UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BOZZUTO'S INC.,	:	**PETITION FOR REVIEW**
Petitioner	:	
	:	
v.	:	
	:	
NATIONAL LABOR	:	
RELATIONS BOARD	:	
Respondent	:	**JANUARY 12, 2018**

In accordance with Fed. R. App P. 15(a), Petitioner, Bozzuto's Inc., hereby petitions this court for review of the December 12, 2017 Decision and Order ("Order") of Respondent, the National Labor Relations Board, and prays that the Order be set aside. See Order attached at Exhibit 1.

Respectfully Submitted

PETITIONER
BOZZUTO'S INC

By /s/

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CERTIFICATE OF SERVICE

In accordance with 29 U.S.C. § 160(f) and 29 C.F.R. § 101.14, the undersigned counsel certifies that on this 12th day of January, 2018 the foregoing Petition for Review was filed electronically and a date-stamped copy was served via regular mail, postage prepaid, upon: Deputy Associate General Counsel of the Appellate Court Branch, National Labor Relations Board, 1015 Half Street SE, Washington, D.C. 20570-0001. Notice of this filing will be sent by email to all parties who have appearances as of the time of this filing, by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/
Sheldon D. Myers, ct13581

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EXHIBIT 1

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Bozzuto's, Inc. *and* United Food and Commercial Workers Union, Local 919. Cases 01–CA–115298 and 01–CA–120801

December 12, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On June 25, 2015, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and supporting, answering, and reply briefs. The General Counsel filed cross exceptions and supporting and answering briefs.

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

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

This case presents several issues related to a union organizing campaign at the Respondent's facility in Cheshire, Connecticut. The issues include whether the Respondent violated Section 8(a)(1) by interrogating employee Todd McCarty; whether the Respondent violated Section 8(a)(3) and (1) by suspending and discharging McCarty, and by disciplining and subsequently discharging employee Patrick Greichen; and whether to order the Respondent to read our remedial notice aloud to employees on work time.

The judge found all the foregoing violations, but declined to grant the General Counsel's request to have the Respondent read the notice aloud. We affirm the judge's findings, and we grant the General Counsel's notice-reading request.

The credited evidence establishes that, sometime in September 2013,[3] Todd McCarty contacted a representative of the Union. On September 22, McCarty, Patrick Greichen, and two other employees met with the union representative to discuss organization at the Respondent's facility. On Monday, September 23, McCarty and Greichen began soliciting employees to support the Union. As the judge found, they initially tried to keep their union activity under the radar. Despite their efforts, the Respondent became aware of the union activity by September 26.[4]

1. Todd McCarty

As noted above, the Union's organizing campaign began on Monday, September 23. Approximately 1 week later, Rick Clark, the Respondent's vice president of warehouse, transportation and risk management, stopped employee and union supporter Todd McCarty as he was exiting the restroom and asked him what was going on with "this union stuff." McCarty replied that he was not going to talk to Clark about it. The General Counsel alleges, and the judge found, that this inquiry constituted an unlawful interrogation. We agree.[5]

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[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 findings that the Respondent violated Sec. 8(a)(1) of the Act when, on October 1, 2013, while explicitly acknowledging its awareness of the union organizing campaign, it announced and implemented wage increases, and by maintaining a policy that conditioned continued employment on an agreement by employees to refrain from talking about any discipline that they have received or about their terms and conditions of employment.

[2] In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143, slip op. at 1 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy.

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 also amend the remedy to require the Respondent to compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. 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.

Last, we amend the judge's remedy to reflect the correct date on which McCarty's backpay and other monetary remedies should be tolled: May 28, 2014, the date of the last opportunity to accept the Respondent's reinstatement offer and the date on which McCarty rejected it. See *Cliffstar Transportation Co.*, 311 NLRB 152, 154-155 (1993) (quoting *Southern Household Products Co.*, 203 NLRB 881, 882 (1973) ("backpay is tolled on the date of actual reinstatement[;] on the date of rejection; or in the case of those who did not reply, on the date of the last opportunity to accept.")).

We shall modify the judge's recommended Order and substitute a new notice to reflect these remedial changes and to conform to the Board's standard remedial language.

[3] All dates are in 2013 unless otherwise noted.

[4] The record shows that sometime before October 1, an employee told the Respondent's vice president of warehouse, transportation and risk management, Rick Clark, of McCarty's involvement in the organization efforts, but, as discussed infra, McCarty, who testified that, initially, he "was [a] little more covert [than Greichen]," did not become open about his support until later.

[5] Contrary to our dissenting colleague's assumption that the interrogation took place on September 27, the record and the judge's decision as a whole indicate that it occurred about October 1. While the complaint alleges that, "on or about [September 27], the Respondent interrogated employees," the judge, relying on McCarty's testimony, stated

In determining whether the questioning of an employee constitutes an unlawful interrogation, the Board considers the totality of the circumstances, including whether the employee is an open and active union supporter; whether there is a history of employer antiunion hostility or discrimination; the nature of the information sought (especially if it could result in action against individual employees); the position of the questioner in the company hierarchy; and the place and method of interrogation. See *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Relco Locomotives*, 359 NLRB 1145, 1156 (2013), affd. and incorporated by reference at 361 NLRB No. 96 (2014); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000); *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). The Board also considers the timing of the interrogation and whether other unfair labor practices were occurring or had occurred. See *Vista Del Sol Health Services, Inc. d/b/a Vista Del Sol Healthcare*, 363 NLRB No. 135, slip op. at 17 (2016) (citing *Gardner Engineering*, 313 NLRB 755, 755 (1994), enfd. as modified on other grounds 115 F.3d 636 (9th Cir. 1997)); see also *Seton Co.*, 332 NLRB 979, 982 (2000) (in finding an unlawful interrogation, Board noted that "the interrogation occurred against a background of numerous other unfair labor practices..."); *EDP Medical Computer Systems*, 284 NLRB 1232, 1264–1265 (1987) (finding that two conversations, in and of themselves, might not be considered coercive, but when viewed in the context of the employer's 8(a)(1) conduct, the questioning was coercive as it reasonably tends to color employees' perception of the character and reason for the inquiries); see also *Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 237 (1998) (finding employer's interrogation of leading union activists unlawful where it occurred against a background of other unfair labor practices, including the discharge of one of them several months later, and noting that the employer's statement to the employees that it did not want a union was likely to convey the message that it viewed any campaigning by them with intense displeasure).

Applying and balancing those factors here, we agree with the judge that Clark's questioning of McCarty was unlawful. Clark was a high-ranking official;[6] he initiated a conversation in which he questioned an active, but not yet open, union supporter; McCarty, who noticed an increase in management's presence on the floor around the same time as this inquiry, did not answer Clark's question;[7] and the inquiry occurred at or near the same time as the Respondent's unlawful discrimination against union supporter Patrick Greichen, including his disciplinary warning and discharge,[8] and its unlawfully motivated pay increase to employees.[9]

Our dissenting colleague maintains that McCarty was an open union supporter who "made no effort to hide his leading role in the organizing campaign." However, the record does not support the conclusion that McCarty was an open union supporter *at the time of the interrogation*.[10] This is true regardless of whether the interroga-

that the interaction occurred "the week *after* the campaign started." As noted supra, the campaign began on Monday, September 23. It goes without saying that the week after the September 23 start date of the campaign was the week of October 1.

[6] While our colleague notes that McCarty and Clark had "a good relationship," the Board has found that a "supervisor's statements may be coercive regardless of his friendship with an employee and regardless of whether the remark was well intended." *Management Consulting, Inc.*, 349 NLRB 249, 250 fn. 6 (2007) (citing *Trover Clinic*, 280 NLRB 6, 6 fn. 1 (1986), and finding that the "apparently friendly nature" of a supervisor's admonition did not negate a finding of coercion); see *Acme Bus Corp.*, 320 NLRB 458, 458 (1995) (finding that friendly relationship between a supervisor and an employee does not necessarily diminish the coerciveness of an interrogation), enfd. mem. 198 F.3d 233 (2d Cir. 1999). As noted supra, the proper test in these circumstances is whether the supervisor's comment reasonably tended to interfere with the employee's free exercise of Sec. 7 rights. Id. (citing *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975). We find that it did. Additionally, despite McCarty's "good relationship" with Clark, it is telling that McCarty did not feel comfortable telling Clark "what was going on" with the organizing campaign.

[7] See *Chipotle Services LLC*, 363 NLRB No. 37, slip op. at 11–12 (2015) (finding that "[t]he coerciveness of [an employee's interrogation was] evident from the fact that the employee did not answer [a high ranking supervisor's] question."); see also *Town & Country Supermarkets*, 340 NLRB 1410, 1423–1424 (2004) (noting an employee's evasive responses to an employer's inquiries supported a finding that inquiries were coercive); *Regal Recycling, Inc.*, 329 NLRB 355, 365 (1999) (finding that employees' denials or failure to respond to interrogations support a finding that an employer's questioning was coercive).

[8] See *Greenfield Die & Mfg. Corp.*, supra (relying in part on the discharge of an employee several months later to find earlier interrogations unlawful); *Santa Fe Tortilla Co.*, 360 NLRB 1139, 1140 fn.8 (2014) ("The Board has recognized that a subsequent unfair labor practice can increase the coerciveness of a preceding interrogation.").

[9] See *Masland Industries*, 311 NLRB 184 fn. 2 (1993) (finding an unlawful interrogation where a high management official introduced the topic of employees' union involvement and the interrogation followed an unlawful threat and was accompanied by a coercive statement); compare *Raytheon Co.*, 279 NLRB 245, 246 (1986) (finding that employees were unlawfully interrogated even though the fact that an employee initiated the conversation about the union reduced the potentially coercive effect of the employer's questioning).

[10] In support of its argument that McCarty was an open union supporter at the time of the interrogation, the dissent points to McCarty's testimony that "after the cat was out of the bag within—so to speak, within that first week I was not secret about [the union campaign] at all." However, this testimony does not establish that McCarty was open at the time of the interrogation and he did not disclose his involvement in the organizing campaign to management until January 2014. We acknowledge that management became aware of McCarty's involvement from another employee early in the organizing campaign, but we do not find that management's awareness equates to openness on McCarty's part.

tion occurred on or about October 1 (as the record supports) or on September 27 (as our colleague asserts). The judge found that McCarty initially attempted to keep a low profile when engaged in union activity and stated that McCarty did not reveal his union activity to the Respondent until sometime "during and after October 2013." In fact, as noted supra, the record reflects that McCarty did not disclose his union support until *January 2014*. We therefore disagree with our colleague's contention that Clark's questioning of McCarty is either comparable to or "less intrusive" than the questioning found lawful in *Rossmore House*, supra, where the employee had identified himself to the employer as a member of the in-plant organizing committee and answered the employer's inquiries about the union candidly and without hesitation. See 269 NLRB at 1176, 1178.[11]

Our colleague also argues that the wage increase and unlawful discipline should not be considered because they occurred *after* the interrogation. However, as noted supra, our colleague's timeline is unsupported by the record. Moreover, even if the interrogation predated the unlawful wage increase and disciplinary warning by hours or a couple of days, as our colleague contends, the Board has found that "a question that might seem innocuous in its immediate context may, in light of later events, acquire a more ominous tone," and the Board may take into account "events or statements that occurred before or after the particular incident in question that may throw light on its significance." *Westwood Health Care Center*, supra at 940 & fn. 17; see also *Santa Fe Tortilla Co.*, supra; *Greenfield Die & Mfg. Corp.*, supra (relying in part on an employee's discharge several months later to find earlier interrogations unlawful). Accordingly, the judge appropriately considered and relied on the October 1 unlawful wage increase and disciplinary warning in the totality of the circumstances analysis, and we affirm his finding that Clark's interrogation of McCarty violated Section 8(a)(1) of the Act.[12]

Additionally, for the reasons stated in his decision, we affirm the judge's finding that the Respondent violated Section 8(a)(3) and (1) when it suspended and discharged McCarty.[13]

2. Patrick Greichen

We affirm the judge's finding that the Respondent violated Section 8(a)(1) when it issued employee and union organizer Patrick Greichen a verbal disciplinary warning for discussing productivity standards, which affect pay and discipline, with his coworkers. On October 1, upon being advised that employees were complaining about Greichen's conduct, Vice President Clark requested a meeting with Greichen to address "negative comments" Greichen was making in the workplace, including complaints about long hours and needing three legs to work there. In addition to Clark and Greichen, Manager of Associate Relations and Development Doug Vaughn and Bill Glass (job title unknown) attended the meeting. During the meeting Clark issued Greichen a verbal warning based on his workplace complaints, and gave him several options, one of which was to resign if he, Greichen, felt he needed to. On those facts, we agree with the judge, for the reasons he gives, that this verbal warning violated Section 8(a)(1).[14]

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[11] Moreover, even if McCarty was an open union supporter at the time of the interrogation, we would still find the interrogation to be unlawful. Openness is only one factor to take into consideration, and we find that the other factors—the identity of the questioner, who was a high-ranking official; the fact that the interrogation occurred around the same time as other unfair labor practices; and McCarty's refusal to answer the question—weigh in favor of finding a violation. See *UNF, West, Inc.*, 363 NLRB No. 96 (2016) (citing *President Riverboat Casinos of Missouri, Inc.*, 329 NLRB 77, 78 (1999)). Additionally, even if McCarty was open at the time of the interrogation, we would still find *Rossmore House*, supra, distinguishable because the employer in that case had not committed any other unfair labor practices when it questioned an employee about the union. Last, although not determinative, as noted above, unlike McCarty, the employee in *Rossmore* responded to the inquiry candidly and without hesitation.

While our colleague argues that Clark's question was innocuous, the Board, after examining the totality of the circumstances, has found questions less specific than "What's going on with this union stuff?" to be coercive. See *MDI Commercial Services*, 325 NLRB 53, 69–70 (1997) (taking into consideration other unfair labor practices, unlawful interrogation found where low-level supervisor, who stated that she was concerned about her job, asked employee "[w]hat's going on . . . what's happening?"); see also *Medical Center of Ocean County*, 315 NLRB 1150, 1154 (1994) (finding coercive interrogation where low-level supervisor invited employee, who was not an open union supporter, into a closed office and asked "[w]hat's going on . . . what's happening?").

[12] Our colleague further argues that Greichen's unlawful disciplinary warning cannot be considered in evaluating the interrogation because the interrogation related to union activity, while Greichen's disciplinary warning related to his complaint about production standards. Our colleague cites no support for his argument that the unfair labor practices must explicitly relate to the subject of the interrogation, and we know of none. Rather, the Board considers the totality of the circumstances, including whether other unfair labor practices were occurring or had occurred. In any event, we find that employees would reasonably interpret a senior official's inquiry into union activity to be coercive where the Respondent unlawfully disciplined a leader of that union activity who had voiced concerns about working conditions to his colleagues.

[13] Because we find the violation under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied, 455 U.S. 989 (1982), we need not pass on our colleague's alternative rationale for finding that McCarty's suspension and discharge violated Sec. 8(a)(3) and (1).

[14] We find it unnecessary to pass on the judge's additional findings that Greichen's warning and discharge, discussed below, violated Sec. 8(a)(3), as those findings would not materially affect the remedy.

We also affirm the judge's finding that the Respondent violated Section 8(a)(1) by discharging Greichen for insubordination when he refused to attend a subsequent meeting that was related to the unlawful October 1 warning. On October 8, Greichen raised his ongoing concerns about the Respondent's production standards with his direct supervisor; in particular, Greichen believed that the Respondent was manipulating the standards during peak periods to the disadvantage of employees. Unsatisfied with his supervisor's response, Greichen spoke to Manager Jason Winans about the standards. Winans asked Greichen why he continued to work for the Respondent if he was miserable. Shortly thereafter, Winans advised Clark that Greichen was complaining about production standards. Clark testified that he advised Winans and Vaughn to talk to Greichen and to arrange a meeting so one of the Respondent's industrial engineers could explain to Greichen how the standards were created.

As instructed, Winans told Greichen about the meeting. In response, Greichen referenced the October 1 unlawful verbal warning meeting, claimed that he was being harassed, and refused to attend the meeting. Upon hearing that Greichen refused to attend the meeting, Clark instructed Winans to tell Greichen that "you need to come to a meeting when you're on the clock being paid...it's not unsafe, it's not against a work rule . . . we want to explain [the standards] to you . . . the repercussions of [not attending] is insubordination and termination." Winans relayed Clark's message to Greichen, but Greichen still refused to attend the meeting.[15]

We agree with the judge that the Respondent's insistence that Greichen attend the October 8 meeting to discuss his ongoing concerns about the Respondent's productivity standards was an outgrowth of the Respondent's earlier unlawful warning to Greichen for discussing those standards with other employees.[16] We reject the Respondent's argument that it called the meeting to provide Greichen with correct information about the production standards. The evidence shows that the meeting was not organized in a manner typical to those held to address complaints about production and safety standards. Jamie Wright, the industrial engineer Clark directed to participate in the meeting, testified that, contrary to past practice, Clark was "vague and [unspecific,] saying [he wanted] to have a meeting with an associate about standards." Wright asked for more information and Clark declined to give him any more information, noting only that the meeting was about standards. Wright testified that he was not told about the nature of the complaint or given any information to prepare for the meeting and that it was "atypically vague" and "frustrating."[17] Moreover, as the judge found, following Greichen's discipline, the Respondent did nothing to mitigate any misinformation circulating amongst its employees as a result of Greichen's comments. If addressing the spread of misinformation in the workplace was the Respondent's true goal, it would have done more than simply discharge Greichen. Accordingly, we conclude that the Respondent's stated reason for the meeting was a pretext, and that it scheduled the meeting for the purpose of interfering with Greichen's protected concerted activity.

In these circumstances, we find that Greichen's refusal to attend the meeting, which the Respondent deemed insubordination, was not a lawful basis for discharging him. The Board has endorsed the "principle . . . that employers should not be permitted to take advantage of their unlawful actions, even if employees may have engaged in conduct that—in other circumstances—might justify discipline."[18] We have applied that principle in

[15] Our dissenting colleague asserts that Managers Winans and Vaughn *repeatedly* assured Greichen that there would be no adverse consequences if he attended the meeting and that Greichen confirmed that he understood he would not be disciplined if he attended. But a recording of Winans' and Greichen's conversation prior to the meeting reflects only that Greichen understood that he would not be *discharged* if he attended the meeting, rather than that he would not be *disciplined* as he had been just a week earlier.

While our colleague notes that Greichen had willingly attended meetings with management in the past, he fails to mention that, contrary to Greichen's previous meetings, this meeting was scheduled on the heels of one in which his Sec. 7 rights were infringed upon. Greichen had never before been disciplined for voicing his concerns about working conditions and this fact makes the October 8 meeting different from all the other meetings our colleague references.

[16] Our dissenting colleague argues that the impetus for the October 8 meeting was not the unlawful October 1 warning. He instead argues that the October 1 warning was for Greichen's complaints "about the Respondent's production standards," which the Respondent had revised in July 2013, while the October 8 meeting was a response to Greichen's claims that "the Respondent was *changing* its production standards ... on purpose to *cheat* employees out of production-based incentive pay." But a complaint that production standards were too stringent or required more work *is* related to a complaint that the Respondent was making its standards more difficult to meet and, therefore, that employees were not able to obtain production-based pay enhancements.

[17] Our colleague notes that Wright's subordinate, David Heatley, also attended the meeting and brought a packet of material, which included a 1-page example of Greichen's work. Heatley did not testify, and there is no evidence indicating why Heatley chose to include an example of Greichen's work in the packet of materials. In our view, these facts do not undermine Wright's testimony or our conclusion that the stated reason for the meeting was a pretext.

[18] *Supershuttle of Orange County, Inc.*, 339 NLRB 1, 3 (2003) (employer could not lawfully discharge employee based on misconduct "*triggered by and elicited during*" unlawfully motivated investigation, given "clear and direct connection between ... employer's unlawful conduct and ... reason for discipline") (emphasis in original). See also *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 849–850 (2001) (misconduct provoked by employer's unfair labor practice is not grounds for discharge).

cases like this one,[19] and we accordingly find that the Respondent's discharge of Greichen violated Section 8(a)(1), given the clear and direct connection between the unlawful warning and the purported insubordination.

AMENDED REMEDY

We find that, by disciplining and discharging the two individuals responsible for bringing the union campaign to the facility within 4 months of the start of the campaign, the Respondent sent a message to employees that those who supported the Union did so at their own peril. Additionally, by unlawfully increasing the wages of every unit employee, the Respondent sent a message to employees that they did not need a union. In light of these serious unfair labor practices, which began as soon as the Respondent became aware of the union organizing campaign and affected every unit employee, we order the Respondent to read aloud the notice to employees during work time. See *North Memorial Health Care*, 364 NLRB No. 61, slip op. at 1 (2016) (ordering that the notice be read aloud because of the public nature of the unfair labor practices, the timing of the violations, and the involvement of upper management); see *Carey Salt Company*, 360 NLRB 201, 201–202 (2014) (finding notice reading appropriate where the employer threatened to and then withheld a wage increase, and failed and refused to bargain in good faith with the Union). Moreover, because Vice President of Warehouse, Transportation and Risk Management Rick Clark committed or was involved in the majority of the violations, we will require that the remedial notice be read aloud to the Respondent's employees by Clark (or, if he is no longer employed by the Respondent, by an equally high-ranking responsible management official), and in the presence of a Board agent and an agent of the Union if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in Clark's presence and, if the Union so desires, in the presence of an agent of the Union. See *1621 Route 22 West Operating Company, LLC, d/b/a Somerset Valley Rehabilitation & Nursing Center*, 364 NLRB No. 43 (2016); *Texas Super Foods*, 303 NLRB 209, 220 (1991).[20] Further, as noted, in accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), we shall also 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). Last, in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143, slip op. at 1 (2016), we modify the judge's recommended tax compensation and Social Security reporting remedy.

ORDER

The National Labor Relations Board orders that the Respondent, Bozzuto's Inc., Cheshire, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, suspending, or discipline employees because they engage in protected concerted activities.

(b) Interrogating employees about their support or activity for United Food and Commercial Workers Union, Local 919 or any other labor organization.

(c) Announcing or granting wage increases in order to dissuade employees from supporting the Union.

(d) Maintaining a policy of conditioning continued employment on an agreement by employees to refrain from talking about any discipline that they have received or from talking about their terms and conditions of employment.

(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.

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[19] In *Metro One Loss Prevention Services Group, Inc.*, 356 NLRB 89, 102–105 (2010), applying *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board affirmed the judge's finding that the employer failed to prove that it would have disciplined an employee for lateness in the absence of the employee's union activity. The Board affirmed the judge's finding that the employee's subsequent discharge for insubordination, which stemmed from the employee's refusal to sign disciplinary warnings, was also unlawful. The judge stated that disciplinary actions "growing out of [unlawful] warnings [are] also unlawful." *Metro One*, supra at 105. The Board also affirmed the judge's finding that:

> [I]f the warnings were not issued, [the manager] would not have visited the store to give them to [the employee at issue] and would not have become involved in a confrontation with him. In the absence of the confrontation, [the employee] would not have allegedly become insubordinate either to [the manager] or in the meeting which was called...at which [the employee] was discharged.

Id. Similarly here, had the unlawful warning not been issued, it is unlikely that the meeting would have been initiated and, consequently, there would have been no meeting for Greichen to refuse to attend.

[20] In light of our conclusion that the Respondent's claim that it discharged Greichen for insubordination was pretext, the discharge was not "for cause" within the meaning of Sec. 10(c) of the Act. Accordingly, we need not address our dissenting colleague's discussion of Sec. 10(c), and we deny the Respondent's request that the judge's remedy be modified to exclude Greichen's reinstatement. We note, however, that the Board has rejected our colleague's interpretation of Sec. 10(c) in prior cases. See *Total Security Management*, 364 NLRB No. 106, slip op. at 16-17 (2016); *Babcock & Wilcox Construction Co., Inc.*, 361 NLRB No. 132 , slip op. at 12-13 (2014).

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

(a) Rescind the rule conditioning continued employment on an agreement by employees to refrain from talking about any discipline that they have received or from talking about their terms and conditions of employment, and notify the employees in writing that this has been done and that the rule is no longer in force.

(b) Within 14 days from the date of this Order, offer Patrick Greichen 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.

(c) Make Patrick Greichen and Todd McCarty whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Compensate Patrick Greichen and Todd McCarty for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 1, 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.

(e) Compensate Patrick Greichen and Todd McCarty for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against Patrick Greichen and Todd McCarty, and within 3 days thereafter, notify the employees in writing that this has been done and that the unlawful actions will not be used against them in any way.

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

(h) Within 14 days after service by the Region, post at its Cheshire, Connecticut facility, copies of the attached notices marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by 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 October 1, 2013.

(i) Within 14 days after service by the Region, hold a meeting or meetings, which shall be scheduled to ensure the widest possible attendance of unit employees, at which time the attached notice marked "Appendix" is to be publicly read by Rick Clark, the Respondent's vice president of warehouse, transportation and risk management (or, if he is no longer employed by the Respondent, by a high-ranking responsible management official of the Respondent) in the presence of a Board agent and an agent of the Union if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in Clark's presence and, if the Union so desires, the presence of an agent of the Union.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 1 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 12, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, concurring in part and dissenting in part.

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

I concur with my colleagues' finding that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (NLRA or Act) when it suspended and later discharged employee Todd McCarty.[1] I also concur with their finding that the Respondent violated Section 8(a)(1) of the Act by issuing a written warning to employee Patrick Greichen on October 1, 2013.[2] I dissent, however, from my colleagues' finding that the Respondent coercively interrogated McCarty, and I also dissent from their finding that the Respondent violated the Act when it suspended and subsequently discharged Greichen. In addition, I would affirm the judge's sound decision that an extraordinary notice-reading remedy is not warranted even if the Respondent committed all the unfair labor practices the judge and my colleagues find.

1. The evidence does not establish that the Respondent coercively interrogated employee McCarty.

Todd McCarty, a selector at the Respondent's food distribution facility, was an open and active union supporter. From the first week of the union organizing effort, McCarty made no effort to hide his leading role in the campaign. In the campaign's first few days, Rick Clark, one of the Respondent's senior vice presidents, approached McCarty and asked, "What's going on with this union stuff?" McCarty confidently responded, "I am not going to talk about it with you[,] Mr. Clark." Clark put up his hands and replied, "OK." That was it.

For an employer's question to interfere with, restrain, or coerce an employee in exercising the rights conferred by NLRA Section 7 in violation of NLRA Section 8(a)(1), "either the words themselves or the context in which they were used must suggest an element of coercion or interference." *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). To determine whether questioning is unlawfully coercive, the Board applies the "totality of circumstances" test articulated in *Rossmore House*, supra at 1176–1178, including the so-called "*Bourne* factors," so denominated after the Second Circuit's decision in *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964), which factors the court of appeals characterized as "fairly severe standards," id. at 48: (1) the background of the question, i.e., whether there was an atmosphere of employer hostility and discrimination toward the union; (2) the nature of the information sought, i.e., whether the employer was seeking information that could have been used to take action against individual employ-

[1] In finding that McCarty's suspension and discharge violated Sec. 8(a)(3) and (1), the judge applied *Wright Line*, 251 NLRB 1083 (1980) (subsequent history omitted), and my colleagues adopt the judge's finding "for the reasons stated in his decision." I believe the appropriate standard to apply is the "cat's paw" theory of liability. See *Staub v. Proctor Hospital*, 562 U.S. 411 (2011). There is no evidence that the person who made the decision to discharge McCarty was motivated by animus against McCarty's union activities. However, in *Staub*, the Supreme Court held that an employer is liable for employment discrimination if a supervisor performs an act motivated by discriminatory animus that is intended by the supervisor to cause an adverse employment action, and that act is a proximate cause of the ultimate employment action. Id. at 422. These elements exist here.

After October 8, 2013, McCarty was the only remaining active supporter of the Union at the Respondent's facility. The judge found that during and after the month of October, McCarty repeatedly disclosed his pro-union stance to supervisory personnel, and as discussed below, his role was well known to supervisors even before October. In early January 2014, McCarty discovered that his down time was being deleted from his production records, which had the effect of depressing his productivity score and making it appear that he was falling short of the required production level. The judge reasonably inferred that McCarty's production records were being altered by a supervisor or manager (since only supervisors and managers typically access the computer program on which those records are maintained), and whoever altered McCarty's records must have intended to cause an adverse employment action (since falling short of the required production level subjects an employee to discipline or discharge). Moreover, the timing of the alterations in relation to McCarty's open declarations of support for the Union and the fact that McCarty was the only remaining employee who openly supported the Union warrant an inference that whoever was altering McCarty's records was motivated by animus against his union activities or sympathies. On January 15, McCarty was suspended for failing to meet production standards, and on February 18, he was discharged for the same reason. Even if the manager or managers who made the decision to suspend and discharge McCarty based those decisions solely on his production records—and there is no evidence that the decision-maker relied on anything else—the supervisor who altered those records was motivated by discriminatory animus, and the alteration of those records was a proximate cause of McCarty's suspension and discharge. Accordingly, applying the test set forth in *Staub*, I find that McCarty's suspension and discharge violated the Act.

[2] In finding the warning issued to Greichen violated Sec. 8(a)(1), the judge applied a motive-based analysis. Greichen had been complaining to his coworkers that the Respondent's production standards were too exacting. The judge found that those complaints constituted protected concerted activity and that the warning was unlawfully motivated by Greichen's protected concerted complaints. My colleagues adopt the judge's rationale. I agree that the warning was unlawful, but in doing so I find it unnecessary to reach or pass on whether Greichen's complaints to his coworkers were protected concerted activity. Rather, I rely on the wording of the warning itself, which required Greichen to "follow a communication process . . . to the appropriate personnel, not making negative comments in the work force without trying to address the issue with management." Regardless of whether Greichen had engaged in concerted activity to that point—i.e., regardless of whether he had been seeking to initiate, induce, or prepare for group action (concerted activity) or had been engaging in mere griping about the standards (*not* concerted activity), see *Mushroom Transportation Co. v NLRB*, 330 F.2d 683 (3d Cir. 1964)—the warning issued to Greichen required him to bring *all* complaints about terms and conditions of employment to management first before speaking about them to his fellow employees, and this unlawfully interfered with Greichen's right to engage in protected concerted activity going forward. See, e.g., *Kinder-Care Learning Centers*, 299 NLRB 1171, 1172 (1990) (finding unlawful employer's rule requiring employees to bring work-related complaints to the employer first). On this basis, I find the October 1, 2013 warning issued to Greichen unlawful.

ees supporting the union; (3) the identity of the questioner, i.e., the rank of the employer representative asking the question; (4) the place and method of the interrogation, e.g., whether the employee was directed to leave his or her work station and report to a manager's office for questioning; and (5) the truthfulness of the employee's reply. Id.; see *Rossmore House*, 269 NLRB at 1178 fn. 20.[3] The Board has also considered the timing of the employer's inquiry and whether the questioned employee is an open and active union supporter. See, e.g., *Vista Del Sol Health Services, Inc.*, 363 NLRB No. 135, slip op. at 17 (2016). The Board has recognized, however, that supervisors and employees will discuss union organizing efforts, which prompted the Board to quote approvingly the observation of the Third Circuit that "'[t]o hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace.'" *Rossmore House*, 269 NLRB at 1177 (quoting *Graham Architectural Products v. NLRB*, 697 F.2d 534, 541 (3d Cir. 1983)).

Applying the totality-of-the-circumstances test to the facts of this case, I believe that Clark's isolated and brief question was not a violation of federal law. The sole *Bourne* factor that might favor an unfair labor practice finding is number three, the identity of the questioner: Clark is a senior vice-president (albeit someone with whom McCarty had a good relationship).[4] All of the other factors are either neutral or point the other way. Factor 1: At the time the question was asked, there was no atmosphere of employer hostility toward the Union. Indeed, there is no evidence that the Respondent had so much as voiced opposition to the Union or to unions generally prior to September 27, 2013,[5] the date alleged by the General Counsel as when Clark asked McCarty his brief question. As of October 1, the date my colleagues say the question was asked, the Respondent had encouraged employees not to sign union authorization cards and stated that "we do not need a union at Bozzuto's," but the Act precludes the Board from relying on these statements to support a finding that Clark's question was unlawful.[6] Factor 2: Clark was not seeking information that could have been used to take action against supporters of the Union. He merely asked, "What's going on with this union stuff?"[7] Factor 4: The judge found that McCarty "was approached by" Clark, who apparently asked the question in a working area. There is no evidence that McCarty was questioned in a manager's office or otherwise surreptitiously. Factor 5 is neutral: McCarty's answer was neither truthful nor untruthful. He simply refused to answer the question—but he made no attempt to conceal his support for the Union, and his refusal was forthright and confident.[8]

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[3] The Board instructed that the *Bourne* factors "are not to be mechanically applied," stating that the applicable test is "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House*, 269 NLRB at 1178 fn. 20.

[4] My colleagues say that the concededly friendly relationship between McCarty and Clark does not eliminate the possibility that the latter's question was coercive. I do not suggest that it does. Rather, their friendly relationship is one factor among others supporting my finding that Clark's brief and isolated question was not unlawful.

[5] All dates herein are 2013.

[6] See NLRA Sec. 8(c) (providing that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute *or be evidence of* an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit" (emphasis added)). Sometime on October 1, the Respondent also unlawfully increased employees' wages and unlawfully disciplined Greichen. However, Greichen was not disciplined for union activity; and while a wage increase might take the wind out of the sails of an organizational effort, it would not create an atmosphere of employer hostility and discrimination toward the Union. Thus, regardless of whether Clark asked the question on September 27 or October 1, the first *Bourne* factor does not weigh in favor of finding the exchange between Clark and McCarty coercive.

[7] Clark's question was no more objectionable than the manager's question found lawful in *Rossmore House* itself ("What is this about a union?"), and it was clearly *less* intrusive than the owner's inquiry also found lawful in *Rossmore House*, where the owner asked an employee *why* he was "trying to get a union in here." 269 NLRB at 1176, 1178.

My colleagues say that in *MDI Commercial Services*, 325 NLRB 53 (1997), enfd. in relevant part 175 F.3d 621 (8th Cir. 1999) and *Medical Center of Ocean County*, 315 NLRB 1150 (1994), the Board found questions less specific than Clark's to be coercive. These cases are inapposite. In *Medical Center of Ocean County*, the Board found that the "studiously ambiguous" question posed—"What's going on; what's happening?"—in the circumstances in which it was posed—behind closed doors and directed to an "unsuspecting employee" who was not an open union supporter—"related to [the supervisor's] desire to know about either or both [the employee's] union sympathies or union activities in the shop." 315 NLRB at 1154. Here, in contrast, Clark was already aware of McCarty's union sympathies, and the judge correctly found Clark's question "an offhand and somewhat innocuous comment" (rendered unlawful, in the judge's view, solely by its temporal proximity to the wage increase and Greichen's discipline and discharge). In *MDI Commercial Services*, the Board found a coercive interrogation *despite* the inspecificity of the question posed based on the surrounding circumstances, including that the questioned employee had just been unlawfully directed to "stop talking" about the union and previously had been subjected to a plant closure threat. 325 NLRB at 69–70. There are no such circumstances here.

[8] My colleagues cite *Chipotle Services, LLC*, 363 NLRB No. 37 (2015); *Town & Country Supermarkets*, 340 NLRB 1410, 1423–1424 (2004); and *Regal Recycling, Inc.*, 329 NLRB 355, 365 (1989), as support for their position that McCarty's refusal to answer Clark's question was evidence of unlawful coercion. The cases are materially dissimilar. In *Chipotle Services*, an employee and open union activist told a coworker, Mandernach, that a third employee was making $11 an hour. Mandernach became upset. A supervisor appeared and asked Mandernach who told him the third employee made $11 an hour, and "Mandernach did not reply." 363 NLRB No. 37, slip op. at 5. Likewise, in *Regal Recycling*, supervisors asked employees which of their co-workers had called a union and inquired whether the employees had

In addition, McCarty was one of the Union's most active supporters. My colleagues say that McCarty was not an open supporter of the Union at the time of his fleeting exchange with Clark. McCarty testified to the contrary, stating that "within that first week [i.e., the week of September 23] I was not secret about it [the union campaign] at all. I'd rather have been out in the open than cowering."[9] Thus, regardless of whether the exchange took place on September 27 or October 1, McCarty by his own account was openly supporting the Union at the time.

Consistent with the above evidence, the judge recognized that Clark's question "might be viewed as an offhand and somewhat innocuous comment." But without evaluating the totality of the circumstances as required under *Rossmore House*, the judge abruptly concluded that the question was unlawful on the basis that it was temporally proximate to an unlawful wage increase[10] and the "unlawful discrimination against Greichen." My colleagues affirm the judge's conclusion, relying in part on the same considerations. I am unpersuaded by the judge's and my colleagues' reasoning, and I would find that the Respondent did not coercively interrogate McCarty.

First, even if the exchange between Clark and McCarty occurred on October 1, the General Counsel did not establish that it occurred after the wage increase was announced or Greichen was disciplined. I do not believe that events *postdating* a question can reasonably constitute circumstances that support finding the question coercive.[11]

Second, even if events postdating a union-related question may be taken into consideration in determining whether the question was coercive, Greichen's October 1 warning had nothing to do with union activity. Greichen was warned about complaining to coworkers about production standards. Even if those complaints were protected concerted activity—and I do not reach or pass on that issue, see supra fn. 2—they were not *union* activity. I do not believe that employees would reasonably connect a warning directed at nonunion activity with a question about "this union stuff." Moreover, Greichen's well-deserved reputation as (in McCarty's words) a "character" and a "hothead" who was prone to "rants" and could become "agitated" makes it even less likely that a warning issued to Greichen would have come as a surprise to anyone, least of all McCarty.[12] Besides, there is no evidence that McCarty was even aware—either before or after his exchange with Clark—of the wording in Greichen's warning that rendered it unlawful, i.e., the requirement that Greichen bring all complaints about terms and conditions of employment to management before speaking about them to his fellow employees. For these reasons as well, I believe Greichen's October 1 warning should be accorded no weight in the *Rossmore House* analysis.[13] And for the reasons explained below, Greichen was lawfully suspended and discharged on October 8 for insubordination, and lawful discipline cannot reasonably constitute a circumstance that renders a question coercive.

Accordingly, I would dismiss the allegation that McCarty was coercively interrogated in violation of NLRA Section 8(a)(1).

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signed authorization cards. The employees either did not respond or denied having signed cards. In *Town & Country*, an employee gave evasive answers to a supervisor's questions. Here, in contrast, McCarty replied to Clark's question and did so in a clear and forthright manner, stating: "I am not going to talk about it with you[,] Mr. Clark." This confident declaration shows that McCarty was anything but coerced.

[9] McCarty also testified that from the outset of the union campaign, Greichen was openly supporting the Union to the point of "grandstanding." Thus, McCarty's testimony contradicts the majority's finding that "McCarty and Greichen . . . tried to keep their union activity under the radar."

[10] There are no exceptions to the judge's finding that the wage increase was unlawful.

[11] I recognize that a Board majority held to the contrary in *Medcare Associates, Inc.*, 330 NLRB 935, 940 & fn. 17 (2000). I disagree with that holding.

[12] Indeed, McCarty testified that he discussed with the union organizer how best to control Greichen in employee meetings.

[13] This leaves the October 1 wage increase as the sole "background" unfair labor practice potentially relevant to the analysis. My colleagues cite several cases for the proposition that a background of unfair labor practices is relevant to determining whether an interrogation that takes place against such a background is coercive and thus unlawful. I agree that a background of serious unfair labor practices is a relevant consideration in a *Rossmore House* totality-of-the-circumstances analysis, see, e.g., *Sproule Construction Co.*, 350 NLRB 774, 774 fn. 2 (2007), but the cases my colleagues cite featured violations far more serious than the October 1 wage increase. Thus, the questions in *Seton Co.* were posed "against a background of . . . threats of plant closure, discharge, and more onerous working conditions." 332 NLRB 979, 982 (2000). In *Masland Industries*, the interrogation of employee-driver Freels "followed an unlawful threat . . . to close the trucking operation . . . ." 311 NLRB 184, 184 fn. 2 (1993). In *EDP Medical Computer Systems*, the violations included threats of plant closure, threats of discharge and blacklisting, threats of futility (i.e., that the respondent would never recognize or negotiate with the union), threats to eliminate existing benefits, and threats to enforce workplace rules more strictly. 284 NLRB 1232, 1264-1265 (1987). These cases are simply not on a par with the instant case. My colleagues also cite *Vista Del Sol Health Services, Inc.*, supra, 363 NLRB No. 135, for the proposition that "whether other unfair labor practices were occurring or had occurred" is relevant to determining whether questioning is coercive. In fact, the Board in *Vista Del Sol* stated that the relevant consideration was whether there was "a history of . . . discrimination against union activity." Id., slip op. at 17. There is no such history in this case.

2. The evidence does not establish that Greichen's suspension and discharge were unlawful.

The judge found that the Respondent violated the Act when it suspended and discharged employee Patrick Greichen on October 8 for insubordination, reasoning that the suspension and discharge were "inextricably bound up [with] the Company's earlier unlawful warning on October 1, which was issued because of Greichen's protected concerted activity."[14] My colleagues affirm the judge's finding, stating that "the Respondent's insistence that Greichen attend the October 8 meeting to discuss his ongoing concerns about the Respondent's productivity standards was an outgrowth of the Respondent's earlier unlawful warning to Greichen for discussing those standards with other employees."

As noted above, I agree that the warning issued to Greichen on October 1 was unlawful, but I believe this violation finding is warranted by the wording of the warning. I do not agree that the conduct for which Greichen was disciplined—complaining to coworkers about production standards—was protected concerted activity; in my view, Greichen was engaged in mere griping, which is not "concerted" activity by two or more employees undertaken for the "purpose" of "mutual aid or protection" (NLRA Sec. 7). See fn. 2, supra.

However, even if the complaints for which Greichen was disciplined on October 1 constituted NLRA-protected activity, I do not agree that Greichen's October 8 discharge violated the Act. Moreover, even if the discharge constituted a violation, I believe the appropriate remedy here would be an order to cease and desist the unlawful conduct, without an order granting reinstatement and backpay.

(a) *The proximate cause of the October 8 meeting was not the October 1 warning; it was Greichen's unsubstantiated claim that the Respondent was cheating employees out of their pay.* I disagree with my colleagues that the October 1 warning was the "but for" or proximate cause of the October 8 meeting. The warning and the meeting arose from very different circumstances. On October 1, Greichen was warned for complaining to coworkers about the Respondent's production standards. On October 8, Greichen was summoned to a meeting after the Respondent learned that Greichen was spreading throughout the workforce the unsubstantiated claim that the Respondent was *changing* its production standards on busy days on purpose to *cheat* employees out of production-based incentive pay.[15] This should go without saying, but I will say it anyway: complaining that Respondent's production standards are too demanding and accusing the Respondent of being a wage cheat are very different matters, and there is no evidence that the summons to the October 8 meeting would not have issued absent the prior warning.

(b) *Even if the October 8 meeting would not have been scheduled absent the October 1 warning, the proximate cause of Greichen's discharge was his insubordination.* Even if one accepts the speculative contention that the October 8 meeting was an outgrowth of—i.e., would not have taken place without—the prior warning, the fact remains that Greichen insubordinately refused to attend the meeting—not once, but three times, and after having been warned that his refusal would be deemed insubordination. That conscious and deliberate choice, not the October 1 warning, was the proximate cause of Greichen's discharge. And the fact that the warning was unlawful did not give Greichen a license to commit insubordination, nor did it immunize him from discipline for his misconduct.

Here is what occurred on October 8. Greichen's supervisor gave Greichen two work assignments that, like virtually all tasks at the Respondent's facility, were to be completed in a certain amount of time. The Respondent's industrial engineers had calculated standard times for specific tasks using accepted engineering methods. Greichen complained to his supervisor that the times for his tasks were too short. He then took his concerns to Jason Winans, the Respondent's grocery distribution manager. During his discussion with Winans, Greichen alleged that the Respondent was intentionally altering the standard times on busy days in order to cheat employees out of production-based compensation. Greichen also said that he was saying the same thing to "anybody and everybody he can," and he threatened to "get back" at the Respondent by initiating legal proceedings.

Given the seriousness of these charges and the fact that Greichen was spreading them throughout the workplace and threatening legal proceedings, Winans decided to inform Senior Vice President Clark. Winans, of course, could not responsibly have done otherwise. After hear-

[14] For ease of reference, and because the suspension and discharge are not analytically distinct for purposes of determining their lawfulness, I will simply refer to these two adverse employment actions in the singular as "discharge."

[15] No party contends that Greichen's claim was true.

Had Greichen attended it, the October 8 meeting would have been one more in a lengthy series of meetings—long predating the union campaign—between Greichen and the Respondent regarding his longstanding complaints about production standards. There is no evidence that Greichen found these meetings to be threatening. Indeed, he often received added incentive pay as a result of his complaints. Of course, the conduct giving rise to the October 8 meeting was of a different order of magnitude than Greichen's previous complaints, as explained in the text.

ing Winans' report, Clark arranged a meeting for 3:45 p.m. that day, the purpose of which was to explain, for Greichen's benefit, how the standard times for various tasks were determined. The attendees were to be Greichen, Clark, vice president of human resources Carl Koch, employee-management liaison Doug Vaughn, and industrial engineers James Wright and David Heatley.[16]

Clark asked Winans to inform Greichen of the scheduled meeting. When Winans did so, Greichen replied that he would not attend. At Clark's direction, Winans and Vaughn then told Greichen that the meeting was mandatory, that he would be paid for attending, and that an industrial engineer would explain the basis for the standard times. Greichen again replied that he would not attend.

At Clark's further direction, Winans and Vaughn repeatedly assured Greichen that there would be no adverse consequences if he went to the meeting,[17] but they informed Greichen that a refusal to attend the meeting on paid time would be regarded as insubordination. Greichen confirmed that he understood he would not be disciplined if he attended and he would be discharged if he did not attend. He also acknowledged that not attending would be insubordination and that termination was the standard penalty for such an offense. Still, and for the third time, he refused to obey the directive to attend. As a result, he was suspended for insubordination on October 8 and discharged for the same reason at a later date.[18]

To establish a prima facie case that Greichen's discharge violated Section 8(a)(1), the General Counsel had to make a showing "sufficient to support the inference that protected conduct was a 'motivating factor'" in the decision to discharge Greichen.[19] Yet, as the above facts demonstrate, Greichen was discharged for his insubordinate refusal to attend the October 8 meeting. Neither the judge nor my colleagues find that Greichen engaged in NLRA-protected activity on October 8. Rather, they find that Greichen made NLRA-protected complaints to his coworkers for which he was unlawfully warned on October 1, and they bootstrap that unlawful warning into a finding that the October 8 discharge was also unlawful on the basis that the discharge was "inextricably bound up" with the October 1 warning (according to the judge), or that "the Respondent's insistence that Greichen attend the October 8 meeting to discuss his ongoing concerns about the Respondent's productivity standards was an outgrowth of the Respondent's earlier unlawful warning to Greichen for discussing those standards with other employees" (according to my colleagues).

As noted above, there is no evidence that the October 1 warning was the "but for" or proximate cause of the Respondent's decision to summon Greichen to a meeting on October 8—no evidence that, in my colleagues' organic metaphor, the summons to the meeting was an "outgrowth" of the warning. To the contrary, the just-recited narrative shows that the summons to the meeting resulted directly from the Respondent's discovery that Greichen was spreading among his coworkers—to "anybody and everybody" he could—the unsubstantiated claim that the Respondent was changing production standards on busy days to cheat employees out of production-based incentive pay. But even if one were to accept the judge's and my colleagues' finding to the contrary, any causal link between the October 1 warning and Greichen's discharge was decisively broken by Greichen's act of insubordination. As recounted above, the record shows that Respondent gave Greichen a lawful directive to attend a work-related meeting on paid time. The Respondent explained the meeting's purpose and repeated the directive three times. The Respondent also placed Greichen on notice that refusing to attend would be treated as insubordination, at the same time assuring him that he would not be disciplined if he did attend.[20] Greichen acknowledged he understood that he would be discharged if he did not attend the meeting, and then proceeded to refuse to attend a third and final time. Given these facts, I cannot agree with my colleagues' decision to attribute the discharge to the prior unlawful warning instead of to Greichen's unfortunate but conscious and deliberate choice to disobey a direct order.[21]

[16] My colleagues contend that this meeting was not organized like most meetings concerning production standards and that Wright was given only "vague" information. This overlooks that another engineer, Heatley, also was asked to attend. Heatley brought a packet of material, including a page of Greichen's production statistics, to use at the meeting.

[17] The majority asserts that Greichen was told only that he would not be terminated if he attended the meeting. The undisputed evidence shows, however, that Greichen was repeatedly assured that there would be no adverse consequences if he participated.

[18] Greichen surreptitiously recorded his various discussions with the Respondent's representatives on October 8. Thus, there is no dispute about what was said. The recording reveals that Greichen never gave Winans or Vaughn a reason or excuse for not attending the meeting. During the hearing, Greichen testified that he did not want to hear what the Respondent had to say and that in his view, attending the meeting might have been at odds with a complaint he had filed with the Wage-Hour Division of the United States Department of Labor. That complaint was later dismissed.

[19] *Wright Line*, supra, 251 NLRB at 1089.

[20] One of the Respondent's human resources managers made an extended effort to avoid a confrontation and to tactfully persuade Greichen to attend the meeting.

[21] The cases on which the majority relies are distinguishable. In *Metro One Loss Prevention Services Group*, 356 NLRB 89 (2010), an employee was discharged for refusing to sign unlawful warnings. Id. at

(c) *Even if Greichen would not have been discharged absent the prior unlawful warning, Greichen was discharged for "cause," and Section 10(c) precludes the Board from ordering reinstatement and backpay.* Even if one were to accept that Greichen would not have been discharged were it not for the unlawful October 1 warning—and for the reasons stated above, I do not accept this claim—my colleagues still cannot lawfully order Greichen reinstated with backpay. Section 10(c) of the Act precludes these remedies. Greichen was discharged for insubordination; unquestionably, insubordination is "cause" for discharge;[22] and Section 10(c) states, in relevant part, that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."[23] Accordingly, my colleagues are without authority to order the Respondent to reinstate Greichen and to pay him backpay.

My colleagues' finding that Greichen would not have been discharged but for the Respondent's prior unfair labor practice does not give rise to an exception to the statutorily compelled rule. Consistent with Section 10(c), the Board has held that it cannot order reinstatement or backpay for employees discharged for cause, even where that cause would not have been discovered absent the commission by the employer of an unfair labor practice. Thus, in *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007), the employer violated Section 8(a)(5) by installing hidden surveillance cameras without giving the union prior notice and an opportunity to request bargaining. Subsequently, by means of the illegally installed cameras, the employer detected employees engaging in illegal drug use, and the employer discharged them. Although the drug use would not have been detected but for the employer's unfair labor practice, the Board found that Section 10(c) precluded reinstatement and back pay for the discharged employees because their illegal drug use was "cause" for their discharge.[24] Similarly, in *Taracorp Industries*, 273 NLRB 221 (1984), the Board withheld a make-whole remedy for an employee discharged for insubordination based on information obtained during an investigatory interview, even though the employer obtained the employee's admission that he had refused to obey a work-related order after unlawfully denying the employee's request for a *Weingarten* representative.[25]

102–106. Here, Greichen was discharged for refusing to obey a lawful order to attend a meeting. In *Supershuttle of Orange County, Inc.*, 339 NLRB 1 (2003), an employee was discharged for misrepresentations he made in the course of an unlawfully motivated investigation, prompting the Board majority to find the discharge unlawful on the basis that the misrepresentations "did not exist independently of the unlawfully motivated investigation." Id. at 3. Here, Greichen was discharged for insubordination in refusing to attend a *lawful* meeting that *did* "exist independently of" the prior unlawful warning, given the very different actions prompting the warning (complaints about production standards) and the meeting (claims that the Respondent is a wage cheat). (I also agree with former Chairman Battista, who relevantly dissented in *Supershuttle of Orange County*, that even if an investigation is discriminatorily motivated, that "does not give a license to an employee to lie to his employer." Id. at 4.) Finally, my colleagues cite *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844 (2001), for the proposition that "misconduct provoked by employer's unfair labor practice is not grounds for discharge." Greichen's insubordination was not provoked by an unfair labor practice. Indeed, it was not provoked at all. Greichen disobeyed a directive to attend a lawful meeting called because he was claiming that production standards were being altered to cheat employees out of incentive pay. The fact that the Respondent had previously issued Greichen an unlawful warning for complaining that production standards were too stringent does not constitute evidence that the warning "provoked" the insubordination.

[22] In industrial settings like the Respondent's facility, insubordination has long been regarded as a termination offense. Tolerating open disobedience of lawful and reasonable orders would jeopardize good order, production and safety. See Adolph M. Koven & Susan L. Smith, *Just Cause: The Seven Tests*, 3d ed. (BNA Books 2006); John E. Dunsford, *Arbitral Discretion: The Tests of Just Cause*, Proceedings of the 42d Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg 23-50 (BNA Books 1990) (discussing and appending copy of *Whirlpool Corp.*, 58 LA 421 (Daugherty, Arb., 1972)); Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 Duke L.J. 594 (1985).

[23] "The legislative history of [Sec. 10(c)] indicates that it was designed to preclude the Board from reinstating an individual who had been discharged because of misconduct." *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 217 (1964). Indeed, that history shows Congress intended to preclude reinstatement and back pay for employees discharged for cause even if the grounds for termination were acts committed in the course of protected activity. The Supreme Court in *Fibreboard* quoted as follows from Sec. 10(c)'s legislative history:

> The House Report states that [Sec. 10(c)] was "intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct." H.R. Rep. No. 245, 80th Cong., 1st Sess., 42 (1947). The Conference Report notes that under § 10(c) "employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause (interfering with war production) . . . will not be entitled to reinstatement." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 55 (1947).

Fibreboard, 379 U.S. at 217 fn. 11.

[24] The Board in *Anheuser-Busch* distinguished *Kolkka Tables & Finnish-American Saunas*, a case on which my colleagues rely, because it was not clear that the employees' actions there would have constituted "cause" for discharge if the employer had not committed the unfair labor practices. Id. at 649.

[25] See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) (holding that it is an unfair labor practice for an employer to conduct an investigatory interview after denying an employee's request that a union representative be present at the interview, where the employee reasonably believes that the interview might result in discipline).

Accordingly, the Board cannot order reinstatement and backpay for Greichen, similarly discharged for insubordination, even if he would not have been discharged absent the Respondent's prior unlawful warning.[26]

In sum, (i) the proximate cause of the Respondent's decision to convene a meeting on October 8 was not the unlawful October 1 warning, but Greichen's unsubstantiated accusation that the Respondent was changing production standards on busy days to cheat employees out of incentive pay; (ii) even if the October 8 meeting would not have been called absent the prior unlawful warning, the proximate cause of Greichen's discharge was not the warning but Greichen's insubordinate refusal to attend the meeting; and (iii) even if Greichen would not have been discharged absent the prior unlawful warning, he was discharged for "cause"—insubordination—and Section 10(c) precludes the Board from awarding him reinstatement and backpay. Accordingly, Greichen's discharge was lawful, and even if it was not, the remedy must be limited to an order to cease and desist, and the Board cannot require the Respondent to reinstate Greichen or to pay him backpay.

3. A notice-reading remedy Is unwarranted.

The judge declined the General Counsel's request for a notice-reading order, i.e., a remedy requiring that the notice to employees be read aloud to the Respondent's assembled employees by Senior Vice President Rick Clark in the presence of a Board agent, or by a Board agent in Clark's presence. My colleagues reverse the judge's decision and grant the General Counsel's request for a notice-reading remedy. I would affirm the judge in this regard.

The Board has held that notice reading is an "extraordinary remedy" that should be granted only in unusual circumstances. See, e.g., *Federated Logistics & Operations*, 340 NLRB 255, 256–257 (2003), petition for review denied 400 F.3d 920 (D.C. Cir. 2005). Those circumstances are cases in which the unfair labor practices are "numerous, pervasive, and outrageous." Id. at 256. The judge correctly concluded that this was not such a case. Further, the judge found that the Respondent was not a recidivist and was unlikely to violate the Act in the future. The Respondent also demonstrated good faith in quickly offering to reinstate Todd McCarty when it came to light that a supervisor had deleted his break times from the Respondent's records, which had the effect of depressing McCarty's production score. See supra fn. 1. Moreover, as discussed above, I believe that two of the judge's violation findings that my colleagues adopt should be reversed.

But even if, as my colleagues conclude, all the judge's violation findings should be upheld, those violations do not rise to the level of "numerous, pervasive, and outrageous" unfair labor practices required to warrant notice reading. Those violations consist of (i) an unlawful wage increase, (ii) a single coercive interrogation, (iii) an unlawful work rule, and (iv) two unlawful discharges. The cases my colleagues cite in support of their decision to order notice reading involved either far more numerous and pervasive violations, see *North Memorial Health Care*, 364 NLRB No. 61 (2016) (12 violations of Section 8(a)(1), (3), and (5)), granting review in part and enfd. in part 860 F.3d 639 (D.C. Cir. 2017), or a recidivist violator of the Act with a history of committing numerous, pervasive, and outrageous violations, see *Carey Salt Co.*, 360 NLRB 201 (2014) (violations of Section 8(a)(1), (4), and (5)); *Carey Salt Co.*, 358 NLRB 1142 (2012) (11 violations of Section 8(a)(1), (3), and (5)); enfd. in substantial part 736 F.3d 405 (5th Cir. 2013). Ordering notice reading in this case lowers the bar to an unprecedented extent and effectively makes notice reading the rule rather than the exception it has always been—an extraordinary remedy reserved for extraordinary cases. Thus, I would uphold the judge's determination that notice reading is not appropriate here.

Accordingly, to the extent and for the reasons stated above, I respectfully dissent.

Dated, Washington, D.C. December 12, 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

[26] To be sure, the Court in *Fibreboard* stated that Sec. 10(c) was not "designed to curtail the Board's power in fashioning remedies when the loss of employment stems directly from an unfair labor practice." 379 U.S. at 217. But in *Fibreboard*, no employee misconduct was involved, and the loss of employment stemmed directly from the employer's unfair labor practice of unilaterally subcontracting bargaining-unit work in violation of Sec. 8(a)(5). Here, Greichen's discharge stemmed directly from his act of insubordination, and Sec. 10(c) bars reinstatement and backpay even if he would not have been discharged absent the prior unlawful warning, as *Anheuser-Busch* and *Taracorp Industries* make clear.

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 benefits and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, suspend, or discipline any of you for engaging in protected concerted activities.

WE WILL NOT interrogate you about your support or activity for United Food and Commercial Workers Union, Local 919 or any other labor organization.

WE WILL NOT announce or grant wage increases to dissuade you from supporting United Food and Commercial Workers Union, Local 919 or any other labor organization.

WE WILL NOT maintain a policy of conditioning continued employment on an agreement by you to refrain from talking about any disciplines you may have received or from talking about your terms and conditions of employment.

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, within 14 days from the date of the Board's Order, offer Patrick Greichen 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 Patrick Greichen and Todd McCarty whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL compensate Patrick Greichen and Todd McCarty for the adverse tax consequences, if any, of receiving lump sum backpay awards, and WE WILL file with the Regional Director for Region 1, 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 both employees.

WE WILL compensate Patrick Greichen and Todd McCarty for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful actions against Patrick Greichen and Todd McCarty and WE WILL within 3 days thereafter, notify them in writing that this has been done and that the disciplines will not be used against them in any way.

WE WILL hold a meeting or meetings during working hours and have this notice read to you and your fellow workers by Rick Clark, our vice president of warehouse, transportation and risk management (or, if he is no longer employed, by a high-ranking responsible management official), and in the presence of a Board agent and an agent of the Union if the Region or the Union so desires, or by a Board agent in Clark's presence and, if the Union so desires, the presence of an agent of the Union.

BOZZUTO'S INC.

The Board's decision can be found at www.nlrb.gov/case/01-CA-115298 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.

Jo Anne P. Howlett Esq., for the General Counsel.
Miguel A. Escalera Jr. Esq., and *Diana Garfield Esq.*, counsel for the Respondent.
J. William Gagne Jr. Esq., counsel for the Charging Party.
Michael Petela, Jr., Esq., counsel for Todd McCarty.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case on January 29 and 30 and March 18 to 20, 2015. The charges and amended charges in these cases were filed on October 21, December 11 and 20, 2013, and on January 16, February 21, and April 1, 2015. The complaint, which was issued on October 16, 2014, alleged as follows:

1. That on or about September 27, 2013, the Respondent interrogated employees about their union activities.

2. That on or about October 1, 2013, the Respondent orally prohibited employees from discussing the terms and conditions of their employment with other employees.

3. That on or about October 1, 2013, the Respondent announced and implemented wage increases.

4. That on or about October 1 and 8, 2013, the Respondent issued a verbal warning and thereafter discharged Patrick Greichen because he assisted the Union and engaged in other protected concerted activity.

5. That on or about January 8, 2014, the Respondent, created the impression that employee union activities were being placed under surveillance.

6. That on or about January 15, 2014, the Respondent for discriminatory reasons, suspended Todd McCarty.

7. That on or about February 18, 2014, the Respondent for discriminatory reasons, discharged Todd McCarty.

8. That since October 1, 2013, the Respondent has issued disciplinary actions that condition employment on employees relinquishing Section 7 rights to discuss them with other employees.

The Respondent essentially denied these allegations of the complaint. In addition, the Respondent asserts that it made an unconditional offer to McCarty which was rejected by him. It therefore asserts that backpay should be terminated as of the time that McCarty rejected the offer and that reinstatement would not be warranted as a remedy.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is admitted and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(1), (6), and (7) of the Act. I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

(a) Company Operations and the Start of the Organizing Drive

The Respondent operates a wholesale warehouse for the distribution of food products. These warehouses are located in Cheshire and North Haven, Connecticut. Together they employ about 450 production employees in various categories such as loaders, selectors, and forklift operators.

The Company's owner is Mike Bozzuto. Rick Clark is the senior vice president of warehouse, transportation and risk management and Carl Koch is the vice president of human relations. Reporting to Clark is Doug Puza and a number of persons who are not relevant to this case. In turn, John Chetcuti and Jamie Wright are managers who report to Puza. Jason Winans is a supervisor who reports to Chetcuti. There are also a number of front line warehouse supervisors who report to Winans.

In addition to the above named individuals, there is a person named Doug Vaughan who reports to Rick Clark and whose role is essentially to be a liaison with production employees regarding various issues such as work related complaints that may arise from time to time.

The two alleged discriminatees, Patrick Greichen and Todd McCarty, were both employed as selectors at the Cheshire faculty. Their job essentially involved receiving "orders" for products; driving a motorized vehicle to where items are stored and loading those items onto pallets which eventually make their way to the loading docks from which trucks deliver them to customers. This type of job requires a substantial amount of physical strength. Employees are rated on their performance through a computerized system, which among other things, measures how fast they do their jobs.

Sometime in September 2013, Todd McCarty contacted a representative of the Union and on September 22, he and Greichen, along with two other employees, met with a union representative. At this meeting they were given authorization cards and told to solicit other employees, which they commenced to do on September 23. At the outset, McCarty and the others tried to keep their solicitation activity under the radar. However, by about September 26, word began to get out and one employee posted a note on the internet talking about the union organizing effort.

The evidence shows that the Company became aware of the union activity during the last week of September. This is essentially conceded by company management who described situations where union literature was found in work areas. In this regard, McCarty testified that about the week after the campaign started, he was approached by Rick Clark who asked what was going on with "this union stuff" and he replied that he was not going to talk to him about it. Also, on October 1, the Company posted a notice explicitly acknowledging its awareness of the union organizing campaign while at the same time granting pay increases to most of its production employees.

By the last week of September 2013, the Union had obtained 84 signed authorization cards. Both McCarty and Greichen were the most active union supporters at this time.

(b) The Wage Increases

On October 1, 2013, the Company posted a memorandum announcing that almost all of its production employees except for day shift selectors would be receiving an increase in pay retroactive to September 29. On the same day, the Company also announced that a number of its employees had told management that the Union was attempting to organize the shop. This notice went on to state that the Company was aware that the Union had obtained a list of the warehouse employees. It encouraged employees to refrain from signing union authorization cards and stated that "we do not need a union at Bozzuto's."

The evidence shows that the last time a general wage increase was given was in 2010. Further, the evidence presented by the Company shows that prior to October 1, there only was some discussion about the possibility or advisability of granting wage increases to certain categories of employees.[1] However, the Employer's proffered evidence did not show that the decision to give these increases was reached at any time before the

[1] R. Exh. 2 consists of notes of a supervisor discussion group meeting held in August 2013. It deals with multiple issues including the possibility of pay increases. But it states only that the Company at that time was "currently discussing premium changes in the Freezer, Forklift Loader and Shift." It clearly does not show that any decision was made at that time to increase wages or wage premiums to employees.

Company became aware of union activity.

The notices posted simultaneously on October 1, 2013, leave no doubt that the pay increases were motivated by the fact that the Company became aware that the Union was engaged in organizing activity. In the absence of a showing that these increases were given on a regular and period basis, or that the decision had actually been made before the Company became aware of union organizing activity, I conclude that the Respondent violated Section 8(a)(1) of the Act. *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1344 (2000); *B & D Plastics*, 302 NLRB 245 (1991); *Speco Corp.*, 298 NLRB 439, 443 (1990).

(c) Patrick Greichen

At the same time that signatures were being solicited for the Union, Greichen was going around and telling other employees that in his opinion, the Company's production standards were too stringent. In this regard, the Company made some changes to its production standards in July 2013, and Greichen asserted to other employees that the standards required more work. It should be noted that employees are evaluated based on a set of standards established by the Company as to how long it should take to do the various tasks to which they are assigned. If an employee exceeds the standard, he can earn more money; but if he fails to meet the standard, he is subject to discipline and discharge.[2]

On October 1, 2013, Greichen was asked to attend a meeting with Rick Clark, Carl Koch, Doug Vaughan, and Bill Glass. At this meeting, Clark asserted that employees were complaining about Greichen's "erratic and scary behavior." When asked to characterize that behavior, Clark's testimony was that Greichen was complaining to other workers about long hours and working conditions.

Greichen received a verbal warning which stated that "his repeated negative attitude and disrespectful behavior . . . have become disruptive to the workforce and work environment." In the attached memorandum, it states inter alia:

> Rick told Patrick he had met with him at least four times in the past year to address the concerns and Patrick had agreed he would follow a communication process in a timely fashion and to the appropriate personnel, not making negative comments in the work force without trying to address the issue with management. Patrick agreed.
>
> . . .
>
> Rick told Patrick he needed to stop disrupting the work environment by making negative comments in the aisles, such as: being forced to work 20 hours per day or comments about needing three legs to do the work here, in the hallway in front of his peers.
>
> Rick told Patrick he fully knows how he needs to properly address his concerns in the work place and he hoped Patrick would follow them going forward....

On October 8, 2013, Greichen told his supervisor that the selection time standard for an order he had to perform was incorrect. He thereafter presented his complaint to Jason Winans via the company's open door policy. With respect to the conversation between Greichen and Winans, the latter recounted the conversation as follows:

> On Tuesday, 10/8/13, at 2:00 p.m., Patrick Greichen came to my office very unhappy about how much standard time the system had given him on two specific assignments he had done. In an attempt to calm Mr. Greichen down I went into his PERQ screen to find out which assignments he was referring to so I could show them to him in detail in the PICQ screen. We looked at the assignments and I didn't see anything out of the ordinary. Patrick was concerned about the amount of cases he had to select and the amount of time he was give.
>
> After we looked at the orders, Patrick began telling me how he believes
> BOZZUTO'S cuts the standard time on assignments on days when the volume is high in order to get more cases out of people and to pay them less, in the process making them miserable. Patrick then told me that he tells anybody and everybody he can that he believes we are purposely changing the standards on a daily basis in order to screw the associates. I told Patrick that I didn't believe any of this to be true and that these were very serious accusations he was making. I went on to say that to the best of my knowledge the company has communicated all changes to standards in my time here.
>
> I asked Patrick why he continued to work here if he thought we were purposely trying to make him miserable. He said that he would get back at the company, not physically but by using the law outside of here. He stated he had too much to lose to do anything physical.
>
> I thought this conversation and the accusations made were serious enough that I should bring it to the attention of upper management... After I told Rick Clark and Doug Vaughn about what had happened, Rick set up a meeting to include the three of us along with the industrial engineering team so that they could explain the standards to Patrick....

After this meeting Winans reported his conversation and arranged for a meeting to be held with Greichen, himself, Rick Clark, Doug Vaughn, and someone from the industrial engineering department.

At around 3:45 p.m., Winans told Greichen that he had to go to a meeting to be held at 4 p.m. with Clark, Vaughn, and the industrial engineers so that they could explain to him how the standards worked. Greichen said that he couldn't attend the

[2] Since each item has a machine readable tag, the Company, through the use of scanners coupled with a computer program, can measure how long it takes to do each and every task from the time an item enters the warehouse until the time it leaves. It seems that these standards are revised from time to time and purport to be an accurate means by which average employee productivity can be used to set a standard against which each employee, each week, is measured.

meeting and that he felt that he was being harassed. After consulting with higher ups, Winans told Greichen that the meeting was mandatory and that if Greichen did not attend, he would be suspended pending termination for insubordination. Greichen still refused to attend. And the result was that he was suspended on October 8 and ultimately discharged as a result of this transaction.

The Company explained that the reason it insisted that Greichen attend this meeting was because they wanted him to get the correct information about standards instead of having him talking to other employees and misleading them into thinking that the Company was somehow manipulating the standards in order to possibly reduce incentive pay or require more work.

I note that despite this assertion as to how important it was required for Greichen to attend this meeting; in order to prevent him from giving inaccurate information to other employees about standards, the Company did nothing thereafter to notify or to educate the employees about any mistaken information that Greichen had allegedly previously given to them.[3]

The Respondent's position is that it discharged Greichen not because he was complaining about production standards per se, but because he refused to attend a meeting where a representative of the engineering department would be able to tell him why his complaints were unfounded. I frankly don't see how one can separate these transactions.

The evidence establishes that the October 1 warning was issued because the Company became aware that Greichen was complaining to other employees about how the production standards were established and how they were being applied to both himself and to others. Since these standards determine not only whether employees receive premium pay, but also whether they can be disciplined or terminated, his discussions with his fellow employees constitute protected concerted activity within the meaning of Section 7 of the Act.

Moreover, as this October 1 warning was issued at virtually the same time that the Company notified employees that they should avoid union activity, it seems that given its awareness of Greichen's concerted complaints about productivity standards, the Company's management more than likely believed that he was among the employees who most likely would support a union.

Based on the above, it is my conclusion that the October 1 warning to Greichen violated Section 8(a)(1) and (3) of the Act.

I also conclude that Greichen's discharge on October 8 was violative of the Act. Even taking Respondent's premise that Greichen's refusal to attend a meeting constituted insubordination, I still think that the discharge was unlawful. Greichen was told to go to a meeting to discuss his complaints about productivity standards because the Company was concerned that he was talking about them and misinforming his fellow employees. Thus, the demand that he attend this meeting was inexplicably bound up to the Company's earlier unlawful warning on October 1, which was issued because of Greichen's protected concerted activity. One follows from the other and the October 8 meeting would not have taken place but for the earlier interference with Greichen's right to talk to his coworkers about their collective terms and conditions of employment.

There being no evidence that Greichen, while engaged in concerted activity, conducted himself in a threatening manner, I conclude that his discharge violated Section 8(1) and (3) of the Act. *Approved Electric Corp.*, 356 NLRB 238 (2010).

(d) Todd McCarty

Todd McCarty was, after Greichen left, the sole active union supporter. And there is no dispute that the Respondent was aware of this. Indeed, McCarty, although originally advised to keep a low profile, was later told that being an open union supporter might, in fact, give him some protection from potential company harassment. In this regard, the evidence shows that on several occasions during and after October 2013, he spoke with supervisory personnel and disclosed his role as a union activist.

McCarty was a long-term employee who had a good production record and who often earned premium pay based on his performance over and above standards.

In early January 2014, McCarty saw that his reported production numbers seemed to be too low in that the computerized reporting system failed to credit him with "down time." In this regard, down time is unit of time for which a supervisor, for example, has approved an employee break. And this down time, if counted, serves to raise an employee's raw productivity score. That is, if the down time is not counted, then that employee would receive a lower productivity score and be subject to discipline if his score for the week was less than 95 percent of the standard amount of time that is allowed for the tasks performed by that employee. (It is not necessary to go into all the details).

Believing that something was up, McCarty started recording his productivity statistics. He testified that in early January he spoke to Winans and complained that his down time had been eliminated from his productivity figures. According to McCarty, Winans essentially ignored him.

On January 15, 2014, McCarty spoke to Englehart and repeated his claims about his down time not being recorded. Despite a statement by Englehart that McCarty shouldn't worry about it, McCarty received a 5-day suspension relating to his productivity.

During the period of his suspension and an overlapping vacation, McCarty had coworkers take photographs of his productivity numbers for the weeks ending January 11 and 18. These also showed that "down time" was deleted and therefore lowered McCarty's productivity percentage scores.

On February 18, 2014, soon after he returned from vacation, McCarty was presented with a write-up stating that his performance for the week of January 11, 2014, was at 94 percent of the standard and therefore that he was being terminated.

Subsequent to his discharge and during the investigation of

[3] The Company called as its witness James Wright, who is one of the engineers. He was told of the meeting but was not given any details as to why the meeting was to be held. He testified that the person who asked him to come to the meeting was very vague. As to Greichen's failure to show up for the meeting, Wright did not think that this was a big deal. He also testified that he was not asked to talk to any other employees about the inaccurate information that supposedly was given by Greichen.

the unfair labor practice charge, McCarty presented to the Regional Office evidence showing that the productivity figures that were used to justify his discharge were wrong. This was then transmitted to the Company on April 9, 2014. After making an internal investigation, the Respondent determined that a supervisor with access to the computer system had eliminated McCarty's "down time" in a way that lowered the productivity percentage numbers that were the basis of his suspension and discharge. And since the only persons who normally would access the applicable computer program are managerial or supervisory level people, it is probable, to a level of certainty, that someone from management, (such as Winans or some other supervisor at his direction), had altered McCarty's productivity numbers in an effort to remove him from the Company. [4]

In this case, the evidence establishes that McCarty was the leading union activist among the employees after October 8; that the Respondent was fully aware of his union activity, and that the ostensible reason for his suspension and discharge was manifestly false. I therefore conclude that the General Counsel has established, by a preponderance of the evidence, that these actions by the Respondent violated Section 8(a)(1) and (3) of the Act. I also conclude that the Respondent has failed to show that it would have taken these actions apart from McCarty's union activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied, 455 U.S. 989 (1982). See also, *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007), in which the Board concluded that where an employer's various asserted reasons were shown to be pretextual and false, it fails to meet its burden under *Wright Line*, even if one of its other asserted reasons may have been legitimate.

(e) Miscellaneous allegations

The General Counsel alleges that the Respondent unlawfully interrogated McCarty when he was asked by Clark "what's going on with this union stuff?"

While this single act of interrogation might be viewed as an offhand and somewhat innocuous comment, the fact is that this event occurred at or near the same time of the unlawfully motivated pay increase and the unlawful discrimination against Greichen. I therefore shall conclude that this interrogation, in the circumstances, violated Section 8(a)(1) of the Act.

The General Counsel alleges that the Respondent created the impression that the employees' union activities were being surveilled. In support of this allegation, McCarty, testified that on one occasion in October, 2013, he was called to a meeting and shown surveillance footage of him having a phone call in the common room. The General Counsel posits that since McCarty was known to be the active union supporter and since he had taken many phone calls in this area without prior objection, the only reasonable assumption is that the Company was engaging in surveillance of his union activity inside the facility. (I don't know if the surveillance system records are sound and therefore I don't know if it was possible for the Company to eavesdrop on any conversations that McCarty had with other employees in the plant).

The Company has maintained a surveillance system long before the advent of the Union. This was not altered when the Union and McCarty started their organizing efforts. The evidence shows that the Company's employees are aware of the surveillance system and this is referenced in the employee handbook.

In my opinion, the evidence as to this allegation is not sufficient to establish that the Respondent either engaged in surveillance of employee union activity or, by this one instance, illegally gave the impression to employees that it was spying on their union activities. I shall therefore recommend dismissal of this allegation of the complaint.[5]

As stated in her Brief, the General Counsel alleges that since October 1, 2013, the Respondent has maintained an ongoing practice of requiring employees, "not to be involved in any conversations that are deemed rumor, hearsay or non-factual."

In support of this allegation, the General Counsel offered a group of documents relating to situations where employees were not fired after having been suspended termination. In these documents, there is a statement to the effect that the employee would not be terminated provided he or she agreed to certain stipulations, one of which was:

> If you agree to and sign this letter of agreement, you will be able to return to regular duties. Going forward, if it is shown after proper investigation that you violate any one or more or the following stipulations within the next six months... your employment status with the Company will be terminated.
>
> You must:
>
> * * *
>
> Not be involved in any conversations that are deemed hearsay, rumors or non-factual comments that cause any disruption in the business environment.

By inserting this statement in these documents, it is clear that the Respondent has created a rule that restrains at least those employees who have been given a second chance, from discussing, in an uninhibited way, the disciplinary actions taken against them with other employees. And since discussion by employees about the nature of, or extent of discipline, would relate to terms and conditions of employment, it can be construed as protected concerted activity within the meaning of Section 7 of the Act.

The General Counsel cites *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), along with *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), and *American Cast Iron Pipe Co.*, 234 NLRB 1126 (1978), enfd. 600 F.2d 132 (8th Cir.

[4] With respect to the falsification of McCarty's records, the Company's investigation pointed toward a supervisor named Grace. But the testimony was that this person denied that he had falsified McCarty's numbers and except for a 5-day suspension with pay, he was not otherwise disciplined.

[5] In her brief, the General Counsel noted that the complaint alleged that this event took place in early January 2014, instead of October 2013 and that the supervisor who allegedly committed the unfair labor practice was mistakenly identified as Dave Gardner. She therefore moved to amend the complaint to correct the matter. In light of my conclusion that the Respondent did not violate the Act in this manner, there is no need to rule on the Motion.

1979). For its part, the Respondent really did not address this issue in its brief. As I think that the cases cited by the General Counsel are dispositive, I conclude that by maintaining this policy and requiring certain employees to acknowledge the policy as a condition of retaining their jobs, the Respondent has violated Section 8(a)(1) of the Act.

REMEDY

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

In addition to the standard remedy for 8(a)(1) and (3) cases, the General Counsel requests that the Respondent be required to read the notice to the employees at a meeting held on work time. In my opinion, this remedy is not required in this case.

From the Board's inception, it has as part of its usual remedial orders, required the offending party to post a notice describing employee rights under the Act and promising to abide by those rights. *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1 (1935).

Requiring an owner or high official of a company or a union to actually read aloud the notice to its assembled employees has not been typically required except in unusual circumstances. In *Federated Logistics & Operations*, 340 NLRB 255, 256–257 (2003), the Board described this as an "extraordinary remedy." This remedy, along with others, was imposed in a case where the employer (a) unlawfully interrogated employees; (b) created the impression of surveillance; (c) solicited grievances; (d) promised benefits; (e) threatened employees with the loss of existing benefits; (f) threatened to move its operations; (g) withheld benefits; and (h) discriminatorily suspending employees for engaging in protected activity. Moreover, in that case, the results of an election were overturned and the Board ordered a new election. Given these findings, in the context of a pending election situation, a Board majority stated:

> The Board may order extraordinary remedies when the Respondent's unfair labor practices are "so numerous, pervasive, and outrageous" that such remedies are necessary "to dissipate fully the coercive effects of the unfair labor practices found." *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995) (and cited cases). For example, a public reading of the notice is an "effective but moderate way to let in a warming wind of information, and more important, reassurance." *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 539–540 (5th Cir. 1969). In addition, the Board has ordered Respondents to supply updated names and addresses of employees to the Union because that "will enable the Union to contact all employees outside the [workplace] and to present its message in an atmosphere relatively free of restraint and coercion." *Excel Case Ready*, 334 NLRB 4, 5 (2001) (quoting *Blockbuster Pavilion*, 331 NLRB 1274, 1275 (2000)). Further, when a respondent "has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights," the Board has issued a broad order for the Respondent to refrain from misconduct "in any other manner," instead of a narrow order to refrain from misconduct "in any like or related manner." *Hicknott Foods*, 242 NLRB 1357 (1979).

Although the violations found in the present case are certainly not trivial, they are not, in my opinion, numerous, pervasive or outrageous. Nor has it been shown that the Respondent has violated the Act in the past or that it likely will violate the Act in the future. In these circumstances, it is my opinion that the Board should not require the owner of the Company to stand in front of his employees and publicly read the notice to the assembled group.

There is another very tricky question in this case; namely whether the Respondent should be required to offer reinstatement to Todd McCarty and whether his backpay should be terminated as of May 15, 2015.

On May 14, 2014, the Respondent transmitted to McCarty a written unconditional offer of reinstatement. This offered him full backpay and the retention of all of benefits including seniority. The offer did not ask McCarty to sign any settlement agreement or release and did not condition his acceptance of the offer on the withdrawal of any pending complaints. This offer gave McCarty 10 days to respond. This was later extended to May 28, 2014.

On May 19, McCarty sent an email to his lawyer and they put together a counter offer.[6] In the proposed counter offer, McCarty demanded, as a condition for accepting reinstatement, that the Company accept a number of demands, including the payment of additional leave money to which he was not entitled. Although this counter offer was sent, it went to the wrong email address and was not actually received. Nevertheless, this undelivered email does indicate that as of May 19, McCarty was reluctant to accept the reinstatement offer and was placing an obstacle to its acceptance. Since this email was not delivered, there was no company response.

McCarty testified that 2 days later, on May 21, he received a phone call in which the caller ID was blocked and where the caller said that if he did not drop his fucking lawsuit and "this union stuff," McCarty's family members who worked at BOZZUTO'S would be fired. He alleges that this caller also said that he had better watch his son when he drops him off at the skate park. McCarty could not identify the person who made the call and testified that he had a New York type of accent and spoke in a "tough" voice. McCarty did not identify this individual as being Jason Winans. Winans, by this time, had been transferred out of the warehouse.

McCarty testified that later in the evening, he received a second phone call from a blocked number where the caller allegedly said, "you got me mother fucker."

McCarty's billing records from Comcast show that eight calls were made to his phone on May 21 where the caller ID was blocked. Unless I am reading these records wrong, they show that four lasted for 0 seconds and apparently were hangups. One call was made at 10 a.m., lasting 5 minutes, 51 seconds; a second was made at 12:32 p.m., lasting 1 minute, 36 seconds; a third was made at 10:06 p.m., lasting 3 minutes, 3

[6] At this time, McCarty had retained a lawyer and had filed a lawsuit against the Company that made a number of allegations including the allegation that he had been wrongfully terminated. In June 2015, he amended that complaint to add Jason Winans as a defendant.

seconds; and a fourth was made at 10:52 p.m., lasting 32 seconds.

On May 28, McCarty sent an email to the Company and rejected the reinstatement offer. He stated:

> Due to threats I have received against myself and my family and other factors, I Todd McCarty will not be accepting your offer of rehire. I believe these threats came from a representative of BOZZUTO'S management or BOZZUTO'S management alone. Myself and counsel deem your offer of rehire disingenuous and unrealistic with the parameters you set forth.

On May 30, 9 days after the calls, McCarty appeared at the local police station and filed a complaint about the threatening phone calls on May 21. The police report notes that McCarty came in at 4:27 p.m. and that:

> Todd does not know the person that called and they blocked their number. He stated that there have been no further calls since then.
>
> At this time I have no suspect or further information. The caller did not make any direct threats and Todd just wanted this incident documented. Todd was advised to contact his service provider for his cellular phone to have them block all incoming private callers.
>
> No further police action.

McCarty claims he received another phone call on June 1, 2015, in which the caller said, "You're through." As to this call, McCarty testified that the number was not blocked and that it came from 860-758-7825. This is Jason Winans' home phone number. McCarty testified that he did not recognize the voice on the phone. He also took a photograph of the caller ID number.

On June 12, McCarty reported this phone call to the police officer and the police report states as follows:

> Todd McCarty contacted me and stated he received another unwanted phone call. He stated that he was called on 06/01/14 at approximately 2015 hours. Todd stated that the caller stated: "You're finished" then hung up. Todd stated that the phone number was not blocked this time and informed me that the name and number that his caller identification showed were Jason Winans, 860-758-7825.
>
> I then called Jason and spoke with him. He stated that he did not call Todd and would have no reason to. Jason was told to stop calling Todd and he stated that he understood.

McCarty's billing record shows a call received from Jason Winans at 860-758-7825 at 8:17 p.m. and lasting for seven seconds.

On the basis of the call on June 1 which is documented as coming from Winans, McCarty assumed, perhaps reasonably, that the previous blocked calls on May 21 also came from him. As such, it is argued that if McCarty was the recipient of these threats, then he legitimately could reject the Company's reinstatement offer without incurring the loss of any backpay or future reinstatement rights.

The problem is that Winans testified that he did not make any of these calls and he produced his billing records from Cox Communications which showed that no calls from 860-758-7825 were made to McCarty's phone on the dates in question.

This presents a quandary inasmuch as I have received into evidence the billing records of two well known cable companies that contradict each other.

At the resumption of the hearing, the Employer proffered an expert witness who was going to testify that it is possible for a person, using internet sites, to alter his own phone bill so as to show that phone calls were made to him when in fact no such calls were made. I rejected this testimony because the Respondent had not given the General Counsel notice of its intent to call an expert witness, despite the fact that there was a substantial hiatus between the opening of the case and its resumption. The General Counsel did not have any notice of what the expert was going to say and did not have any report describing his findings. Therefore, the General Counsel could not, in my opinion, adequately cross examine this person or find an expert of her own. *National Extrusion & Mfg.*, 357 NLRB 127 (2011).

Nevertheless, as an attachment to its Brief, the Respondent provided a copy of the Truth in Caller ID Act of 2009, 47.U.S.C. Section 227(e) and a copy of a related Federal Communications Commission Order dated June 22, 2011. As one is a statute and the other an official document, I will take official notice of both. The point being argued is that there is a practice called "Caller ID spoofing" whereby an individual can manipulate his caller ID. As stated in the FCC report; "Callers using some interconnected VOIP services can easily alter their caller ID by making a call appear to come from any number."

To my mind, this does not sufficiently answer the question of whether McCarty managed to alter his phone bill to show a call that was not actually made to him. Nor does it show if Winans managed to do the opposite; manipulate his billing records to eliminate a call that he actually made to McCarty. What might have helped would be some persons with expertise employed by the respective carriers who could testify as to what was possible and what was not.

On June 19, the Company became aware of two emails coming from addresses labeled winanslies@gmail.com and Jasonwlies@yahoo.com. These were two lengthy and essentially identical documents that set forth in great detail, the unnamed author's grievances and gripes involving Jason Winans from 2004 to the present. These documents, each totaling five single spaced pages, describe in great detail, a variety of incidents purporting to show the author's harassment by Winans, who is described as being conceited, condescending and narcissistic.

I am not concerned with the truth of the assertions made in these two emails. Rather, I am concerned by the timing of the emails, (soon after the alleged threats to McCarty), and the fact that McCarty denied being the author. In this respect, McCarty acknowledged that the contents of the emails were basically accurate insofar as his feelings about Winans and the various incidents described. His testimony was that they were "pretty dead on." And despite the fact that these narratives are so de-

tailed, covered such an extended period of time, and included photos of McCarty and his photos of the June 1 caller ID number, it is hard for me to imagine that anyone other than McCarty could possibly have been the author. When I asked who he thought might have written these emails, McCarty responded; "I honestly don't know. I have suspicions." When asked to give his suspicions, McCarty said he couldn't speculate or throw anybody under the bus.

It is impossible, based on this record to say with certainty that anyone from management made the alleged threats described by McCarty as having occurred on May 21. Nor can I with certainty, determine if Winans called McCarty on June 1 and made the statement; "you're through."

Nevertheless it is my opinion that the evidence suggests that McCarty had already decided by May 28 to reject the Respondent's reinstatement offer, but then tried to set up a situation where he could blame the Company for his refusal. In this way, by rejecting the reinstatement offer, but asserting that his refusal was based on alleged threats, he could refuse to go back to work while preventing his backpay from being cut off.

Based on the above, I conclude that the Respondent made an unconditional offer of reinstatement. I also conclude that the evidence presented by McCarty is not sufficient to warrant a conclusion that the Respondent, by its agents, engaged in subsequent threatening conduct that would vitiate the validity of the reinstatement offer. Accordingly, I conclude that backpay owed to McCarty should be tolled as of May 25, 2014, and that a reinstatement order is not required.

Having determined that the Respondent unlawfully suspended McCarty on January 15, 2014, and thereafter unlawfully discharged him on February 18, 2014, the Respondent must make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him until May 15, 2014.

Having concluded that the Respondent unlawfully discharged Patrick Greichen on October 8, 2013, it must offer him reinstatement and make him 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 at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

As to McCarty and Greichen, the Respondent shall be required to expunge from its files any and all references to the unlawful suspensions and discharges and to notify these employees in writing that this has been done and that the unlawful actions will not be used against them in any way.

The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate McCarty and Greichen for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [7]

ORDER

The Respondent, BOZZUTO'S Inc., its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging, suspending, or issuing warnings to employees because of their union or protected concerted activity.

(b) Interrogating employees about their support or activity for United Food and Commercial Workers Union, Local 919 or any other labor organization.

(c) Promising or granting wage increases in order to dissuade employees from supporting the Union.

(d) Maintaining a policy of conditioning continued employment on an agreement by employees to refrain from talking about any disciplines that they have received or about their terms and conditions of employment.

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

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

(a) Make Patrick Greichen and Todd McCarty whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of this Decision.

(b) Within 14 days from the date of this Order, offer Patrick Greichen, 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.

(c) Remove from its files any reference to the unlawful actions against Patrick Greichen and Todd McCarty and within 3 days thereafter, notify them in writing, that this has been done and that the discharges will not be used against them in any way.

(d) Reimburse Greichen and McCarty an amount equal to the difference in taxes owed upon receipt of a lump sum backpay payment and taxes that would have been owed had there been no discrimination against them.

(e) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Greichen and McCarty it will be allocated to the appropriate periods.

(f) 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.

(g) Within 14 days after service by the Region, post its Con-

[7] 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.

necticut facilities, copies of the attached notices marked "Appendix."[8] Copies of the notices, on forms provided by the Regional Director for Region 1, after being signed by the Employer's authorized representative, shall be posted by the Employer 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 Employer customarily communicates with its employees by such means. Reasonable steps shall be taken by the Employer 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 Employer has gone out of business or closed the facilities involved in these proceedings, the Employer shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Employer at any time since October 1, 2013.

Dated, Washington, D.C. June 25, 2015

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, suspend, or discipline employees because of their union or protected concerted activities.

WE WILL NOT interrogate employees about their support or activity for United Food and Commercial Workers Union, Local 919 or any other labor organization.

WE WILL NOT promise or grant wage increases in order to dissuade employees from supporting the Union.

WE WILL NOT maintaining a policy of conditioning continued employment on an agreement by employees to refrain from talking about any disciplines they may have received or about their terms and conditions of employment.

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

WE WILL make Patrick Greichen and Todd McCarty whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL offer Patrick Greichen 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 remove from our files any reference to the unlawful actions against Patrick Greichen and Todd McCarty and within 3 days thereafter, notify them in writing, that this has been done and that the discharges will not be used against them in any way.

BOZZUTO'S INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-115298 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

[8] 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."