find that it failed to bargain in good faith, and therefore violated Section 8(a)(5) and (1), when it made a change that deprived the ILA-represented employees of work loading aluminum on the wet side of the facility without giving the ILA notice and an opportunity to bargain.

In reaching the conclusion that the Respondent violated Section 8(a)(5) and (1) with respect to the aluminum loading work, I was given pause by Leach's suggestion that the loading work that the ILA is trying to preserve is not necessary work. However, the Respondent does not make a factual or legal argument on that issue and I am left with little other than, on the one hand, Leach's statement that he could accomplish the task "ten times faster" by eliminating the ILA loading work and, on the other hand, the long history of management relying on the ILA

loading work to accomplish that task. Relative to this concern, I make clear that I am not awarding the ILA the work of loading aluminum for transfer from the wet side to the dry side, but only requiring that the Respondent restore the status quo in that regard while it meets its obligation to bargain with the ILA in good faith. It could be that such bargaining will not result in the preservation of that work because of benefits that might flow from eliminating it, but the arguments in that regard should in the first instance be discussed between the Respondent and the ILA in the bargaining context. As the Supreme Court has noted, even when “it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation.” *Fibreboard Paper Products, Corp. v. NLRB*, 379 U.S. 203, 214 (1964). Such bargaining may lead the parties to a mutually acceptable agreement, or it may lead to an impasse that will privilege the Respondent to make the change unilaterally.

For the reasons discussed above, I find that since August 2013 the Respondent has violated Section 8(a)(5) and (1) by unilaterally changing its established past practice regarding the transfer of aluminum at the facility in a manner that deprived the ILA unit of loading work that it had performed under the established past practice.

C. Loading, Unloading and Transfer of Calcium

Facts

The complaint alleges that, since about November 8, 2013, the Respondent violated Section 8(a)(5) and (1) by unilaterally reassigning the loading, unloading, and shipping of calcium to non-bargaining-unit employees. The General Counsel clarifies that the Respondent allegedly did this by changing its practice of transmitting calcium by truck to ILA-serviced warehouses where it would be unloaded by ILA members and unilaterally beginning to have the trucks transmit the calcium instead to Teamsters-serviced warehouses where it would be unloaded by Teamsters members.

The evidence showed that the Respondent stores cargo at various warehouses, including three on the wet side and three on the dry side of its facility. Some types of cargo can only be stored in warehouses that have a special certification or trade status. However, the parties have not demonstrated that the storage of calcium was subject to these constraints. The record does not explain with any specificity how the Respondent goes about choosing which of the available and permissible warehouses it uses to store a particular shipment.

Multiple witnesses for the General Counsel, including Brown and Rizo, gave credible testimony that, prior to November 2013, the Respondent’s practice was for ILA members to unload the calcium cargo from barges onto the dock and then load the cargo onto trucks that transported the calcium exclusively to ILA-serviced warehouses where ILA members unloaded it. In November 2013, the Respondent changed this practice and began to have the trucks transport the calcium to Teamsters-serviced warehouses where the ILA members would have no involvement with unloading it. I credit this account, which was not meaningfully contradicted.

In November 2013, when ILA members observed that the trucks were moving the calcium to Teamsters-serviced warehouses rather than ILA-serviced warehouses, the ILA protested by ceasing to unload the calcium from the barge. About an hour after this conflict arose, Leach told the ILA members that “it had been resolved, go back to work.” The ILA members complied, and resumed unloading the calcium from the barge. That day, the Respondent did not transport any more loads of calcium to the Teamsters-serviced warehouses, but it has subsequently resumed doing so. The Respondent made this change without giving the ILA notice and opportunity to bargain.

Analysis

As discussed above, an employer violates Section 8(a)(5) and (1) of the Act, if it does not give the collective-bargaining representative of employees notice and an opportunity to bargain before making a change that eliminates bargaining unit work or reassigns it out of the bargaining unit. See, e.g., *NLRB v. Katz*, supra, *Mi Pueblo Foods*, supra, *O.G.S. Technologies*, supra, *Spurlino Materials*, supra. The Respondent committed such a violation here by unilaterally changing its established practice⁶ of using ILA unit members to unload calcium from transfer trucks at ILA-serviced warehouses, and instead beginning to use Teamsters unit members to perform the calcium unloading work at Teamsters-serviced warehouses.

The Respondent does not deny that it made this change, or attempt to assert that special circumstances justify making the change without good-faith bargaining. Instead, as with the change to aluminum work, the Respondent contends that the Board’s April 30 decision in the Section 10(k) jurisdictional case authorized its action. That contention is without merit. The fact that that decision awards the Teamsters unit any work transporting material from the wet side to the dry side, in no way suggests that the Board is authorizing the Respondent to unilaterally change its established practice of storing coal in ILA-serviced warehouses. The Respondent’s argument is another example of it confusing what it tried to accomplish during the 10(k) proceeding with what it actually accomplished.

I want to make clear that I am not suggesting that the Respondent is prohibited from changing its practice of assigning to ILA employees the work of unloading calcium from trucks. The Respondent did not violate the Act because it made such a change, but because it made such a change without giving the bargaining representative of the ILA unit notice and an opportunity to bargain. As with the aluminum work discussed above, the Respondent will be required to restore the status quo ante

⁶ The General Counsel asserts that, under the collective-bargaining agreement, the calcium is “designated as product to be handled,” by the ILA. To the extent that the General Counsel is contending that the Respondent’s action violated a condition established by the collective-bargaining agreement (as opposed to a condition established through past practice) I reject that contention. The collective-bargaining agreement does include a list of over 30 categories of “obnoxious and distressed cargo,” including calcium nitrate and calcium chloride, and provides that ILA members are entitled to premium pay if they handle those types of cargo. Joint Exhibit (Jt. Exh.) 1 at Sec. 15. The contract does not, however, provide that the handling of any of the types of obnoxious cargo listed is to be performed exclusively by the ILA unit, or even provide that the ILA will perform any such work.

pending good-faith bargaining.

For the reasons discussed above, I find that since November 2013, the Respondent has violated Section 8(a)(5) and (1) by unilaterally reassigning calcium unloading work historically performed by the ILA bargaining unit employees to others outside the unit.

D. Training on Cranes, Forklifts, and End Loaders

Facts

The General Counsel alleges that the Respondent's past practice under the collective-bargaining agreement included offering both formal and informal training to ILA-represented employees on the operation of cranes, forklifts and end loaders and that the Respondent unilaterally changed these practices in that "by early July 2013" it "had no intention of training employees." The Respondent denies this, and contends that it has continued to offer training to the ILA employees and that any changes to the manner in which it offered that training occurred outside the 6-month charge filing period under Section 10(b) of the Act.

When Leach began working for the Respondent in 2007, he found that the company did not have training records evidencing the qualifications of employees who the company was treating as qualified to operate various types of equipment. He decided to "grandfather in" all the employees who the Respondent already recognized as qualified, but he also wanted to get something "on the record" showing "we did try to provide training, formal setting, third party, that actually qualified these guys as far as what they could and could not do on a piece of equipment." The record indicates that Leach did make efforts to do that, but that such efforts proceeded somewhat lurchingly and not always in the same direction.

1. Crane Training: Operating the cranes requires a greater level of skill and training than operating the end loaders and forklifts, and the ILA members who operate cranes at the Respondent's facility receive the highest rate of pay of any of the unit employees. The collective-bargaining agreement includes a section on training that specifically discusses crane operators. Joint Exhibit (Jt. Exh.) 1, Section 28. That section states in relevant part:

The Company will man the crane operator's position as work opportunities warrant both in terms of seniority and in terms of work availability. When such conditions warrant, a crane operator trainee will be placed in the crane along with the crane operator for purposes of training.

The training provision in the agreement also includes general language that is broad enough to cover training on the cranes, as well as the end loaders and forklifts. That language provides in part:

The company shall provide reasonable training opportunities for all employees in all classifications. In this regard, the Company shall implement a training program for each classification within 180 days of the effective date of this Agreement. Further, the Company will allow bargaining unit employees to train with equipment during off hours under the following conditions:

1. The employee provides reasonable notice to the Company

of at least forty-eight hours;

2. The employee shall not be paid for such "off hours" training;

3. The Company has equipment available for such off hours training that will not impede with the regular operational maintenance schedules of the equipment;

4. The Company will establish the times of year, days of the week and times of the day when training may be conducted;

5. Hours spent training during "off hours" will not count towards seniority;

6. The Company will not be required to provide paid supervision during off hours training.

The Company may schedule additional training sessions with outside suppliers.

Over the course of the last number of years the type of cranes the Respondent's employees operated changed, and this has had implications for the crane training required. Until 2010, the Respondent operated two types of cranes—known as Gantry cranes and Lucas cranes—at the facility. Employees received informal, on-the-job, training to operate these cranes, not formal training by third parties. The informal crane training for employees who had no prior crane operation experience generally consisted of the following: first, the trainee performed maintenance on the crane under the instruction of an experienced operator; second, the trainee sat in the cab of the crane and observed as an experienced individual operated the crane; and third, the trainee operated the crane while an experienced operator was present in the cab to provide oversight. The third step is referred to at the facility as "seat time." The contract provides that the trainee is to provide the Respondent with at least 48 hours' notice when he or she plans to train on the equipment during off hours, but there was testimony that Leach, or another manager, was sometimes the one that initiated the seat time training.

The experienced operator who provided almost all of the informal training during the years leading up to alleged unlawful change was John Murphy. Witnesses identified Murphy as the crane supervisor or the crane "guru" and the record indicates that he had many decades of experience operating the cranes.⁷ The training that Murphy provided was "informal" only in the sense that it was not run by a third-party training entity. The record establishes that Murphy's training was, in fact, very methodical and demanding. Brown, Fussell, and Newcomer were among those ILA-represented employees who became qualified crane operators under Murphy's tutelage. The record does not pinpoint when Murphy last trained a unit employee to operate a crane, although it does show he trained Newcomer in 2008 and Fussell who began working for the Respondent in June 2008, and there was uncontradicted testimony that Murphy continued to provide training until his failing health prevented him from continuing to do so. Murphy died at some point between approximately late 2011 and early 2012. The Respondent designated Jordan Salhoff, a maintenance employee who is not affiliated with the ILA, to be Murphy's successor

⁷ Murphy's union status was unclear. He paid union dues, but is not included on the "order of call" lists submitted at the hearing.

as crane supervisor.

In approximately 2010, the Respondent began using two new, more modern, mobile cranes, known as the Liebherr cranes. At that time, the Respondent ceased operating the Gantry cranes and later, in the beginning of 2014, the Respondent also ceased operating the Lucas cranes. The Liebherr cranes are not owned by the Respondent, but rather by the Port of Toledo, which allows the Respondent to operate them, but places conditions on such operation. The Port's conditions, which are set forth in a letter from the Port to the Respondent and were also testified to by witnesses, include that all crane operators for the Liebherr cranes must be certified by the National Commission for the Certification of Crane Operators (NCCCO). See General Counsel Exhibit (GC Exh.) 11. However, neither that letter nor the testimony, show that the Port was requiring that crane trainees obtain NCCCO certification before receiving informal training on the Liebherr cranes under the direct oversight of individuals who were NCCCO certified.

In early 2010, just prior to the start of the trusteeship period, the Respondent notified employees that it would be bringing in the Liebherr cranes and that operators would require additional certification to qualify to operate them. Brown, who was not yet president of the ILA local, initiated a grievance over this development. Later in 2010, when the trustees assumed control of the ILA local, the Respondent met with the trustees and informed them about the switch to the Liebherr cranes and explained that the Port was requiring that the crane operators for that equipment be NCCCO certified. The ILA trustees did not agree to the NCCCO certification requirement, which they understood as being relevant to construction work, not maritime work, and which, in the trustees' experience, was not imposed on ILA-represented crane operators at other ports. Despite the ILA's position, the Respondent selected individuals who it had previously deemed to be qualified crane operators to attend a 5-day formal NCCCO training with a third-party trainer located in Ohio. Those individuals then took a written test and a practical test, both of which they had to pass in order to become NCCCO certified. Once an employee became NCCCO certified, it was still up to the Respondent to make the final determination as to whether that employee was "qualified" to operate the Liebherr cranes for the Respondent. Leach was the one who made this determination, and he did so by watching the employee operate the crane. The certification training did not actually take place on Liebherr cranes, and the employees who completed that training still had to learn how to work the specific controls on the Liebherr cranes. They did this by studying written materials and/or by receiving instruction from an experienced individual at the facility.

The ILA apparently did not refuse to cooperate with this process as it applied to members who were previously qualified by the Respondent to operate cranes. From 2010 to 2012, a number of ILA members participated and became NCCCO certified and qualified to operate the Liebherr cranes for the Respondent. These unit employees included Randy Baumert, Brown, Fussell, and Newcomer. The Respondent also sent a number of nonunit individuals for the formal crane training and testing. These included Brad Hendricks (operations manager), Ryan "Moose" Richardson (maintenance employee), and

Salhoff (maintenance employee).⁸ Not all the persons sent for the training passed the NCCCO certification test the first time. Both Brown and Baumert required multiple attempts. The Respondent allowed Brown, Baumert, and Newcomer to have informal training on the Liebherr cranes at the Respondent's facility before they became NCCCO certified. In Newcomer's case such informal training was permitted even before he attended the formal third-party training.

At some point between March and May 2013, the Respondent and the ILA had a meeting to discuss training unit members on the cranes and other mobile equipment. Present for the Respondent were Leach, Lauri Justen (human resource director), and Christopher Blakely (human resource manager). Present for the Respondent were Brown (president of the ILA local) and Ray Sims (financial secretary of ILA local). Brown testified that at that point the ILA was concerned because the Respondent had lost three of its crane operators and, as a result, the Respondent was sometimes using nonunit individuals to operate the cranes. Leach stated that financial considerations were limiting the Respondent's willingness to provide training and he asked if the ILA would be willing to share part of the cost of training. Brown declined, and stated that under the collective-bargaining agreement the Respondent had to provide the training. The parties discussed training two or three new crane operators, four to six end loader operators, and an unspecified number of forklift operators, but an agreement was not reached.

In April or May 2013, Leach approached Brown about sending two unit employees to a formal, third-party, training for NCCCO certification. The unit employees for whom crane training was discussed at this point, unlike the previous group of crane trainees, had not previously been qualified by the Respondent to operate cranes. Given the lack of crane experience among these potential trainees, the Respondent was not offering the 5-day NCCCO training that Brown and other qualified crane operators had received, but a more extensive, 2-week, course designed for persons who had not previously operated a crane. Leach asked Brown to pick two unit employees to receive the formal training in July. Brown refused to do so, stating that July was too soon and that the Respondent was setting up the potential trainees for failure by sending them for the formal training without first providing them with informal, seat time, training. Brown left this conversation with the understanding that Leach had agreed to allow the persons who would be sent to the formal training course to receive prior informal training by unit members.

By letter to Brown dated June 7, 2013, Blakely repeated Leach's request that the ILA select two unit employees to receive crane training for NCCCO certification beginning on July 15, 2013. Brown responded, in a letter dated June 14, by stating that he "could not agree on the July 15 date" because the trainees would be "at a great disadvantage going in to that school" without prior informal training. He stated his understanding that the parties were going to work on how to provide

⁸ As is discussed below, the collective-bargaining agreement provides that the Respondent is entitled to use nonunit individuals to operate equipment when a qualified unit member is not available to do so.

seat time training to employees in advance of those employees testing for NCCCO certification and took the position that the training committee would have to meet to do this. He stated that both himself and Fussell were prepared to provide informal crane training to unit members.

Subsequently, in late June, Leach again spoke to Brown about sending unit members to the crane training school and Brown proposed that the training be provided not in July, but in September or October so that the prospective trainees would have the opportunity to receive informal, seat-time, training prior to the formal training. Leach told Brown that the crane school administrators preferred that the participants for the extended 2-week training have no experience that might “taint” their minds. After this late June conversation, Brown reached out to Leach, including by email, to further discuss crane training, but he received no response from Leach. Neither Brown, nor anyone else with the ILA, provided management with the names of unit employees who the ILA agreed to have participate in the formal training that the Respondent was offering. The Respondent did not contact Brown about scheduling crane training at a later date or state that it would permit trainees to receive informal training before the formal NCCCO course. Blakely testified that the Respondent’s position was that it would not permit employees to have informal seat time training on the Liebherr cranes if they were not NCCCO certified.⁹

In early 2014, the Respondent stopped operating the Lucas cranes. The Respondent never required employees to have NCCCO certification to operate the Lucas cranes. The last time any employees had informal, seat time, training on the Lucas cranes was in approximately December 2012.

2. End Loader: In 2008, the Respondent had an outside contractor provide end loader training to employees at the facility. This training was provided primarily for the benefit of the employees Leach had grandfathered in as end loader operators, but for whom he had no training records. However, documentary evidence shows that Brown completed end loader safety training in April 2008 even though the order-of-call lists from April 2007 and June 2008 do not show that the Respondent previously recognized him as qualified to operate the end loader. See (GC Exhs. 31 and 52). There has been no formal end loader training since that time. During the period of trusteeship the process reverted to one where unit employees who were experienced on the end loaders provided seat time training to unit employees. Fussell was among the employees trained in that manner who the Respondent determined became qualified to operate the end loaders. Leach testified that he has continued to allow inexperienced employees to get seat time on the end loaders when there is availability, but he stated this “didn’t work out too well” and that it was “very rare” that employees trained in this manner.

The record does not demonstrate that there were instances when the Respondent took the initiative to offer employees the

⁹ As noted above, the Respondent permitted Baumert, Brown, and Newcomer to have seat time training in the Liebherr cranes prior to when they obtained NCCCO certification, but the Respondent only permitted this for crane operators who had previously been qualified and were “grandfathered in.”

opportunity to have informal training on the end loaders, but neither does it demonstrate instances when unit employees, as provided for by the collective-bargaining agreement, gave the Respondent notice that they wanted to engage in end loader training. As noted above, during a meeting in about March to May 2013, representatives of the ILA and management met and discussed future training, including the possibility of training between four and six individuals as end loader operators. However, it is not clear from the record whether it was the Respondent, the ILA, or both, who were responsible for the failure to follow through with discussions about end loader training.

3. Forklift: The forklift is the type of mobile equipment that is most often used by the unit employees and the one that is the easiest to become qualified to operate. The Respondent provides employees with third-party safety and certification training for the forklift. An employee’s forklift certification is valid for 3 years. Leach stated that the Respondent provides the initial training when there are enough employees that are ready for the training. In practice the last two trainings were 3 years apart. One of these was in 2012, but it is not clear from the record whether the other was in 2009 or in 2015.

The record shows that the Respondent has provided unit employees with minimal, on the job, forklift training without those individuals being formally trained or certified. One employee, Paul Floering, credibly testified about receiving such training in the Spring of 2011. Floering had no relevant prior experience or certification when Leach gave him 10 minutes of instruction on forklift operation. Then Leach left Floering to practice for about 30 minutes. After this, and before Floering was certified, he received regular forklift assignments. Subsequently, Floering was formally certified. In addition, Leach asked Rizo to provide informal forklift training to Hubbard during the trusteeship period. At the time Rizo advised Leach that Hubbard had no forklift experience and Leach responded “just show him how to do it.”

Analysis

Employee training is a mandatory subject of bargaining, *Southern California Gas Co.*, 346 NLRB 449 (2006), and therefore an employer violates Section 8(a)(5) and (1) of the Act by making changes regarding training without giving the employees’ bargaining representative notice and opportunity to bargain, *NLRB v. Katz*, supra, *Whitesell Corp.*, supra, *Ivy Steel & Wire, Inc.*, supra, *Mercy Hospital of Buffalo*, supra, *Associated Services for the Blind*, supra.

Regarding crane training, the evidence showed that the Respondent either entirely ceased to provide informal training in crane operation or ceased to provide it to trainees who did not possess NCCCO certification. The Respondent attempts to defend against the allegation that this change violated the Act by asserting that any such change was made prior to June 23, 2013, and that the allegation is therefore untimely because the relevant charge was not filed until December 23, 2013—outside the 6-month charge filing period under Section 10(b) of the Act.¹⁰ The limitations period under Section 10(b) is an affirma-

¹⁰ Sec. 10(b) of the Act states that, “no complaint shall issue based on an unfair labor practice occurring more than six months prior to the filing of the charges.”

tive defense that the Respondent has the burden of proving. *NLRB v. Public Service Electric & Gas Co.*, 157 F.3d 222, 228 (3d Cir. 1998). The Respondent attempts to meet this burden by pointing to evidence showing that, in 2010, it informed the ILA that NCCCO certification was being made a prerequisite to unit employees qualifying as crane operators for the new Liebherr cranes. That evidence, however, fails to satisfy the Respondent's burden regarding the cessation of training because any notice that NCCCO certification was being made a prerequisite to becoming a qualified Liebherr crane operator does not provide notice that such certification is being made a prerequisite to receiving supervised training to become a qualified Liebherr crane operator, much less to receiving such training on other cranes, such as the Lucas cranes, that were not covered by the agreement with the Port. Indeed, subsequent to 2010, the Respondent permitted Brown, Baumert and Newcomer to receive informal seat time training on the Liebherr cranes at a time when neither had NCCCO certification.

In reaching the determination that the Respondent did not establish a 10(b) defense regarding the change in crane training, I also considered the evidence that in the period leading up to early June 2013—just outside the 10(b) period—the Respondent discussed with Brown that it wished to send ILA members to formal training for NCCCO certification. However, the record does not show that the Respondent gave the ILA notice during those discussions that it would no longer allow informal crane training. Indeed, the Respondent's statements during those discussions led Brown to understand that the parties were going to work out how to schedule informal crane training prior to the formal training. Brown memorialized this understanding in his June 14 letter to Blakely. I find that the earliest that the ILA can conceivably be said to have been on notice that the company was eliminating informal crane training either completely or for noncertified trainees was when it became clear that the Respondent was refusing Brown's continuing efforts to schedule informal crane training following Leach's assertion to Brown that such training would "taint" trainees. The "taint" assertion was not made until late June, and it was several days later that Brown sent Leach an email in which he attempted to continue the conversation regarding informal training. It would not have been until some days or weeks after that email that Brown and the ILA could arguably have been expected to understand the Respondent's silence as meaning that the informal crane training would no longer be allowed.

Moreover, even once the Respondent repeatedly ignored Brown's attempts in 2013 to continue discussing informal training on the Liebherr cranes, the ILA was not, in my view, on notice that informal training was being eliminated for all cranes, since the Respondent has not shown that it notified the ILA that the NCCCO certification requirement applied to the Lucas cranes or that those cranes would be taken out of service in early 2014. Therefore, the Respondent has not shown that prior to June 23, 2013, the ILA was given notice that informal training for its cranes was being eliminated completely or for unit employees without NCCCO certification. For these reasons I find that the Respondent's Section 10(b) defense fails with respect to the allegation that the Respondent ceased providing informal crane training.

Turning to the merits of the crane training allegation, I find that the Respondent violated Section 8(a)(5) and (1) when it unilaterally eliminated informal crane training for unit employees either entirely or for those who were not NCCCO certified. I note that such training was the established method by which persons without prior crane experience became proficient in crane operation before June 23, 2013. Brown, Fussell, and Newcomer all testified that they initially became qualified crane operators by way of the informal training. Moreover, this practice was expressly required by the collective bargaining agreement, which states that when conditions of "seniority" and "work availability" warrant it, "a crane operator trainee will be placed in the crane along with the crane operator for purposes of training." (Emphasis Added.) The evidence here shows that, as of the middle of 2013, the Respondent and the ILA were in agreement that conditions warranted training additional ILA unit employees as crane operators and that there were three unit members who were in a position to begin crane training. Thus pursuant to past practice under the collective-bargaining agreement, the Respondent was required to place each crane operator trainee "in the crane along with the crane operator for purposes of training." The Respondent ceased and refused to do this and therefore made a change to employee training—a mandatory subject of bargaining. The Respondent never presented this change to the ILA as one that could be bargained over and, to the contrary, dodged Brown's efforts to continue discussing the matter. For these reasons, I find that the Respondent violated Section 8(a)(5) and (1) by ceasing informal crane training for unit employees after June 23, 2013.

As regards formal crane training, I find that the General Counsel has not shown an unlawful unilateral change. It is the General Counsel's burden to show the existence of an established practice that an employer cannot change without providing the employees' representative with notice and an opportunity to bargain. *National Steel & Shipbuilding*, 348 NLRB 320, 323 (2006), *enfd.* 256 Fed. Appx. 360 (D.C. Cir. 2007). In this case, the only evidence of formal crane training concerns training provided beginning in 2010 to a single group of unit employees. Moreover, that group was unique in that it was comprised of individuals who had been grandfathered in as crane operators because they were qualified by the Respondent before the introduction of the Liebherr cranes and the related NCCCO certification requirement. The General Counsel did not show that, prior to June 23, 2013, unit employees who were not already crane operators had ever been provided with formal crane training. To the contrary, the first time the record shows that the Respondent and the ILA discussed the possibility of sending unit members without prior crane experience to formal crane training was in 2013. Moreover the record, far from showing that the Respondent was not offering formal crane training to inexperienced unit members, gives every reason to believe that the Respondent would have provided unit employees with such training if the ILA had agreed to it.

With respect to the training on the end loaders and forklifts, the General Counsel has not shown that the Respondent deviated from an established past practice. The evidence only shows one instance, in 2008, when the Respondent provided formal end loader training. Subsequent to that time, informal end

loader training occurred, but the record does demonstrate an established past practice by which that informal training was initiated and organized or show that the Respondent deviated from any such past practice. Indeed, Leach testified that he has continued to offer informal end loader training. I considered the provision in the collective-bargaining agreement which states that employees can provide 48-hour notice to the Respondent that they wish to engage in off hours training on equipment. However, the General Counsel has not shown a deviation from that training process because the record does not demonstrate that employees provided notice regarding off-hours end loader training and that the Respondent refused them the opportunity.

Similarly, the evidence shows that unit employees have intermittently received training on the forklifts both informally and formally. The General Counsel has not, however, shown that employees or the ILA gave 48-hour notice that they wished to engage in off-hours forklift training or that the Respondent failed to provide formal forklift training at specific junctures that would have been warranted by some past practice. There was testimony that the last two formal forklift trainings occurred about 3 years apart, and that one occurred in 2012. Even if I assume that this showed a past practice of providing such training every 3 years, and that there had been no training since 2012, it would not show a change since the 3-year period after the 2012 training had not passed as of the time of the consolidated complaint and was not shown to have passed at the time of the hearing.

For the reasons discussed above, I find that the Respondent violated Section 8(a)(5) and (1) by ceasing informal crane training for unit employees after June 23, 2013, without giving the ILA notice and an opportunity to bargain over the change. To the extent that the Complaint allegation regarding training concerns formal crane training or training on end loaders and forklifts, I find that the evidence fails to establish a violation of Section 8(a)(5) and (1). Those elements of the allegation should be dismissed.

E. Supervisors and Nonunit Employees Perform Unit Work

Facts and Analysis

The General Counsel alleges that the Respondent violated Section 8(a)(5) and (1) since July 1, 2013, by allowing supervisors and nonbargaining unit employees to perform bargaining unit work. The collective-bargaining agreement between the ILA and the Respondent provides that the Respondent may use supervisors or other nonunit employees to perform bargaining unit work when qualified ILA unit members are not available. (Tr. 565, 1930–1931; J. Exh. 1, Sections 5.1 and 20.10.) The collective-bargaining agreement also permits nonunit individuals to perform maintenance work on the cranes. (Jt. Exh. 1, Section 20.13.) The testimony indicates that such crane maintenance sometimes requires the maintenance worker to use the crane's controls, but not to do so for the purposes of performing unit work such as moving cargo. In addition, Hendricks credibly testified that he sometimes moves a crane because its location is impeding other work at the facility and that this is not bargaining unit work.

The General Counsel points to evidence showing that the

Respondent has used supervisors and nonunit maintenance employees to perform ILA unit work. However, the General Counsel has not shown that in these instances the Respondent exceeded its contractual authority, summarized above, to use non-unit individuals to perform unit work in certain circumstances. In 2013, the Respondent had Hendricks (a supervisor), Chad Moody (a supervisor), and Richardson (a nonunit maintenance employee) operate cranes. In the cases of both Hendricks and Moody, the testimony of Brown was that he raised his concerns about this with the Respondent and the Respondent explained that the nonunit employees were operating the cranes because there were no qualified bargaining unit employees available to do so. Hendricks testified that when a nonunit employee operated a crane to perform unit work it meant there were no crane-certified, ILA represented, employee available to do that work. Based on the state of the record regarding this issue, I do not have a basis for finding that there were qualified ILA unit members available to perform the crane work at the times Hendricks and Moody operated the cranes.

With respect to Richardson, the record indicates that this maintenance employee had an accident while operating a crane in 2013. However, the record provides no specifics that would allow me to find either that a qualified ILA employee was available to operate the crane at the time, or that Richardson was performing unit work rather than operating the crane controls for purposes of performing crane maintenance as permitted by the collective-bargaining agreement.

For the reasons discussed above, I find that the General Counsel has failed to establish that the Respondent violated Section 8(a)(5) and (1) by allowing supervisors and other nonunit employees to perform unit work. That allegation should be dismissed.

F. Step One Grievance Procedure

Facts

The Complaint alleges that, since about July 1, 2013, the Respondent violated Section 8(a)(5) and (1), and Section 8(a)(3) and (1) by unilaterally changing its grievance procedure. The General Counsel's brief clarifies that what is being alleged is that the Respondent unilaterally limited the company officials to whom unit employees could present step one grievances. According to the General Counsel, prior to July 1, 2013, the Respondent allowed unit employees to present their step one grievances to any available supervisor or foreman, but that after that time the Respondent only permitted them to present their step one grievances to Leach.

The collective-bargaining agreement creates a four-step grievance process, step one of which requires the employee to discuss the grievance with "his foreman" within 3 days of the alleged violation or knowledge of the alleged violation.¹¹ The

¹¹ The collective-bargaining agreement section on step one grievances states as follows:

When a grievance arises, the employees will continue to work and such grievance shall be processed in the following manner.

STEP ONE: An employee who believes he has a grievance shall discuss the grievance with his foreman within three (3) calendar days of its occurrence or knowledge of its occurrence. The employee shall have the dock steward present at the time the grievance is discussed

collective-bargaining agreement does not define “foreman” and the evidence, including personnel records and testimony, does not show that “foreman” was a part of the Respondent’s general system of job titles and classifications. However, the collective-bargaining agreement requires the Respondent to provide the ILA with a “roster of supervisors” and the Respondent has, in the rosters submitted annually since at least August 9, 2012, stated that all “contractual discussions with a foreman *must be* with Mr. Leach.” Respondent’s Exhibit (R. Exh.) 76 (emphasis in original).

Leach testified that since he came to the Respondent he has been the only official who handles step one grievance discussions on behalf of the Respondent. The record shows that Leach was, in fact, the Respondent’s representative for step one discussions during the period both immediately before and immediately after the alleged July 1 change. The parties stipulated that Leach was the Respondent’s representative at least 18 times between August 2012 and January 9, 2014, and by my count all but four of those instances occurred before the July 1 date of the alleged change requiring that such discussions be with Leach. The record definitively identifies just one instance when someone other than Leach represented the Respondent during a step one grievance discussion. In that instance, which occurred in October 2011, the Respondent’s representative was Christopher Blessing, a supervisor. That instance occurred well before the Respondent provided the ILA with the August 9, 2012, roster of supervisors that named Leach as the “foreman,” and more than 20 months before the alleged change regarding step one grievance procedures.

Two of the General Counsel’s witnesses asserted that they held step one grievance discussions with Hendricks, but Hendricks denied that he ever conducted such discussions and I found his denial credible. Hendricks acknowledged that ILA members sometimes approached him about a grievance, but I credit Hendricks’ testimony that, rather than engage in step one discussions at that point, he would simply acknowledge the individual’s request for such a discussion and communicate that request to Leach. One of the two witnesses who claimed to have conducted step one meetings with Hendricks was Mark Lockett—an ILA steward at the facility from about August 2012 to January 2013. However, Lockett did not identify a single specific instance when he had actual step one discussions with Hendricks. To the extent that he provided any details, those details arguably support Hendricks’ account. Specifically, Lockett stated that he would bring step one matters to Hendricks and that Hendricks would respond “duly noted” and drive away. Lockett may have been interpreted such an exchange as a step one grievance discussion, but it is, in fact, more supportive of Hendricks’ testimony that while he could not conduct step one discussions he would acknowledge the receipt of employee requests for such discussions and communicate them to Leach. None of the step one meeting minutes submitted at the hearing identified Hendricks as the Respondent’s representative, although there were notes of 18 such meet-

with the foreman. In the even the matter cannot be satisfactorily adjusted within forty-eight (48) hours after the discussion with the foreman, it goes to [STEP TWO.]

ings that identified Leach as serving in that capacity.

Rizo was another witness for the General Counsel on this subject. Rizo was an ILA steward for approximately 3 ½ years ending in 2012 or 2013. He testified that he would have step one grievance discussions with whoever “was in charge” at the time. However, he also testified that if Leach “was available” that is who he would contact about the step one grievance. His assertion that he also had step one grievance discussions with persons other than Leach was undercut to some extent by his affidavit, in which he stated: “Before a written grievance is filed, I call Terry Leach to discuss it with him. I usually can’t get a hold of him, so I leave a message.”

As one would expect, there are times when unit members wish to initiate the grievance procedure but Leach is not immediately available at the facility for a step one discussion. However, the Respondent has never barred a step one grievance because the deadline for raising it passed while Leach was unavailable.

Analysis

The General Counsel correctly states that an employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing grievance procedures. *Public Service Company of New Mexico*, 360 NLRB 573 (2014); *Bethlehem Steel Company*, 136 NLRB 1500, 1502 (1962), affd. in relevant part 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964). Under the facts present here, however, I find that the Respondent did not make a change in grievance procedures, but rather exercised its right to choose its representative for purposes of step one grievance discussions. As the Board stated in *Fitzsimons Mfg. Co.*, “It is well established that each party to a collective-bargaining agreement has the right to select its representative for bargaining and negotiations and the duty to deal with the chosen representative of the other party.” 251 NLRB 375, 379 (1980), enf. sub nom. *Auto Workers v. NLRB*, 670 F.2d 663 (6th Cir. 1982). A party’s right to select its own representative encompasses the right to select its representative for grievance meetings. *Pan American Grain Co., Inc.*, 343 NLRB 205, 206 and 211 (2004),¹² *Long Island Jewish Medical Center*, 296 NLRB 51, 71 (1989). Under the facts present here, I find that the Respondent was not establishing or changing grievance procedures, but simply exercising its right to choose its own representative.

The result might be different if the Respondent’s designation of Leach as its representative for purposes of step one grievance discussions was contrary to limits established by the collective-bargaining agreement, or by an established past practice, or was being used by the Respondent to avoid processing grievances. However, none of that is the case here. The collective-bargaining agreement provides that step one discussions are to be attended by “the foreman” and the ILA “dock steward.” “Foreman” is not defined by the collective-bargaining agreement and was not shown to be part of the Respondent’s

¹² In *Pan American Grain Co.*, the Board applied *Fitzsimons* and stated that a party had the right to choose its own representative for, inter alia, grievance meetings, but applied an exception to that rule because the union’s chosen representative was implicated in death threats against the company’s president.

established system of titles or classifications of employees. The General Counsel and the Charging Party did not point to any company documentation giving anyone other than Leach the title of foreman, nor did they show that anything about Leach's duties was incompatible with the Respondent's designation of him as its sole foreman. As noted above, there was no evidence that any employee's grievance had been time-barred as a result of Leach's unavailability. Under such circumstances, the ILA has no more right to dictate who the Respondent selects as its foreman for step one grievance discussions than the Respondent has to dictate who the ILA selects as its dock steward for such discussions.

The record also fails to show that designating Leach as the foreman for purposes of step one grievance discussions was a change from an established prior practice. The record identifies the participants in a number of step one discussions both before and after the alleged change. Leach was the Respondent's representative in eighteen of those instances, which was almost all of them. There was one incident, 20 months prior to the alleged unilateral change, in which Blessing was shown to have served as the Respondent's representative at a step one grievance discussion. That aberration, the surrounding circumstances of which were not explored at the hearing, does not establish a past practice under which the ILA gets to decide which company official will serve as the Respondent's representative.¹³

The Complaint alleges that the purported change in grievance procedures not only violated Section 8(a)(5) and (1), but also violated Section 8(a)(3) and (1) because it was inherently destructive of Section 7 rights. Since I find that the General Counsel failed to show that the Respondent made a change in grievance procedures, this allegation fails as well.

For the reasons discussed above, the evidence fails to show that the Respondent violated Section 8(a)(5) and (1) or Section 8(a)(3) and (1) by unilaterally changing its grievance procedure. Those allegations must be dismissed.

G. Alleged Threat and Pay Dispute Related to Hubbard's Work Injury

Facts

Hubbard, an individual charging party and ILA unit employee, sustained a workplace injury on August 11, 2013. The Complaint alleges that the Respondent should have paid Hubbard for the portion of his shift that he was unable to work because of this injury, but that the Respondent refused to do so in violation of Section 8(a)(5) and (1), Section 8(a)(4) and (1), and Section 8(a)(3) and (1) of the Act. The Complaint further alleges that on August 12, 2013, Blakely threatened a unit employee (Hubbard) in violation of Section 8(a)(1) by stating that, because of the unfair labor practices charges filed by the employee and the ILA, Blakely was too busy to provide information to the employee.

Hubbard has been a vice-president of the ILA local and a steward since approximately the middle of 2012 and an em-

ployee at the facility since April 2006. As steward he is responsible for policing the collective-bargaining agreement and investigating calls from ILA unit members about potential contract violations at the facility. Hubbard was actively involved with the ILA efforts, discussed above, to resist the Respondent's unlawful changes to aluminum handling practices. On June 1, 2013, Hubbard challenged the Respondent's actions in this regard and disputed Leach's assertion that the change was authorized by a prior Board decision. This activity led to a brief work stoppage by Hubbard and the other ILA unit members present. On August 5, 2013, Hubbard again challenged Leach about the unlawful change and, once again, a work stoppage by Hubbard and the ILA members ensued. The record also shows that on June 27, 2013, Hubbard filed an unfair labor practices charge against the Respondent and that this charge led to an investigation.

Hubbard's work-related injury occurred during a shift that began at 6 pm on August 10, 2013, and continued overnight and was extended through much of August 11, 2013. At the beginning of this shift, Hubbard and the other ILA unit members on the crew were made aware that the work would likely continue past 6 am, when the shift would normally be expected to end. The unit employees who accepted the assignment agreed to continue their duties until the work was completed. The undisputed evidence was that the ILA crew that began this shift worked for almost 24 hours straight to complete the work. Hubbard's assignment on this occasion required him to be on a vessel. At about 2:45 a.m. on August 11, Hubbard tripped and fell on the deck of the vessel after the lights illuminating the area unexpectedly went out. Hubbard was aware that he had injured his legs. The Respondent's procedures require that employees who have a work-related injury inform the Respondent and initiate an incident report before leaving the facility.¹⁴ Hubbard did this, leaving the ship and informing Eddie Tierny, who was acting in a supervisory capacity, of his injury. Both Hubbard and Brown asked Tierny to provide Hubbard with the forms necessary to make his report regarding the incident, but Tierny indicated that Hubbard would have to wait until Hendricks arrived at the facility to obtain the forms. Hubbard told Tierny that his legs were hurting, bleeding and swelling up, and that he wanted to go to the hospital. However, since Tierny could not, or would not, provide the incident report forms, Hubbard remained at the facility and awaited Hendricks' arrival. At one point after the injury occurred and before Hendricks arrived, Tierny suggested that Hubbard resume his work in a seated position, but Hubbard declined, explaining that he was concerned that his injury would make it impossible for him to disembark from the vessel.

At about 5:45 a.m. on August 11, Hendricks arrived at the facility and Hubbard obtained the necessary incident report forms from him. Hendricks photographed Hubbard's injured

¹⁴ Work rule 3, which is an attachment to the collective bargaining agreement, provides in relevant part:

All accidents involving personal injury must be reported to the Supervisor immediately by the employee(s) causing or involved in the accident. An accident/injury report shall be prepared by the employee(s) ASAP or at least prior to leaving the shift that day.

Jt. Exh. 1.

¹³ Given that the General Counsel has not proven its allegation that the Respondent made a unilateral change to the grievance process, I need not reach the Respondent's defense that the allegation is time-barred.

lower legs and those photographs show cuts on Hubbard's legs and what is likely some swelling. Hubbard completed the report, in which he noted injuries to both shins and one knee. Then Hubbard told Hendricks that he was going to the hospital. Hendricks stated that a hospital visit was not necessary and that Hubbard should, instead, go home and take an over-the-counter pain reliever. Hubbard left and began his commute home. During the commute, Hubbard spoke to Brown by phone and Brown urged Hubbard to visit a hospital emergency room. Brown told Hubbard that if he did not do so the Respondent might refuse to pay him for the hours that the crew continued working after Hubbard left the facility due to his injury. Management had previously notified employees that if they were injured at work they should go to one of two hospitals that were close to the dock, but Hubbard was already at, or near, his home when Brown convinced him to visit a hospital. Hubbard stopped at home to clean his legs and then went to a hospital in the vicinity of his home, rather than drive back to one of the hospitals that were located near the Respondent's facility.¹⁵ At the hospital, the staff took x-rays of Hubbard's legs and told him to follow up with his own physician. After he left the hospital, Hubbard's back began to hurt, and he also discovered a finger injury for which he ultimately underwent surgery.

Hubbard contacted his physician's office on the morning of August 12 to arrange an appointment and that office encouraged him to obtain a workers' compensation claim number. Hubbard called Justen (human resource director) to request a workers' compensation claim number. Justen told him that she was "working on trying to get" a workers' compensation number for him and that he should call again in an hour. Hubbard then called Blakely about the matter by phone. As is discussed below, what Blakely said during that conversation is in dispute. It is not in dispute, however, that on August 12 Blakely and Justen were already gathering information and making submissions to move forward with Hubbard's workers' compensation claim. At 1:44 p.m. that day—approximately 4 or 5 hours after Hubbard called—Blakely forwarded a draft of the required report regarding Hubbard's injury to Justen. By 4:29 p.m., Justen informed Hubbard by email that the incident had been entered with the workers' compensation agency and that the Respondent was awaiting a claim number. Justen provided the workers compensation number to Hubbard by email the next day, August 13, at 8:33 a.m.

Regarding the factual dispute over the conversation that took

place when Hubbard called Blakely at approximately 9 or 10 am on August 12, the evidence was as follows. In Hubbard's account, after Justen told him that the Respondent was already working on obtaining a workers' compensation number for him, he called Blakely and stated that he needed a workers' compensation number so that he could see a physician. According to Hubbard, Blakely responded that he had not had a chance to work on the incident report yet, and explained: "Well, Prentis [Hubbard], you know all these charges and stuff that—you done filed grievances and charges. You done filed, I guess . . . with the NLRB against us. I just been too busy working on those." Blakely contradicted Hubbard's account and specifically denied stating that he was too busy handling charges and grievances to work on Hubbard's workers' compensation matter. Blakely testified that he was actually working on the report about Hubbard's injury at the time of the call and that he told Hubbard that he was aware of the incident and had notified Justen.

After considering the evidence regarding the August 12 conversation and the demeanor of the witnesses, I credit Hubbard's account over Blakely's. Hubbard was a cooperative witness and on both direct and cross examination he answered questions forthrightly and without biased embellishment. I found him a particularly credible witness. There was no testimony or other evidence that suggested to me that he was the type of individual who would invent a story whole cloth, as the Respondent would have me believe he did regarding Blakely's alleged threat, and his demeanor on the stand was not consistent with such dishonesty. I am not persuaded by the Respondent's argument that I should not credit Hubbard because he did not mention the threat in his steward's notes for August 13. Those notes do not contain any mention at all of the call between Hubbard and Blakely, even though both Hubbard and Blakely testified that the call took place. This leads me to believe that the threat was not mentioned in the notes for no other reason than that the call was not the subject of the entry.

Blakely, based on his demeanor, generally appeared to be an honest witness. However, he was also a witness who demonstrated a tendency, consistent with his alleged statements to Hubbard, to bristle at the demands of dealing with ILA-related controversy. One such instance concerned his testimony about his compliance with the General Counsel's subpoena duces tecum. During that testimony it became apparent that, although the Respondent's counsel had represented that Blakely had fully complied, the truth was that Blakely had taken it upon himself to respond only to the subpoena items he thought he could reasonably address given time constraints and his other work. (Tr. 473 ff.) In response to the revelation regarding the deficiency of his response, Blakely's demeanor was more irritated than contrite as he recounted the other work he had to attend to and complained about the hours he had been forced to spend responding to as much of the subpoena as he had answered. In another instance, Blakely testified that he had left in the middle of a training meeting with ILA representatives because he felt that they were wasting his time. (Tr. 1595.) Hubbard's very credible testimony that, on August 12, Blakely had responded to his injury-related inquiry by stating that he had too much else to do given the demands placed on him by ILA-

¹⁵ The Respondent's brief makes a point of noting that the hospital that Hubbard went to did not administer a drug test, something that either of the hospitals near the dock would have done. To the extent that counsel is suggesting that Hubbard intentionally avoided the hospitals near the dock in order to evade a drug test, I find that such a suggestion is not only irrelevant, but also unsupported by the record. The Respondent presented no testimony whatsoever that Hubbard was impaired at the time of the accident, or that the Respondent had ever found him to be, or even suspected him of being, impaired by drugs or other substances while at work. Hubbard's choice of hospitals is fully explained by his credible testimony that, when he was leaving the dock, Hendricks discouraged him from going to a hospital, and that he only decided to go once Brown advised him of the importance of having a medical examination.

related controversies is lent further credence by these aspects of Blakely's testimony and demeanor.

The collective-bargaining agreement provides in part: "An employee who is injured on the job shall be paid for the hours he would have worked on that day had he not been injured." (Jt. Exh. 1, Sec. 22.5.) Hubbard and Brown testified that when a unit employee was injured at work and left to go to the hospital they were paid for the hours they would have continued working if not for the injury. The Respondent did not present any evidence showing that the practice was something other than what is indicated by the collective-bargaining agreement and testified to by Hubbard and Brown. Nevertheless, although the crew that Hubbard began work with on the day of his injury continued to work and were paid for almost 24 hours, the Respondent only paid Hubbard for the 12 hours prior to when he left the facility after suffering an injury. Blakely, as the Respondent's human resources manager, had responsibility for submitting the company's payroll information.

Analysis

1. Alleged Threat: Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" their rights to engage in protected union and concerted activity. In deciding whether an employer has made a threat in violation of this prohibition, the Board applies the objective standard of whether the remark would reasonably tend to interfere with the free exercise of employee rights, and does not look at the motivation behind the remark, or rely on the success or failure of such coercion. *Divi Carina Bay Resort*, 356 NLRB 316, 320 (2010), enfd. 451 Fed. Appx. 143 (3d Cir. 2011); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998); *Miami Systems Corp.*, 320 NLRB 71, 71 fn. 4 (1995), affd. in relevant part 111 F.3d 1284 (6th Cir. 1997). When applying this standard, the Board considers the totality of the relevant circumstances. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994).

The General Counsel alleges that Blakely made an unlawful threat on August 12, 2013, when he told Hubbard that he had not been able to work on Hubbard's worker's compensation claim because he was too busy handling grievances and unfair labor practice charges filed by Hubbard. The Respondent does not defend this allegation by claiming that such a statement was not unlawful under the circumstances present here, but rather argues that the statement was not made. As discussed above, after considering the record, I credit Hubbard's testimony that Blakely made the alleged threat.

In light of the totality of the relevant circumstances present here, I conclude that Blakely's remark was unlawfully coercive. He suggested that, because Hubbard had engaged in union activity and participated in the Board's processes, the Respondent was delaying Hubbard's unrelated workers' compensation claim. In reaching my determination on this issue, I considered circumstances that weigh against finding that an employee would reasonably be coerced by Blakely's remark. In particular, I considered that at the time of Hubbard's and Blakely's conversation, Justen had already told Hubbard that work had begun on his claim, that within just a few hours thereafter the

Respondent informed Hubbard that it had submitted his worker's compensation paperwork, and that by early the next day, the Respondent provided Hubbard with the claim number he was seeking. The General Counsel did not show that this facially swift processing represented a delay that Hubbard would reasonably attribute to his protected activity. That being said, I am persuaded to find unlawful coercion because Blakely went beyond simply stating that there would be some delay in the Respondent's completion of the workers' compensation paperwork, and specifically told Hubbard that the delay was the result of Hubbard's protected activity. Moreover, Blakely himself testified that he was not, in fact, busy with ILA grievances or charges at the time, meaning that any delay he threatened based on union activities would be a product of his own volition rather than circumstances beyond his control. Even if, as it appears, the Respondent did not actually delay the processing of Hubbard's worker's compensation paperwork, Blakely's statement was a warning shot that put Hubbard on notice that union activity and participation in the Board's processes could cause the Respondent to delay action on unrelated matters important to Hubbard.

For the reasons discussed above, I conclude that, on August 12, 2013, Blakely unlawfully threatened Hubbard in violation of Section 8(a)(1) by telling him that he was too busy with Hubbard's union charges and grievances to work on the paperwork relating to Hubbard's workers' compensation claim.

2. Denial of Pay: The General Counsel claims that the Respondent's action in denying Hubbard pay for the hours he would have worked on August 11, 2015, if he had not left due to a work-related injury was discriminatory in violation of Section 8(a)(3) and (1) and Section 8(a)(4) and (1), and was also a unilateral change in violation of Section 8(a)(5) and (1).

Turning to the discrimination claims first, under the Board's Wright Line decision, in cases alleging a violation of Section 8(a)(3) and (1), where motivation is at issue, the General Counsel bears the initial burden of showing that the Respondent's decision to take adverse action against an employee was motivated, at least in part, by antiunion considerations. 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). The General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activity, and (3) the employer harbored animosity towards the Union or other protected activity. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1184-1185 (2011); *ADB Utility Contractors*, 353 NLRB 166, 166-167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville*, 350 NLRB 1270, 1274-1275 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). Animus may be inferred from the record as a whole, including timing and disparate treatment. *Brink's, Inc.*, 360 NLRB 1206, 1206 at fn. 3 (2014); *Camaco Lorain Mfg. Plant*, supra. If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Camaco Lorrain*, supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra. The Board

also applies this *Wright Line* analysis to allegations that an employer violated Section 8(a)(4) and (1) by discriminating against “an employee because he has filed charges or given testimony” in a Board proceeding. *Verizon*, 350 NLRB 542, 546–547 (2007); *American Gardens Mgmt. Co.*, 338 NLRB 644, 644–645 (2002); *Gary Enterprises, Inc.*, 300 NLRB 1111, 1113 (1990), enfd. mem. 958 F.2d 368 (4th Cir. 1992).

The General Counsel has met its initial burden of showing discrimination under both Section 8(a)(3) and (1) and 8(a)(4) and (1) of the Act. The first element under Section 8(a)(3) is established by the evidence that Hubbard was very active in union matters at the facility—serving as vice-president of the ILA local and as dock steward, and personally challenging management over unilateral changes to the way aluminum was handled at the facility. With respect to Section 8(a)(4), the evidence showed that Hubbard had recently invoked the Board’s processes by filing an unfair labor practices charge against the Respondent. These are all activities about which the Respondent had knowledge. The General Counsel has made the required showing of animus in that, as found above, on August 12, just the day after the injury that gives rise to the pay controversy, Blakely unlawfully threatened Hubbard because he had engaged in union activity and availed himself of the Board’s processes.

Since the General Counsel has made the required initial showings under *Wright Line*, the burden shifts to the Respondent to show that it would have denied Hubbard pay for the hours after he left work because of a work-related injury even absent Hubbard’s protected activity. The Respondent has not met that responsive burden. Neither Blakely, nor any other official involved with denying Hubbard the disputed pay, testified to a lawful reason that, in fact, caused the Respondent to take that action. The nondiscriminatory reason forwarded in the Respondent’s brief—that Hubbard was not paid for the disputed hours because his work-related injury was not the real reason he left work—appears to be the invention of counsel. Given the lack of any credible testimony or documentary evidence that the nondiscriminatory reason forwarded by counsel was the actual reason for the denial of pay, the Respondent has failed to meet its rebuttal burden. See *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011), enfd. in relevant part 795 F.3d 18 (D.C. Cir. 2015) (employer cannot meet its burden merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct); *ADB Utility Contractors*, supra (an employer fails to meet its burden of showing that it would have taken the same action absent the discrimination, when the evidence establishes that the reason forwarded was not in fact relied upon); *Monroe Manufacturing, Inc.*, 323 NLRB 24, 27 (1997) (an employer does not meet its responsive *Wright Line* burden by showing the existence of a valid reason that could justify the challenged action, but rather must show that such valid reason would have resulted in the same action even in the absence of the employee’s protected activities); *Structural Composites*, 304 NLRB 729, 729–730 (1991) (not enough for employer to show that it could have taken the action it did for the reasons given, rather it must show that it would have taken the action for the reasons given). Not only did none

of the Respondent’s witnesses testify that the nondiscriminatory reason asserted in the brief submitted by counsel was actually relied on in denying Hubbard pay, but none of them even expressed agreement with counsel’s related insinuations that Hubbard was faking his injury.

I find that the Respondent discriminated against Hubbard in violation of Section 8(a)(3) and (1) and Section 8(a)(4) and (1), when it denied him pay for the hours he would have worked on August 11, 2013, if he had not left work due to a work-related injury.

The Respondent’s denial of pay to Hubbard also violated Section 8(a)(5) and (1) because that denial contravened past practice and the collective-bargaining agreement. The record shows that the Respondent pays ILA-represented employees who are injured on the job for the hours they would have worked on that day if not for the injury. The credible evidence showed that Hubbard would have continued working for an additional 11 to 12 hours on August 11, if he had not been injured, but that the Respondent denied him the pay for those hours even though he was entitled to it under established practice and the collective bargaining agreement.

The Respondent violated Section 8(a)(5) and (1) when it denied Hubbard pay that he was entitled to under past practice and the collective-bargaining agreement for the hours he would have worked on August 11, 2013, if not for the injury.

H. Discipline and Refusal to Hire Victorian and Woodley

Facts

Fred Victorian Jr. and Rodney Woodley appeared for an assignment on September 17, 2013, without the required safety glasses and the Respondent refused to hire them. Then the Respondent issued a written notice to each employee stating that he was receiving a verbal warning for appearing without the safety glasses. The General Counsel alleges that the Respondent took these actions because of Victorian’s and Woodley’s union and/or protected concerted activities in violation of Section 8(a)(3) and (1) of the Act.

The record shows that the Respondent had a legitimate concern with injuries to employees’ eyes and had notified employees of the importance of wearing safety glasses prior to the alleged discrimination against Victorian and Woodley in 2013. The annual injury report that the Respondent is required to submit to the Occupational Safety and Health Administration (OSHA), and which the Respondent filed on January 14, 2013, shows that there were three reportable injuries in 2012, and that every one of those was an eye injury involving a foreign body entering the eye. During the pre-season training that the Respondent conducted for employees and supervisors on March 15, 2013—and which was attended by both Victorian and Woodley—the Respondent discussed this record of eye injuries and the necessity of avoiding them by wearing the required safety glasses. Since at least November 18, 2010, the Respondent’s safety handbook has required employees “to wear eye protection in operational areas where the potential for eye injury exists,” and stated that failure to abide by this and other safety equipment requirements, “will result in disciplinary action.” J. Exh. 3, Page 61 (Personal Protective Equipment #1800). Brown, Lockett, Rizo, Woodley—all witnesses for the General

Counsel—testified that there were past instances in which employees did not have necessary safety glasses, but were permitted to obtain them from a manager, supervisor, or a coworker, without being denied work or subjected to discipline. However, these witnesses did not identify the specific circumstances or dates of these occurrences—and in particular did not show that any of these prior incidents took place after the OSHA report filed in January 2013 or the training in March 15, 2013.

Victorian and Woodley were among the group of ILA unit employees who participated in a work stoppage on June 1, 2013, to protest a unilateral change in the way the Respondent was moving aluminum at the facility. On that occasion, the discussion between Victorian and Leach became heated, and both raised their voices. Leach told Victorian, “I’m about this far off your ass,”¹⁶ and made a gesture holding his thumb and forefinger about an inch apart. Victorian also filed a number of grievances. One such grievance, filed on October 15, 2012, complained of the Respondent’s failure to move Victorian from the regular list to the skilled list. In another, filed on June 5, 2013, Victorian grieved more generally over the Respondent’s failure to add employees to the skilled list. On August 13, 2013, Victorian filed an unfair labor practices charge alleging that the Respondent had discriminatorily refused to place him on the skilled list.

As noted above, the allegation regarding discrimination against Victorian and Woodley arises over work on September 17, 2013. On that day, Victorian and Woodley both got calls from an ILA dispatcher to come to the facility to shift the lines that secured a vessel. They were given significantly less than the usual amount of time to appear for this work, but the record does not make clear whether the short notice was attributable to the dispatcher, the Respondent, the unavoidable uncertainties of the work, or some other factor. At any rate, Victorian and Woodley hurried to the facility and, when they presented themselves at the location where the lines were to be moved, neither had the required safety glasses on their person. It is not disput-

¹⁶ Hubbard testified that Leach made this statement, and the thumb and forefinger gesture, on June 1, and Leach denied it. I credit Hubbard, who, as discussed above, I found a particularly credible witness and more credible on disputed matters than Leach. See, *supra*, footnote 3. However, I do not find a basis for crediting the statement, in Victorian’s affidavit (GC Exh. 2), that Leach reprised the thumb and forefinger gesture when he denied Victorian and Woodley an assignment 3 ½ months later on September 17. At the time of the hearing, Victorian was deceased and, consistent with Board precedent, I admitted his affidavit into evidence, but carefully scrutinized the affidavit and other factors before deciding what weight to give to the assertions in it. *Weco Cleaning Specialists, Inc.*, 308 NLRB 310, 311 fn. 7 (1992); *Ann’s Laundry & Dry Cleaners, Inc.*, 276 NLRB 269, 270 fn. 3 (1985). In the case of the September 17 incident, Leach testified that he had not made the alleged gesture and the contrary claim in Victorian’s affidavit was not corroborated by other testimony or documentary evidence. In particular, Woodley, who was the General Counsel’s only live witness regarding the September 17 encounter between Leach and Victorian, did not testify that Leach made the thumb and forefinger gesture at that time. Although I found Leach a less than fully credible witness, I do not find a basis here for finding Victorian’s affidavit more reliable than Leach’s denial on the question of whether Leach made the thumb and forefinger gesture on September 17.

ed that safety glasses were required for the type of work they had been told they would be performing. The two employees had a discussion with Leach regarding this, and both Victorian and Woodley indicated to Leach that they could get safety glasses from the break room or a car—something that would take about 5 minutes. Either at that time, or when they returned a few minutes later with safety glasses, Leach told Victorian and Woodley that it was “too late” and that their services would not be needed that day. Both Victorian and Woodley left the facility.¹⁷

On September 18, 2013, Leach issued discipline to Woodley for violating the Respondent’s safety policy number 1800, which includes the language requiring employees to have safety glasses. Although provided to Woodley in written form, that document characterizes the discipline as a “verbal warning.” The document states that any additional incidents regarding the safety policy and the safety glasses “could result in further disciplinary action up to and including suspension, and or termination.” Victorian also received a disciplinary warning based on the incident. There was no evidence that the Respondent had ever disciplined any other employees for presenting themselves for work without required safety glasses. By the same token, the evidence does not establish that any employees had appeared for work without required safety glasses after the submission of the injury report to OSHA in January 2013, or after the March 2013 meeting at which the Respondent discussed that report and the importance of avoiding eye injuries.

Analysis

I find that the General Counsel has met its initial *Wright Line* burden with respect to discrimination against Victorian. The evidence shows that Victorian was particularly active in union matters, having filed multiple grievances in recent years and then, just a month before the alleged discrimination, an unfair labor practices charge regarding the Respondent’s refusal to place him on the skilled list. In addition, as discussed above, on June 1, 2013, Victorian not only took part in a work stoppage to protest an unlawful change to the way the Respondent was handling aluminum at the facility, but directly confronted Leach about the violation. These were all activities of which Leach—who made the decision to refuse work to Victorian and to issue discipline—was aware. The record also shows that Leach bore animus towards Victorian’s activities. When Victorian complained to Leach about an unfair labor practice on June 1, Leach raised his voice towards Victorian and warned “I’m about this far off your ass,” while making a gesture with his thumb and index finger.

Since the General Counsel has made the required initial showing, the burden shifts to the Respondent under *Wright Line* to show that it would have refused to allow Victorian to work on September 17, and issued discipline to him, even in the ab-

¹⁷ According to Leach, other employees had already begun shifting the lines, but according to Woodley the line shifting work was not yet underway when he arrived. I do not find a basis in the testimony, the demeanor of the witnesses, or the record as a whole, for crediting one witness over the other regarding the question of whether the lines were already being shifted.

sence of the protected activity. I find that the Respondent has provided sufficient evidence to meet its burden by showing that Victorian presented himself for work that day in an area where safety glasses were required, but that he did not have the safety glasses with him. The evidence shows that employees' failure to wear safety glasses had become a subject of concern to the Respondent. Every one of the injuries that the Respondent reported to OSHA in the most recent annual report was an injury involving an eye and a foreign object. Not surprisingly, during the most recent pre-season training prior to September 17, 2013, the Respondent discussed that report and emphasized the necessity of employees wearing safety glasses while doing work that required eye protection. The evidence did not show that, since that meeting, any other employee had appeared for work without the required safety glasses, but been treated more leniently than Victorian. Indeed Woodley, who the General Counsel concedes was not particularly involved in union activity, received exactly the same treatment as Victorian for exactly the same safety violation. Under the circumstances present here, I find that the Respondent has met its rebuttal burden by showing that, more likely than not, Leach would have denied Victorian work and issued the warning to him even if not for his protected union activities.

The General Counsel states that Woodley had engaged in only "minimal union activity," Brief of General Counsel at Page 19, and I agree. The activity that was shown—participating, along with the other ILA unit members in a brief work stoppage called by Brown and Hubbard—is insufficient standing alone and under the circumstances present here to provide a basis for believing he would be a target of the Respondent's anti-union animus. Unlike in Victorians' case, there was no evidence that Leach had expressed any animus towards Woodley or his activity, or that Woodley had directly challenged Leach or filed grievances and unfair labor practices charges. The General Counsel argues that I should find that it has met its initial *Wright Line* burden with respect to Woodley on the theory that he was an innocent bystander injured by the Respondent's discrimination against its true target, Victorian. Brief of the General Counsel at Page 19, citing *Professional Eye Care*, 289 NLRB 1376 (1988), *Hunter Douglas Inc.*, 277 NLRB 1179 (1985), and *Jack August Enterprises, Inc.*, 232 NLRB 881 (1977). This argument, however, depends on the assertion that Leach's actions with respect to Victorian over the safety glasses issue were themselves discriminatory. For the reasons discussed above, I find that unlawful discrimination was not shown with respect to Victorian, and therefore the General Counsel's argument that Woodley was an "innocent bystander" injured by unlawful discrimination against Victorian fails.

For the reasons discussed above, the claims that Victorian and Woodley were discriminated against in violation of Section 8(a)(3) and (1) when they were denied work on September 17, 2013, and subsequently issued disciplinary warnings, should be dismissed.

I. ALLEGATIONS REGARDING TREATMENT OF RUSSELL

The General Counsel alleges that the Respondent discriminated in violation of Section 8(a)(3) and (1), and also interfered with the exercise of Section 7 rights in violation of Section

8(a)(1), since late October or early November 2013, by restricting Russell's access to certain areas of the facility; discriminating in violation of Section 8(a)(3) and (1) by issuing a written reprimand to Russell on about January 3, 2014; and violated Section 8(a)(1) by threatening to terminate Russell on about January 3, 2014. Russell began working at the facility in 2004. While he was never a permanent steward, since November 2013 he has served as a fill-in steward at times when a permanent steward was not present. Paul Floering and Sims also served as fill-in stewards.

1. Steward's Ability to Move Around the Facility to Police the Contract: As is discussed more fully below, the record shows instances when Russell was a fill-in steward and the Respondent confronted him about being away from his assigned work area. An employee designated as the steward on a shift has a work assignment, just like any other unit employee, in addition to the responsibilities of steward. The collective-bargaining agreement provides, however, that "the steward shall be allowed a reasonable amount of time to investigate alleged contract violations, process grievances and attend arbitration hearings without loss of pay." (Jt. Exh. 1, Sec. 22.3.) At the same time, the collective-bargaining agreement includes work rules that place restrictions on the unit employees' freedom to interrupt their work. Those work rules state: (1) "During temporary work interruptions occurring during work periods, employees must remain in the vicinity of the job or, with supervisory approval, at a designated area within the Terminal."; (2) "If an employee[] must leave the job area for relief purposes, such employee shall notify supervisor and not be absent from the job longer than 10 minutes, including travel time."; and (3) "Employees that leave work early or take unauthorized breaks will be docked time." In addition, Section 20.6 of the collective-bargaining agreement provides that "The Company reserves the right to deny future employment to any employee who leaves his job unattended." The collective-bargaining agreement also states that in certain circumstances, not shown to pertain here, the steward will be assigned as an "extra man" in addition to "minimum gang positions." See (Jt. Exh. 1, Secs. 22.3(1)(B.) and 22.3(2.)). There was no testimony that Russell was an "extra man" at the times when the Respondent attempted to limit his movements. Nor was there testimony explaining how, if at all, such an assignment affected a steward's flexibility to attend to union matters.

The credible evidence showed that stewards move around the facility to police the contract, often in response to inquiries from unit members about potential contract violations, and usually by driving forklifts or other work equipment to area where they are needed. The credible testimony of Rizo¹⁸ and Hubbard—both long-term stewards—established that, depending on the type and location of the work activity that the steward was involved in at the time, the steward could sometimes investigate a possible contract violation immediately and without notifying the Respondent. In other cases, however, the steward delayed the investigation until after he completed a

¹⁸ Rizo was a steward for approximately 3½ years ending in 2012, and has also been an official with the ILA local. At the time he testified in this matter, Rizo was no longer an ILA steward or official.

work task or notified the Respondent and/or obtained the Respondent's approval. If, for example, the steward was assigned to operate a forklift and was not busy with any work when he became aware of a potential contract violation, the steward could immediately investigate the suspected contract violation, without notifying the Respondent. (Tr. 127, 1951–1952.) If, after arriving at the location of the potential violation, the steward concluded that there was a contract violation, he would contact Leach or another “company man” to discuss the matter. (Tr. 123–125.) However, if the steward was in the middle of a particular task at the time he was alerted to the possibility of a violation, the steward would complete that task before leaving to investigate so as not to cause an undue delay by, for example, “leav[ing] the truck or the railcar stuck there half loaded.” (Tr. 126–128, 267–268.) In other circumstances, for example if the steward was on-board a vessel or was assigned to work that demanded “constant production,” the employee would have to contact an official of the Respondent before leaving to investigate the potential violation. (Tr. 1947–1952.) Rizo and Hubbard both used forklifts and other company equipment to move around the facility to investigate possible contract violations, and the Respondent never told them that they were prohibited from doing so. (Tr. 105–106, 266–268.)

Russell testified, contrary to Rizo and Hubbard, that union stewards had, in essence, an unfettered right to stop their work activity without notifying the Respondent and go wherever they wished at the facility. I found Rizo and Hubbard, both of whom, like Russell, testified for the General Counsel, to be far more reliable witnesses on this subject than Russell. Rizo and Hubbard were long-time permanent stewards who I expect would be better versed in the established practices for stewards than was a fill-in steward like Russell. Moreover, unlike Russell, they did not have a direct interest in the outcome of the allegations relating to Russell's movements around the facility. In addition, based on my consideration of his demeanor, testimony and the record as whole, I found Russell a less reliable witness than either Rizo or Hubbard.¹⁹ I also believe that Russell's suggestion that stewards had an absolute right to leave their work assignment and move around the facility was facial-

¹⁹ Russell was a particularly hostile and uncooperative witness. On more than one occasion, Russell attempted to recant testimony he had just given when cross examination suggested that his prior assertions might be problematic. Tr. 1064–1065, 1066–1067. Likewise, when presented with statements in his signed Board affidavit that appeared to contradict his trial testimony, Russell claimed that the affidavit had a misprint. Tr. 1062–1063. In a number of instances, Russell began to stonewall, repeatedly stating he “did not recall,” regarding matters about which he had previously testified confidently. Tr. 1066–1067. In some instances Russell's testimony was shown to be at odds with his own notes. Compare Tr. 1091–1092 (Russell testifies that Leach never warned him that the forklift was not a taxi and that he should use the union truck) with Tr. 1093–1094 (Russell's recollection recorded in his own notebook states that Leach warned him that the forklift was not a taxi and that he should use the union truck.). In numerous other instances, Russell was evasive or uncooperative as a witness. See, e.g., Tr. 1077–1078 (when asked if he sometimes leaves his job duties for reasons other than union business, Russell states that most of the time it is about union business, and repeatedly refuses to answer whether in some instances it is not about union business).

ly implausible given that stewards were assigned to regular work duties that sometimes involved constant production.

2. The Respondent's Actions Regarding Russell: Leach and Hendricks testified that Russell had an unusual tendency to disappear at the facility when he had work to perform. Although they provided little in the way of specifics about this, and the documentary evidence is thin,²⁰ I found their testimony credible. No disinterested witness denied that Russell was particularly disposed to leave his work duties without notice. If anything Russell's testimony—which significantly exaggerated the level of freedom that stewards have to leave their work duties—lends support to Leach's and Hendricks' testimony on this subject. Leach often found it necessary to search the facility to find Russell. When found, Russell would sometimes resist Leach's direction to return to work, stating that he did not have to follow the direction because he was a union steward.

The parties focus on three incidents regarding the Respondent's treatment of Russell. The first began on December 19, 2013. Russell was serving as a fill-in steward and was on a forklift away from his work assignment talking to Rizo in an area known as Berth A. Hendricks approached the two because there was no work for a forklift at Berth A. He asked Russell what he was doing there, and Russell responded that he was “checking out the operation” in his capacity as steward. Although Russell testified that he told Hendricks he was present there in his capacity as steward, neither Russell nor Rizo testified that the subject of their conversation was, in fact, union-related. The next day, December 20, Hendricks approached Rizo in the shape-up room and asked him, in Russell's presence, if there was a problem in Berth A. Rizo answered that there was no problem at Berth A. Hendricks then told Russell that he should not drive his forklift to Berth A because there was no work for him there.

The second incident occurred on December 29, 2013, and concerns Russell's actions relating to the hiring of unit employees for that day. As I understand it from the testimony, the hiring procedure at the facility is that the Respondent records a message stating what work is available on a particular shift for unit employees on the regular list. The collective-bargaining agreement provides that, depending on the circumstances, this recording must be made available to employees a minimum of either 6 or 8 hours before the hiring is expected to occur.²¹ Employees are able to access this recording by telephone and may then appear at the facility and seek to be hired. The steward generally works with the Respondent to ensure that an adequate number of unit employees with the requisite skills present themselves. At the shape-up meeting, the Respondent hires the unit employees who will work that day from among those who have appeared. The shape-up meeting occurs at a designated time and, in the normal course of things, employees must be

²⁰ Other than the January 3, 2014, discipline that is being challenged here, the only documentation is a disciplinary write up from March 5, 2014, which cites Russell for sleeping on the job.

²¹ The collective-bargaining agreement provides: “For work from 6:00 AM to 10:00 PM, the Company shall provide 6 hour notice through the telephone tape of its best estimate of its anticipated employment needs. For work from 10:00 PM to 6:00 AM, the Company will provide 8 hours' notice.” Jt. Exh. 1 at Sec. 5.3(C).

present at that meeting in order to be hired.

After the shape-up meeting for December 29 was over, Russell, who was acting as steward that day, concluded that there were still some positions that the Respondent needed to fill. Without consulting the Respondent, Russell called Terrance Clemons, an ILA unit employee, and asked him to report to the facility. Afterwards, Russell informed Hendricks that he had told Clemons to come in. Hendricks responded that the Respondent did not need any more employees for the shift and that Russell should let Clemons know that he was not needed. Russell testified that he attempted to contact Clemons by telephone, but was unable to reach him. Clemons appeared at the Respondent's guard station and sought admittance to the facility. The guard called Hendricks, who instructed him to tell Clemons that the shape-up meeting was over, and that the Respondent did not need him for the current shift. Clemons contacted Russell, who left his assigned work without notice to the Respondent and went to the guard station to meet Clemons. Although Hendricks had already told Russell that Clemons was not needed for the shift and would not be hired, Russell told the guard to summon Hendricks to the guard station. Hendricks came to the guard station where he found both Russell and Clemons present. Hendricks told Clemons that he had missed the shape-up meeting and that the Respondent did not need him at that time. In addition, Hendricks told Russell to "get where you need to be" because there was work that needed to be done at a barge. According to Clemons, Hendricks used a "high tone" of voice when communicating this instruction to Russell. Russell did not return to work at that time as directed by Hendricks, but rather told Hendricks: "You guys ain't going to talk to me like a little kid. Fuck that." Hendricks stated that Russell had a job to do and needed to return to the barge, but Russell persisted in refusing to comply. Then, Hendricks warned that he would issue discipline to Russell if he did not return to work. Russell still did not return to his work assignment. Hendricks told Clemons that he was sorry Clemons had wasted his time that day and explained that he had previously told Russell that Clemons was not needed. Clemons left and then Russell proceeded back to his work on the barge.

The third incident cited by the General Counsel took place a few days later on January 3, 2014. Hendricks told Russell that a barge was expected at the facility and that he should give the unit employees a "heads up." At some point Leach told Russell that the Respondent was going to conduct a "shape-up" meeting to hire for the shift. Russell took issue with this, stating that the Respondent could not have a shape-up meeting because it had not used the taped announcement to give employees the required notice. Leach responded: "You don't need to tell me how to do my job. I know how to do my job, you learn to do yours." Leach also used an expletive.²² Russell did not engage

²² I base this account on the testimony of Rizo, a witness for the General Counsel, who was present for the exchange between Leach and Russell. Russell gave a somewhat different account than Rizo, stating that Leach made the more threatening statement, "Don't be so disrespectful or you won't be here that long." I consider Rizo a more reliable witness regarding this conversation than Russell. Not only does Rizo have no direct interest in the outcome regarding this allegation, but for the reasons discussed above, see *supra* footnote 19, I consider

Leach further on the subject.

As Russell was leaving work that day, Hendricks presented him with a written disciplinary warning. The disciplinary notice, dated January 3, 2014, stated that the reason for the action was: "Failure to modify behavior after multiple warnings from Mr. Terry Leach, Director of Operations, and Mr. Brad Hendricks, Operations Manager. The specific behaviors are insubordination, leaving the job, and failure to begin work promptly and/or return to work promptly from meal period." The Respondent stated that it wanted Russell to: "a) notify a supervisor when he needs to leave the job; b) begin work promptly at the beginning of a shift and/or return to work promptly when returning to work from a meal period; c) stop hanging up on supervisors when they attempt to deliver critical job information." The Respondent also stated that "Russell needs to follow not ignore supervisors' work directives." The notice warned that unless Russell modified his behavior, he would "be subject to a Disciplinary Layoff and/or Termination." Although this write-up states that it follows "multiple warnings" for misconduct, there is no documentary evidence of prior warnings.²³ The disciplinary notice does not identify, by date or otherwise, the specific incidents that it is based on. However, a cover letter, signed by Hendricks and provided to Russell with the disciplinary notice, makes specific reference to one incident—the confrontation between Russell and Hendricks at the guard station on December 29 arising out of the decision not to hire Clemons. About that incident, the letter states: "[Y]our actions on the morning of December 29, 2013 clearly demonstrate that verbal reprimands have failed to make you understand the seriousness of your actions and that these behaviors (insubordination, leaving the job, and failure to begin or return to work promptly) must stop immediately." Along with these documents, the Respondent provided several attachments, including excerpts from the collective-bargaining agreement and a policy statement. These materials were referenced in both the disciplinary notice and the cover letter.

Analysis

The General Counsel alleges that, on January 3, 2015, Leach violated Section 8(a)(1) by making a threatening statement in reaction to Russell asserting that the Respondent had to give employees greater notice before a shape-up meeting could be held. Section 8(a)(1) provides that an employer may not "inter-

Russell an unreliable witness. I note, moreover, that although counsel for the General Counsel had Rizo testify on two occasions about what Leach said on January 3, in neither instance did counsel succeed in eliciting confirmation from Rizo of the threatening statement claimed by Russell. For his part, Leach testified that he did not recall making the statements recounted by Rizo, but he did not testify that he recalled that he had *not* made those statements and he gave no account at all of the January 3 exchange. Similarly, Hendricks testified that he never heard Leach threaten Russell, but he was not specifically asked about the particular statements reported by Rizo. Hendricks did not deny that, on January 3, Leach and Russell had a conversation regarding the timing of a shape-up meeting, nor did he provide his own account of such a conversation.

²³ The write-up that cited Russell for sleeping on the job was not issued until March 5, 2014, and therefore cannot be one of the prior warnings that the January 3, 2014 disciplinary notice refers to.

ferre with, restrain, or coerce employees” in the exercise of their Section 7 rights.” The General Counsel contends that Leach’s reaction constituted an implied threat of discharge. Brief of General Counsel at Page 24, citing *KSM Industries, Inc.*, 336 NLRB 133, 133 (2001) and *Cooper Tire & Rubber Co.*, 308 NLRB 72 (1992). As stated above, I do not find that Leach gave the response that the General Counsel alleges was a threat—i.e., “Don’t be so disrespectful because you won’t be here that long.” For the reasons discussed above, I find instead that Leach responded by using an expletive and saying: “You don’t need to tell me how to do my job. I know how to do my job, you learn to do yours.” It is not clear whether the General Counsel contends that this response violated the Act. At any rate, I conclude that this response was not an unlawful threat. It does not, on its face, threaten Russell with discharge or any other adverse job action. Nor does it cross the line into the area of statements that would “reasonably be interpreted” by an employee as a threat that Leach would take adverse action. *Smithers Tire, supra*. Given the totality of the circumstances present here, I find that Leach was referencing Russell’s job knowledge in order to compare it to Leach’s own purportedly superior knowledge and as a basis for rejecting Russell’s protest about the shape-up meeting—not to suggest that Russell would be disciplined for exercising his Section 7 rights.

For the reasons discuss above, I find that the allegation that Leach unlawfully threatened Russell on January 3, 2014, should be dismissed.

The complaint also alleges that, since about late October or early November 2013, the Respondent restricted Russell’s access to certain areas of the facility and that this action was discriminatory in violation of Section 8(a)(3) and (1), and unlawfully interfered with Russell’s Section 7 activity in violation of Section 8(a)(1). The allegation that the Respondent was motivated to do this by Russell’s union activity is analyzed pursuant to the burden shifting approach under *Wright Line, supra*. The General Counsel has satisfied the first two elements of the initial *Wright Line* showing. Since about November 2013, Russell had been filling-in as a union steward and the Respondent was aware of this. The record does not show that Russell engaged in other notable union activity, or that he engaged in any such activities prior to beginning to fill-in as a steward in late 2013.

I find that the General Counsel has failed to show animus that satisfies the third element of the prima facie case. The General Counsel relies on alleged disparate treatment for this purpose. However, what counsel for the General Counsel presents in this regard is evidence purporting to show that Russell was treated less favorably than some permanent stewards who it asserts were not limited to the same extent as Russell. However, those permanent stewards were, if anything, more active in union affairs than Russell was. Facially, such comparisons do not show that Russell was being discriminated against because of his union activity. For that, the General Counsel would generally have to compare the way the Respondent treated Russell to more favorable treatment afforded to employees in general or to those who had not engaged in the same protected activities. That was not shown. Indeed, the evidence did not show that the Respondent had granted any unit employee, un-

ion activist or not, the level of freedom to leave their duties and move around the facility that Russell tried to claim for himself.

The General Counsel also asserts that animus was shown because Russell was the last man standing who was able to carry out the duties of steward. That is a theory about motivation, but not evidence of that motivation. Such evidence is lacking here. To the contrary, the General Counsel has not even shown that Russell was, in fact, the last unit member available to fulfill the duties of steward. Floering and Sims are both fill-in stewards and were both employed at the facility during 2013 and 2014. Moreover, Rizo, an individual who had substantial past experience as a permanent steward, was also working at the Respondent at that time. Although the Respondent’s discussion of this theory cites two cases and puts the phrase “last man standing” in quotation marks, neither of the cases cited actually uses the phrase much less holds that an employee’s circumstance as the only available steward would, if shown, alleviate the need for evidence of animus. See Brief of the General Counsel at Page 23, citing *Bryant & Stratton Business Institute*, 321 NLRB 1007 (1996), enfd. 140 F.3d 169 (2d Cir. 1998) and *Thill Inc.*, 298 NLRB 669 (1990), enfd. in part 980 F.2d 1137 (7th Cir. 1992).

Even if I had found that the General Counsel made a weak initial showing of discrimination, I would find that the Respondent has met its responsive burden. The evidence shows that Russell had an exaggerated view of the freedoms that he acquired upon becoming a fill-in union steward in November 2013. See *Electro Controls, Inc.*, 161 NLRB 307, 320 (1966) (employer did not violate the Act by disciplining an employee who, after becoming a union steward, began to leave his work area without permission and to do so to a greater extent than other employees). As set forth above, the collective-bargaining agreement between the parties placed limits on employees’ freedom to leave their work areas without notifying the Respondent or obtaining authorization. The evidence shows that union stewards have been allowed additional flexibility when they are notified of possible contract violations, particularly if they are not engaged in work activities at the time or are able to complete their current assignment. However, that flexibility did not extend as far as Russell took it—that is, to permit him to leave his work activities whenever he decided to (including for matters that may not have been union business) and to do so without notice to, or permission from, the Respondent, and even, on occasion, in contravention of a direct order to resume his work duties. Such freedom was not shown to have been granted to any employee at the facility—whether they were active in union matters or not. To the extent that Russell was leaving areas where he had work to perform, the record suggests that he was doing so without giving notice or otherwise following the procedures necessary to limit potential work disruptions caused by such absences. Given the nature of the work that the unit employees were engaged in at the facility, and the record as a whole, I find that the Respondent would have found it necessary to take the actions it did with respect to Russell’s movements around the facility absent any discriminatory motive.

I also find that the Respondent did not violate Section 8(a)(1) by restricting Russell’s ability to leave the work to which he

was assigned without notifying the Respondent or obtaining its approval. In general, an employer may restrict employees from leaving their assigned work without permission. *Heartland Catfish Co.*, 358 NLRB 1117, 1118 (2012) (employer does not interfere with Section 7 rights in violation of Section 8(a)(1) by prohibiting employees from leaving a department during a shift without permission); *Emerson Electric Co.*, 185 NLRB 346 (1970) (employer does not violate Section 8(a)(1) by enforcing a rule prohibiting employees from leaving their work stations without supervisory approval); cf. *Weyerhaeuser Co.*, 251 NLRB 574, 583 (1980) (employer violates Section 8(a)(1) by enforcing its rule against employees leaving their work stations without permission more strictly in response to a union campaign). Moreover, the record does not demonstrate any specific instances in which the restrictions imposed by the Respondent meaningfully interfered with the ability of Russell, or any other steward or fill-in steward, to address a potential contract violation or otherwise fulfill their union duties.

I find that the General Counsel has not shown that the Respondent violated Section 8(a)(3) and (1) or Section 8(a)(1) by restricting Russell's movements at the facility.

The General Counsel also alleges that the Respondent discriminated in violation of Section 8(a)(3) and (1) when it issued a written disciplinary warning to Russell on January 3, 2014. The General Counsel and the Respondent both acknowledge that this discipline was premised on the incident involving Russell, Hendricks and Clemons that occurred on January 29 at the guard station. The General Counsel and the Respondent also both treat Russell as being engaged in union and/or protected concerted activity at that time, and frame the question, at least in part, as whether his conduct in the course of that activity caused him to lose the protections of the Act. Under *Atlantic Steel Co.*, 245 NLRB 814 (1979), where an employer defends disciplinary action on the basis of employee misconduct that is part of the res gestae of the employee's protected activity, the Board decides whether the otherwise protected activity has lost the Act's protection based on a "careful balancing" of four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. 245 NLRB at 816; see also *Lou's Transport, Inc.*, 361 NLRB 1446 (2014); *United States Postal Service*, 360 NLRB 677 (2014).

Under the circumstances present here, I conclude that to the extent that Russell was engaged in protected activity at the guard station he lost that protection through his misconduct. After the Respondent had completed its hiring for the shift, Russell took it upon himself to contact Clemons and tell him to come to work. Before Clemons appeared, Hendricks definitively told Russell that hiring for the shift was complete and that Russell should notify Clemons not to come in. When Clemons nevertheless arrived at the guard station, the Respondent informed him that the hiring for the shift was closed. There is no dispute that the Respondent—in this case Hendricks—is the party that makes hiring decisions for particular shifts, and the General Counsel has not claimed that Russell had a basis under the contract or otherwise for contending that the decision not to hire Clemons was an unfair labor practice. Although

Russell's explanation is rather unclear as to why he left his assigned duties without notice and came to the guard station, or why he insisted on summoning Hendricks to the guard station, I assume that at least one of his intentions was to give Clemons and himself an opportunity to persuade Hendricks to reverse the decision not to hire Clemons for the shift. I find that this was protected concerted activity.

When Hendricks arrived at the guard station he reiterated that Clemons would not be hired for the shift, and instructed Russell to return to work on the barge. In response to the first such instruction, Russell did not raise any issue regarding the failure to hire Clemons, but rather became insubordinate and used profanity. Hendricks continued to direct Russell to return to his work, and eventually warned that failure to do so would result in discipline, but Russell continued to defy those directions. Consideration under the factors articulated in *Atlantic Steel*, leads me to conclude that Russell forfeited the protection afforded to his protest over the hiring decision. His outburst was directed at his supervisor, Hendricks, and took place in the open and in the presence of others, including at least one unit employee. Russell's actions were a direct challenge to Hendricks' authority to decide who to hire and to direct Russell to perform work duties. The General Counsel does not contend that Hendricks was engaged in an unfair labor practice by refusing to hire Clemons. Moreover, Russell's outburst was not an isolated incident, but the culmination of a continuing pattern of refusing to respect the Respondent's authority to direct work at the facility.

The General Counsel cites *Lewittes Furniture Enterprises, Inc.*, 244 NLRB 810 (1979), for the proposition that an employees' brief refusal to return to work while attempting to raise a matter of concern with their employer does not cause the employee to lose the protections of the Act. I do not find that precedent applicable here for a number of reasons. First, *Lewittes Furniture* is a pre-*Atlantic Steel* decision and it is not clear how the Board would have viewed the facts present in *Lewittes* under the controlling standard subsequently adopted in *Atlantic Steel*. At any rate, the circumstances present in *Lewittes Furniture* are far enough removed from those at issue here that it would not be controlling precedent even if it had been issued after *Atlantic Steel*. In *Lewittes Furniture*, a group of five employees stopped work for approximately 8 to 15 minutes while asking the employer for a wage increase. There was no employee "outburst" in the sense discussed in *Atlantic Steel* and engaged in by Russell, but rather a simple request for a pay raise. Moreover, the employee in *Lewittes Furniture* did not refuse an order to return to work. Indeed the employer did not make such an order, but rather responded to the employees' request for a raise by ordering them to "get the hell out" of the facility, and issuing termination notices to them. Russell, in contrast, was insubordinate in that he refused a repeated order from his supervisor to return to his work duties, and used profanity in the process. Moreover, he did this even though the Respondent had already discussed with him the issue relating to hiring Clemons for the shift. In addition, I consider it significant that in *Lewittes* a group of employees were raising their concern regarding one of the most important terms and conditions of employment—that is, their ongoing rate of pay. Rus-

sell's more belligerent and persistent protest, on the other hand, concerned the Respondent's decision not to assign one employee to one shift on one day.

The General Counsel also cites *Avante at Boca Raton, Inc.*, 332 NLRB 1648 (2001), for the proposition that an employee's brief refusal to return to work while attempting to discuss a matter of concern is not insubordination. However, it is not surprising that the employee in *Avante* was not considered insubordinate since the individual whose direction he refused was a nonsupervisory employee who lacked authority to give orders to the refusing employee. Moreover, the reasoning in *Avante* specifically relies on the fact that that employee's statements, unlike Russell's, did not include the use of profanity.

The General Counsel, in addition to arguing that Russell's actions did not cause him to lose the protections of the Act with respect to his activities at the guard station on December 29, also argues that the timing of the disciplinary warning suggests that it was discriminatorily based on unlawful animus resulting from Russell's exchange with Leach on the morning of January 3, 2014, and demonstrated by Leach's unlawful threat at that time. As discussed above, the General Counsel has failed to show that Leach unlawfully threatened Russell on January 3, 2014, and has also failed to show the Respondent harbored unlawful animus against Russell's protected activities for purposes of the *Wright Line* analysis. Moreover, I do not find the timing of the disciplinary notice to be suspect. It was issued within a few days of the December 29 incident that the paper-work references and during which incident Hendricks specifically warned Russell that he would be disciplined if he continued to refuse to return to his work duties. Moreover, the relatively thorough nature of the letter and disciplinary notice—which, inter alia, include citations to specific work rules and provide relevant attachments—undercuts the General Counsel's suggestion that the discipline was thrown together on January 3 to retaliate for Russell's comments to Leach that morning. Finally, the mild nature of the discipline is consistent with the view that such discipline would have been imposed absent any discriminatory motive, regardless of whether harsher discipline such as suspension or termination could, under the circumstances, have been defended. To sum up, the General Counsel has failed to make the initial showing of animus required under *Wright Line*. Even if it had, the Respondent has shown that it would have issued the disciplinary write-up to Russell based on the December 29 misconduct referenced in that write-up even if Russell had not engaged in protected activity.

For these reasons, I find that the allegation that the Respondent violated Section 8(a)(3) and (1) when it issued a written warning to Russell on January 3, 2014, should be dismissed.

J. Termination of Brown

The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1), and Section 8(a)(4) and (1) of the Act by discriminatorily terminating Brown on October 1, 2013, because of his union activity and participation in the Board's processes. Leach, who made the decision to terminate Brown, testified that he did so exclusively because Brown caused damage to an end loader by riding the brakes while operating it on

the night shift of September 19 to 20, 2013.²⁴

1. Brown's History at the Facility: Brown began working at the facility in 2004. Prior to July 2012, Brown was an ILA member, but not an ILA officer. Brown was elected president of the ILA local when it emerged from trusteeship in July 2012, and continued to hold that position at the time of the hearing in this matter. During his time as president, Brown has served as chief contract negotiator for the ILA local, chairman of the safety committee, and the ILA's representative for purposes of grievance processing. Brown was also the ILA official who, on August 5, 2013, directed the ILA unit employees to stop work over the dispute regarding the use of non-ILA individuals to handle aluminum on the wet side of the facility, and during that work stoppage he was the union officer who presented the ILA's position to Leach. On June 10–14 and August 21, 2013, during a prior unfair labor practices proceeding against the Respondent, Brown was present as a representative of the ILA local and also testified.

For a period of time after starting at the facility, Brown was a regular list employee, however, he rather quickly acquired the skills necessary to qualify for placement on the skilled list and more consistent employment.²⁵ Leach asked Brown to join the skilled list in the fall of 2007 and again in 2008. In at least one of those instances, Leach attempted to require Brown to join the skilled list, but the collective-bargaining agreement permitted Brown to decline and he did so. Brown eventually joined the skilled list on July 1, 2011. Generally only a small minority of the unit employees qualify for the skilled list. The various order of call documents submitted at the hearing have between 6 and 11 unit employees on the skilled list and between 25 and 51 unit employees on the regular list. The order of call list that the Respondent issued immediately prior to Brown's termination states that he was qualified for: signalman, rigging, crane operator, checker, forklift operator, end loader operator, and fall protection. This was as high a number of areas of qualification as any employee on that order of call list.

Shortly after Brown became president of the ILA local, the Respondent, on August 9, 2012, issued two written disciplinary notices to him for causing damage at the facility. One concerned an incident on July 27, 2012, that resulted in damage to a warehouse wall. The notice stated that "this incident can be attributed to operating the forklift at a speed unsuitable for the conditions." The other disciplinary notice was a written reprimand, which stated that, on August 4, Brown had damaged a power line with the end loader he was operating. That notice stated that "[a]fter an investigation, it has been determined that this situation could have been avoided had [Brown] examined the area thoroughly before raising the bucket of the end loader." Both notices are signed by Leach and conclude by stating that "[a]ny further occurrences could result in equipment disqualification, suspension, and or termination."²⁶

²⁴ That shift began at 6 p.m. on September 19, 2013, and ended at 6 a.m. on September 20, 2013.

²⁵ A unit employee must become qualified to perform four of the types of skilled work listed in the collective-bargaining agreement in order to move onto the skilled list.

²⁶ During his testimony, Leach stated that there was an incident in approximately 2007 or 2008 when Brown had misused the brakes on a

2. Prior Decision Regarding Discrimination against Brown: In a decision dated March 31, 2015, the Board affirmed the decision of Administrative Law Judge Mark Carissimi in an earlier case involving the same employer and union. *Midwest Terminals of Toledo International*, 362 NLRB No. 57 (2015). That decision found, inter alia, that the Respondent bore animus against Brown because of his protected activities and unlawfully discriminated against him on that basis by denying him regular work assignment and light duty work assignments. Leach, the decision found, had lied about his reasons for denying light duty work to Brown and that the real reason was unlawful discrimination. Among the other findings was that Leach had made an antiunion threat and had physically assaulted an employee because of that employee's union and/or protected concerted activity. The hearing in the prior case was held on June 10–14, 2013, and August 21, 2013. Brown was present throughout that proceeding as a party representative and testified during the August 21 session.

3. Brown and the End Loader Damage in September 2013: The Respondent contends that Brown was discharged for causing damage to the end loader he was operating on the night shift of September 19–20. The particular end loader Brown was operating at that time is referred to at the facility as “3-Kawasaki.” Brown had been operating various end loaders for 6 days in a row culminating with that shift. From September 16 to 19, the 3-Kawasaki loader was in almost continuous operation, with Ralph Leiby, another bargaining unit employee, operating it during the day shifts from 8 am to 5 pm.

Before starting work on an end loader, the operator is required to perform a preshift inspection. That entails turning on the end loader, checking the gauges, then moving it and engaging the brakes. Neither Brown nor Leiby reported discovering any problems with 3-Kawasaki during their pre-shift inspections on September 19.

During the night shift on September 18 to 19—that is, during the shift prior to the one on which the Respondent says Brown damaged 3-Kawasaki—Brown was operating 3-Kawasaki when a warning light briefly flashed on the control panel. Brown informed Moody—the supervisor on duty—about this and Moody told Brown to inform him if the warning light came back on. The warning light did not come back on. Brown

forklift. Brown denied the incident described by Leach. I do not find it necessary to resolve this factual dispute. Leach testified that he made the decision to discharge Brown based exclusively on Brown's operation of 3-Kawasaki on September 19–20, 2013, not on anything that occurred in 2007 or 2008. Tr. 1748–1749. Similarly, the paperwork prepared by the Respondent for Brown's termination makes no reference to any incident in 2007 or 2008, or to any basis for the termination other than the September 2013 damage. GC Exh. 43. I note, moreover, that the disputed incident in 2007/2008, even if it did occur, was quite distant in time. The Respondent's policy handbook provides that “documentation of violations of at-risk behaviors and/or company policies” must be maintained in the employee's personnel file for 9 months after the documentation is created and that the employee may seek to have such violations removed from his or her personnel file after that period. Jt. Exh. 2 (Progressive Disciplinary Policy #2000) at Section II.E. At the time the Respondent terminated Brown, the 2007/2008 incident that Leach mentioned would have been several years outside the 9-month period.

mentioned the warning light to Leiby, and Leiby told Brown that he had concerns about the transmission. When Brown next operated 3-Kawasaki, he paid attention to the transmission, but did not notice a problem.

During the September 19–20 shift, Brown was using 3-Kawasaki to pick up coke or coal from a pile and move it to a dumping location about 100 yards away. Fussell was doing the same work on a different end loader, and was generally following behind Brown as the two went back and forth between the pile and the dumping location. The area where this work was being done was lit. Brown denies that he was riding the brakes during that shift, and states that for most of the shift he did not experience any problems with 3-Kawasaki. Fussell testified that Brown was not riding the brakes during that shift. Fussell explained that he would have known if Brown had been doing so because it would have slowed their work unreasonably. He also testified that he did not see the 3-Kawasaki's rear brake lights come on while he was following behind Brown.

Moody, the supervisor on the night shift, communicated with Brown and Fussell by way of a radio system. The radio system allowed Fussell to hear communications not only from Moody to himself, but also between Moody and Brown. During the shift, Moody also sometimes approached Brown and Fussell while they were on the end loaders in order to talk with them in person. The last time Moody did this during the September 19–20 shift was at about midnight. When he approached Brown and 3-Kawasaki on that shift, Moody did not notice unusual smells or anything else that would suggest a problem with the equipment's brakes, nor did he observe Brown operating 3-Kawasaki in an improper manner.

Towards the end of Brown's September 19–20 shift, a warning light was triggered in 3-Kawasaki and stayed lit. Brown was not familiar with the particular warning light. Brown also noticed a buzzing sound. He stopped the end loader and called Moody on the radio and told him that a sensor had been triggered on 3-Kawasaki. Moody told Brown to take 3-Kawasaki to the maintenance shop.²⁷ Brown brought 3-Kawasaki to the maintenance shop and told a maintenance employee about the warning light.

When Hendricks arrived at work shortly before 6 am on September 20, a maintenance employee advised him that there was a problem with 3-Kawasaki. Hendricks inspected it, and observed that there was warning light and a burning odor. He could feel heat “coming off” the loader. Leach arrived at the facility shortly after Hendricks, and Hendricks informed him of the problem. Leach testified that he did not recall if anyone had moved 3-Kawasaki after Brown stopped operating it. (Tr. 1813.) Leach stated that even from a distance he could “smell the brakes” on 3-Kawasaki and that when he got closer he observed heat-related discoloration to parts of the brakes. According to Leach, an operator should be able to tell something is wrong with the brakes by the smell. Leach told Hendricks

²⁷ Brown and Fussell both testified that Brown had used the radio to notify Moody of this problem. Moody testified that he did not recall that communication, but his answers make clear that he was only testifying that he did not recall such a conversation, not that he recalled that such a communication had not taken place.

not to let anyone else move the end loader until a representative arrived from Reco Equipment, Inc. (Reco). Reco is the outside contractor that the Respondent uses for major repairs to the Kawasaki end loaders. Later on September 20—the same day the damage was discovered—Robert Groweg, a heavy equipment mechanic from Reco with 23 years' experience, arrived at the facility. Leach asked Groweg to do a full assessment of what was wrong with 3-Kawasaki. Leach testified that at this point he already thought that the damage was the result of “inattentive operating” by Brown, but that he wanted this conclusion to come from Reco, rather than from himself, because he was concerned that he would be accused of discriminating against Brown. Leach had no further conversation with Groweg about the matter. Leach did, however, discuss the situation and Groweg's assignment with Laverne Jones, a non-unit employee in the maintenance department.

Groweg did an initial examination of 3-Kawasaki on September 20. The damage he observed went well beyond normal wear and tear and eventually required approximately \$25,000 in repairs. On that first day, Jones asked Groweg what was wrong with the end loader. Groweg told Jones that he had not found anything mechanically wrong that would explain the damage. In response to Jones' questioning, Groweg stated that the “only thing that could be left is if an operator was resting his foot on the brake pedal when they were running it.” Jones asked Groweg to put that information in the service report. Groweg had never included a statement assigning blame in a service report before, Tr. 1366, but he did so in this case because of Jones' request.²⁸ The service report that Groweg created that day was one page long and including the following statement:

Drove to jobsite. Checked out brakes on loader. Found final drives were pretty hot. Checked temp of final drive covers and rear axle was about 150 degrees and front axle was 110 degrees after setting [sic] 4 to 5 hours. Looked at wheel seals left rear is leaking already. Checked accumulators and the pressures little low but not enough to be a problem. Brakes and seals are going to need replaced. Problem was do [sic] to operator not using machine properly.

(GC Exh. 29.) Groweg did not talk to Brown or any other operator, nor did he complete a full inspection, before making this initial report on September 20.

It was only after September 20, that Groweg did a full inspection of 3-Kawasaki by removing its wheels and accessing various components. Before finishing the work, Groweg completed 12 additional service reports regarding 3-Kawasaki. Through the course of the work, Groweg identified a number of mechanical factors that could have played a part in the brake damage. Groweg found that the “transmission disconnect” system was not working on the 3-Kawasaki at the time Brown was operating it, thus compromising a mechanism that Groweg testified was designed to ensure “that the transmission is not trying to pull through the brakes when you're raising the loader.” (Tr.1350–1351, 1354–1355.) Groweg also concluded that

²⁸ Jones was not called as a witness in this case to explain what led him to ask Groweg to report his surmise regarding operator error in his initial service report.

at the time Brown was operating 3-Kawasaki its brake pressure switch was broken. According to Groweg, the brake power switch “tells the computer when you're applying the brakes and also it gives you brake pressure so you can see what the brake pressure is when you push on the brake pedal, at different positions on the brake pedal what the pressure is.” (Tr. 1356.) Groweg's post-September 20 service reports note, *inter alia*, that on October 4, Groweg discovered that the brake pressure switch was “bad” and that when he checked the transmission the disconnect did not operate. (GC Exh. 29.) Groweg told both Jones and an attorney for the Respondent that Brown could have caused the damage without knowing it because if he applied a slight bit of pressure to the brakes “you may not feel it in the operation of the loader.” (Tr. 1377–1380.) At trial Groweg indicated that he was not sure that the operator had caused the damage by riding the brakes. (Tr. 1348.)

On September 27, 2013—7 days after the Respondent discovered the damage to 3-Kawasaki—Leach approached Brown about the damage for the first time. Leach interrupted Brown's work, and said “Tell me what happened to the end loader.” Brown did not understand what Leach's question referred to since he had recently operated three or four different end loaders and had not operated 3-Kawasaki since September 20. Brown replied, “What?” Leach said “I want you tell me what happened to the end loader.” Brown asked “Which end loader?” and Leach said, “The one you were riding.” Leach eventually revealed that he was talking about 3-Kawasaki and said “I want to know what you did to it.” Brown replied: “I didn't do nothing to it. What's wrong with it?” Leach told Brown, “Tell me anything that might have . . . happened to it.” Brown related that Leiby had mentioned concerns about the transmission. Leach said: “I ain't talking about the transmission. The brakes.” Leach said he wanted Brown to give him a written statement regarding “everything that happened.” Brown said that he would give a statement when they met and Leach explained what he was asking about. Leach said, “Okay. We'll probably meet on Monday.” Brown indicated to Leach that he would give a statement at that time. Leach, however, did not attempt to meet with Brown on Monday. Nor did he make any further efforts to obtain a statement from Brown prior to terminating him.²⁹

Leach testified that his effort to investigate the damage to 3-Kawasaki, in addition to the above, consisted of talking to Leiby and Hendricks. Leach did not memorialize these conversations in writing. Leach chose not to interview Fussell about the matter despite the fact that Fussell had been in a position to observe Brown operating 3-Kawasaki throughout the September 19–20 shift. Indeed, the evidence does not show that, prior to making the decision to terminate Brown, Leach interviewed a single witness who observed Brown working on September 19–20.

²⁹ I base this account of the September 27 exchange largely on the testimony of Brown, which was more detailed than, and largely consistent with, Leach's testimony about it. To the extent Brown's and Leach's testimonies conflict, I credit Brown. I found Brown to be an honest, if extremely circumspect, witness and generally more credible regarding disputed matters than Leach. For the reasons discussed above, I found Leach less than fully credible. See, *supra*, fn. 3.

On October 1, 2013, Leach presented Brown with a letter terminating his employment. The letter was signed by Leach, and the body of the letter stated in its entirety:

After completing the investigation for equipment abuse and misuse, it is my duty to inform you that your employment with Midwest Terminals of Toledo International, Inc. is terminated effective immediately. If you have not done so already, please turn in all company property (keys, gate card, etc.) in your possession prior to leaving the facility today and remove all personal items from your locker.

The Respondent did not attach documentation or an investigative report to this letter. When he received the letter, Brown asked: “Where is the investigation? Where is the documentation?” Leach answered “You have what you need in front of you. I will tell you right now, verbally, that we are already at \$20,000.” At trial, Leach testified that the primary basis for this decision was the one-page initial report that Groweg completed on September 20. Leach testified that he never spoke to Groweg about that report. Moreover, Leach did not claim that prior to October 1, or later when he denied the grievance regarding the discharge, he considered any of the subsequent reports that Groweg prepared for the Respondent, including those which stated that the brake pressure switch had been “bad” and that the transmission disconnect mechanism had been inoperable. Nor did Leach state whether he was aware of, or considered, the fact that Groweg had reported to Jones and Respondent’s counsel that, under the circumstances, Brown could have caused the damage without knowing it.

The ILA grieved the decision to terminate Brown, and the Respondent denied the grievance. At the step one grievance meeting, Leach told Brown and Sims that Brown had caused damage by “riding the brakes.” Brown told Leach that he had not been riding the brakes. Leach responded: “Gentleman, the union wants Otis[Brown] reinstated. That is not going to happen.” The Union moved the grievance to step two, and on October 16, 2013, the Respondent denied the grievance again. When Brown applied for unemployment compensation, the Respondent opposed his application, contending that Brown was barred from receiving such compensation because his termination was for just cause. The State of Ohio Unemployment Compensation Review Commission rejected the Respondent’s contention, and found that the Respondent lacked just cause to discharge Brown. The Respondent appealed, but the decision of the State Review Commission was upheld in court. See *Cardiovascular Consultants of Nevada*, 323 NLRB 67 fn. 1 (1997) (state unemployment compensation decisions are admissible in Board proceedings but not controlling).

4. Respondent’s Written Policy on Damage and the Evidence Regarding Treatment of Others: At all times relevant to Brown’s termination, the Respondent maintained “Equipment Abuse & Misuse Policy #3050.” That Policy classifies “hard breaking” as a Level I offense (the lowest level), “excessive hard breaking” as a Level II offense (the middle level), and causing “brake system damage due to hard breaking” as a Level III offense (the highest level). The policy sets forth progressive discipline for each level of offense. For Level I and Level II offenses, termination is not a possibility until the fourth and

third offenses respectively. For Level III offenses, termination is generally not a possibility until the second offense, however, this is qualified by a section stating that any Level III offense “resulting in equipment damage and facility damage over \$500 . . . may result in termination.” The Respondent asserts that it terminated Brown pursuant to its Abuse and Misuse policy because he caused brake system damage and that damage exceeded \$500. The policy handbook also contains a section titled “Equipment Policy #3000” which provides, inter alia, that “damage to any piece of equipment, facility, or property,” or “mistreatment of equipment” may result in termination in the case of first offense and will result in termination in the case of a second offense. The Respondent does not claim that Brown was terminated pursuant to Equipment Policy #3000, but rather states that he was terminated pursuant to the Equipment Abuse and Misuse Policy #3050, which is outlined above. Brief of Respondent at Page 12. However, a number of the comparator employees identified by the parties appear have been disciplined pursuant to Equipment Policy #3000.

The parties introduced information regarding the discipline imposed on multiple other employees whose actions resulted in damage to equipment or structures at the facility. In all but one of those cases, the employee received either discipline short of termination, or no discipline at all. The record shows that, in January 2012, Joseph Victorian, Sr., (J. Victorian) drove an end loader into a gas line and barrier poles, causing damage to both, but was not disciplined. In June 2012, J. Victorian was at fault in an accident that caused over \$50,000 worth of damage to an end loader. Leach disciplined J. Victorian for that accident with a written warning and disqualification from end-loader operation for 30 days. J. Victorian was an ILA-represented employee, but was not shown to be a union official or particularly active in union affairs. Another employee, Newcomer, was not terminated even after multiple accidents in which he caused damage to equipment or structures. These accidents included knocking over a telephone pole, “slicing” two railcars, and damaging a vessel while loading material onto it with a crane. In the case of the damage to a vessel, the repairs required a team of four outside iron workers. In 2014, Newcomer backed a crane into a coal pile and tore a stabilizer off the crane. Newcomer received a “write-up” for that incident. Newcomer was a union member, but had no position with the union. In July 2008, Moody, a nonsupervisory unit employee at the time, ran the forklift he was operating into a transformer, causing damage that required over \$28,000 in repairs by an outside electrical contractor. Leach punished Moody for this incident with a written reprimand. In 2010 or 2011, Moody had another accident—this time hitting an employee with his forklift and necessitating a visit by that employee to a hospital. There is no evidence in the file that Moody received any discipline at all for that accident. In 2013, Ryan “Moose” Richardson, a non-unit employee, was operating a crane and caused damage to its hydraulic system. The Respondent did not issue any discipline to Richardson for that accident.

In its brief, the Respondent itself admits that there were multiple other instances in which it issued nothing more than written or verbal reprimands to employees who were involved in accidents that caused damage to equipment or structures. Brief

of Respondent at Pages 36–37. These instances include ones in which the employee: damaged a carbon fiber grill while operating an end loader in 2011; was operating a forklift and collided with a support beam in 2013; tipped a forklift over in 2013; shattered a windshield as a result of operator error in 2013; and drove a front-end loader into a hole.

The Respondent cites only a single employee, other than Brown, who it discharged for causing damage to equipment or structures at the facility. That employee was J. Victorian who, as discussed above, had already been subjected to lesser discipline for causing damage on two separate occasions in 2012—one of which resulted in repairs costing in excess of \$50,000. J. Victorian was terminated after yet another accident, this one in 2013, which required extensive repairs. In that instance the Respondent concluded that J. Victorian was operating a forklift in an unsafe manner when he collided with the main support beam in the largest warehouse at the facility. The Respondent had to call in an outside contractor to make repairs and ensure that the warehouse roof did not collapse. Leach testified that before terminating J. Victorian for this accident he conducted an investigation that included obtaining statements from J. Victorian and other individuals who were present when the accident occurred.

Analysis

The General Counsel alleges that the Respondent discriminated in violation of both Section 8(a)(3) and (1) and Section 8(a)(4) and (1) of the Act when it discharged Brown on October 1, 2013. These claims are properly analyzed using the burden shifting approach set forth in *Wright Line*, supra. The General Counsel has introduced evidence sufficient to make out a prima facie case that the Respondent discriminated against Brown. At the time Leach made the discharge decision, he was aware that Brown was the president of the ILA local and served as the ILA local's chief negotiator and its representative for purposes of grievance processing. In addition, just 2 months before Leach terminated him, Brown led the unit in a work stoppage to protest Leach's unlawful use of non-ILA individuals on the wet side of the dock. Brown had also testified against the Respondent in a recent Board hearing involving multiple claims that the Respondent committed unfair labor practices against ILA members. Brown was present as a party representative throughout that hearing, which eventually resulted in a decision finding, inter alia, that Leach had lied about the reason for denying Brown light duty work and that the real reason was discrimination based on Brown's protected activities. 362 NLRB No. 57 (2015). There is no question that at the time of his termination, Brown was the leading ILA activist at the facility and that the Respondent was aware of this.

The record also amply demonstrates that the Respondent, and in particular Leach, harbored animus against the ILA. This animus is demonstrated on the record of this case by the Respondent's discrimination against Hubbard, as well as by the fact that Leach reacted to F. Victorian's protest regarding an unfair labor practice by raising his voice and warning "I'm about this far off your ass." As discussed above, in a recently decided case the Board affirmed that Leach had lied about the reason for denying Brown light duty work and that the action

was the result of animus against Brown's protected activities. In addition, the Board affirmed, that Leach was so hostile to protected activity that in one instance he reacted such activity it by assaulting the employee involved.³⁰ Although the evidence did not include any overt expressions of animus directed at Brown's participation in the Board's processes, it is reasonable to infer that the Respondent's demonstrated animus towards the exercise of Section 7 rights would extend to Brown's efforts to vindicate those Section 7 rights using the Board's processes. Moreover, in its unlawful actions against Hubbard, which are discussed above, the Respondent demonstrated hostility towards employee participation in the Board's processes. See *Commercial Air, Inc.*, 362 NLRB No. 39, slip op. at 1 fn. 1 (2015) ("[P]roving that an employee's protected activity was a motivating factor in the employer's action does not require the General Counsel to make a particularized showing of animus towards the disciplined employee's own protected activity.").

The timing of Brown's discharge also supports finding that unlawful animus was a factor. Success *Village Apartments, Inc.*, 348 NLRB 579 fn. 5 (2006) (timing of discipline in relation to charges and Board hearing was evidence of animus); *Detroit Paneling Systems, Inc.*, 330 NLRB 1170 (2000) (timing is an important factor in assessing motivation in cases alleging discriminatory discipline based on union or protected activity). Brown had been an employee at the facility for 9 years, and Leach discharged him less than 60 days after Brown led a work stoppage regarding the highly contentious dispute over Leach's use of non-ILA employees on the wet side of the dock, and within 6 weeks after Brown testified against the Respondent in an unfair labor practices hearing. Moreover, the write-ups that Leach had previously issued to Brown on August 9, 2012, were imposed within a few days or weeks after Brown became president of the ILA local.

Although the above evidence is more than sufficient to demonstrate the necessary animus, I find that further evidence is provided by the testimony and exhibits showing that the Respondent treated Brown more harshly than other employees. It is true that the Respondent's policies #3000 and #3050 discussed discipline, including under certain circumstances discipline up to termination, for employees who caused damage to equipment or structures. However, the record shows that it was overwhelmingly the exception, rather than the rule, for the Respondent to react to such damage by discharging the involved employee. In at least 10 prior instances discussed above, the Respondent imposed discipline short of discharge, or no discipline at all, on employees it found responsible for causing damage at the facility. These included instances in which individuals caused damage in excess of that which the Respondent attributes to Brown, but who, unlike Brown, were not the facility's leading union activist. See *T. Steele Construction*, 348 NLRB 1173, 1186 (2006) ("When employees who were not involved in protected activity are given lesser discipline for worse conduct it suggests an improper motive."). In one of

³⁰ The decision in the prior case involving the same employer may be relied on as background evidence in this proceeding, including on the question of animus. See *Norman King Electric*, 334 NLRB 154, 159 (2001); *Stark Electric, Inc.*, 327 NLRB 518 fn. 2 (1999).

those instances J. Victorian's error resulted in damage costing over \$50,000 to repair—about twice the amount attributed to Brown—and yet the Respondent let J. Victorian off with a written warning and a 1-month disqualification from operating a particular type of equipment. In another, Moody caused \$28,000 in damage and Leach let him off with a written reprimand.

Since the General Counsel has succeeded in making the required initial showings under *Wright Line*, the burden shifts to the Respondent to show that it would have discharged Brown based on the damage to 3-Kawasaki even if Brown had not engaged in protected activity and/or participated in the Board's processes. *Camaco Lorrain*, supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra. The Respondent has failed to meet its responsive burden in this case. The Respondent's argument stumbles at the outset given the evidence, discussed immediately above, that the Respondent dealt far more harshly with Brown than it did with other employees to whom it attributed damage at the facility. Against the parade of examples of more lenient treatment, the Respondent offers a single example in which it terminated an employee for causing damage at the facility. As discussed above, that employee—J. Victorian—had previously been retained after causing damage on two prior occasions, even though there was no doubt that J. Victorian was culpable and, in one case, the damage was twice as costly to repair as that for which the Respondent claims to have discharged Brown. The Respondent did not terminate J. Victorian until, within the same 2-year period, he caused yet another major accident—one that threatened to bring down the roof of the Respondent's largest warehouse.

Moreover, the record shows that Leach, who has already been shown to be disposed to discriminate against Brown, leapt at the chance to use the damage to 3-Kawasaki as a grounds for terminating him.³¹ Before becoming president of the ILA local, Brown had a long history as a valued equipment operator for the Respondent. In fact, prior to Brown's emergence as a union activist, Leach had valued him so highly that he repeatedly tried to get Brown to join the skilled list. Brown had been operating end loaders at the facility for many years. Given these circumstances, it is reasonable to expect that Leach would have substantial doubts about the likelihood that Brown would suddenly become so incompetent or careless an operator as to cause major damage to an end loader absent a mechanical failure or an accident of some sort. However instead of evidencing any such doubts, Leach seized the opportunity to attribute the damage entirely to Brown.

Leach testified that the primary thing he relied on in deciding

³¹ See *New Orleans Cold Storage & Warehouse Co.*, 326 NLRB 1471, 1477 (1998) (An employer's "failure to conduct a meaningful investigation and to give the employee who is the subject of the investigation an opportunity to explain are clear indicia of discriminatory intent.") enfd. 201 F.3d 592 (5th Cir. 2000); see also *Health Management, Inc.*, 326 NLRB 801, 806 (1998) (fact that discharge was close in time to protected activity and imposed "on the basis of a questionable determination in a rush to judgment" over culpability and despite the employee's denial support an inference that the nondiscriminatory reason offered by the employer was pretextual), enfd. in relevant part 210 F.3d 371 (6th Cir. 2000).

to terminate Brown was the initial one-page service report that Groweg prepared on the day that the damage to 3-Kawasaki was discovered, although Leach admitted that even before receiving that report he attributed the damage to inattentive operation by Brown. As discussed above, during Groweg's initial examination of 3-Kawasaki he could find no mechanical explanation for the damage and therefore believed that improper operation was the cause. Groweg testified that this was merely his surmise at that time and that he could not be certain. However, at Jones' urging, Groweg did something he had never done before—he included his impression regarding operator error in the initial service report.

After carefully considering the record evidence here, I find that the Respondent has not shown that Leach would have discharged Brown based on that initial service report if not for Brown's protected union activities and participation in the Board's processes. While Groweg's initial report summarily states that improper use by the operator caused the damage, it does not state that such improper use occurred during the shift when Brown was operating 3-Kawasaki, as opposed to during a prior shift, or over the course of multiple shifts, or during any movement of the end loader that may have occurred after Brown parked it.³² The evidence shows, moreover, that Groweg submitted 12 additional service reports to the Respondent as he completed a full inspection of, and repairs to, 3-Kawasaki. Based on his full inspection, Groweg found that, contrary to his initial impression, there were mechanical problems with 3-Kawasaki. He discovered, inter alia, that the brake pressure switch and the transmission disconnect mechanism were both dysfunctional during Brown's last shift operating it. Those are both mechanisms that assist the operator in protecting the brakes. Groweg informed Jones and counsel for the Respondent that, under the circumstances, the operator could have caused the damage without knowing it. Leach did not explain why he insisted upon continuing to rely on Groweg's vague initial assessment even after Groweg's more thorough inspection led him to report that the brake pressure switch and transmission disconnect mechanism had not been functioning and that the damage could have occurred without the Brown's knowledge. Leach did not even have a conversation with Groweg about his inspection reports prior to discharging Brown and denying the Union's grievance regarding it.

The conclusion that the Respondent has failed to show that Leach would have terminated Brown if not for Brown's protected activity is buttressed by other aspects of how Leach handled his inquiry about the damage. In the case of J. Victorian, Leach imposed the harsh discharge penalty only after he obtained J. Victorian's statement and interviewed witnesses to the accident. That stands in stark contrast to the way Leach handled the investigation regarding Brown's responsibility for the damage to 3-Kawasaki. Leach discharged Brown without obtaining his statement, even though Brown had offered to meet and give a statement. See *Amptech, Inc.*, 342 NLRB 1131, 1146 (2004), enfd. 165 Fed. Appx. 435 (6th Cir. 2006) (failure to inquire of the disciplined employee as to "what had occurred

³² Leach testified that he did not know if anyone had moved 3-Kawasaki after Brown turned it in. Tr. 1813.

constituted a rush to judgment attributable to Respondent's unlawful motivation to take adverse action against the leading prounion employee on the premises); see also, *New Orleans Cold Storage*, supra. In addition, Leach decided to terminate Brown without interviewing Fussell—the one witness who had been working with Brown throughout the relevant shift and who was in the best position of anyone other than Brown himself to observe whether Brown was riding the brakes during the shift and whether there were any burning smells that should have alerted Brown to a problem. Fussell's testimony indicated that, had Leach bothered to interview him, Fussell would have reported that Brown was not riding the brakes on 3-Kawasaki during the shift in question. Leach did not even claim that before terminating Brown he interviewed Moody, the acting supervisor and someone who, during the relevant shift, was in radio contact with Brown and had several opportunities to approach Brown while he was on 3-Kawasaki and to perceive any unusual burning odors.

For the reasons discussed above, I conclude that Leach seized on the damage to 3-Kawasaki as a pretext to rid the facility of the most active prounion employee in the ILA bargaining unit, without regard to culpability for the damage. Even assuming that Leach believed in good faith that, despite Brown's long history as valued employee, he had a lapse in operating competence that caused the damage, the record indicates that Leach would have imposed discipline short of discharge, as he did for the vast majority of other employees, if not for the unlawful animus against Brown's protected union activities and participation in the Board's processes.

I find that the General Counsel has established that the Respondent discriminatorily terminated Brown in violation of Section 8(a)(3) and (1) and Section 8(a)(4) and (1) of the Act.

CONCLUSIONS OF LAW

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

2. The International Longshoremen's Association, Local 1982, AFL-CIO, (the Union, or the ILA, or the ILA local) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent, by Christopher Blakely, unlawfully threatened Prentis Hubbard in violation of Section 8(a)(1) by telling him that he was too busy with Hubbard's union charges and grievances to complete the paperwork relating to Hubbard's workers' compensation claim.

4. The Respondent violated Section 8(a)(5) and (1) of the Act: since August 2013, by unilaterally changing its established past practice regarding transfer of aluminum at the facility in a manner that deprived the ILA bargaining unit employees of work that they had historically performed; since November 2013, by unilaterally reassigning calcium unloading work historically performed by the ILA bargaining unit employees to others outside the unit; since June 23, 2013, by unilaterally ceasing informal crane training for ILA bargaining unit employees; and when it denied Hubbard pay that he was entitled to under past practice and the collective bargaining agreement for hours he would have worked on August 11, 2013, if he had not left work due to a work-related injury.

5. The Respondent discriminated in violation of Section 8(a)(3) and (1) and Section 8(a)(4) and (1) of the Act: in October 2013 when it terminated Otis Brown's employment; and when it failed to pay Hubbard for the hours he would have worked on August 11, 2013, if he had not left work due to a work-related injury.

6. The Respondent was not shown to have committed the other violations alleged in the Complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent, having discriminatorily discharged Brown, must offer him reinstatement and make him whole for any loss of earnings and other benefits resulting from that discrimination. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and shall also compensate Brown for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB 518 (2012). In addition, the Respondent must make Hubbard whole for the pay he was unlawfully denied on August 11, 2013. Hubbard's make-whole remedy shall be computed in accordance with *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), rather than *with F. W. Woolworth Co.*, supra. See *Pepsi-America, Inc.*, 339 NLRB 986 fn. 2 (2003). The Respondent shall also make the ILA bargaining unit employees whole for any losses in earnings and other benefits that they suffered as a result of the Respondent's unlawful unilateral changes. Such make whole relief shall be computed in accordance with *Ogle Protection Service*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.³³

ORDER

The Respondent, Midwest Terminals of Toledo International, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, denying pay to, or otherwise discriminating against Otis Brown, Prentis Hubbard, or any other any employee for engaging in protected union or concerted activity.

(b) Discharging, denying pay to, or otherwise discriminating against Otis Brown, Prentis Hubbard, or any employee for participating in the Board's processes.

(c) Threatening any employee for engaging in protected union or concerted activity, and/or for participating in the Board's

³³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

processes.

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

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

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the International Longshoreman's Association, Local 1982, AFL-CIO (the Union, the ILA, or the ILA local), as the exclusive collective-bargaining representative of employees of the bargaining unit described in the 2006–2010 collective-bargaining agreement between the Respondent and the Union.

(b) Rescind the unlawful unilateral change that it has made since August 2013 to the established past practice regarding the ILA unit employees' participation in the transfer of aluminum at the facility and restore the status quo ante pending the results of good faith bargaining.

(c) Rescind the unlawful unilateral changes it has made since November 2013, by reassigning calcium unloading work from the ILA unit employees to others outside the unit, and restore the status quo ante pending the results of good faith bargaining.

(d) Rescind the unlawful unilateral change it has made since June 23, 2013, by ceasing informal crane training for unit employees and restore the status quo ante.

(e) Make the ILA unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes.

(f) Within 14 days from the date of the Board's Order, offer Otis Brown full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(g) Make Otis Brown whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(h) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Otis Brown in writing that this has been done and that the discharge will not be used against him in any way.

(i) Make Prentis Hubbard whole for any loss of earnings and other benefits suffered as a result of its unlawful denial of wages to him in the manner set forth in the remedy section of the decision.

(j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(k) Within 14 days after service by the Region, post at its facility in Toledo, Ohio, copies of the attached notice marked

“Appendix.”³⁴ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 23, 2013.

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

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

Dated, Washington, D.C. January 21, 2016

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 discharge or otherwise discriminate against Otis Brown, Prentis Hubbard, or any other employee for engaging in protected union or concerted activity.

WE WILL NOT discharge or otherwise discriminate against Otis Brown, Prentis Hubbard, or any other employee for participating in the Board's processes.

WE WILL NOT threaten you for engaging in protected union or concerted activity, and/or for participating in the Board's processes.

³⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

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

WE WILL, before making any changes to the wages, hours, or other terms and conditions of employment of employees in the bargaining unit represented by the International Longshoreman's Association, Local 1982, AFL-CIO (the Union, the ILA, or the ILA local), notify and, on request, bargain with the Union as the exclusive collective bargaining representative of bargaining unit employees.

WE WILL rescind the unlawful unilateral change that we made since August 2013 by changing the established practice regarding the participation of ILA unit employees in the transfer of aluminum at the facility and restore the status quo ante pending the results of good-faith bargaining.

WE WILL rescind the unlawful unilateral change that we made since November 2013 by reassigning calcium unloading work from the ILA unit employees to others outside the unit and restore the status quo ante pending the results of good-faith bargaining.

WE WILL rescind the unlawful unilateral change we made since June 23, 2013, by ceasing informal crane training for ILA unit employees.

WE WILL make you whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes.

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

WE WILL make Otis Brown whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

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

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

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Otis Brown, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL make Prentis Hubbard whole for any loss of earnings and other benefits suffered as a result of our discrimination against him.

MIDWEST TERMINALS OF TOLEDO INTERNATIONAL INC

The Administrative Law Judge's decision can be found at www.nlr.gov/case/08-CA-119493 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

