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**East End Bus Lines, Inc. and International Brotherhood of Teamsters Local 1205 and Sharon Tarry.** Cases 29–CA–161247, 29–CA–162261, 29–CA–166857, 29–CA–169382, 29–CA–172090, and 29–CA–178014

August 27, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS PEARCE  
AND MCFERRAN

The primary issues addressed in this decision are the Respondent’s reassignment/demotion and discharge of school bus driver Sharon Tarry, allegedly because of her union and other protected concerted activities.<sup>1</sup> Contrary to the judge, we conclude that Tarry’s reassignment was lawful.<sup>2</sup> But we agree with the judge that Tarry’s discharge was unlawful.<sup>3</sup>

INTRODUCTION

Tarry’s September 23, 2015<sup>4</sup> reassignment from a full-size bus to a van, which significantly reduced her hourly wage, and her October 19 discharge occurred against the backdrop of several union organizing campaigns and—

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<sup>1</sup> On November 21, 2016, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions and a supporting brief. One day after the deadline for filing an answering brief, the General Counsel filed a motion to permit late filing and attached his proposed brief. While that motion was pending, the Respondent filed a reply brief. By order dated March 9, 2017, the National Labor Relations Board denied the General Counsel’s motion, thereby rejecting the General Counsel’s answering brief and mooting the Respondent’s reply brief.

The Board has delegated its authority in this proceeding to a three-member panel. Member Emanuel took no part in the consideration of this case.

The Board has considered the decision and the record in light of the exceptions and supporting brief and has decided to affirm the judge’s rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

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.

We shall modify the judge’s recommended Order to conform to our findings and to the Board’s standard remedial language and in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and we shall substitute a new notice to conform to the Order as modified.

<sup>2</sup> Member Pearce dissents from this conclusion.

<sup>3</sup> Chairman Ring dissents from this finding.

<sup>4</sup> Dates are in 2015 unless otherwise specified.

beginning soon after Tarry’s reassignment—numerous unfair labor practices by the Respondent. Although the Respondent now challenges only Tarry’s reassignment and discharge, its many other unfair labor practices remain relevant to the case.<sup>5</sup> In particular, we consider the Respondent’s numerous unfair labor practices in assessing its motivations for reassigning and discharging Tarry.

When assessing the lawfulness of Tarry’s reassignment and discharge, which turns on the Respondent’s motivation in taking those actions, we apply our longstanding *Wright Line* test.<sup>6</sup> Under *Wright Line*, the General Counsel has the burden of establishing that the employee’s protected activity was a motivating factor in the adverse employment action. The elements commonly required to support such a showing are union or other protected activity by the employee, employer knowledge of that activity, and antiunion animus on the part of the employer. See *Allstate Power Vac., Inc.*, 357 NLRB 344, 346 (2011) (citing *Willamette Industries*, 341 NLRB 560, 562 (2004)); see also *Austal USA, LLC*, 356 NLRB 363, 363 (2010).<sup>7</sup> Once the General Counsel makes that

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<sup>5</sup> As several appellate courts have observed, unchallenged unfair labor practices “lend[] their aroma to the context in which the [remaining] issues are considered.” *NLRB v. Clark Manor Nursing Home*, 671 F.2d 657, 660 (1st Cir. 1982); see also *Torrington Extend-A-Care Employee Assn. v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994) (where, in court proceedings, employer contests some, but not all, of the Board’s findings of unfair labor practices, “[i]t is against the background of acknowledged violations that we consider those findings”) (citations omitted).

<sup>6</sup> *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) (establishing framework for motive-based violations).

<sup>7</sup> Although the administrative law judge stated that the General Counsel’s initial burden under *Wright Line* also includes a showing that “the employer took action because of [its] animus,” the Board has repeatedly clarified that the demonstration of a causal nexus is not an element of the General Counsel’s initial burden. See, e.g., *Amalgamated Transit Union, Local 689*, 363 NLRB No. 43, slip op. at 1 fn. 1 (2015) (quoting *Libertyville Toyota*, 360 NLRB 1298, 1301 fn. 10 (2014), enfd. 801 F.3d 767 (7th Cir. 2015)) (internal quotation marks omitted); *Mesker Door, Inc.*, 357 NLRB 591, 592 fn. 5 (2011) (“[T]he *Wright Line* standard does not require the General Counsel to show . . . some additional, undefined ‘nexus’ between the employee’s protected activity and the adverse action.”); *EF International Language Schools, Inc.*, 363 NLRB No. 20, slip op. at 1 fn. 2 (2015), enfd. 673 Fed. Appx. 1 (D.C. Cir. 2017); *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). Rather, whether the employer took action because of its animus is “a question of fact that may be inferred from direct or circumstantial evidence. In most cases only circumstantial evidence of motive is likely to be available.” *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995) (citations omitted), enfg. 312 NLRB 155 (1993). Even if such a showing were necessary, however, we would find that the October 15 statement by the Respondent’s Vice President Jennifer Thomas that Tarry had no right to distribute union literature, and Thomas’ threat that Tarry would regret doing so, along with other Respondent statements and actions

showing, the burden of persuasion “shift[s] to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct.” *Allstate Power Vac.*, 357 NLRB at 346 (quoting *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004)); see also *Austal USA*, 356 NLRB at 364. To establish this affirmative defense, “[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity.” *Consolidated Bus Transit*, 350 NLRB at 1066 (quoting *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996)). And where the General Counsel makes a strong showing of discriminatory motivation, the employer’s defense burden is substantial. See, e.g., *Bally’s Park Place, Inc.*, 355 NLRB 1319, 1321 (2010) (reversing judge and finding violation because judge “did not consider the strength of the General Counsel’s case in finding that the Respondent met its *Wright Line* rebuttal burden”), enfd. 646 F.3d 929 (D.C. Cir. 2011); see also *NLRB v. CNN America, Inc.*, 865 F.3d 740, 759 (D.C. Cir. 2017).

Applying *Wright Line*’s burden-shifting framework to Tarry’s reassignment, we find, in short, that although the General Counsel met his initial burden of showing that Tarry’s union activity was a motivating factor for her reassignment, the Respondent sustained its *Wright Line* defense burden.<sup>8</sup> In contrast, we find that the Respondent failed to overcome the General Counsel’s compelling showing that Tarry’s union activity was a motivating factor for her discharge. That is, the Respondent failed to show that it would have discharged Tarry regardless of her union conduct.<sup>9</sup> We explain our analysis below, after recounting the relevant facts.

#### I. BACKGROUND: THE 2014–2015 SCHOOL YEAR

As the judge described, for several weeks in October 2014, Local 1181 of the Amalgamated Transit Union

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directed toward Tarry and other employees engaged in similar conduct, amply demonstrate the Respondent’s motivating animus against Tarry’s protected activity.

As he explained in *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 11 fn. 25 (2018), Chairman Ring agrees that there is no separate and distinct “nexus” element that the General Counsel must satisfy under *Wright Line*, but because *Wright Line* is inherently a causation test “[t]he ultimate inquiry” is whether there is a nexus between the employee’s protected activity and the challenged adverse employment action. *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1327–1328 (D.C. Cir. 2012).

<sup>8</sup> Member Pearce would find that the Respondent failed to sustain its defense burden.

<sup>9</sup> Chairman Ring would find that the Respondent showed it would have discharged Tarry even in the absence of her union activities.

(ATU) sought to organize the Respondent’s bus drivers,<sup>10</sup> distributing union authorization cards in the employee parking lot. The Respondent’s owner, John Mensch, repeatedly referred to the ATU organizers as Tarry’s “friends” and implied that she had contacted them to organize the Respondent’s employees. Tarry denied having done so, eventually replying to Mensch that Local 1181’s representatives were not her friends and if she were going to bring in a union, she would bring in the Teamsters.<sup>11</sup> At that time, another driver asserted that they did not need a union and, in Mensch’s presence, Tarry replied that the drivers did need a union, and she expressly named Mensch as the reason they did. Mensch “got mad and stormed away.”

Shortly thereafter, in late October and early November of 2014, the Respondent issued several disciplinary warnings to Tarry. Because the Respondent relied on those 2014 disciplinary actions as support for Tarry’s 2015 discharge, the judge addressed them in depth. First, on October 30, 2014, Tarry received a written warning for failure to follow instructions, safety violations, and insubordination after Tarry stated that she did not care if she got fired for handing out Halloween candy to the students on her bus. Tarry made that statement to head dispatcher Lorraine Giugliano in response to a renewed Respondent effort to enforce its existing policy prohibiting candy distribution. Despite the written policy, drivers had given out candy on various holidays, including Halloween, in prior years, apparently without disciplinary consequences, and Tarry had expected to do so again. The judge found that Tarry had not failed to follow instructions or committed any safety violation, and that, although an insubordination allegation might be sustainable, only verbal warnings had been given to numerous employees for more serious violations.

On November 4, 2014, after the Respondent viewed the October 31, 2014 video from Tarry’s bus<sup>12</sup> to check on whether or not she had distributed candy to the students, the Respondent issued Tarry two verbal warnings: (1) for playing with her hair and driving with her knee while operating the bus, and (2) for telling students on

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<sup>10</sup> ATU was no longer attempting to organize the employees when the unfair labor practices at issue in this case occurred. Instead, in late 2015, Teamsters Local 1205 (the Union) and Transport Workers Local 252 (Local 252) were campaigning to represent the employees.

<sup>11</sup> About November 14, 2014, Tarry contacted Teamsters vice-president Gary Kumpa and began talking with other employees about organizing, but the record does not indicate whether the Respondent knew that.

<sup>12</sup> The Respondent’s buses and vans contain video cameras that record portions of the vehicles’ interior and surroundings. The video is stored on a Secure Digital memory card (SD card), which the Respondent can pull and review in order to investigate complaints, etc.

her bus that she would be trick-or-treating with her daughter in their neighborhood that evening and would give them candy if she saw them on the street. The first of those verbal warnings was purportedly documented in writing on November 6, 2014, but Tarry did not see the document until 2016, in connection with a separate proceeding. The judge considered the inconsistencies and the general context and concluded that the November 4, 2014 verbal warnings, as well as the October 30, 2014 warning, were driven by antiunion animus and that the Respondent's reliance on them to justify Tarry's October 2015 discharge was pretextual.

In early December 2014, Tarry raised concerns about the Respondent's newly announced delay in the payment of drivers' quarterly bonus until January 2015 and its potential impact on drivers' unemployment benefits. She spoke with the Respondent's payroll office on December 3, 2014, and she discussed the issue with about six other drivers the following day, telling them that she had contacted the state unemployment office for information and had been told that the delayed bonus would be a problem for them in 2015. When Tarry was then called into a meeting with Mensch, she told him, too, that she had contacted the unemployment office. Mensch got red in the face, cursed at Tarry, ordered her off the property, and told her she was fired. Tarry later received a termination letter dated December 8, 2014, stating that her position was terminated as of December 4 "due to lack of work." The judge found that, in discussing the issue with coworkers, Tarry engaged in protected concerted activity and that any actions the Respondent took against her for that activity after December 2014 violated Section 8(a)(1).

The parties settled a Board charge based on Tarry's 2014 discharge, and Tarry returned to work in late March 2015.<sup>13</sup> She was then assigned to drive a route that had no riders but offered the same hourly pay and number of hours (5½ "package hours"<sup>14</sup>) as the route to which she had been assigned before her discharge. Tarry drove the no-riders route through the end of the school year. She did not drive for the Respondent during the summer.

<sup>13</sup> Because that charge was settled by an agreement containing a nonadmission clause, the judge did not consider the lawfulness of Tarry's December 2014 discharge in analyzing the Respondent's later actions regarding her employment.

<sup>14</sup> A route's "package hours" reflect the daily hours for which the driver will be paid, based on the expected time needed to drive the morning and afternoon runs, plus the driver's pre-trip and post-trip vehicle inspections.

## II. TARRY'S REASSIGNMENT TO A VAN

### A. Facts and Judge's Findings

On August 27, shortly before the start of the 2015-2016 school year, Giugliano assigned Tarry to the Mercy High School route, with 5½ package hours. Tarry's three dry runs on the route before the school year began demonstrated that she could not complete the route in the allotted time. About September 4, Tarry spoke to Giugliano about expanding the time for her assigned route to 6 package hours. Giugliano responded that she would send someone to calculate the hours once school had started. But instead, on September 8, one day before classes began at Mercy High, Giugliano removed six stops and seven riders from Tarry's route, moving them into a van driven by another employee. This change had no direct effect on Tarry's hours or pay rate. The judge found that change lawful, and there are no exceptions to that finding.<sup>15</sup>

On September 23, two weeks after Giugliano split Tarry's original route, Giugliano determined that fewer students than expected were actually riding Tarry's bus, and they would fit into a van. Giugliano testified that she tried to save school districts money whenever possible.<sup>16</sup>

<sup>15</sup> The judge confusingly stated, as his rationale for dismissing the allegation, that he could not "conclude that the reduction in [Tarry's] number of stops carried any connotation of animus." In light of the Respondent's well established animus, the judge's statement cannot reasonably be read, contrary to the Respondent's suggestion, as a general conclusion that the Respondent bore no animus toward Tarry's union activity or protected concerted activity. Rather—consistent with the judge's findings that the decision to remove some stops from Tarry's route did not affect her hours, did not subject her to any financial detriment, and was initiated by her—we understand the judge to have concluded that the Respondent's removal of several stops, at Tarry's own instigation and with no negative consequences for her, simply was not an adverse action that could have been unlawfully motivated by animus. See, e.g., *Bellagio, LLC*, 362 NLRB No. 175, slip op. at 2–3 (2015) ("Under *Wright Line*, the General Counsel must show by a preponderance of the evidence that, in response to protected activity, '...some legally cognizable term or condition of employment has changed for the worse.'") (quoting *Northeast Iowa Telephone Co.*, 346 NLRB 465, 476 (2006)), enf. denied 854 F.3d 703, 709–710 (D.C. Cir. 2017) (agreeing with Board that, under *Wright Line*, "[a] finding of unlawful retaliation . . . requires a predicate determination that an employer took an adverse action," but denying enforcement of Board's finding based on court's conclusion that no adverse action had occurred).

Member Pearce, in dissent, takes issue with what he sees as our reliance on Tarry's initiation of the September 8 route reduction as a justification for her eventual reassignment to a van. To be clear, we are merely pointing out that no party has challenged the judge's dismissal of the route-reduction allegation. We necessarily treat the route reduction as lawful.

<sup>16</sup> Giugliano also testified that was her reason for initially scheduling only one bus to run the Mercy route for that school year, even though it had required two vans in the past: the number of students attending Mercy High had decreased, and they would have fit into one bus.

Servicing the route using a van instead of a bus would save money for Mercy High: Tarry's pay rate as a van driver was \$3 per hour less than her pay rate as a bus driver. After Giugliano notified Tarry of the change, Tarry insisted on speaking with Mensch or Thomas; when she met with Thomas later that morning, Thomas inaccurately told Tarry that the change was made because the school wanted to use a van rather than a bus. Tarry accused them of playing games with her, suggested that the reassignment was inconsistent with the settlement agreement resolving her prior Board charge, and initially refused to sign papers accepting the change. After speaking with a Board agent, however, Tarry agreed to accept the van route and filed a Board charge about it that day.

Over the next week or so, Tarry told Thomas that the van was too small for the morning route, which typically carried more students, and suggested that she drive a bus in the morning and a van in the afternoon. Thomas said that she would check into it, but the Respondent did not change Tarry's assignment again after reassigning her to a van.

As stated above, the judge found unlawful Tarry's reassignment, which resulted in a reduction in her pay. He found, first, that the General Counsel met his initial burden by showing that Tarry engaged in protected concerted activity and union activity, that the Respondent knew about it, and that the Respondent, by Mensch, expressed anger about it. As discussed above, the judge also relied on the pretextual nature of the October 30 and November 4, 2014 disciplines as demonstrations of the Respondent's antiunion animus.

### B. Analysis

#### 1. The General Counsel's initial burden

Although we find that the General Counsel's initial showing was not exceptionally strong, we agree with the judge that it sufficed to meet the General Counsel's burden. The intervening time between the 2014 disciplines and the 2015 reassignment contains few demonstrations of the Respondent's antiunion animus, but, in our view, that period of relative calm primarily reflects the cessation of union activity during that time.<sup>17</sup> And as the

<sup>17</sup> At about 10 a.m. on September 23, the same morning that Tarry was reassigned from a bus to a van, Tarry and Lori Monroig met with the Union's Vice President, Gary Kumpa, to receive union authorization cards for distribution and instructions on how to organize employees. Although the record does not expressly state whether the meeting preceded Tarry's reassignment, it appears that Giugliano had informed Tarry of her reassignment to a van earlier that morning, and that Tarry met with Thomas to discuss the matter sometime after the meeting with Kumpa and Monroig. The record does not indicate when, or whether, the Respondent became aware of Tarry and Monroig's September 23 meeting with Kumpa.

judge noted in his discussion of Tarry's October 19 discharge, even in the absence of union activity, Mensch demonstrated animus toward Tarry's protected concerted activity when, in December 2014, she challenged the Respondent's change in the timing of employees' bonus payments. Thus, the sequence of events between October 2014 and September 2015 suggests that the Respondent's animus had not abated but was merely dormant until some new occurrence of protected conduct roused it.<sup>18</sup> Meanwhile, Tarry had established a record of challenging the Respondent's managers and supervisors regarding her terms and conditions of employment, and she continued to do so at the start of the new school year, when she repeatedly informed Giugliano that the Mercy route was impossible as scheduled and that completing it required a 6-hour package rather than a 5½-hour package. Thus, although the passage of time between Tarry's late-2014 disciplines and her September 2015 reassignment may to some extent weaken the inference that Tarry's late-2014 protected activity motivated the reassignment, we agree with the judge's finding that the General Counsel met his burden, though perhaps not by a wide margin.

#### 2. The Respondent's defense burden

Contrary to the judge's further conclusion, however, we find that the Respondent narrowly met its defense burden under *Wright Line* by showing that it would have reassigned Tarry from a bus to a van even in the absence of her protected activity.<sup>19</sup> Giugliano credibly testified that she tried to save school districts money if she could.<sup>20</sup> She similarly testified that adjustments to pack-

<sup>18</sup> As the judge stated, "Mensch committed numerous violations of Section 8(a)(1) starting on October 1, 2015, and there is nothing to suggest that his attitude toward unionization changed dramatically from October 2014. . . ."

<sup>19</sup> Our disagreement with Member Pearce, who dissents on this issue, is, at its foundation, a difference in our assessment of the relative strengths of the showings made by the General Counsel and the Respondent.

<sup>20</sup> Although the judge discredited some of Giugliano's testimony, particularly that relating to when she became aware that Tarry and Monroig supported the Union and "matters regarding the Union and the disciplines of the discriminatees in which [Giugliano] was involved, or Mensch's involvement in those disciplines," the judge expressly distinguished "her confident and straightforward testimony in addressing general policies and procedures pertaining to drivers." And although Thomas told Tarry, apparently untruthfully, that the school had requested the change to a van, it is undisputed that Giugliano, not Thomas, decided to make the change. Thomas' lack of credibility thus does not undermine Giugliano's credible testimony about her own independent decision.

Member Pearce suggests, in his dissent, that Giugliano herself bore antiunion animus and acted on it in reassigning Tarry. Although there is ample evidence that Giugliano took other actions, such as those described below involving Monroig, based on Mensch's animus or that of other Respondent officials, there is no evidence that Tarry's reas-

age hours during the school year could be based on factors including rider counts and expense reduction by combining routes. We find that this constitutes evidence that, even absent Tarry's protected activity, Giugliano would have made the cost-reduction decision to substitute a van for a bus on Tarry's route when it became clear that the number of students Tarry was transporting would fit in the smaller vehicle.

Unlike the judge and Member Pearce, we find nothing suspicious in the Respondent's choice not to restore to Tarry's route the six stops that had been part of her route before the school year started. That route was split earlier in September, not because there were too many riders, but because driving the route took too much time. Even if students assigned to the route were not riding, Tarry would still have had to drive to every stop before delivering the riders to their school.<sup>21</sup> That issue was unrelated to the vehicle's size and would have again become a problem if the routes had been consolidated. We note that the Mercy route had been assigned to two vans the prior year. Giugliano's unsuccessful attempt to consolidate it into one route (which would have reduced the school's costs by requiring only one driver, despite also requiring a larger vehicle) ultimately seems to have demonstrated that two vans (but not a van and a bus) were in fact needed.<sup>22</sup>

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signment to a van was similarly instigated by an official whose animus was shown.

<sup>21</sup> As a practical matter, it is unsurprising if the students on a parochial school's bus route are more widely dispersed than the students on a public school route: where public schools use more buses to cover their territory, geographically compact routes can more easily be devised.

<sup>22</sup> We note the judge's further observation that "the Respondent has a general policy of letting drivers retain their routes." But the record indicates that that policy applied primarily to "senior drivers," those who had worked for Mensch's father or for one of the family's other transportation companies before the Respondent came into existence. Tarry was not a senior driver. And, even if Tarry had been a senior driver, how a route-retention policy would have applied in Tarry's situation is uncertain because Tarry had been assigned to different routes at the start and end of the prior school year. The route she had driven at the start of the prior year had been eliminated, according to the Respondent, and (as alleged in a charge that was dismissed after investigation) Tarry perceived as retaliatory the no-riders route to which she was assigned after her reinstatement.

Similarly, although Member Pearce argues in his dissent that the Respondent could have saved even more money for the school district by allowing Tarry a 6-hour package to drive the route with a big bus, the record reflects that 6-hour packages were primarily assigned to senior drivers, apparently to match their hours at their prior employers. Tarry, who was not a senior driver, had consistently been assigned 5½-hour packages. Further, even if the Respondent had expanded Tarry's hours to accommodate the Mercy route, that change would not have allayed the concern that Mercy students were spending too much time on the bus; indeed, it would have exacerbated the problem. Thus, from a legal

### III. THE CONTEXT OF TARRY'S DISCHARGE: THE UNION'S ORGANIZING CAMPAIGN BEGINS, AND THE RESPONDENT COMMITS NUMEROUS, UNDISPUTED VIOLATIONS OF THE ACT

By late September 2015, Teamsters Local 1205 (the Union) had begun its organizing campaign among the Respondent's drivers.<sup>23</sup> On the morning of September 23, as noted above, Tarry and her fellow driver Lori Monroig met with Union Vice President Gary Kumpa to get organizing instructions, and soon thereafter Tarry, Monroig, and other employees, including fellow discriminatee Chiarina Santana, began distributing union literature at the Respondent's gate. The Respondent's owner, Mensch, and its high-level managers promptly launched a barrage of unfair labor practices, especially targeting employees who had engaged in union activity.

To begin, on October 1, Mensch told Monroig that he knew she was getting signatures on cards for the Union. He also said that everything gets back to him, and he warned her to watch who her friends were. The judge found that, by those statements, the Respondent unlawfully created an impression of surveillance. On October 8, 1 day after Santana complained to Thomas about not being assigned charter runs and told Thomas that the employees needed a union, Giugliano issued Santana a written warning, purportedly for insubordination to Thomas in late September; the judge found that warning unsupported by facts, suspiciously timed, and unlawful. On October 14, when Monroig was handing out union flyers and discussing the Union with other drivers in the parking lot, Mensch again unlawfully created the impression of surveillance by telling driver Brenda Alcorn that he knew she had attended an October 8 meeting with Local 252 representatives at Applebee's; he also again referred to Monroig's distribution of union cards. Driver Linda Griffin had also attended the October 8 union meeting and, about October 15, Mensch asked her how Applebee's was, a question that the judge found to yet again unlawfully create an impression of surveillance.

On Friday, October 16, 2 days after Mensch had confronted Monroig while she was distributing union literature and talking to coworkers about the union, Giugliano, apparently acting on Mensch's instruction, cancelled a charter run that Monroig had been scheduled to drive the following day.<sup>24</sup> The judge found the stated reason for

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and practical standpoint, Member Pearce's postulated 6-hour package solution would have been no solution at all.

<sup>23</sup> As stated above, Transport Workers Local 252 also campaigned for recognition as the drivers' representative; Local 252 appeared as Intervenor on the ballot in an election that was held in February 2016.

<sup>24</sup> While informing Monroig of the cancellation of her assignment to drive a charter bus for a homecoming parade (which had not itself been

that cancellation pretextual, and the cancellation retaliatory and unlawful. The following Monday, October 19, Giugliano issued Monroig a pretextual and unlawful verbal warning for insubordination for her purported reaction when Giugliano told her about the charter cancellation.<sup>25</sup> And the Respondent failed to assign Monroig any charter runs or midday runs thereafter, despite Monroig's repeated requests. Previously, she had received both types of assignments regularly. The judge discredited Giugliano's uncorroborated testimony regarding why she stopped assigning Monroig midday runs, found that the Respondent offered no evidence of why Monroig stopped receiving charter work, and found unlawful the discontinuation of both types of work. The Respondent does not dispute the judge's factual findings with regard to those events or his conclusions that the Respondent acted unlawfully by those actions.<sup>26</sup>

On October 23, while Santana was distributing union flyers in the parking lot, Mensch told Santana that she could not loiter on the property and that he would call the police; when she said she was sorry, he warned her, "If you are not careful, you are going to be on the outside looking in." The judge found that Mensch implicitly threatened Santana with discharge on account of her union activity. And on October 26, the Respondent unlawfully issued Santana a verbal warning for distributing union literature on October 23 in the bus yard, which the Respondent asserted, without providing any supporting evidence, was a work area. On October 30, the Respondent unlawfully disciplined Griffin—by means of a written warning, two strikes on her attendance record, and a reduction of her quarterly bonus—for her absences on October 1, 19, and 20, even though each absence was either excused or properly supported by a doctor's note as required by the Respondent's absence policy. In addition, on an unspecified date in October, Mensch unlawfully threatened a group of employees in the bus yard that he could shorten their runs from 6 hours to 4 hours

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cancelled), Giugliano said to Monroig, "Look, Lori, don't be mad at me. It's not me." Monroig responded that she knew it was Mensch and that she was not mad at Giugliano. Giugliano did not disagree with Monroig's statement.

<sup>25</sup> Giugliano apologized for issuing the October 19 warning and twice told Monroig that she did not have to sign it, implicitly admitting, the judge found, that the warning was not warranted.

<sup>26</sup> The Respondent took additional actions against Monroig, including ordering her to take a random drug test on the day of the election, at which she was serving as the Union's observer. The testimony indicates that the Respondent even pulled Monroig away from the vote count to deliver the drug-test order. Monroig went for the ordered drug test after the vote count. Finding that the Respondent had never before ordered an off-duty employee, which Monroig was on the day of the election, to immediately submit to a drug test, the judge found that the Respondent acted unlawfully.

and that they would not get what they thought they would if the Union came in. On November 6, the Respondent unlawfully issued Santana a written warning and reduced her bonus because of an accident that occurred when she backed up her bus on the express orders of a police officer, and for which the officer took the blame.<sup>27</sup> And on an unspecified date in November, Mensch warned Griffin to be careful who she talked to, a comment that the judge found was a threat of unspecified reprisals.<sup>28</sup>

#### IV TARRY'S OCTOBER 19 DISCHARGE AND THE EVENTS LEADING UP TO IT

##### A. Facts

Concurrently with the Respondent's onslaught of unlawful threats, impressions of surveillance, and discriminatory employment actions against Tarry's coworkers who engaged in union activity, the Respondent unlawfully directed Tarry to stop distributing union literature, unlawfully threatened her with unspecified reprisals for doing so, and almost immediately thereafter discharged her.

##### 1. Events preceding the complaint about Tarry's driving

On October 15, Thomas saw Tarry distributing literature at the Respondent's gate while Tarry was off duty after her morning run. Thomas told Tarry (inaccurately) that she did not have the right to hand out union cards on the Respondent's property and that Tarry needed to go home, and Thomas threatened that Tarry would regret

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<sup>27</sup> In the spring of 2016, the Respondent unlawfully discharged Santana following an unsuccessful random drug test. As the Respondent was aware, Santana suffered severe kidney problems and was on regular dialysis; as a result, she was physically unable to provide a urine sample when ordered to do so for the drug test. Santana communicated with Thomas from the testing center about how to proceed when, despite several attempts, she was unable to provide an adequate urine sample, and Santana's doctor provided the Respondent with a statement that Santana could be drug tested by a swab or blood test. The Respondent contended that its drug-testing policy required it to discharge Santana for her unsuccessful drug test. The judge, however, found that the policy required discharge only for those who refuse to be tested and those who do not pass the test and do not agree to enter a treatment program, and neither category applied to Santana. Based on that finding and on the 10-day period between Santana's unsuccessful drug test and her termination, during which the Respondent permitted Santana to drive, the judge found the Respondent's rebuttal burden unmet. Because Santana died shortly before the hearing began, the judge's recommended remedy for her unlawful discharge omits the typical reinstatement order and terminates backpay, to be paid to her estate, as of the day she died.

<sup>28</sup> Later, the Respondent took further action against Griffin, putting her on probation and docking her quarterly bonus in December based on an inaccurate (and unexplained) count of Griffin's November absences. The Respondent does not challenge the judge's finding that those actions were taken because of Griffin's union activity.

what she was doing. The judge found that Thomas' direction not to engage in union activity and threat of unspecified consequences violated Section 8(a)(1).

When Tarry returned to the facility after her afternoon run that day, she found her personal vehicle blocked in by a payloader (an industrial machine similar to a bulldozer) that she had seen Mensch driving earlier. When she asked Mensch to move the payloader, he responded sarcastically and said that she would have to wait and see if he could move it. The judge found that Mensch's comments reflected his lack of surprise about the location of the payloader and his complicity in the situation. After about 15–20 minutes, Mensch moved the payloader. No other incident of that kind had happened in the 5 years that Tarry had been employed by the Respondent. The next morning, Friday, October 16, Tarry again passed out union cards at the gate after completing her morning run.

## 2. The complaint about Tarry's driving and the Respondent's investigation

About 4 p.m. on Friday, October 16, the Respondent received a call from Toni Gerwycki, an individual who had been driving near Tarry's van during Tarry's afternoon run. Gerwycki reported to dispatcher Barbara Nunziata that, while on County Road 51 (Rte. 51), a driver—indisputably Tarry—"went into oncoming traffic to pass [Gerwycki]. She then swerved in front of her." Nunziata conveyed the message to Safety Supervisor Joseph Vopat. According to Thomas, dispatcher Suzanne Secreto advised Thomas of Gerwycki's call, after which Thomas had the SD card pulled from Tarry's van and left it on Vopat's desk.<sup>29</sup> Along with Safety Department employees Helen Lachacz and Donna White, Vopat viewed the video recorded on the SD card.<sup>30</sup> According to Vopat, he, Lachacz, and White all agreed that the video showed the van crossing a double yellow line, passing a vehicle, and crossing back over the double yellow line, narrowly averting a head-on collision.<sup>31</sup> Vopat then asked Thomas to come and watch the video. Sometime between 5:00 and 6:00 that afternoon, Thomas viewed the video and then told Vopat to continue his investigation. According to Vopat, at that time Thomas indicated that she agreed with his conclusions about what the video

<sup>29</sup> As noted above, the Respondent's vehicles are equipped with cameras that record video on Secure Digital (SD) cards.

<sup>30</sup> Nunziata, Lachacz, and White were not called as witnesses. The judge found that their failure to testify at the hearing warranted an adverse inference that their testimony would not have been favorable to the Respondent.

<sup>31</sup> Although the record is not crystal clear, the Respondent's own notes of its investigation appear to indicate that Vopat, Lachacz, and White concluded that afternoon that Tarry should be discharged. The judge did not address this question directly.

showed; Thomas, however, denied saying anything about agreeing with his conclusions.<sup>32</sup>

Vopat spent much of the weekend reviewing the video and maps and compiling a detailed account of the location, speed, and direction of Tarry's van on the afternoon of October 16. Tarry's van had been speeding on Rte. 51, but Vopat determined that Tarry could not have passed Gerwycki's vehicle there, as Gerwycki had reported, because Rte. 51 is a divided highway with a median and no double yellow line. Vopat concluded that the incident must instead have occurred on Lake Avenue. Vopat wrote up a report recommending that Tarry be "terminated without delay" for dangerous driving and speeding, exacerbated by the presence of a student on board the van.<sup>33</sup> On Sunday evening, October 18, Vopat called Thomas to relay his conclusions, including his recommendation that Tarry be discharged. Thomas gave Vopat the authority to proceed with Tarry's termination. Thomas testified that she called Mensch to report to him that Tarry would be fired the next morning; Mensch, in contrast, testified that he became aware of Tarry's termination only after it had occurred.<sup>34</sup>

## 3. Tarry is discharged

On Monday morning, October 19, Vopat had Tarry report to the safety trailer as soon as she arrived. But after Tarry was in the safety trailer, Vopat made her wait while he showed the video from her van to Donald Shukri, a safety department employee who had not been pre-

<sup>32</sup> The judge discredited both Vopat and Thomas in significant part. Regarding Thomas, the judge found that she "displayed observable nervousness at certain points when addressing matters pertaining to Tarry's disciplines," gave "equivocal testimony regarding whether the Company has a policy of getting an employee's version before issuing discipline [which] was inconsistent with Mensch's and Vopat's testimony that this has been the standard practice," and "appeared to be tailoring her testimony to comport with Vopat's earlier testimony as to why Tarry was not interviewed about the incident that led to her discharge." As to Vopat, the judge found much of his testimony about his investigation implausible, suspicious, or contradicted by other evidence. In such a context, where several participants in the events at issue did not testify and those who did testify were less than fully credible and contradicted each other, we defer to the factual findings of the judge, who observed the testifying witnesses, without needing to address each of the judge's reasons for his credibility determinations. In any event, we find that the facts established by undisputed or credible testimony demonstrate that the Respondent's investigation of Tarry's conduct was rushed, incomplete, and inconsistent with the Respondent's standard procedures, as explained below.

<sup>33</sup> GPS records establish that Tarry's van reached top speeds of 59.8 mph on Lake Avenue and 66.1 mph on Rte. 51, where, in each case, the speed limit was 55 mph.

<sup>34</sup> In explaining why he "doubt[ed] Mensch's credibility" generally, the judge noted, among other issues, that Thomas contradicted Mensch's claim not to have known about Tarry's termination until after the fact.

sent the previous Friday.<sup>35</sup> Shukri agreed with Vopat's conclusions that Tarry had sped, had passed Gerwycki's car by crossing a double yellow line, and had returned to her own lane barely ahead of oncoming traffic. Vopat and Shukri (and possibly Lachacz) then told Tarry that there had been a complaint against her, that it had been substantiated, and that she was being terminated. Tarry protested the decision to discharge her rather than taking a lesser action, and she argued about whether the incident could have occurred as Gerwycki had reported it, given Rte. 51's design. On Tarry's demand, Vopat showed her the video from her van. She responded, "That's all you've got? That's nothing. I'll own this company." She was asked to leave and was eventually escorted off the property by Shukri and Vopat.

Vopat did not ask Tarry for her view of the October 16 incident until after he had informed her that she was being discharged for it. That approach was inconsistent with Vopat's own testimony that he "always" got an employee's response to accusations prior to issuing discipline and "always" gave employees the opportunity to write their side of the story on any discipline that he issued. Mensch, like Vopat, testified that the Respondent's practice was to ask employees for their version of events during the investigation.

### B. Analysis

The judge found that the Respondent's investigation was rushed and incomplete, that much of Vopat's testimony was not credible,<sup>36</sup> and that termination was an

<sup>35</sup> The judge found it perplexing that Vopat would seek Shukri's opinion after Thomas had already instructed him to go forward with Tarry's discharge, particularly given that Vopat had not talked to either Tarry or Gerwycki because he "felt [he] didn't need to due to all the other evidence that [he] had." Vopat purportedly took a statement from Gerwycki after Tarry's termination, in an effort to clarify where the incident had occurred and "to have her statement on file just to confirm that we were not mistaken on the location where this incident happened." Despite that stated intent, Vopat also testified that he kept no notes of the conversation, and no statement from Gerwycki was introduced at trial.

<sup>36</sup> "In sum," the judge stated, "Vopat presented an inconsistent, illogical, and incredible account of his investigation."

Chairman Ring, in his dissent, characterizes Vopat's investigation as "appropriate," "careful[.]" and "thorough[.]" In so doing, he implicitly, if not explicitly, rejects the judge's credibility-based conclusions. Chairman Ring also accepts and relies on Vopat's testimony that he contacted Gerwycki after terminating Tarry. The judge expressed serious doubt, if not outright disbelief, about that claim, commenting, "I cannot fathom why, if Vopat's testimony is credited that he spoke to Gerwycki after the termination, he admittedly did not take any notes, and the Respondent provided nothing from her." He further stated, "I will not repeat Vopat's unconvincing testimony concerning his failure to interview Tarry prior to her termination and his purported contact with Gerwycki after the fact." As stated above, we have carefully examined the record and find no basis for overruling the judge's credibility resolutions.

atypically harsh sanction compared to the Respondent's practice in other circumstances; accordingly, he found that Tarry's discharge on October 19 violated Section 8(a)(3) and (1). We agree.<sup>37</sup>

#### 1. The General Counsel's strong initial showing

First, we agree with the judge's finding that the General Counsel met his initial burden. As the judge found, Tarry engaged in both union activity and protected concerted activity, as previously described, and the Respondent knew that she had done so. In addition, the judge found, and again we agree, that there is overwhelming evidence, both direct and circumstantial, of the Respondent's animus.

##### a. *The Respondent demonstrated animus toward Tarry's union activity*

Particularly significant in establishing the General Counsel's initial burden is the judge's finding that Thomas, on October 15, saw Tarry handing out union cards on Tarry's off-duty time and told Tarry that she had no right to do so and would regret what she was doing. In his discussion of the complaint's many 8(a)(1) allegations, the judge found both that this interaction occurred and that Thomas, by those statements, unlawfully directed Tarry not to engage in union conduct and threatened unspecified reprisals toward Tarry.<sup>38</sup> The Respondent's contention that "Thomas took no further action regarding the matter" after obtaining legal advice in no way mitigates the animus demonstrated by Thomas' direct and unremedied threat just days before Tarry's termination. And in any event, whether the Respondent took further action based on its hostility to Tarry's union activity is very much in dispute.

That same afternoon, while Tarry's personal vehicle was parked in the Respondent's parking lot, she found it blocked by the Respondent's payloader, and she had to ask Mensch to move it so she could move her own car. Although the Respondent argues that there was no evidence about who had left the payloader there, the judge credited Tarry's testimony that she had previously seen Mensch driving it. And as the judge found, Mensch's response demonstrates his awareness of and involvement in the situation.<sup>39</sup> Standing alone, this incident might not

<sup>37</sup> Chairman Ring dissents from this finding.

<sup>38</sup> The Respondent does not except to the judge's finding of that 8(a)(1) violation, but in its exceptions to Tarry's discharge, it does take exception to the judge's finding that Thomas made the statement at issue. We adopt the judge's credibility-based finding regarding what Thomas said, as well as the unchallenged findings that the statements were unlawful.

<sup>39</sup> Even if Tarry and her coworkers laughed at Mensch's annoyance when he was asked to move the payloader, as the Respondent argues,

be a strong indicator of animus, but its timing—within hours after the Respondent’s vice-president saw Tarry distributing authorization cards and threatened her with unspecified consequences for doing so—supports the judge’s finding that it additionally showed the Respondent’s animus toward Tarry’s protected activity.

*b. The Respondent’s other violations also demonstrate animus*

The judge stated that he found it unnecessary to rely on the Respondent’s numerous other violations of Section 8(a)(1) as evidence of the Respondent’s animus, and we agree that there is ample evidence of animus even without considering those violations.<sup>40</sup> Nonetheless, we find that the additional 8(a)(1) violations, as well as the numerous 8(a)(3) violations, especially those that occurred close in time to Tarry’s discharge, are particularly relevant: they support the inference that Tarry’s discharge was motivated by the Respondent’s animus toward employees’ union and other protected activity.<sup>41</sup> They therefore strengthen the General Counsel’s showing of unlawful motivation.

In particular, after Tarry and Monroig met with Union Vice President Kumpa on September 23 and began distributing union flyers, the Respondent directed its unlawful conduct toward Tarry and Monroig as well as other employees who openly engaged in union activity, such as Santana and Griffin. Mensch—the owner and highest ranking officer of the Respondent—gave the impression that employees’ union activities were under surveillance in conversations with Monroig on October 1 (when Mensch told her that he knew she was soliciting signatures on authorization cards, that everything gets back to him, and that she should watch who her friends were), with Monroig and other employees on October 14 (when he saw them distributing union literature and talking about the union in the parking lot), and with Griffin, who had attended the October 8 union meeting at Applebee’s, on October 15. Further, on an unspecified date in October, Mensch threatened Monroig and other employees with reduced work hours if they selected the Union as their bargaining representative, and on October 23, only 4 days after Tarry’s discharge, Mensch implicitly threat-

their amusement does not alter the animus communicated by the payloader’s placement.

<sup>40</sup> Notwithstanding the judge’s stated nonreliance on the 8(a)(1) violations, he clearly did rely on Thomas’ October 15 unlawful statements to Tarry that she had no right to distribute union materials and that she would regret it. The judge found those statements to be direct evidence of animus, and we agree.

<sup>41</sup> Member Pearce also relies on the Respondent’s September 23 demotion of Tarry from bus to van driver as additional evidence of animus. See Member Pearce’s partial dissent, *infra*.

ened prounion employee Chiarina Santana with discharge for distributing union flyers.<sup>42</sup>

In short, we find that the General Counsel has made a compelling showing that Tarry’s discharge was motivated by the Respondent’s animus toward the employees’—and, specifically, toward Tarry’s—union activity and protected concerted activity.

2. The Respondent’s defense burden

The General Counsel’s powerful showing that Tarry’s discharge was motivated by the Respondent’s animus toward protected activity raises the bar that the Respondent must surmount to persuade us that it would have discharged Tarry even in the absence of her protected conduct. As we have explained, “[w]here, as here, the General Counsel makes out a strong showing of discriminatory motivation, the employer’s rebuttal burden is substantial.” *Bally’s Park Place, Inc.*, 355 NLRB at 1321 (reversing judge and finding violation because judge “did not consider the strength of the General Counsel’s case in finding that the Respondent met its *Wright Line* rebuttal burden”), *enfd.* 646 F.3d 929 (D.C. Cir. 2011); *Ed-dyleon Chocolate Co.*, 301 NLRB 887, 890 (1991) (employer’s economic defense for layoffs “falls far short of the substantial burden [it] shoulders in overcoming the General Counsel’s powerful prima facie showing of discrimination,” including previous threats to lay off known union supporters and evidence that the layoffs were accelerated); see also *NLRB v. CNN America, Inc.*, 865 F.3d at 759 (quoting *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d at 936). For the reasons explained below, we find that the Respondent has not cleared that bar.<sup>43</sup>

<sup>42</sup> The Respondent committed other 8(a)(1) violations from November through February 2016, as the judge detailed. The election was held on February 26, 2016, and the Union was certified as the employees’ representative on August 3, 2016. *East End Bus Lines and Floyd Bus Co., Inc.*, 366 NLRB No. 54, slip op. at 4 (2018). As explained below, the Respondent’s violations throughout the election campaign are also relevant, particularly where, as here, they demonstrate a pattern of behavior by the Respondent’s representatives or “establish extreme hostility to unionization and employees’ efforts to organize.” *Trus Joist Macmillan*, 341 NLRB 369, 378 (2004); see also *Yellow Ambulance Service*, 342 NLRB 804, 804 (2004) (noting that relevant evidence of animus includes evidence of the employer’s related violations). Especially relevant is the Respondent’s October 16–19 cancellation of Monroig’s charter run, pretextual discipline against her, and discontinuation of charter and midday runs for her. Notably, on those same days, the Respondent was investigating Gerwycki’s complaint about Tarry’s unsafe driving and deciding to immediately discharge her. See *Yellow Ambulance Service*, above (finding that discriminatory action against one employee is a factor to consider in assessing lawfulness of contemporaneous action against another employee who engaged in the same protected conduct as the first) (citing *Howard’s Sheet Metal, Inc.*, 333 NLRB 361 (2001)).

<sup>43</sup> Chairman Ring dissents from this portion of the analysis.

Initially, we recognize the Respondent's need to prioritize the safety of the students it transports, and we acknowledge, as the judge did, that Tarry engaged in unsafe driving on October 16 by speeding and by crossing into the path of oncoming traffic to pass Gerwycki's vehicle.<sup>44</sup> We do not question that, in the absence of unlawful motivation, the Respondent *could have* discharged Tarry for that conduct; the Respondent undoubtedly has a substantial interest in student safety. But the Respondent's defense burden under *Wright Line* requires more: the Respondent must show that it *would have* discharged Tarry even in the absence of her union and other protected activity. In finding that the Respondent did not make that showing, we rely primarily on the nature of the Respondent's investigation of the incident and on the Respondent's inconsistency in its disciplinary responses to occurrences raising safety concerns. We also note that the full context of the Respondent's unfair labor practices further undermines its assertions.

In dissent, Chairman Ring emphasizes the seriousness of Tarry's misconduct, as if that were sufficient to demonstrate the legality of her discharge, regardless of the Respondent's motives. As we have said, we do not condone Tarry's misconduct, nor do we conclude, as the Chairman asserts, that Tarry's conduct "can be overlooked." Rather, we assess the lawfulness of Tarry's discharge in light of all the relevant facts and law. And, as we demonstrate, the evidence regarding the Respondent's disciplinary practices shows that its reaction to Tarry's October 16 conduct owed less to the safety concerns than her conduct reasonably raised than it did to her union and protected concerted activity.<sup>45</sup>

<sup>44</sup> Contrary to our dissenting colleague, however, the record does not "indisputably establish" that Tarry passed Gerwycki "when Gerwycki would not join her in speeding." Rather, while the record does establish that Tarry reached a maximum speed of 59.8 mph on Lake Avenue (where the posted speed limit was 55 mph), the record does not establish that Tarry exceeded the speed limit when she passed Gerwycki.

<sup>45</sup> As stated above, because the Respondent relied on the October 30 and November 4, 2014 disciplines of Tarry as part of its rationale for terminating Tarry in 2015, the judge assessed those disciplines and found them pretextual and based on animus. We agree, and we find that the Respondent's reliance, in part, on pretextual explanations further undermines its contention that it would have discharged Tarry in October 2015 even in the absence of her union activity. See *Metropolitan Transportation Services*, 351 NLRB 657, 659–660 (2007).

In a footnote to his partial dissent, Chairman Ring states that he would instead find that Tarry's October 30 and November 4, 2014 disciplines support finding her 2015 discharge lawful, as the Respondent contended. In rejecting the judge's conclusions regarding those discharges, the Chairman would apparently overrule the judge's credibility determinations. As stated above, we have carefully examined the record and find no basis for reversing the judge's credibility findings.

*a. The Respondent's rushed and incomplete investigation*

Specifically, regarding the Respondent's investigation, we find that it was inexplicably rushed and incomplete in ways that reflect a departure from the Respondent's usual investigative practices. As we have said repeatedly, "[t]he failure to conduct a meaningful investigation or to give the employee [who is the subject of the investigation] an opportunity to explain' are clear indicia of discriminatory intent." *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1632, 1648 (2011) (quoting *Bantek West, Inc.*, 344 NLRB 886, 895 (2005), and citing *K & M Electronics*, 283 NLRB 279, 291 fn. 45 (1987)), enf. 609 Fed. Appx. 656 (D.C. Cir. 2015). Vopat was notified of Gerwycki's complaint about Tarry late on Friday afternoon and did not bother to interview her before discharging Tarry early Monday morning.<sup>46</sup> Vopat's investigatory shortcut is puzzling in light of the manifest inaccuracy of Gerwycki's statement that Tarry crossed a double yellow line to pass her on Rte. 51; it is undisputed that Rte. 51 is a four-lane highway with a median, rather than a two-lane road divided by a double yellow line.<sup>47</sup> Vopat's failure to clarify this inconsistency by talking to Gerwycki before recommending and implementing Tarry's termination suggests a rush to reach a conclusion, and seemingly an interest in reaching a particular conclusion. Although Vopat testified that he interviewed Gerwycki to clarify the inaccuracy after Tarry had already been fired, the judge expressed serious doubts about that "unconvincing" testimony.<sup>48</sup> And even if that

<sup>46</sup> The Chairman, defending the Respondent's failure to seek Tarry's view before reaching its decision, states that "[i]t is difficult to think of any exculpatory fact" that Tarry could have offered. Without any such inquiry it cannot be known what exculpatory evidence Tarry might have brought to light. Our imagination is not so parched: for instance, nothing in the evidence Vopat reviewed would rule out explaining Tarry's crossing into the opposing lane as a successful effort to avoid a rear-end collision after Gerwycki suddenly applied her brakes. In any case, it is not merely the Respondent's failure to ask Tarry what happened that raises questions about the Respondent's motivation; it is also the fact that, in taking that shortcut, the Respondent deviated from its usual practice.

<sup>47</sup> The Chairman complains that we "needlessly review . . . at length" Gerwycki's misstatement about the incident's location but do not find that it occurred anywhere other than on Lake Avenue, as Vopat concluded. Our point should be evident: a careful, thorough, and appropriate investigation would have included following up with Gerwycki prior to making a disciplinary determination.

<sup>48</sup> The Chairman claims that we err in accepting the judge's finding that Vopat did not contact Gerwycki. We disagree. The judge reasonably questioned Vopat's testimony that he contacted Gerwycki for a statement "to include . . . in the investigation." The Respondent did not offer to introduce a written statement from Gerwycki into evidence; Vopat testified that he took no notes of his alleged conversation with Gerwycki; and, even if Vopat did contact Gerwycki, it was—by Vopat's own testimony—not until after he discharged Tarry, and thus it

testimony were credited, Vopat's asserted failure to keep any notes of that interview raises questions about whether any information obtained from her would have supported the Respondent's case. Had Gerwycki confirmed Vopat's conclusions, it seems likely that he would have documented that confirmation.

Similarly revealing, if not more so, is the Respondent's failure to interview Tarry before terminating her employment, which was contrary to its customary procedure in carrying out an investigation, as Vopat and Mensch testified.<sup>49</sup> That the Respondent would normally interview an employee as part of its investigation of her conduct was also shown by the process it followed in investigating a November 2015 infraction by driver Joan Perry. Perry was accused by a parent of speeding and nearly striking his children while they waited at the bus stop. After viewing the video and observing that Perry had engaged in dangerous driving, the Safety Department interviewed Perry (as well as the driver's assistant on her bus) as part of its investigation. Perry was suspended pending completion of the investigation, which is a common step that the Respondent could have taken—but did not—in investigating Gerwycki's allegations regarding Tarry. An employer's failure to follow its own procedures in disciplining or discharging an employee undercuts its attempt to meet its *Wright Line* defense burden. See *Allstate Power Vac., Inc.*, 357 NLRB 344, 347 (2011). Although Vopat permitted Tarry to see the video and comment on it after the decision to discharge her had already been made and announced, his grudging agreement to her request to see the evidence on which he had relied is hardly comparable to soliciting her side of the story before reaching a determination. And in any event, there is no evidence that the decision to discharge Tarry was subject to reassessment based on any explanation or other response she might have offered after the fact.<sup>50</sup>

could not have conceivably affected his decision. In these circumstances, we agree with the judge that "Vopat presented an inconsistent, illogical, and incredible account of his investigation."

<sup>49</sup> The judge discredited Thomas' equivocal testimony on this point. Although the judge also discredited much of Mensch's and Vopat's testimony, he appears to have concluded that their mutually corroborating testimony on this point was more believable than Thomas' equivocation.

<sup>50</sup> In light of the judge's general discrediting of Vopat's testimony, which we adopt, we will neither assume, as the Respondent and Chairman Ring would have us do, the reliability of Vopat's testimony that he gave Tarry the opportunity to write down her version of events on the termination notice, nor find that it warrants a different outcome. The Respondent's explanations regarding Vopat's apparent thoroughness in continuing his investigation after Thomas had already approved the decision to terminate Tarry are similarly unpersuasive; if anything, Vopat's continued efforts to supplement the record against Tarry appear to suggest that he may have harbored doubts about the record's adequacy to justify her termination.

*b. The Respondent often imposed less severe discipline for similar or more serious misconduct*

Regarding the Respondent's other disciplinary decisions, we find that the Respondent's own evidence shows that it frequently treated serious safety incidents less severely than Tarry's.<sup>51</sup> More often than not, the Respondent itself apparently concluded that it need not discharge employees whose conduct had compromised safety, i.e., that warnings, lost bonuses, and retraining of drivers were adequate corrective measures to ensure that it met its safety obligations.<sup>52</sup> For example, between October 2014 and February 2015, more than 50 speeding violations (three of which were committed by Vopat himself, before his promotion from driver to safety supervisor) were disciplined by verbal or written warnings only, including some by employees who were up to their fifth, sixth, or ninth speeding violation. In addition, eight employees who were ticketed for red-light violations between late 2014 and early 2016 received warnings, three of those drivers also lost bonuses, and one had her proba-

<sup>51</sup> Even where the employer relies on its application of an existing disciplinary rule in seeking to meet its *Wright Line* defense burden, it "fails to meet its burden where the evidence affirmatively shows a lack of consistency in the employer's application of its disciplinary rules, and where the case for unlawful motive is substantial." *Publix Super Markets, Inc.*, 347 NLRB 1434, 1438–1439 (2006) (citing *Septix Waste, Inc.*, 346 NLRB 494, 496–497 (2006)). Here, there is no showing that the Respondent had an existing rule that it applied to Tarry's conduct; rather, its disciplinary actions appear to have been imposed ad hoc. But even if the Respondent had shown that it had an existing rule, we would find that the wide variance in the Respondent's disciplinary actions, including for conduct that it identified as serious safety violations, affirmatively shows a lack of consistency in its application of its disciplinary rules. And as we have explained above, the case for unlawful motive here is substantial.

<sup>52</sup> Thus, contrary to the Chairman's assertion, we do not substitute our judgment for that of the Respondent; in examining the Respondent's motives, we merely assess the Respondent's decision in Tarry's case by the standards of judgment that it had previously established. See *Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1005 (2004) ("Analyzing the relevant evidence is not an exercise in second guessing the Respondent. It is, instead, a necessary process . . . to determine whether or not the Respondent violated the Act."), *enfd.* 198 Fed. Appx. 752 (10th Cir. 2006). The Chairman's argument rests essentially on his personal view that Tarry's conduct was so egregiously unsafe that the Respondent *could not reasonably have responded to it in any other way than by discharging her*. But to decide the case on that basis is to make the very error of which the Chairman accuses us—substituting the Board's judgment about appropriate discipline for the Respondent's. Our role is neither to condemn Tarry's conduct nor—as the Chairman accuses—to condone it; rather, we seek, as the Act requires, to ascertain whether the Respondent's treatment of Tarry's conduct, based on *its* judgment, would have been the same absent the unlawful motive that we all agree the General Counsel has shown. This record fails to establish that the Respondent would have discharged Tarry absent its unlawful motive. Instead, as explained in detail below, the record shows that the Respondent regularly concluded that major safety violations were adequately addressed by retraining or discipline short of discharge.

tion extended by 30 days, but none was suspended, much less discharged. In February 2015, driver (and eventual discriminatee) Rosehanna Pometti was given a written warning for an incident that the Respondent characterized as a safety violation, when she drove her bus into an unplowed lot and got stuck in ice, forcing the Respondent's mechanics to dig out the vehicle.<sup>53</sup> And in March 2016, driver Steven Edwards was merely verbally warned for "signaling late—not making complete stops—made a right turn to[o] fast and turned into wrong lane." Edwards' unsafe driving seems generally comparable to Tarry's, but the disciplinary consequences to him were as different from Tarry's discharge as they could possibly be.

Even taking into account the risk to a student riding in Tarry's van when Tarry passed Gerwycki's vehicle, the record demonstrates that conduct that could have endangered students was usually disciplined only by means of a verbal or written warning and, in some cases, retraining. Safety incidents disciplined in that manner include (1) dropping off a student at the wrong school (December 2014; written warning); (2) allowing a first grade student to get off the bus at an unauthorized stop and without a parent present (January 2015; verbal warning); (3) driving with a student in the bus stairwell and committing other infractions (February 2015; retraining); (4) failing to notice missing or loose lug nuts on tires in pre- or post-trip inspections (February 2015; written warning); (5) returning to the yard without noticing that students were still on the bus (July 2015; written warning and retraining); (6) according to a complaint, almost striking a student when pulling away from the bus stop (early September 2015; verbal warning and retraining)<sup>54</sup>; (7) allowing a kindergarten student to get off the bus without a parent present (late September 2015; written warning, loss of bonus, and strike on the driver's record); (8) leaving students unattended on the bus (late October 2015; verbal warning); and (9) failing to notify dispatch when students got off the bus to fight (April 2016; verbal warning).

Perhaps most starkly, in January 2016, a driver received only a written warning for failing to stop behind another bus when its "reds were activated," i.e., when its red lights were flashing and its "stop" signs were extended to signal that students were disembarking. The Respondent expressly described that conduct as "an ex-

treme hazard to students exiting [the] bus." But even so, the driver's warning notice stated that a "[f]uture infraction will result in a strike [and] will result in a loss of bonus or possible termination." That is, even if a second such incident had occurred, the driver's termination was merely possible, not certain. The sanction imposed on that driver differed sharply from Tarry's abrupt discharge.

Even in many cases of more serious occurrences, such as collisions, drivers were suspended rather than discharged. For instance, in February 2015, driver Karen Guedes, who continued to drive with students on board after breaking the mirror and passenger door by colliding with a tree branch, was suspended for 3 days "while drug results come back." Similarly, in January 2015, driver Rosario Russo, who operated the bus under the influence of Nyquil, was suspended for one afternoon and had his route changed.<sup>55</sup> At least seven other drivers who had collisions or damaged their vehicles were also suspended, often for 2–3 days, sometimes with retraining or bonus loss as well. A handful of other drivers who had collisions or caused damage were merely warned. Notably, just 10 days after Tarry's discharge, driver Esther Candelario had what the Respondent characterized as a "preventable accident" and received only a written warning, bonus loss, and retraining on proper following distance.

*c. Other drivers' discharges do not undermine the evidence of disparate treatment*

Of course, Tarry was not the only driver whom the Respondent discharged. Before Tarry's discharge, the Respondent had terminated the employment of six other drivers in 2015 for safety-related violations. William Solomon was discharged for safety violations, failure to follow instructions, and violation of company policies in January when, after two prior warnings, he allowed a student to oversee other students on the bus in violation of state statute, including bullying and hitting those students, as well as to stand on the seats and sit on the seat backs; because Solomon was "kicked out of the school district," the Respondent discharged him. Also in January, Ronald Lupski was discharged when he refused to be tested for drugs and alcohol after having a fuel spill and backing his bus into a car. Driver Anthony DeCanio was discharged for misconduct in March after he found a laptop case on school grounds and kept it rather than returning it; his disciplinary document suggests that DeCanio was initially suspended pending the school's in-

<sup>53</sup> Later that year, the Respondent unlawfully disciplined Pometti by giving her a pretextual written warning for improper use of the radio.

<sup>54</sup> This incident, a near-miss with a potentially catastrophic collision involving a student, occurred within 5 weeks of the events that resulted in Tarry's termination. Yet it resulted in only a verbal warning and retraining.

<sup>55</sup> Notably, Vopat interviewed Russo to get his explanation for Russo's reported drowsiness before the disciplinary action to be taken was decided.

vestigation of the issue, but he was ultimately discharged. Richard Caramanica was discharged in April, after several prior warnings, for safety and other violations as a result of his speeding, unexcused absence, and failure to submit forms. In June, Ruth Piretti was discharged for safety and other violations after she pushed and kicked a student while telling him to move over to the window.<sup>56</sup> And Kathy Tallerine was discharged in September for misconduct and safety, described as “student got off bus, Kathy did not call in the situation and left the student behind.”

After Tarry’s mid-October discharge, several additional employees were discharged in late 2015 and early 2016. Antonio Ramos was terminated in mid-November—about a month after Tarry’s discharge—for substandard work, violation of company policies, and insubordination when he “d[id]n’t answer his radio, used his cell phone to call dispatch from bus.” As mentioned above, driver Joan Perry was investigated and suspended pending the investigation’s outcome in early November; she was ultimately terminated for safety reasons for “hazardous driving, use of cell phone while driving, endangering the students on her run.” Driver Jenna Lunetta was discharged in March 2016 for a positive drug test. Also in March 2016, Anthony Houston was discharged for violation of company policies and “other” reasons, described as “made false statements to Dispatch about his whereabouts while working, did submit pay request for work not done, use cellphone while operating bus with students on board and did allow unauthorized passenger on bus.” The investigation report entered into the record by the Respondent indicates that Houston’s use of the cell phone appeared to be for the purpose of acting as a car-service dispatcher while he was also on duty as a driver for the Respondent. Although it is difficult to find a common thread among the reasons other drivers were discharged, their conduct—such as mistreatment of students, repeated failure to follow the Respondent’s rules, positive drug tests, and dishonesty—was generally of a different character and severity from Tarry’s unsafe driving incident.<sup>57</sup> We therefore agree with the judge that,

<sup>56</sup> Driver Robert McDermond was discharged in mid-July 2015 for a safety violation and failure to follow instructions for conduct described as “didn’t want to transport w/c.” No further explanation was provided, in light of which the seriousness of his misconduct—and its connection to safety interests—cannot be assessed. Because the Respondent bears the burden of demonstrating that it would have discharged Tarry even in the absence of her union activity, “ambiguity in the record evidence, especially if it is due to the lack of explanatory documents or testimony, weighs against the Respondent and negates its defense.” *Publix Super Markets, Inc.*, 347 NLRB at 1439 fn. 24.

<sup>57</sup> The Chairman’s dissent claims that we “conveniently overlook” the purportedly consistent treatment of Deborah Friscia and Antonio Ramos. To the contrary, we agree with the judge’s reasonable conclu-

“[m]easured against the disciplines that the Respondent meted out for [other employees’] misconduct, the penalty of termination that the Respondent imposed on Tarry was unduly and unexplainably harsh.”

*d. The Respondent demonstrated a pattern of taking adverse action against employees who engaged in protected activity*

Finally, although the facts described above provide ample support for finding that the Respondent failed to meet its defense burden, we note that the Respondent’s pattern of conduct, as reflected in its undisputed violations, provides an additional reason to doubt that the Respondent would have discharged Tarry even in the absence of her union activity. That is, the record demonstrates that the Respondent’s actions toward Tarry, culminating in her discharge, parallel its unlawful treatment of other employees who engaged in union activity. Thus, shortly after Mensch learned that Monroig was distributing union literature, the Respondent unlawfully created an impression that her union activity was under surveillance, issued her a pretextual warning for insubordination, and soon thereafter unlawfully cancelled her October 17 charter run and unlawfully ceased assigning her any subsequent charter or midday runs. On those same days, Thomas saw Tarry distributing union literature, unlawfully instructed her not to do so and threatened that she would regret it, and began a rushed and incomplete investigation that concluded with Tarry’s discharge at the start of her very next workday. And on the day of the election, at which Monroig acted as the Union’s observer, the Respondent, contrary to its usual practice, unlawfully ordered Monroig to immediately submit to drug

sions that Ramos’ violations were not similar to Tarry’s and that the Respondent’s evidence regarding Friscia lacked sufficient information to make an informed comparison. All we know about Friscia’s incident is that she swerved on the highway. Accordingly, we find that the Respondent failed to show that it treated Tarry consistently with either Ramos or Friscia. But even if we agreed that Friscia’s misconduct was similar to Tarry’s, a single instance of similar discipline for similar conduct would not establish that Tarry was disciplined pursuant to a consistent policy or practice, particularly in light of the extensive evidence to the contrary discussed above.

Further, although the Chairman perceives that Ramos’ conduct was less serious than Tarry’s, cell phone use while driving appears to be a type of misconduct that the Respondent was relatively consistent in treating severely. Of four employees who used cell phones while operating their buses (Ramos, Perry, Houston, and Meiselbach), three were discharged and one (Meiselbach) was warned. The Respondent’s strictness regarding cell-phone use appears to have been well-known among the drivers: Janice Marinaccio, who was discharged after she failed to drop off a student and circled back to do so without telling the dispatcher what had happened until she returned to the bus yard, explained on her termination form that she had been afraid to explain the situation on the radio (where everyone could hear), and she knew that she “was not allowed to be on the phone in the bus.”

testing. Similarly, Mensch threatened Santana with discharge when he saw her distributing union flyers and unlawfully disciplined her for doing so. And the Respondent did ultimately find a pretext to discharge Santana by exploiting her medical condition, which interfered with her ability to provide a urine sample for drug testing. Griffin, who was known to have attended a union meeting, was also given the impression that her union activities were under surveillance, and she was pretextually disciplined twice in the following 2 months, to the point of being put on probation, for absences that were preapproved, excused, or nonexistent.

The Respondent's 8(a)(3) violations against its pro-union employees did not always occur immediately; rather, the Respondent apparently seized on opportunities to take action against them, even if those opportunities presented themselves months later, as in the case of Santana. In Tarry's case, however, Gerwycki's October 16 complaint about Tarry's driving presented the Respondent an immediate opportunity to carry out the threat that Thomas had issued on October 15, and the Respondent pounced upon that opportunity. When the Respondent's termination of Tarry is viewed side by side with its similar retaliatory actions against coworkers who participated in the same union activities as Tarry, the Respondent's already unpersuasive claim that it would have discharged Tarry regardless of her comparable union activity verges on the absurd.<sup>58</sup>

The Respondent argues, in general, that Vopat's promotion to safety supervisor in July 2015 initiated a new era of proactive investigation and discipline, such that any prior laxness in disciplinary action should not be considered for purposes of comparison to Tarry's discharge. But the judge appears to have implicitly discredited Thomas' testimony that Vopat's promotion initiated a change, and in any event, the Respondent has not shown that the severity of disciplinary actions issued changed after Vopat's promotion. In particular, we note that serious safety violations continued to be disciplined less severely than Tarry's conduct after Vopat's promotion, and even after Tarry's discharge. For example, as described above, Steven Edwards was verbally warned in March 2016 for conduct not unlike the unsafe driving that led to Tarry's discharge. Indeed, any comparably severe disciplines that occurred after Tarry's discharge

<sup>58</sup> The Chairman cites a handful of cases expressing the unremarkable proposition that the evidence supporting a respondent's burden need not be unequivocal to find that burden met. But the evidence here is not merely equivocal, or even in equipoise. Rather, the preponderance of the evidence here undermines, rather than supports, the Respondent's asserted lawful motivation.

and her related unfair labor practice charge<sup>59</sup> may be nothing more than a post-hoc smokescreen, attempting to create more favorable comparators.<sup>60</sup>

#### CONCLUSION

In sum, the Respondent utterly failed to rebut the General Counsel's compelling showing of the Respondent's unlawful motivation in discharging Tarry in the midst of the fall 2015 organizing campaigns. In contrast, the Respondent did rebut the General Counsel's weaker initial showing regarding its motivation for reassigning Tarry from a full-size bus to a van.

#### AMENDED REMEDY

As explained, we adopt the judge's finding that Tarry's termination was unlawful; however, unlike the judge, we have found that her earlier reassignment to a position as a van driver was lawful. Accordingly, we modify the Respondent's remedial obligations. The Respondent need not expunge from its records references to Tarry's September 23, 2015 reassignment. Nor must the Respondent make Tarry whole for that reassignment; rather, as a starting point, the Respondent must provide Tarry backpay, for the period beginning from her unlawful termination on October 19, 2015, based on the earnings she would have accrued at her pay rate as a van driver. Further, an offer of reinstatement to a position as a van driver would generally be considered a substantially equivalent position. We leave open, however, the possibility that the General Counsel may show in compliance proceedings that Tarry would have been re-promoted to her prior position, driving a full-size bus, had she not been unlawfully terminated. If such a showing is made, the backpay due to her and the evaluation of the substantial equivalence of an offer of reinstatement should be modi-

<sup>59</sup> The first charge alleging that Tarry's discharge was unlawful was dated October 19, 2015, the day she was discharged, and it was sent to the Respondent on October 20.

<sup>60</sup> The Board has observed that "[i]t is not uncommon for an employe[r] to discipline some of its employees in order to give credence to its pretextual reasons for disciplining employees whom it has unlawfully targeted." *Koonis Parts, Inc.*, 324 NLRB 675, 675 fn. 1 (1997) (concluding that employer's discipline, under tightened enforcement of longstanding rule, of some employees who had not engaged in union activity, as well as union proponents, did not disturb finding of employer's unlawful motivation) (quotation omitted). See also *Avondale Industries, Inc.*, 333 NLRB 622, 633 (2001) (finding that belated discipline to an employee was "an attempt to make the discipline [to a pro-union employee] appear evenhanded" and "a transparent attempt to hide [r]espondent's true motive behind the discipline of [the pro-union employee]"); *Fast Food Merchandisers*, 291 NLRB 897, 898 & fn. 7 (1988) (finding that employer's pretextual discipline of an employee who had not engaged in union activity was merely a failed attempt to disguise its antiunion motive for earlier unlawful discharges).

fied accordingly. In all other respects, we adopt the judge's recommended remedy.<sup>61</sup>

The Respondent has not excepted to the judge's recommendation that the remedial notice be read to employees by Mensch, or by a Board agent in Mensch's presence; thus, we need not reconsider the appropriateness of this remedial provision. Even if we were to do so, however, we would conclude that our finding that Tarry's reassignment was lawful does not undermine the judge's stated reasons for finding the notice-reading remedy appropriate. The violations we adopt, which include the discharges of Tarry and Santana, are—as the judge explained—serious, numerous, predominantly committed by the Respondent's highest ranking officials, and expansive in both the time span over which they occurred and the number of employees affected. See, e.g., *Voith Industrial Services, Inc.*, 363 NLRB No. 116, slip op. at 1 fn. 5 (2016) (adopting judge's finding that “the pervasiveness of the Respondent's unlawful scheme and the seriousness of the unfair labor practices” justified notice-reading remedy); *Farm Fresh Company, Target One, LLC*, 361 NLRB 848, 849 fn. 3 (2014) (finding the judge's notice-reading remedy “appropriate given the [r]espondent's serious and widespread unfair labor practices”); *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003) (ordering notice reading “so that employees will fully perceive that the [r]espondent and its managers are bound by the requirements of the Act”), rev. denied 400 F.3d 920 (D.C. Cir. 2005). In our view, the Respondent's unfair labor practices, even after eliminating Tarry's reassignment, justify the notice-reading remedy recommended by the judge.

<sup>61</sup> The Chairman argues that Sec. 10(c) of the Act precludes an award of reinstatement and backpay to Tarry, because Sec. 10(c) states 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 [or her] of any back pay, if such individual was suspended or discharged for cause.” In finding that Tarry was discharged for cause, the Chairman relies on his (dissenting) view that Tarry's termination was lawful. As explained at length above, her termination was not lawful but an unfair labor practice. And, as the Supreme Court stated in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 217 (1964), “[t]here is no indication . . . that [Sec. 10(c)] was designed to curtail the Board's power in fashioning remedies when the loss of employment stems directly from an unfair labor practice” as is the case here. See *Butler Medical Transport, LLC*, 365 NLRB No. 112, slip op. at 7–8 (2017). See also *Anheuser-Busch, Inc.*, 351 NLRB 644, 648 (2007) (“A termination of employment that is motivated by protected activity is unlawful under Section 8(a)(1) and/or (3), and is not ‘for cause.’ The termination is unlawful, and the Board can order reinstatement and backpay.”), review denied 303 Fed. Appx. 899 (D.C. Cir. 2008).

## ORDER

The National Labor Relations Board orders that the Respondent, East End Bus Lines, Medford, New York, its officers, agents, successors, and assigns, shall

### 1. Cease and desist from

(a) Terminating, issuing warnings to, or otherwise discriminating against employees for engaging in activities on behalf of International Brotherhood of Teamsters Local 1205 (the Union) or any other labor organization, or for otherwise engaging in protected concerted activity.

(b) Directing employees to go for a random drug test on their nonworking days because of their union activities.

(c) Directing employees not to engage in union activities.

(d) Giving employees the impression that their union activities have been under surveillance.

(e) Threatening or impliedly threatening employees with discharge for engaging in union activities.

(f) Threatening or impliedly threatening employees with unspecified reprisals for engaging in union activities.

(g) Threatening employees with plant closure, selling the business, or loss of their jobs if they select the Union as their bargaining representative.

(h) Threatening employees with loss of seniority or reduced hours of work if they select the Union as their bargaining representative.

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

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

(a) Within 14 days from the date of this Order, offer Sharon Tarry full reinstatement to her former job as a van driver or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Sharon Tarry, Linda Griffin, Lori Monroig, Rosehanna Pometti, and Chiarina Santana's estate 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.

(c) Compensate Sharon Tarry, Linda Griffin, Lori Monroig, Rosehanna Pometti, and Chiarina Santana's estate for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 29, 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 year(s) for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful terminations of Sharon Tarry and Chiarina Santana, and to the other discriminatory actions that it took against Linda Griffin, Lori Monroig, Rosehanna Pometti, and Chiarina Santana, and within 3 days thereafter notify Tarry, Griffin, Monroig, Pometti, and Santana's estate in writing that this has been done and that the terminations and other discriminatory actions will not be used against those employees in any way.

(e) 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.

(f) Within 14 days after service by the Region, post at its facilities in Medford, New York, copies of the attached notice marked "Appendix."<sup>62</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, 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. The Respondent shall take reasonable steps 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, 2015.

(g) Within 14 days from the date of this Order, hold a meeting or meetings, scheduled to ensure the widest possible attendance in order to fully communicate with employees, at which the attached notice marked "Appendix" will be publicly read by John Mensch in the presence of a Board agent or, at the Respondent's option, by a Board agent in the presence of John Mensch.

<sup>62</sup> 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."

(h) Within 21 days after service by the Region, file with the Regional Director for Region 29 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. August 27, 2018

\_\_\_\_\_  
John F. Ring, Chairman

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN RING, dissenting in part.

While driving a child home from school, Respondent's school van driver Sharon Tarry, exasperated by a vehicle that was moving too slowly to suit her, unlawfully crossed a double yellow line to pass the other vehicle, then swerved back in front of the car she had just passed, narrowly avoiding a head-on collision with an oncoming car. The driver of the vehicle Tarry passed called the Respondent to complain about this dangerous episode, and the Respondent discharged Tarry after an appropriate investigation of the incident. My colleagues find that this discharge violated the National Labor Relations Act, and they order Tarry reinstated with backpay. Because I believe that this finding is unjustified and that these remedies violate the Act, I respectfully dissent.<sup>1</sup>

#### Facts

The Respondent operates school buses and vans under contract with various Long Island, New York school districts. Tarry was hired as a bus driver in 2010. In late September, 2015, the Union started an organizing campaign among the Respondent's drivers. Tarry supported the Union's campaign. There are no exceptions to the judge's finding that the Respondent committed numerous violations of Section 8(a)(1) of the Act in response to this campaign.

<sup>1</sup> I join Member McFerran in reversing the judge's finding that the Respondent violated the Act by reassigning Tarry from a bus to a van on September 23, 2015. I also join in adopting, in the absence of exceptions, the other unfair labor practices found by the judge. I agree that a notice-reading remedy is warranted given the number and nature of the Respondent's violations. In so finding, I do not rely on the discharge of Tarry discussed herein.

On Friday, October 16, 2015,<sup>2</sup> Tarry drove her assigned route. That afternoon, dispatcher Barbara Nunziata received a call from motorist Toni Gerwycki, who called to complain that “[b]us driver went into incoming traffic to pass [her]. She then swerved in front of her.”<sup>3</sup> Nunziata made a short written note of Gerwycki’s complaint and informed the Respondent’s safety supervisor, Joseph Vopat. Another dispatcher, Suzanne Secreto, informed the Respondent’s vice-president, Jennifer Thomas. The Respondent determined that Tarry was the operator of the vehicle in question, and Thomas removed the GPS recorder and SD card (which contained a video recording from a camera located inside the van) from Tarry’s van and put them on Vopat’s desk. Vopat reviewed the SD card video with fellow Safety Department employees Helen Lachacz and Donna White.<sup>4</sup> The video recorded Tarry saying “you’ve got to be kidding me” and then blowing her horn before passing another vehicle on the left, crossing a double yellow line and driving into oncoming traffic, then returning to the proper lane, narrowly avoiding a head-on collision with two oncoming cars. It is undisputed that a child was riding in the front seat of the van during these events. Vopat, Lachacz, and White agreed that the video confirmed the accuracy of Gerwycki’s complaint.

Alarmed, Vopat alerted Thomas that she should review the video. She did and agreed with what Vopat, Lachacz and White had concluded. Thomas instructed Vopat to continue his investigation. Over the weekend, Vopat carefully and thoroughly reviewed the SD card video, maps, GPS data, and the precise times and places when and at which events occurred. His review verified that Tarry had passed Gerwycki by crossing a double yellow line into oncoming traffic and that she had dangerously exceeded the posted speed limits at several points on her route. Vopat handwrote a report of his findings that was later typed by Lachacz.

<sup>2</sup> All dates hereafter are in 2015 unless otherwise indicated.

<sup>3</sup> Gerwycki said that the incident occurred on County Route 51. But the opposing traffic lanes on that road were separated by a median rather than a double yellow line. It was later determined from a video and GPS data that the unlawful passing took place on Lake Avenue, a narrower street than County Route 51 with a double yellow line, which runs into County Route 51. The General Counsel and the judge both accepted that the incident occurred on Lake Avenue. Although they needlessly review this factual point at length, my colleagues do not find otherwise.

<sup>4</sup> The majority notes that the judge drew adverse inferences from the Respondent’s failure to call Nunziata, Lachacz, and White as witnesses. Despite this, my colleagues and I agree that the Respondent received a phone call from Gerwycki complaining about one of its drivers, that driver was Tarry, and the SD card showed Tarry speeding and crossing into the path of oncoming traffic as detailed above.

On Sunday night, October 18, Vopat called Thomas to recommend that Tarry be terminated. Thomas concurred and authorized Vopat to proceed with the discharge. Vopat also reviewed the SD card video with Donald Shukri, another Safety Department employee who had been absent the previous Friday. Like Lachacz and White, Shukri agreed that the video captured Tarry passing Gerwycki and driving headlong into oncoming traffic.

On Monday morning, October 19, with Shukri present, Vopat met with Tarry and gave her a detailed overview of Gerwycki’s complaint, the investigation into it, the SD card video, the GPS data, and the speeding violations. Vopat then informed Tarry that, because the complaint had been substantiated, the Respondent was terminating her. Without denying her conduct or offering any explanation or possible excuse, Tarry instead protested the Respondent’s decision to discharge her rather than to impose a more lenient sanction and argued about the location of the incident. Vopat replied that a full review of the evidence confirmed the conduct for which she was being terminated.

At Tarry’s request, Vopat showed Tarry the SD card video. After seeing it, Tarry remarked, “[T]hat’s all you got. I’ll own this company.” Vopat also gave Tarry a chance to state her objections in writing, but she declined. Following the discharge first thing Monday morning, Vopat obtained Gerwycki’s caller identification number and interviewed her to confirm the evidence as it had been reported.<sup>5</sup>

#### Discussion

Under *Wright Line*,<sup>6</sup> the General Counsel has the burden to prove that an employee’s Section 7 activity was a motivating factor in the employer’s adverse employment action against the employee. The General Counsel can make his initial showing by establishing union or other protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. See, e.g., *Kitsap Tenant Services*, 366 NLRB No. 98, slip op. at 11 (2018). If the General Counsel

<sup>5</sup> Vopat testified that he contacted Gerwycki and obtained a statement from her, but the judge, sua sponte, interjected, “I don’t know if we need it, if it was after the termination. It’s also hearsay, so I don’t—does General Counsel agree?” and the Respondent’s counsel accepted this ruling. (Tr. 817–818.) I believe that my colleagues err in accepting the judge’s subsequent finding that Vopat did not contact Gerwycki, or obtain her statement, on the grounds that the judge “[could] not fathom why, if Vopat’s testimony is credited that he spoke to Gerwycki after the termination, he admittedly did not take any notes, and the Respondent provided nothing from her.”

<sup>6</sup> 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

makes the required initial showing, the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of the union or other protected concerted activity. *Id.*

The General Counsel met his initial *Wright Line* burden with respect to Tarry's discharge. Nevertheless, I believe that the Respondent clearly proved that it would have discharged her even in the absence of her union activity.<sup>7</sup>

Tarry engaged in serious misconduct that endangered the safety of the child entrusted to her care as well as the safety of other motorists. It is undisputed that Tarry drove recklessly during her afternoon route on October 16, and the conduct was significant and severe enough for another motorist, Gerwycki, to take the extraordinary action of calling the Respondent to complain. Gerwycki's complaint and objective video evidence indisputably established that, when Gerwycki would not join her in speeding, Tarry blew her horn at Gerwycki and then illegally passed her by crossing a double yellow line with two cars fast approaching from the other direction.<sup>8</sup> She swerved to return to the proper lane with only a few seconds to spare, narrowly averting a head-on collision at high speed. Tarry's conduct was both dangerous and intentional, and she acted with careless disregard for the safety of the child in her care and other motorists. The Respondent had no choice but to discharge Tarry; no reasonable employer could continue to entrust children to a driver under these circumstances.

My colleagues properly acknowledge that "the Respondent *could have* discharged Tarry" for her unsafe driving (emphasis in original). Nevertheless, they find that Respondent would not have discharged her absent her union activity, concluding that Tarry's reckless and dangerous conduct can be overlooked. To support their position, they cite purported flaws in the Respondent's investigation of the incident and alleged disparate treatment. Neither reason withstands scrutiny, and neither

<sup>7</sup> Citing *Bally's Park Place, Inc.*, 355 NLRB 1319, 1321 (2010), *enfd.* 646 F.3d 929 (D.C. Cir. 2011), and other precedent, the majority "raises the bar" on the Respondent based on their conclusion that the General Counsel's showing of unlawful motivation was particularly strong. Because I find, applying the preponderance of the evidence standard, that the Respondent's evidence rises above any bar, I need not pass on whether these cases were correctly decided.

<sup>8</sup> Based on the video evidence of Tarry's exasperation with Gerwycki's speed before passing her, I infer that Tarry exceeded the speed limit during that encounter. My colleagues agree that Tarry engaged in unsafe driving when she passed Gerwycki, but suggest that she may have exceeded the speed limit at some other point on her route. Even if true, this would demonstrate that Tarry engaged in two separate instances of misconduct during that day, which would only further support a finding that her discharge was lawful.

should permit the Board to countenance Tarry's conduct in this case.

My colleagues find that the Respondent's investigation was "rushed and incomplete." It is certainly true that Tarry's misconduct occurred on a Friday afternoon and the Respondent discharged Tarry on the following Monday morning, after conducting an appropriate investigation over the weekend. But, as established above, there was nothing "rushed" about the investigation or suspect about its timing. To the contrary, having learned that Tarry engaged in reckless driving that nearly resulted in a head-on collision while a child was riding in the passenger seat of Tarry's van, the Respondent had a duty to respond before placing any more children in Tarry's care on her next shift on Monday morning. Nor was the Respondent required to delay acting until it contacted Gerwycki to clear up the insignificant discrepancy as to the location of the incident clearly shown on the video. Such a minor discrepancy could not have had any impact on the Respondent's decision to discharge Tarry, since the video and GPS data provided indisputable evidence of what Tarry had done and where she had done it.

It is true that the Respondent did not interview Tarry before discharging her, a step it followed for other employees. Again, this fact is insufficient to undermine the Respondent's showing in the circumstances of this case, given that video evidence indisputably proved that Tarry was guilty of the misconduct for which she was discharged. It is difficult to think of any exculpatory fact that could have been elicited from Tarry had she been interviewed.<sup>9</sup> Indeed, her post-discharge falsehoods and indifference demonstrate just how futile such an interview would have been.<sup>10</sup> Ordering the Respondent to reinstate Tarry because there was no pre-discharge interview is especially unwarranted in these circumstances.

The majority's evidence of disparate treatment is equally unpersuasive. First, my colleagues conveniently overlook that the Respondent's discharge of Tarry was consistent with its discharges of employees Deborah Friscia on April 4, 2014, and Antonio Ramos on November 12. Friscia's disciplinary notice states that she was discharged because "video showed Deborah Friscia swerving on William Floyd Parkway." The notice indicates that this was a first offense and gives as Friscia's

<sup>9</sup> The majority speculates that, if Vopat had questioned Tarry before discharging her, she might have explained that she crossed a double yellow line into oncoming traffic in order to avoid a rear-end collision with Gerwycki. No evidence supports this speculation, which in any event would only reinforce Tarry's culpability for tailing Gerwycki so closely as to require such risky evasive tactics.

<sup>10</sup> Even at the hearing, Tarry flatly denied having crossed a double yellow line and even insisted that she was never on Lake Avenue that day.

response: “As I was driving, I was speaking the student [sic] about pickups and I was looking for his schedule when it appears that I was swerving. I was not texting.” Ramos was discharged for failing to answer his radio and “us[ing] his cellphone to call dispatch from bus.” As discussed more fully below, there is also no evidence of disparate treatment. This evidence of consistent treatment, together with the seriousness of Tarry’s misconduct discussed above, supports a finding that the Respondent met its *Wright Line* burden.

My colleagues cite a number of instances in which the Respondent imposed discipline short of discharge for traffic violations such as speeding, red-light violations, signaling late, making a turn too fast, and turning into the wrong lane. The Respondent also imposed lesser discipline for certain instances of unsafe conduct, such as driving with a student in the bus stairwell, allowing students to exit the bus without a parent present, and almost striking a student when pulling away from a bus stop, and for collisions. But none of these incidents involves the sort of reckless and aggressive conduct that Tarry committed on October 16. Instead, the closest comparators to Tarry are Ramos and Friscia, who, like Tarry, were discharged for their misconduct as discussed above.<sup>11</sup> Moreover, Tarry’s discharge was hardly unique. As the majority acknowledges, the Respondent discharged 10 other drivers in 2015 and early 2016 alone. Contrary to the majority, those discharges were for conduct of similar or less severity than Tarry’s misconduct, and thus further support the Respondent’s *Wright Line* defense.

The majority evidently would have preferred that the Respondent conduct its investigation of Tarry differently, and my colleagues find fault with the consistency of its disciplinary choices. But it is firmly settled that the Board should not second-guess employer judgments

<sup>11</sup> Even though it was the offense most similar to Tarry’s, the majority ignores Friscia’s discharge altogether. They do so based on the judge’s finding that the record lacked enough detail to evaluate Friscia’s incident. But we know as much about that incident as we do about many other incidents the majority cites as instances of purportedly disparate discipline. The majority cannot persuasively rely on those instances while discarding the evidence of Friscia’s discipline as too sketchy. As to Ramos, the majority cites the facts of his discharge and then summarily asserts that his conduct, like the others’, was “generally of a different character and severity from Tarry’s unsafe driving.” I agree. Tarry’s conduct was of a different character and severity. It was much more severe and egregious than the misconduct for which Ramos was discharged.

The majority inaptly cites as evidence of disparate treatment Steven Edwards’ March 2016 verbal warning for “signaling late—not making complete stops—made a right turn to[o] fast and turned into wrong lane.” There is no indication that Edwards’ mistake (turning wide into the wrong lane) was deliberate. As discussed above, Tarry’s misconduct clearly was intentional and reckless.

about what level of discipline is appropriate for a given offense. “[A]s we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision.” *Sam’s Club*, 349 NLRB 1007, 1009 fn. 10 (2007) (quoting *NLRB v. Columbus Marble Works*, 233 F.2d 406, 413 (5th Cir. 1956)).

In finding that the Respondent did not meet its *Wright Line* defense burden, my colleagues insufficiently consider the fundamental principle that an employer need only prove by a preponderance of the evidence that it would have taken the same action even absent the employee’s union activity. See, e.g., *Merillat Industries*, 307 NLRB 1301, 1303 (1992) (“The Respondent’s defense does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it.”); *Synergy Gas Corp.*, 290 NLRB 1098, 1102–1106 (1988) (defense burden sustained despite evidence that employer’s “disciplinary system is not highly organized or completely consistent or fool-proof in all cases”); *Westinghouse Electric Corp.*, 277 NLRB 136, 137 (1985) (reversing judge’s rejection of employer’s case based on purported flaws in its investigation of employee misconduct where investigation was not “biased, negligent, or cursory”). Even assuming that the factors the majority cites did detract from the Respondent’s defense (and as shown, they do not), they cannot fairly be said to outweigh the factors that support it. Accordingly, my colleagues err in finding that the discharge of Tarry violated the Act.<sup>12</sup>

<sup>12</sup> Tarry was disciplined on October 30, 2014, for failure to follow instructions, safety violations, and insubordination after she defied the Respondent’s effort to enforce its longstanding rule against giving Halloween candy to children on the bus by stating that she didn’t care if she got fired for handing out candy to the students on her bus. On November 4, 2014, based on a review of the October 31, 2014 bus video, Tarry was warned for announcing to the children on her bus that she would be in their neighborhood trick or treating that evening and would give them candy if she saw them on the street, and for playing with her hair and steering with her knees while operating her bus. These warnings are not alleged to be unfair labor practices. Contrary to the majority’s suggestion, the judge did not discredit the testimony that Tarry engaged in this misconduct, some of which she specifically admitted in her own testimony at the hearing. Undeterred, the majority seizes on the manner in which the warnings were worded and distributed to find that they were pretexts for discrimination despite the undisputed evidence that (1) Tarry was insubordinate in defying the no-candy rule, as the October 30 warning stated, and she repeated that insubordination by stating that she would hand out candy to the children; and (2) Tarry *did* steer the bus with her knees, as the November 4 warning stated. The majority’s analysis is no more persuasive here than in their handling of the facts related to Tarry’s discharge itself. I believe that these prior warnings support, rather than detract from, the Respondent’s defense to the extent that the Respondent relied on the warnings as a basis for the discharge. But even if I agreed with the majority that the reasons given for the warnings, even though factually

Because Tarry was discharged for cause, the Board lacks the authority to award her reinstatement or backpay. Section 10(c) of the Act 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 [her] of any back pay, if such individual was suspended or discharged for cause.” As established above, Tarry was discharged for an egregious act of reckless and unlawful driving that was fully substantiated. That, unquestionably, was “cause” for discharge, especially in an industry in which the safety of children is the overriding concern. In fact, as discussed above, the majority concedes that Tarry’s aggravated misconduct was serious enough to warrant discharge.

The Supreme Court has observed that “[t]he legislative history of [Section 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). To support its point, the Court quoted as follows from Section 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.

Both the text of Section 10(c) and its underlying policy thus preclude reinstating Tarry and awarding her backpay. Accordingly, for the reasons stated above, I must respectfully dissent from my colleagues’ finding that Tarry’s discharge was unlawful, as well as from the remedies that the majority orders for that discharge.

Dated, Washington, D.C. August 27, 2018

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accurate, were pretexts for discrimination, I would still find that the Respondent met its *Wright Line* burden.

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John F. Ring,

Chairman

NATIONAL LABOR RELATIONS BOARD

MEMBER PEARCE, dissenting in part.

Contrary to my colleagues, I would affirm the judge’s conclusion that the Respondent violated Section 8(a)(3) and (1) by demoting Sharon Tarry from bus driver to van driver on September 23, 2015, because of her union and protected concerted activity. We all agree that the General Counsel made the requisite initial showing under *Wright Line*.<sup>1</sup> But, as explained below, I find the General Counsel’s initial showing much stronger than my colleagues suggest. And, especially in light of the General Counsel’s strong initial showing, the Respondent clearly failed to meet its defense burden.

First, the Respondent has consistently demonstrated a pattern of hostility towards Tarry’s known union and protected concerted conduct. From the fall of 2014, Tarry made no secret of her pronoun stance. After the Respondent’s sole owner John Mensch repeatedly accused Tarry of initiating an organizing campaign by the Amalgamated Transit Union (ATU), Tarry replied that if she were going to bring in a union, it would be the Teamsters. Another driver said that they did not need a union, and Tarry said—in Mensch’s presence—“yes, we do, open your eyes, [Mensch] changes his mind like he changes his underpants.” Mensch “got mad and stormed away.”

The Respondent’s head dispatcher Lorraine Giugliano—who would later play a direct role in Tarry’s demotion—similarly made known the Respondent’s hostility to employee union activity when she assured Tarry that she knew Tarry would not bring in a union. Such reassurance from a senior company official implies that Tarry’s workplace security depended on avoiding union involvement. Consistent with this implication, shortly after Tarry’s public pronoun statements in October 2014, Giugliano and the Respondent’s Vice President Jennifer Thomas each issued disciplinary warnings to Tarry, which, as the judge found, were motivated by animus towards Tarry’s expressed union sympathies. Shortly after Tarry received these warnings, Mensch himself reinforced the message by calling Tarry over to warn her that the conduct at issue in the disciplines (announcing to children that she would hand out candy on Halloween

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<sup>1</sup> 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

and steering her bus with her knee) “was a crime,” before yelling at her to “get the fuck off the property.”

In addition to her known or suspected union activity, Tarry also engaged in concerted activity over employee terms and conditions of employment when she objected to the Respondent’s postponing payment of an incentive bonus from December 2014 until January 2015. Tarry raised group concerns both by telling the Respondent that many drivers depended on their bonuses for Christmas and by inquiring about the effect of the delayed payment on drivers’ claims for state unemployment benefits during seasonal layoffs. Rather than accepting the Respondent’s assurance that the delayed payment would not affect drivers’ unemployment claims, Tarry followed up with the state unemployment office. And, when she learned that 2015 claims might be imperiled, she discussed her discovery with other drivers. The judge correctly found that this conduct was concerted and protected by the Act. See *Meyers Industries*, 281 NLRB 882, 887 (1986) (“concerted activity . . . encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.”), *affd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988).

The Respondent’s reaction to Tarry’s protected conduct relating to the bonus payment was swift, hostile, and conclusive. When Giugliano overheard Tarry discussing the issue with other drivers on December 4, 2014, she promptly summoned Tarry to Mensch’s office. Tarry testified that after Tarry stated that she had called the unemployment office:

[Mensch] got very angry. He turned around and faced the whiteboard that was in the office. He just yelled I’m calling it consolidation, you’re fired, but you can collect unemployment. I turned to [Mensch] and said are you kidding me, you can’t stand a woman standing up to you. Then he got like beet red in the face. As he was opening up the door, he yelled to me to get the fuck off my property, you’re fired. . . . I yelled to him you’re a fucking asshole, and I walked out the door, went outside.<sup>2</sup>

<sup>2</sup> The judge found that Mensch and drivers regularly exchange profanity at work, and no employees have been disciplined for that reason.

The judge’s factual findings about the December 2014 discharge generally relied on Tarry’s account. The judge also specifically cited Tarry’s testimony about this exchange in observing that “Tarry had very good recall, answered questions readily and showed candor in most of her answers” (with the notable exception of her testimony about the events of October 16, 2015).

A subsequent discharge letter stated that Tarry’s position had been terminated “due to lack of work.” Shortly thereafter, on December 18, 2014, Tarry filed a Board charge alleging that the Respondent had unlawfully discharged her.

Tarry returned to work pursuant to the terms of an informal Board settlement agreement on March 30, 2015. To understand what happened next, a brief digression into the Respondent’s business operations is required. As explained in detail by the judge, the Respondent operates both full-size buses and minibuses or vans. Bus drivers maintain a higher-class commercial driver’s license than van drivers and are paid a higher hourly wage. All drivers work a scheduled number of “package hours” every day, ranging from 4 to 6 hours in 15-minute increments, depending on the length of the route. A typical package is 6 hours—three in the morning and three in the afternoon. The Respondent assigns drivers to the same route year after year.

For about 3 years prior to her December 2014 discharge, Tarry had driven a bus on a 5-1/2 hour package route. But when she returned to work on March 30, 2015, the Respondent did not return her to her former route. Instead, the Respondent assigned Tarry to drive an empty bus on a route with five stops but no students—albeit labeled a 5-1/2 hour package—between March 30 and June 24, 2015. Then, when it assigned routes for the new school year that fall, the Respondent again did not restore Tarry to her former route. Rather, on August 27, 2015, it assigned her to a newly created 5-1/2 hour package bus route that had previously been serviced by two vans. Three trial runs established that the new route could not be completed as a 5-1/2 hour package, but required 6 hours—as stated, above, the typical driver package. However, rather than expanding Tarry’s package by a half hour (as Tarry suggested), on September 8 Giugliano split the route, reassigning six stops to a van driver. Two weeks later, on September 23, Giugliano determined, unsurprisingly, that Tarry’s shortened route no longer served enough riders to warrant a bus. Giugliano then demoted Tarry to driving a van, with a three-dollars-per-hour pay cut.

On these facts, the judge easily concluded that Tarry’s demotion was unlawful. After determining that the General Counsel met his initial burden by establishing the Respondent’s hostility towards Tarry’s known union and protected concerted conduct in 2014, the judge found that the Respondent had: (1) failed to offer any explanation as to why it demoted Tarry just 2 weeks after splitting the route; (2) failed to explain its decision to service the route with two vans rather than restoring the six stops removed on September 8; and (3) generally failed to explain Tarry’s demotion to a van in light of its policy of

permitting drivers to keep their routes and absent any showing that it had ever previously reassigned a bus driver to drive a van.

I agree with the judge's straightforward analysis. And, contrary to my colleagues, I find that the General Counsel's initial showing under *Wright Line* was clear and strong. In concluding that the General Counsel met his initial *Wright Line* burden as to both union and protected concerted activity, the judge found that Mensch had "expressed anger" at Tarry for engaging in protected concerted activity (i.e., protesting the bonus-payment-date change), and that Giugliano's and Thomas' 2014 pretextual disciplinary warnings to Tarry additionally evidenced the Respondent's animus towards Tarry's protected prounion expressions. But the judge understates the case. Mensch did not merely politely "express anger" at Tarry when he learned that she had called the state unemployment office—he turned "beet red in the face" and yelled "get the fuck off my property, you're fired." As expressions of animus go, it is hard to top this loud, angry, and profane termination. Moreover, as described above, not only Mensch, but also both Thomas and Giugliano—three high company officials, including the one most directly responsible for the demotion—also expressed unmistakable animus towards Tarry's open prounion position.<sup>3</sup>

<sup>3</sup> My colleagues assert that Giugliano's own antiunion animus has not been shown. To the contrary, the judge specifically concluded that animus motivated Giugliano's October 2014 warning to Tarry. I also find implausible my colleagues' suggestion that Giugliano might somehow have remained, throughout her role in executing numerous unlawful actions, detailed elsewhere in the judge's decision and the majority opinion, merely a neutral conduit for the expression of *other* company officials' antiunion animus.

The judge properly considered the Respondent's conduct prior to its settlement of Tarry's 2014 Board charge as background evidence to establish the Respondent's motives for its postsettlement conduct. See, e.g., *St. Mary's Nursing Home*, 342 NLRB 979, 980 (2004) (quoting *Black Entertainment Television*, 324 NLRB 1161, 1163 (1997)) ("the Board has long held that '[e]vidence involved in a settled case may properly be considered as background evidence in determining the motive or object of a respondent in activities occurring either before or after the settlement, which are [currently] in litigation.'"), *affd.* sub nom. *NLRB v. St. Mary's Acquisition Co.*, 240 Fed. Appx. 8 (6th Cir. 2007); *Steves Sash and Door Co.*, 164 NLRB 468, 476 (1967), *enfd.* in relevant part, 401 F.2d 676, 678 (5th Cir. 1968). To be clear, the 2014 disciplines and discharge are not themselves bases for a remedial order in this case. But they illuminate the Respondent's motivation for its 2015 conduct now at issue. Cf., e.g., *Special Mine Services, Inc.*, 308 NLRB 711, 711, 720 (1992) (citing *Host International*, 290 NLRB 442 (1988)) (judge properly considered conduct that was subject of prior settlement agreement where "the General Counsel [did] not seek to set aside the settlement, and the presettlement conduct . . . was not litigated as the basis for a remedial order. Rather, the presettlement conduct was offered as background evidence to establish that union animus motivated [the respondent's] new and independent postsettlement conduct,

Moreover—as my colleagues agree—there is no reason to suppose that the Respondent's animus dissipated between December 2014 and September 2015. Given Tarry's absence for part of the intervening period (due to her discharge in December 2014) and the seasonal nature of the work, the relative calm of early 2015 was likely a mere lull in the storm of the Respondent's unlawful activity that again gathered force in the fall of 2015.<sup>4</sup>

Accordingly, I find the General Counsel's initial showing much stronger than my colleagues suggest. I also find, contrary to the majority, that the Respondent has not met its *Wright Line* defense burden.

The Respondent's entire course of conduct makes it clear that Tarry's demotion was simply the final act in a series of steps carefully designed to punish her for her protected activity by avoiding to fully reintegrate her into its workforce. To begin, the Respondent has never offered any persuasive explanation for its failure to assign Tarry in September 2015 to the 5-1/2 hour package route to which she had been assigned prior to her December 2014 discharge, despite its policy of letting drivers retain their routes from year to year. The Respondent continues to maintain that it had to consolidate routes and that Mensch laid Tarry off in 2014 due to this consolidation. Yet this explanation is patently pretextual in light of Mensch's December 4, 2014 meeting with Tarry where he angrily summoned her to the office, fired her, and yelled, "I'm calling it consolidation, you're fired . . ." after learning that she had spoken to the drivers about the bonus payment.<sup>5</sup> Then, when Terry was subsequently reinstated, instead of assigning Tarry to her own or some other stable, regular route, the Respondent assigned her

which [was] alleged to be the basis for a remedial order."), *enfd.* in relevant part, 11 F.3d 88, 89 (7th Cir. 1993).

<sup>4</sup> Although the General Counsel alleged that the demotion and discharge were in retaliation for Tarry's concerted activity and her filing of a Board charge, the General Counsel has not excepted to the judge's finding that he waived complaint allegations that Tarry's 2015 demotion and discharge were retaliatory for her filing of a Board charge in 2014 and thus independently unlawful under Sec. 8(a)(4). However, the filing of the Board charge was itself clearly protected conduct, and similar in character to Tarry's protected inquiry with the state unemployment office in that both sought to bring outside government authority to bear on issues within the Respondent's workplace. The vehemence of Mensch's reaction to Tarry's resort to the unemployment office invites the inference that he was not indifferent to her resort to the Board, further supporting the conclusion that the Respondent's treatment of Tarry in 2015 was not motivated solely by legitimate business considerations.

<sup>5</sup> My colleagues' uncritical acceptance of Mensch's claim that Tarry's 2014 route had been eliminated is baffling, especially in light of the judge's discussion of Mensch's doubtful credibility. "In demeanor," the judge found, "Mensch appeared defensive, irritable and often resistant to providing information. He was very vague, to the point of obvious evasiveness on numerous matters," and on other matters testified contrary to the credible record.

to a series of improbable and impracticable positions: first driving an empty bus on a route with no students, then driving a full bus on a route that could not be completed in the 5-1/2 hours it allowed her, and finally splitting that route and assigning her to drive an underutilized bus on a route better served by a van.<sup>6</sup> Taken together, the series of assignments given to Tarry after March 2015 reflect the Respondent's hostility towards Tarry and its unwillingness to fully reintegrate her into its workforce following the settlement of her unfair labor practice charge. The Respondent's insistence that each decision along the way was warranted by legitimate considerations having nothing to do with its hostility towards Tarry's protected conduct defies credulity.<sup>7</sup>

Moreover, the Respondent's proffered business justification for finally reassigning Tarry to a van (which apparently had never occurred before)—that its obligation to provide the lowest-cost service to the school district required doing so—is not credible: as the judge found, the Respondent offered no explanation for why it could not have restored Tarry's route to its pre-September 8 configuration.<sup>8</sup> Contrary to my colleagues' claim that restoring the route to its pre-split configuration was not feasible because that route took too much time, it is uncontested that the longer route could have been completed as a typical 6-hour package. The Respondent may have been loath to let Tarry earn the additional half hour of pay that would have been required for the route to be served by one vehicle. But it is incredible to suppose that the cost of servicing the route with *one bus* on a 6-hour package could have exceeded the cost of servicing the route with *two separate vans*, at least one of which (Tarry's) was on a 5-1/2 hour package. Absent some further explanation—and the Respondent offers none—I agree with the judge that this thin reed cannot bear the Respondent's defense burden.

<sup>6</sup> I agree with the General Counsel's arguments that the empty-route assignment and the September 8, 2015 route split evidenced animus.

<sup>7</sup> I find disingenuous, at best, the majority's repeated references to Tarry having initiated the September 8, 2015 route reduction as a justification for her ultimate transfer to a van. As found by the judge, the customary driver package was 6 hours, and Tarry suggested and clearly sought that package in order to continue her assigned bus route. Thus, rather than initiating the reassignment, she actively sought to retain her route.

<sup>8</sup> The majority attempts to have it both ways. It relies on Giugliano's (uncredited) testimony that her goal was to save the school district money but, when faced with the fact that a two-van route would necessarily be costlier than having Tarry reclaim her bus route, asserts that 6-hour shifts were assigned to only senior drivers. Significantly, however, neither the Respondent nor the majority claim that there was any prohibition against such an assignment. And, contrary to my colleagues' suggestion, whether or not Tarry's seniority status would otherwise entitle her to a 6-hour shift is irrelevant to the Respondent's purported goal of minimizing costs to the school.

I accordingly disagree with my colleagues' conclusion that the Respondent met its burden of establishing that it would have demoted Tarry absent that protected conduct, and I would affirm the judge's conclusion that the demotion was unlawful.

Dated, Washington, D.C. August 27, 2018

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Mark Gaston Pearce, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT terminate, warn, or otherwise discriminate against you for engaging in activities on behalf of International Brotherhood of Teamsters Local 1205 (the Union) or any other labor organization, or for otherwise engaging in protected concerted activity.

WE WILL NOT direct you to go for a random drug test on your nonworking days because you engaged in union activities.

WE WILL NOT direct you not to engage in union activities.

WE WILL NOT give you the impression that your union activities have been under surveillance.

WE WILL NOT threaten or impliedly threaten you with discharge for engaging in union activities.

WE WILL NOT threaten or impliedly threaten you with unspecified reprisals for engaging in union activities.

WE WILL NOT threaten you with plant closure, selling the business, or loss of your jobs if you select the Union as your bargaining representative.

WE WILL NOT threaten you with loss of seniority or reduced hours of work if you select the Union as your bargaining representative.

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 Sharon Tarry full reinstatement to her former job as a van driver or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Sharon Tarry, Linda Griffin, Lori Monroig, Rosehanna Pometti, and Chiarina Santana's estate whole for any loss of earnings and other benefits suffered as a result of our discrimination, plus interest, and WE WILL also make them whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Sharon Tarry, Linda Griffin, Lori Monroig, Rosehanna Pometti, and Chiarina Santana's estate for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 29, 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 year(s) for each employee.

*Brent E. Childerhose and Francisco Guzman, Esqs.*, for the General Counsel.

*Clifford P. Chaiet and W. Matthew Groh, Esqs. (Naness, Chaiet & Naness, LLC)*, for the Respondent.

*Eric R. Green, Esq. (Spivak Lipton, LLP)*, for the Charging Party, Teamsters.

#### DECISION

##### STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This matter is before me on an order further consolidating cases, amendment to amended consolidated complaint and notice of hearing (the complaint), arising from unfair labor practice charges that International Brotherhood of Teamsters Local 1205 (the Union or the Teamsters) and Sharon Tarry (Tarry) filed against East End Bus Lines, Inc. (the Respondent or the Company), alleging violations of Section 8(a) (1), (2), (3), and (4).

Pursuant to notice, I conducted a trial in Brooklyn, New York, on July 11–14 and July 18–20, 2016, at which I afforded the parties a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The General Counsel and the Respondent filed helpful posthearing briefs

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful terminations of Sharon Tarry and Chiarina Santana, and to the other discriminatory actions that we took against Linda Griffin, Lori Monroig, Rosehanna Pometti, and Chiarina Santana, and WE WILL, within 3 days thereafter, notify Tarry, Griffin, Monroig, Pometti, and Santana's estate in writing that this has been done and that the terminations and other discriminatory actions will not be used against those employees in any way.

EAST END BUS LINES, INC.

The Board's decision can be found at [www.nlr.gov/case/29-CA-161247](http://www.nlr.gov/case/29-CA-161247) 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.



that I have duly considered.<sup>1</sup>

#### Issues

The General Counsel at the outset of the trial withdrew paragraphs 47 and 48 of the complaint relating to Harry Sherman. The General Counsel's brief does not address the 8(a)(1) allegations in paragraphs 11, 15, and 17; or the 8(a)(4) allegations in paragraph 54 relating to Tarry and Chiarina (Rina) Santana (Santana), and I therefore deem them withdrawn as well. Nor will I recite any statements that possibly violated Section 8(a)(1) if they are not alleged in the complaint or raised in the General Counsel's brief as evidence of animus.

Further, although the brief (at 28) contends that David Moriarty (Moriarty) was constructively discharged, this was never alleged as a violation, and such issue is not properly before me. Similarly, the brief discusses (at 26–27) the March 29, 2015 letter that the Respondent issued to Moriarty after he received verbal warnings that are alleged in the complaint, but it is not alleged as a separate violation and will not be considered. See *Postal Service*, 345 NLRB 1203, 1203–1204 (2005); *Cibao Meat Products*, 338 NLRB 934, 935 (2003), *enfd.* 84 Fed.Appx. 155 (2d Cir. 2004), *cert. denied* 543 U.S. 986 (2004).

The issues are:

<sup>1</sup> The Respondent's brief addresses the 8(a)(3) allegations but not the independent 8(a)(1) allegations.

- (1) Did Owner John Mensch (Mensch), on October 1, 2015, in his office, give Lori Monroig (Monroig) the impression that her union activities were under surveillance?
- (2) Did Mensch, on October 8, 2015, by text message, engage in surveillance of employees' union activities through an employee who was attending a union meeting?
- (3) Did Mensch, on about October 14, 2015, in the bus yard (the yard), give employees, including Monroig, the impression that their union activities were under surveillance?
- (4) Did Mensch, on about October 15, 2015, in the yard, give Linda Griffin (Griffin) the impression that her union activities were under surveillance?
- (5) Did Vice President Jennifer (Jen) Thomas (Thomas), on October 15, 2015, outside the yard, direct Tarry not to engage in union activities, to wit, handing out union cards, and threaten her with unspecified reprisals for doing so?
- (6) Did Mensch, on two occasions in October 2015, in the yard, threaten employees, including Monroig, with reduced work hours if they selected the Union as their bargaining representative?
- (7) Did Mensch, on about October 23, 2015, in the yard, impliedly threaten Santana with discharge for engaging in union activities, to wit, distributing union flyers?
- (8) Did Mensch, in November 2015, at the facility, impliedly threaten Griffin with reprisals for engaging in union activities?
- (9) Did Mensch, on about January 18, 2016, in the yard, give Karen Grigg (Grigg) the impression that her union activities were under surveillance?
- (10) Did Mensch, on February 3, 2016, at a special meeting that he called and held with employees at the Bellport Middle School:
- threaten to sell the business in order to avoid the Union?
  - impliedly threaten employees with job loss if they selected the union as their bargaining representative?
  - threaten employees with loss of benefits if they selected the Union as their bargaining representative?
  - encourage and suggest to employees that they participate in a committee to address wages, hours, and other terms and conditions of employment with the Respondent (the pay package committee)?
- (11) Did Mensch, on February 10, 2016, at a safety meeting of employees:
- impliedly threaten employees with job loss if they selected the Union as their bargaining representative?
  - threaten employees with loss of benefits if they selected the Union as their bargaining representative?
  - threaten employees with loss of company-wide seniority if they selected the Union as their bargaining representative?
  - encourage and suggest to employees that they participate in the pay package committee?
- (12) Did the Respondent, on February 26, 2016, the day of the election, direct Monroig to take a random drug test because of her union activities, including acting as an observer for the Union?<sup>2</sup>
- (13) Did Human Resources (HR) Director Jerry Kloss (Kloss), on February 26, 2016, during the election, engage in surveillance of employees' union activities by going inside the Union's mini-bus parked on a street outside of the facility?
- (14) Did Mensch, on April 8, 2016, at a safety meeting of employees, encourage and suggest to employees that they participate in the pay package committee?
- (15) Did the Respondent reduce the number of stops on Tarry's bus route on September 8, 2015; and change her bus from a "big bus" to a "mini-bus" and reduce her rate of pay on September 23, 2015, because Tarry engaged in protected concerted activity in December 2014?
- (16) Did the Respondent terminate Tarry on October 19, 2015, because she engaged in union and/or other protected concerted activities?
- (17) Did the Respondent issue Santana a written warning on October 8, 2015, a verbal warning on October 26, 2015, and a written warning on November 7, 2015; fail and refuse to pay her her full quarterly bonus on about December 23, 2015; and terminate her on May 3, 2016, because she engaged in union and/or other protected concerted activities?
- (18) Did the Respondent take away an assigned charter run from Monroig on October 16, 2015, issue her a verbal warning on October 19, 2015, and refuse to assign her charter work and midday runs since about October 19, 2015, because she engaged in union activities?
- (19) Did the Respondent issue Griffin a written warning dated October 30, 2015; place her on probation and refuse to pay her her quarterly bonus on December 23, 2015; and willfully misrepresent information submitted in about January 2016 to the state unemployment office in order to prevent her from receiving unemployment benefits, because she engaged in union activities?
- (20) Did the Respondent issue a written warning to Rosehana Pometti (Pometti) on November 19, 2015, because she engaged in protected concerted activity?
- (21) Did the Respondent issue four verbal warnings to Moriarty on March 11, 2016, because he engaged in union activities?

Settlement Agreement in Case 29-CA-143256,  
Complaint Paragraphs 24-28

On December 18, 2014, Tarry filed a charge in the above case, alleging, inter alia, that the Respondent terminated her on December 4, 2014, because she had engaged in protected concerted activity, more specifically, protesting and speaking to other drivers about the negative impact on them of the Respondent's decision to pay their 2014 bonus in January 2015

<sup>2</sup> This is alleged as 8(a)(1) interference, not as an 8(a)(3) violation.

rather than in December.

The Regional Director found merit to this allegation, and on March 24, 2015, approved an informal Board settlement agreement with a nonadmission clause (GC Exh. 33). It included provisions for Tarry's reinstatement and backpay, and one of the paragraphs of the notice to employees was that the Respondent would not "lay off employees because they exercise their rights to discuss wages, hours and working conditions with other employees, or bring these issues to us on behalf of themselves and other employees." The Region never withdrew approval of the agreement, and the General Counsel has not contended that the Respondent failed to comply with its terms.<sup>3</sup>

A settlement agreement with a nonadmission clause "may not itself be used to establish anti-union animus." *Steves Sash & Door Co.*, 164 NLRB 468, 476 (1967), enfd. in pertinent part 401 F.2d 676, 678 (5th Cir. 1968), quoting *Metal Assemblies, Inc.*, 156 NLRB 194, 194 fn. 1 (1965).

Nevertheless, although such a settlement agreement itself is not admissible evidence that a respondent violated the Act, *Steves Sash & Door Co.* also stands for the proposition that presettlement conduct underlying the settlement agreement is properly permitted into evidence as background evidence establishing the motive or object of a respondent in its postsettlement activities. See *Northern California District Council (Joseph's Landscaping Service)*, 154 NLRB 1384, 1384 fn. 1 (1965), enfd. 389 F.2d 721 (9th Cir. 1968); see also *Host International*, 290 NLRB 442, 442(1998); *Electrical Workers Local 13 (M.H.E. Contracting)*, 227 NLRB 1954, 1954 fn. 1 (1977). In other words, the facts underlying the allegations that were settled may be admitted into evidence and considered to shed light on postsettlement conduct. I note that both briefs specifically summarize the termination interview that Tarry had with Mensch on December 4, 2014, in a light favorable to their respective positions (GC Br. at 5; R. Br. at 18).

Consequently, I will consider the subject matter of the settlement agreement as background evidence.

#### Witnesses and Credibility

Unfortunately, Santana passed away the week prior to the opening of the trial. However, she had provided three affidavits to the Board (GC Exhs. 2, 3, and 4), which I admitted over the Respondent's objection. Rule 804 of the Federal Rules of Evidence relates to the unavailable declarant as an exception to the rule against hearsay, including Rule 804(b)(5), "Other Exceptions," which are not contained in Rule 807.

Rule 807 provides:

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804.

- (1) the statement has equivalent circumstantial guarantees of trustworthiness;
- (2) it is offered as evidence of a material fact;

<sup>3</sup> Tr. 570–571.

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

As to subparagraph (a), the Board has consistently held that the requirement of "equivalent circumstantial guarantees of trustworthiness" is met by an affidavit taken by a Board agent from a deceased witness. *Weco Cleaning Specialists, Inc.*, 308 NLRB 310, 310 fn. 7, 314–315 (1992); *Colonna's Shipyard*, 293 NLRB 136, 143 fn. 2 (1989); *Canterbury Gardens*, 238 NLRB 864, 868 (1978); *Prestige Bedding, Co., Inc.*, 212 NLRB 690, 701 (1974).

Thus, the Board generally receives such documents in evidence, with the caveat that such evidence "must be evaluated with maximum caution, only to be relied upon if and when consistent with extraneous, objective, and unquestionable facts." *Industrial Waste Service*, 268 NLRB 1180, 1180 (1984); *United Sanitation Service*, 262 NLRB 1369, 1374 (1982); *Custom Coated Products*, 245 NLRB 33, 35 (1979); *Colonna's Shipyard*, above. A similar rule of cautious scrutiny also applies to the testimony of witnesses concerning conduct of the deceased. *Colonna's Shipyard*, id.; *Sears, Roebuck & Co.*, 224 NLRB 558 (1976); *Goodwater Nursing Homes*, 222 NLRB 149, 149 fn. 2 (1976).

Regarding subparagraph (b), Santana was named in the amended consolidated complaint issued May 13, 2016, 2 months before the trial opened, and the General Counsel raised her death to opposing counsels in the pretrial telephone conference call that we had the week prior to trial, the same week that Santana passed away. Accordingly, I am satisfied that admission of her affidavits satisfies the requirements of Federal Rules 804 and 807, and I will weigh them in accordance with established Board precedent.

The following individuals testified:

The General Counsel called Mensch, sole owner and president, as an adverse witness under Section 611(c);<sup>4</sup> Union Vice-President Gary Kumpa (Kumpa); alleged discriminatees Griffin, Monroig, Moriarty; Pometti, who testified by videoconference, without objection;<sup>5</sup> and Tarry; and Drivers Grigg and Shawn Carey-Albano (Carey-Albano).

The Respondent called Vice President Thomas, Head Dispatcher Lorraine Giugliano (Giugliano); Safety Director Denise McGarty (McGarty); Jerri Alexander (Alexander) of HR; Safety Supervisor Joseph Vopat (Vopat); and, under subpoena,

<sup>4</sup> The Respondent's counsels chose not to ask Mensch any questions after the conclusion of the General Counsel's examination, and they did not call him as a witness in their case in chief.

<sup>5</sup> Technical difficulties interfered with the smooth flow of her hearing questions and giving answers—one of the problems that sometimes arise from using that mode of taking testimony.

Edward Nieves (Nieves), a medical assistant for Island Medical, a company with which the Respondent contracts to perform drivers' drug and alcohol tests.

At the outset, I note the well-established precept that a witness may be found partially credible; the mere fact that the witness is discredited on one point does not automatically mean that he or she must be discredited in all respects. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970). Rather, a witness' testimony is appropriately weighed with the evidence as a whole and evaluated for plausibility. *Id.* at 798–799; see also *MEMC Electronic Materials*, 342 NLRB 1172, 1183 fn. 13 (2004), quoting *Americare Pine Lodge Nursing*, 325 NLRB 98, 98 fn. 1 (1997), enf. granted in part, denied in part 164 F.3d 867 (4th Cir. 1999); *Excel Container*, 325 NLRB 17, 17 fn. 1 (1997). As Chief Judge Learned Hand stated in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), regarding witness testimony, “[N]othing is more common in all kinds of judicial decisions than to believe some and not all.”

Regarding Carey-Abano and Grigg, I take into account that “the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interest.” *PPG Aerospace Industries*, 355 NLRB 103, 104 (2010), quoting *Flexsteel Industries*, 316 NLRB 745, 745 (1995), enf. mem. 83 F.3d 419 (5th Cir. 1996). Thus, current employee status may serve as a “significant factor,” among others, on which reliance can be placed in resolving credibility issues. *Avenue Care & Rehabilitation Center*, 360 NLRB 152, 152 fn. 2 (2014); *Flexsteel*, *id.* Although Grigg was not good on dates, she was candid, as reflected by her admission that she used profanity at Mensch during an incident in January 2016. Carey-Abano also appeared candid. Their testimony was consistent with other credited evidence, and nothing leads me to believe that they were attempting to skew their answers for or against the Respondent. I therefore conclude that their testimony was reliable.

Nieves, the employee of a neutral third party, had very good recall of the incident involving Santana's drug test and no stake in the proceeding or other incentive not to testify truthfully. Accordingly, I find that his testimony, too, was reliable.

The Respondent did not call Charter Dispatcher ToniAnn Fiorello (Fiorello), Personnel Director Klauss, Safety Manager Helen Lachacz (Lachacz), Dispatcher Barbara Nunziata (Nunziata), Anthony Reid (Reid) (former director of the safety department), or Safety Supervisor Donna White (White) as witnesses. Our system of jurisprudence has what is called the “missing witness rule,” which provides that:

Where relevant evidence which would properly be part of a case is within the control of the party whose interest it would normally be to provide it, and he fails to do so without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him. 29 Am. Jur.2d §178.

Normally, an administrative law judge has the discretion to draw an adverse inference based on a party's failure to call a witness who may reasonably assumed to be favorably disposed to the party and who could reasonably be expected to corroborate

its version of events, particularly when the witness is the party's agent and thus within its authority or control. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006); see also *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977); *Underwriters Laboratories Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998). In that event, drawing an adverse inference regarding any factual question on which the witness is likely to have knowledge is appropriate. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enf. mem. 861 F.2d 720 (6th Cir. 1988).

Although the Respondent's counsel represented that White's sister was in hospice (Tr. 1435), he offered no documentation supporting that claim. In any event, the Respondent did not request a continuance so that White could testify at a later date. Nor did the Respondent show that it sought to secure Reid's presence, by subpoena if necessary.

Accordingly, the Respondent's failure to call the individuals named above leads to an adverse inference that their testimony would not have been favorable to the Respondent, and I credit the General Counsel's witnesses' un rebutted accounts of incidents in which those individuals were present, where the witnesses' accounts were otherwise credible.

In a similar vein, when a party does not question a witness about damaging or potentially damaging testimony, it is appropriate to draw an adverse inference and find that the witness would not have disputed such testimony. See *LSF Transportation, Inc.*, 330 NLRB 1054, 1063 fn. 11 (2000); *Asarco, Inc.*, 316 NLRB 636, 640 fn. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996). I do so here where Mensch offered no testimony to rebut various 8(a)(1) statements attributed to him by witnesses of the General Counsel. Similarly, Giugliano did not refute the testimony of Tarry and Monroig that she made statements explicitly or implicitly showing Mensch's animus toward them for their union activities. For example, Tarry testified that in the fall of 2014, Giugliano repeatedly stated that she was tired of Mensch accusing Tarry of bringing in (Amalgamated Transit Union) Local 1181 or that they were her friends. This un rebutted testimony of Tarry's contradicts Mensch's testimony that he had no idea if Tarry contacted Local 1181 or was involved with them.

Other factors also cause me to doubt Mensch's credibility. In demeanor, Mensch appeared defensive, irritable and often resistant to providing information. He was very vague, to the point of obvious evasiveness on numerous matters, including but not limited to his knowledge of employees' union activities, the meetings he called and held about unionization at Bellpoint Middle School, and the safety meetings at which he discussed the subject. Further, Mensch has a constant, part-time presence at the facility and testified that he can personally issue discipline if he is aware of a situation. Yet, when the General Counsel asked how many times he did so over the past year, he answered:

A: I have no idea.

Q: Was it—

A: Don't recall.

However, when I then asked if he recalled any, he replied

Pometti.<sup>6</sup>

Mensch denied using profanity at work. However, his testimony was contradicted not only by Tarry and Monroig but by Thomas, and he professed not to recall when asked if ever swore at Tarry.

In light of the ample evidence in the record that Mensch was very concerned about unionization efforts among the drivers, I do not believe his testimony that he had no conversations with Thomas about any specific employee supporting the Union. I also note that Thomas contradicted his testimony that he did not learn about Tarry's October 19, 2015 termination until after the fact.

For the same reason, I find completely unbelievable Giugliano's testimony that she, an admitted supervisor, never had a conversation with Mensch in which the Union was a topic of discussion. Furthermore, when I asked if she was aware that Mensch opposed unionization, she answered, "Actually, I'm just going to say—I'm going to say no. I'm going to say no. I kept myself out of it."<sup>7</sup>

Giugliano often appeared ill at ease when discussing the situations involving the alleged discriminatees. Furthermore, her testimony on when she first learned Tarry and Monroig were union supporters was inconsistent, equivocal, and impeached by documents of record—contrary to her confident and straightforward testimony in addressing general policies and procedures pertaining to drivers. Her testimony was particularly suspect inasmuch as she was their first-line supervisor.

Thus, she initially testified that she learned that Monroig was a supporter of the Union "a couple of months ago" (or in May 2016); then said, "No, when the Union started coming to the thing . . .;" and then that it was in 2016.<sup>8</sup> However, after being shown General Counsel's Exhibit 17, Monroig's October 16, 2015 warning on which Monroig wrote on her that work was taken from her "due to union involvement," Giugliano admitted that Monroig told her so at the time, thus admitting knowledge of Monroig's union activities by October 16, 2015. I do not believe Giugliano's testimony that she never discussed that discipline with either Mensch or Thomas.

Similarly, Giugliano's testimony that she first learned Tarry was involved with the Union "sometime this year"<sup>9</sup> was unbelievable, especially since it is undisputed that in October 2015, Thomas told Tarry not to distribute union literature at the gate, and Tarry was fired that month. When the General Counsel pointed out that Tarry was fired in October 2015, Giugliano equivocated, "I guess that's when I found out she was with the Union. I don't know. No, I didn't know she was involved with the Union back then. No, I didn't."<sup>10</sup> Moreover, as previously noted, Giugliano did not deny certain statements that Tarry and Monroig attributed to her that showed animus by Mensch.

In sum, I do not find that Giugliano was candid when it came to matters regarding the Union and the disciplines of the discriminatees in which she was involved, or Mensch's involve-

ment in those disciplines.

Thomas was partially credible, for example, in testifying—contrary to Mensch—that he uses profanity with drivers and that they use it toward him and toward each other. She also testified that she could not recall any times that Mensch has initiated discipline other than when Santana handed out union literature and Pometti told other drivers over the radio that their health insurance had been canceled. She also conceded that she knew Santana was on dialysis on the day of Santana's unsuccessful random drug test.

On the other hand, Thomas displayed observable nervousness at certain points when addressing matters pertaining to Tarry's disciplines. Her equivocal testimony<sup>11</sup> regarding whether the Company has a policy of getting an employee's version before issuing discipline was inconsistent with Mensch's and Vopat's testimony that this has been the standard practice. In this regard, she appeared to be tailoring her testimony to comport with Vopat's earlier testimony as to why Tarry was not interviewed about the incident that led to her discharge on October 19, 2015. I note that she was the Respondent's designated representative present throughout the proceeding.

And, as with Giugliano, I suspect that Thomas underplayed the role that Mensch played in the discipline imposed on at least some of the alleged discriminatees, and his motivations. This conclusion is reinforced by the circumstances surrounding how Vopat carried out the investigation of the complaint against Tarry for unsafe driving on October 16, 2015. As I will later discuss, Vopat's depiction of his communications with Thomas concerning this incident did not fully mesh with her description of them.

According to Vopat, Dispatcher Nunziata (who was not called as a witness) informed him at about 4 p.m. that day that a motorist (Toni Gerwycki (Gerwycki)) had called and told her that the operator of bus 1033 "was following her very closely, beeping a horn at her, and that at one point went into oncoming traffic over a double yellow line, passing her, and then swerving back in front of her."<sup>12</sup> However, the message that Nunziata took over the phone and then provided him (R. Exh. 18) was much more abbreviated, simply stating, "Bus driver went into incoming traffic to pass (her) motorist. She then swerved in front of her." I find it implausible that Nunziata would have related to him orally more information than she had written down, causing me to conclude that Vopat was deliberately embellishing what was reported to him. I further note that the investigation report that Vopat completed on October 19, 2015 (R. Exh. 21), recommending Tarry's discharge, also added details not contained in Nunziata's note of Gerwycki's phone call: "Dispatch received a phone call from a frantic motorist . . . who states that bus #1033 was behind her went into oncoming traffic passing her on left and then swerved back to the right almost hitting her veh." This also indicates an intention to exaggerate the egregiousness of Tarry's conduct.

According to Vopat, he and other members of the safety department reviewed the SD card or videoclip from Tarry's bus

<sup>6</sup> Tr. 126–127.

<sup>7</sup> Tr. 1299.

<sup>8</sup> Tr. 1281–1282.

<sup>9</sup> Tr. 1295.

<sup>10</sup> Tr. 1296.

<sup>11</sup> At Tr. 1467–1468.

<sup>12</sup> Tr. 788.

and determined that she had gone over a double yellow line and narrowly avoided a head-on collision. He then advised Thomas of his findings, and she instructed him to continue his investigation over the weekend, go over everything, and let him know his findings. Vopat “spent the rest of the weekend”<sup>13</sup> reviewing the videoclip and checking maps and he concluded that in addition to crossing the double yellow line, Tarry had also been speeding. On Sunday night, he called Thomas with these results and recommended that Tarry be terminated. She gave him authorization to do so. Vopat’s spending hours over the weekend reviewing bus records and maps strikes me as suspicious, in the absence of evidence that he normally spends his weekends investigating safety complaints.

There were also a number of inconsistencies in Vopat’s account of what occurred, aside from the apparent discrepancy between Nunziata’s written note and what he said she related to him about Gerwycki’s complaint. Vopat testified that Thomas, to whom he reported, gave him authority to terminate Tarry on Monday morning. However, he further testified, that on Monday morning, he shared the results of his investigation with Donald Shukri (Shukri) of the safety department, (who had not been in the previous Friday), to see if he agreed that they should move forward with Tarry’s termination. I am perplexed as to why Vopat needed Shukri’s approval when Thomas, Mensch’s second in command, had already instructed him to go forward with the discharge. Vopat’s explanation that he wanted to confirm with Shukri “just in case I missed something or maybe I was wrong, get his opinion, and then we could have delayed the proceedings”<sup>14</sup> makes no sense in light of the fact that Vopat, by his own testimony, had already thoroughly investigated the occurrence, recommended to Thomas that Tarry be terminated without delay, and had Thomas’ concurrence.

This testimony is particularly puzzling when Vopat failed to even talk to either Tarry or Gerwycki prior to terminating Tarry. Notable in this regard was his following testimony:<sup>15</sup> (Emphasis added)

Q: Prior to issuing a discipline to any employee, you get their side of the accusations?

A: Yes, **always**.

Q: Do you get a written statement from them?

A: I **always** give people the opportunity to write their side of the story down on any discipline that I give out.

Vopat’s explanation for why he did not interview Tarry before terminating her was that “I felt I didn’t need to due to all the other evidence that I had.”<sup>16</sup> Thus, Vopat admittedly violated what he himself said was his policy. And, when driver Joan Perry was accused by a parent of speeding and almost striking his children while they were waiting at the bus stop on November 3, 2015, the safety department did interview her after viewing the video clip and observing that she had engaged in dangerous driving, and she was suspended pending the re-

sults of the investigation (see R. Exh. 24).

Further, Vopat testified that only after Tarry’s termination did he get a statement from Gerwycki to include in the investigation. His purported reason for doing so was curious, to say the least:

Q: [I]f you did not request a statement from the parent with respect to Ms. Perry, why did you request a statement from Ms. Gerwycki?

A: Because initially there was a confusion about where the incident actually took place. I wanted to narrow that down.

....

Q: Why did you solicit that statement after Ms. Tarry was already discharged?

A: I wanted to have her statement on file just to confirm that we were not mistaken on the location where this incident happened.<sup>17</sup>

Moreover, despite first testifying that he obtained a statement from Gerwycki, Vopat later testified that he kept no notes of his conversation with her, without offering an explanation for his failure to do so, and the Respondent provided no statement from her at trial.

In sum, Vopat presented an inconsistent, illogical, and incredible account of his investigation into the October 16, 2015 incident involving Tarry.

McCarty, who offered limited testimony relating to drug testing and, in particular, Santana’s termination, was generally credible, with the exception of the contradictory testimony that she offered regarding her instructions from Thomas. She first testified that Thomas instructed her to terminate Santana immediately but later testified that she did not believe that Thomas told her to inform Santana that she was discharged. Moreover, her initial testimony that Thomas instructed her to terminate Santana immediately was not consistent with her testimony that in her first conversation with Santana on May 3, 2015, she stated that Santana was being suspended pending further investigation.

Alexander offered testimony related to Griffin’s unemployment application. She testified in a straightforward manner and offered plausible testimony that was not contradicted by other evidence of record. Accordingly, I credit what she said. The same holds true for Union Vice President Kumpa.

The alleged discriminatees were for the most part credible, with exceptions described below. They generally had good recall, answered questions readily and without hesitation, and were internally consistent and not inconsistent with one another.

Tarry had very good recall, answered questions readily and showed candor in most of her answers. For example, she testified that when Giugliano told her on October 30, 2014, that she could not distribute Halloween candy on the bus, she admittedly replied, “I don’t care if I get fired if I hand them out.” As another example, when Mensch told her to “get the fuck off my property, you’re fired!” in December 2014, she admittedly swore back, “[Y]ou’re a fucking asshole!” Finally, she admit-

<sup>13</sup> Tr. 802.

<sup>14</sup> Tr. 814.

<sup>15</sup> Tr. 858.

<sup>16</sup> Tr. 868.

<sup>17</sup> Tr. 870–871.

ted both at trial and to Vopat on October 19, 2015, that she had been speeding on October 16.

In contrast to her general confident demeanor while testifying, Tarry appeared evasive when addressing the incident of October 16, 2015, and I do not credit her denial that she crossed over a double yellow line that day. The videotape that was viewed at trial (Jt. Exh. 2) does appear to show that she did so, and the General Counsel has not disputed its authenticity or accuracy. However, where that occurred is not clear inasmuch as the safety department's letter recommending her termination (GC Exh. 40) states that the motorist reported the incident occurred on County Road 51 (consistent with Dispatcher Nunziata's note, GC Exh. 18), but the parties stipulated that County Road 51 has no double yellow line, and the Respondent contends that she crossed over the double line on Lake Avenue. Regardless of locale, it was a serious traffic violation. Moreover, although Tarry denied driving on Lake Avenue that day, GPS records (GC Exh. 41) show otherwise.

Monroig was generally quite credible, and her accounts of conversations with management were very consistent on direct and cross-examination. However, her testimony that she never received any disciplines prior to the Union's organizing campaign in the fall of 2015 was refuted on cross-examination, when she acknowledged receiving a warning, suspension, and loss of her package bonus in January 2014, for a safety violation (R. Exh. 4).

In evaluating Pometti's credibility, I take into account the technical difficulties that arose during her video conference testimony, which interfered with the smooth flow of questions and answers. In any event, her testimony was confusing about the number of conversations she had with Mensch about using her bus radio on November 15, 2015, to tell other drivers that their health insurance benefits had been canceled, as well as their dates and when Mensch yelled at her.

Nonetheless, the comments that Pometti wrote on General Counsel's Exhibit 12, the written warning that she received on November 19, 2015, for improper use of the two-way radio, support her testimony that Mensch yelled at her and told her to give the radio policies to the Teamsters when he met with her on November 15. Mensch did not specifically deny this. I also note Pometti's candor in characterizing as "very nice" or "very cordial" the tenor of her conversation with Mensch in the first week of November 2015, in which he stated his impression that she was for the Teamsters.<sup>18</sup> Taking these factors into account, I find reliable what Pometti wrote on the warning.

Moriarty also was not fully credible, in particular regarding his conversations with Dispatcher Bryan Blumberg (Blumberg) after Moriarty decided on his own volition that he did not need to start at 5:30 a.m. but could start at 5:45 a.m. and still do his route. Thus, Moriarty offered conflicting testimony about what he told Blumberg the first day that his self-initiated change in time resulted in his being late on his a.m. run. He first testified that he told Blumberg that he thought he could have made it if he had not been delayed at a train crossing, but then testified that he told Blumberg that he did not think the change was going to work. Moreover, his testimony that Blumberg resisted

his going back to his original, earlier starting time makes no sense when Moriarty was the one who initiated it.

Finally, Santana's affidavits must be considered in lieu of her testimony. To the extent that there are inconsistencies between her affidavits and Nieves' testimony, I credit the latter because of his neutral status and good recall. I also take into account that Santana was understandably distressed on the day she went for the drug test and therefore less likely to have recalled it accurately and dispassionately. Other germane statements made in her affidavit are generally quite consistent with other credited testimony and documents of record, and I credit them. In this regard, I credit her affidavits as far as statements she attributed to Mensch, drawing an adverse inference against him for his failure to deny making them.

#### Facts

Based on the entire record, including the pleadings, testimony of witnesses and my observations of their demeanor, documents, and the parties' stipulations, I find the facts as follows.

#### The Respondent's Business Operation

At all times material, the Respondent has been a domestic corporation with an office and place of business in Medford, New York (the facility), engaged in school bus transportation services in Suffolk County, New York. The Respondent admits jurisdiction as alleged in the complaint, and I so find.

The Company has been in existence for approximately 7 years. Mensch is the Company's president and sole owner. His father previously owned the business under another name, and about 15–20 of the Respondent's current employees worked for the predecessor company. Mensch oversees the Company's operations with the assistance of at least 10 managerial employees, and he is normally at the facility Monday through Friday on a part-time basis. Vice President Thomas is directly under him, and other management and supervisors, including Head Dispatcher Giugliano and Safety Supervisor Vopat, also report to her. The dispatch office adjoins the drivers' room and is separated from it by a glass partition. Thomas' office and HR are in a different building.

Most of the Company's business is with public school districts in Suffolk County, New York, but its customers also include parochial schools and other private parties. The Company provides a range of services to students during the school year, including home to school; in-district and out-of-district special education; homeless children; and after school, charters, field trips, and sporting events. In addition, the Company provides transportation to summer school and summer camps.

The Company employs a total of approximately 300 employees, of whom about 200 are full-time or part-time drivers, and about 60 are matrons (aka monitors, escorts or driver's assistants), who ride with the bus drivers and help them on troubled or special needs routes.

The Company has approximately 200 vehicles, which are parked in the bus yard (the yard), as distinguished from the parking lot where employees park their personal vehicles. About half of them are "big buses" (hereinafter buses) which hold 66–72 passengers and have air brakes; and the other half, "mini-buses" or vans (hereinafter vans), which hold about 16–19 passengers. Driving a bus requires a class B commercial

<sup>18</sup> Tr. 1024–1025.

driver's license (CDL), as opposed to driving a van, which requires a Class C CDL. Class B license holders can drive vans, but class C licensees cannot drive buses. Only a few of the van drivers have the class B CDL. The Company pays bus drivers a higher hourly wage than the van drivers.

Drivers typically keep their routes year after year unless the number of students changes. Mensch testified that he is involved in specific driver assignments only if the school district gets involved and wants or does not want a particular driver; otherwise, their assignments are "completely at the discretion" of Giugliano, who goes to Thomas if there are any issues that she cannot handle.<sup>19</sup>

Giugliano testified in detail about how routes are set up each school year. A school district provides a list of students, which she inputs into a software program called Versitrans. Versitrans generates maps placing students in their particular schools, and Giugliano uses them to create routes. Special needs children are put on vans, and other students on buses or vans depending how many students are in the school and the area.

After a route is determined, Giugliano decides how many hours (package hours) it should take the driver, starting with the computer-generated estimated length of time. Package hours range in 15-minute increments from 4 to 6 hours daily. A typical package is 6 hours, three in the morning, and three in the afternoon, to a high school, middle school, and elementary school. A package can also be one private school. The employee handbook (Jt. Exh.1) (the handbook) does not mention seniority. However, drivers who drove for the company when it was operated by Mensch's father are considered "senior drivers," and they usually pick and retain their routes from year to year, get bigger bonuses (quarterly and attendance), and generally have 30 hours as their weekly package.<sup>20</sup>

Because the computer-generated routes are not always accurate, a driver does at least one dry run (on an empty bus) shortly before school starts and lets Giugliano know if the route will be longer or short. The driver can also suggest route changes, such as making a turn on a different street.

"Extra work" is anything other than a driver's package. This includes midday runs between the normal a.m. and p.m. routes, late runs, and charter runs. Midday runs are for students who go to special programs during the midday hours, and late runs are for students who stay after school, such as for intramural sports. In making those assignments, Giugliano tries to equalize drivers' hours and avoid the Company having to pay overtime. Late runs are paid fixed amounts.

Charter work is for sports and special events trips. Some drivers are hired solely for charters and do not have regular routes. There were about 10 of them in the 2015–2016 school year, but the number varies yearly. Other drivers do charter work only if the regular charter drivers are not available and there is no interference with their regular routes. Charter drivers have their own dispatcher, formerly Nunziata and now Fiorello, who is primarily responsible for their assignments. Giugliano assists the charter dispatcher when needed. As opposed

to route drivers, charter drivers are paid only for the actual hours worked.

Since in about August 2015, almost all of the buses have two-way intercoms (radios), by which dispatchers communicate with the drivers while the latter are on their buses, on matters pertaining to scheduling and routing. When many of the buses did not have two-way radios, their communications were by cell phone. The bus drivers are on a different frequency than the van drivers. Communications between a driver and dispatch are heard by everyone on that frequency.

Most of the buses are equipped with video chips or SD cards, which provide a videotape of what occurs when they are driven. The SD card comes from the camera of the bus and can be inserted into a computer to view the videotape. Some of the buses are equipped with GPS, which monitors both where the bus goes and its speed. When a driver goes over 55 mph, or whatever the speed is set, the software sends an alert that pops up on the dispatch screen. Drivers have received written disciplines for getting three or four such speed alerts.

The handbook states (Part 4 at 10) with regard to discipline:

Disciplinary action may include a verbal warning, written warning, and suspension with or without pay, loss of monthly bonuses, attendance incentive and/or discharge. The appropriate disciplinary action imposed will be determined by the company. The company does not guarantee that one form of action will necessarily precede another.

Mensch, Thomas, and Vopat all testified that the Company follows a progressive discipline procedure. Depending on the seriousness of the violation, the first step is a verbal warning, and more than one warning can be issued at one step before stronger discipline is imposed. The policy is that an employee is asked his or her version of events when an investigation is conducted and before disciplinary action is taken.<sup>21</sup>

For the 2015–2016 school year, the Company made a number of changes in pay and compensation (see GC Exh. 13, pay overview summary sheet). The bonus program was changed to three quarterly bonuses based on the school year calendar. Varying deductions or strikes are made for unexcused absences, policy violations, missing safety meetings or state-required refresher courses, and trip violations (missing or incomplete trip sheets). A first strike causes a loss of a portion of the quarterly bonus, a second strike a larger loss, and a third strike the entire bonus.

Additionally, a third strike results in a driver being placed on probation in terms of receiving bonuses for subsequent quarters. Thus, if the driver receives an additional strike within the quarter for which he or she has lost the entire bonus, his or her ineligibility for the bonus will be extended. A driver on probation at the start of the quarter is ineligible for that quarter's bonus. Verbal warnings do not negatively impact bonuses.

The Company's drug and alcohol policy (R. Exh. 67) provides for five types of drug testing for drivers, pursuant to Department of Transportation regulations: pre-employment, return to duty testing, random, reasonable cause, and post-accident. The Company also requires that drivers take a drug and alcohol

<sup>19</sup> Tr. 48.

<sup>20</sup> Tr. 136–137 (Mensch), 1276–1277 (Giugliano).

<sup>21</sup> Tr. 133 (Mensch), 858 (Vopat).

test in connection with their state-required annual physical examination. Federal and state laws dictate what percentage of drivers needs to be sent for random drug tests, either urine or blood alcohol, each quarter.

#### Organizing Efforts at the Facility

For approximately 3 weeks in October 2014, about four representatives from Amalgamated Transit Union Local 1181 (Local 1181) handed out union cards and literature to drivers at the main gate they used. On one occasion, they put literature on the seats of the school buses.

The Teamsters' organizing campaign began in October 2015. During this same period, Transit Workers Union of America, Local 252, AFL-CIO (Local 252) also was involved in organizing the Respondent's employees. The union activities of the alleged discriminatees will be described when addressing the facts regarding the 8(a)(3) allegations concerning them.

On January 25, 2016, then Union President Timothy Lynch, Kumpa, and about 20–25 employees, including Monroig, Moriarty, and Santana, went to the main office at the facility and asked to speak to Mensch. They were told he was not available, and they met with Thomas. The Union demanded recognition and presented a list of employees. Thomas stated that she would give the list to Mensch.

The Union filed a petition that day, in Case 29-RC-168266, seeking to represent a unit of all full-time and regular part-time drivers, monitors, mechanics, dispatchers, and maintenance workers employed [at the facility], excluding all other employees, watchmen, office clerical employees, professional employees, confidential employees, and supervisors as defined in Section 2(11) of the Act.

An election was held on February 26, 2016, with Local 252 on the ballot as Intervenor. Monroig and Moriarty were the Union's observers. The General Counsel alleges that the Respondent committed two independent 8(a)(1) violations that day. I will address the one involving Monroig when I recite the facts relating to the 8(a)(3) allegations involving her. The other one is as follows.

On the day of the election, the Union parked a small mini-bus with across the street from the facility. It had eight windows, spray painted black and obstructing visibility to look inside, and "Teamsters organizing for power" painted on the side. After the preelection conference, Kumpa and two other union representatives, along with three drivers, were in the mini-bus. The service door was open, and a man who Kumpa later learned was Personnel Director Klauss, walked up the ramp and said, "[H]ey, I want a Teamsters shirt and a button."<sup>22</sup> Kumpa heard mumbling behind him that the man worked in the office and told him to get out. Klauss said that all he wanted was a shirt and a button.

The Respondent's request for review of the Regional Director's August 3, 2016 decision and certification of representative, and the Union's opposition thereto, remain pending before the Board.

#### Mensch's Meetings with Employees Regarding Unionization

The General Counsel contends that at three meetings, on

<sup>22</sup> Tr. 236.

February 3 and 10, and April 8, 2016, Mensch made certain statements that violated Section 8(a)(1) and (2) by encouraging employees to participate in a pay package committee that the Respondent had created the previous summer to revise the compensation package (see GC Exh. 14; Tr. 334).

The problem for the General Counsel is that there is no allegation in the complaint that the Respondent's actual formation and administration of the pay package committee violated Section 8(a)(2). Thus, this was not an issue on which the Respondent was asked to respond or given an opportunity to defend. Had there been such an allegation, we cannot assume that the Respondent's counsels would not have explored the matter further with Mensch, who testified on the subject on Section 611(c) examination, or called other witnesses. See *Coppinger Machinery Service*, 279 NLRB 609, 610 (1986); see also *Teamsters "General" Local 200*, 357 NLRB 1844, 1844 (2011), affd. 723 F.3d 778 (7th Cir. 2013).

I cannot simply accept the bare assertion of the General Counsel (Br. 37) that "there is no doubt that it was an employer-dominated committee such as is prohibited by Section 8(a)(2)" as a substitute for evidence. Without a finding that formation and administration of the pay package committee was unlawful, there is no necessary predicate for finding that Mensch's solicitation of employees to participate therein was a violation. Accordingly, I recommend that these allegations be dismissed. In light of that conclusion, I need not set out the statements that Mensch made concerning the pay package committee at the meetings, or the circumstances of the April 8 meeting, which involves only that allegation.

#### A. Bellport Middle School Meeting, February 3, 2016

That evening, Mensch called and held a voluntary meeting with approximately 100 employees concerning the Union and Local 252. Monroig recorded the meeting on a micro recorder on her cell phone, and the recording (GC Exh. 18), as well as written excerpts that the General Counsel prepared (GC Exh. 19), were admitted without objection.

The General Counsel contends that the following statements of Mensch violated the Act by threatening to sell the business, impliedly threatening the employees with job loss; and threatening loss of benefits:<sup>23</sup> [In this and other meetings, I am quoting the General Counsel's excerpts verbatim and without regard to punctuation or grammar.]

Options... you have an option, you can go with 1205, 252 or nonunion ... but guess what, I have options. I can accept the vote, I can negotiate in good faith with any union. I can negotiate with you guys nonunion, change the package, I can sell the contract, I can keep the contract, I can do anything you have options for, and I have options, it is what it is, that's life.

<sup>23</sup> The GC's Br. (at 34) also avers that other statements at this and the February 10, 2016 meeting amounted to the threat of "bargaining from scratch," but this is not alleged in the complaint, and the General Counsel has never moved to amend the complaint to include this as a specific violation. Accordingly, my finding such an additional violation would be inappropriate. See *Teamsters "General" Local 200* and *Coppinger Machinery Service*, supra. Therefore, I am omitting passages of what Mensch said in those meetings that go to "bargaining from scratch."

If you remember United Bus, United Bus was a union contract, they sold off to Suffolk Bus...

It's very simple. There's about 200 busses plus at South Country alone, there's 200 busses plus with William Floyd. I could ship all those busses to William Floyd, I could, that's my option. I could sell the contract without [unclear]. And I could guarantee you jobs with 1205 with Baumann, I could guarantee you jobs with 252 with Suffolk or myself. That's my option. I don't want to do it, I'm not putting that on the table... [unclear] I'm okay with the vote, I'm not losing sleep over it.

#### *B. Safety Meeting, February 10, 2016*

That day, Mensch conducted a meeting with about 30 employees in the safety trailer. Driver Carey-Abano recorded the meeting on his cell phone. The recording and selected excerpts that the General Counsel transcribed (GC Exhs. 27 and 28) were admitted without objection.

The General Counsel avers that the following statements of Mensch constituted unlawful threats:

If Medford becomes unionized, it's a totally separate bargaining unit. No matter what union it is [interruption with side chatter] . . . so what happens is, now that you have a separate bargaining unit, no matter what union it is, I don't care what union or what local it is, now you have to make a seniority list. The seniority list goes by East End Bus Line because East End Bus Line is the company that's being unionized. Not [Montauk]. So, now you have the luxury of me giving you that time counted towards your time with the company. So if you've been working for East End for 5 years let's say, I'm just picking on you (employee says, "yeah"), and you worked for my father for 15 years, technically, I consider you a 15-year employee, so you get certain benefits from me. If the Union gets in you're a five-year employee. So now, on the list, if someone has worked here at East End for 7 years, they're above you. I legally cannot count [Montauk] Buses' time to a seniority list if I'm union. If I'm nonunion, then that's, I can do that.

And I said at the meeting, I have options too, just like you have options. Listen, you guys would do the biggest favor for me ever, I would love you dearly, because guess what, if I sell, which I have an option to sell my contracts, everybody does it, United sold to Suffolk Bus (an employee says, "then we'd really be screwed"), if I sell South Country to Baumann, guess what?, you automatically become 1205 . . . If I sell Longwood to Suffolk, they do the big busses, that's 252, and guess what, at the end of the day, I don't have to sell a bus, I'll keep all my busses, and I'll put my busses in my [unclear]. Done. That's my option, I don't want to do it, but you have options, I have options. It's not a one-way game, it's negotiations . . .

#### *Tarry's Employment Prior to 2015*

Tarry began her employment in December 2010. For the first year, she drove a van, thereafter a bus. Her work schedule was generally 5-1/2 package hours from Monday through Friday.

For approximately 3 weeks in October, 2014 (all dates hereinafter in this section occurred in 2014 unless otherwise indicated), about four representatives from Local 1181 handed out union cards and literature to drivers at the main gate they used. On one occasion, they put literature on the seats of the school buses.

During that period, Mensch frequently spoke to Tarry, mostly in the parking lot where drivers parked their personal vehicles, but sometimes outside of the drivers' room. He accused her of bringing Local 1181 to the gate and stated that they were her friends. She denied both accusations.

On the last occasion when Mensch spoke to her, they were outside the drivers' room with other drivers present. Mensch said, "[O]h, your friends are at the gate."<sup>24</sup> She responded that they were not her friends, and if she was going to bring in a union, she would bring in the Teamsters. Another driver (Brenda, last name unknown) turned to Mensch and said that they did not need a union. Tarry turned to her and said, "[Y]es, we do, open your eyes. John changes his mind like he changes his underpants," and Mensch "stormed away."<sup>25</sup>

During this period, in the drivers' room, Giugliano told Tarry on numerous occasions that she was tired of hearing Mensch accuse her (Tarry) of bringing in Local 1181 or that they were her friends. In the last conversation, Giugliano added that she knew Tarry would not bring in a union.

Tarry's termination on December 4 was the subject matter of the charge and settlement agreement previously described.

The General Counsel has contended that because of Tarry's expressed and perceived union sympathies, as reflected by her above conversations with Mensch and Giugliano, the Respondent issued her: (1) a discipline on October 30, regarding giving Halloween candy to children who rode her bus; and (2) a discipline on November 4, for announcing that she would pass out candy to children on her own time and for having been videotaped driving the bus with her knee.

Nothing in the charge, as described in paragraph 24 of the complaint, or in the settlement agreement had any reference to these disciplines or to her express or perceived union sympathies motivating the Respondent to take action against her. However, because the Respondent relies on these prior disciplines as part of its defense to Tarry's October 19, 2015 termination (see R. Br. at 16-18),<sup>26</sup> I will therefore determine whether they were properly imposed or were based on unlawful motivation.

The handbook (Part 5 at 25) provides, inter alia, "Do not give passengers food, candy, cake, ice cream, etc. as passengers might be allergic. Bribery will not help you control passengers and it may harm them."

Every year prior to 2014, Tarry would give out bags of candy to students five times yearly, on Halloween, Christmas, Easter, Valentine's Day, and at the end of the school year, if their parents had given her permission. Tarry had no direct knowledge that management knew she did this, although Giugliano did see her carrying candy.

<sup>24</sup> Tr. 530.

<sup>25</sup> Id.

<sup>26</sup> See also Tr. 1361 (Thomas).

Giugliano admittedly was aware prior to 2014 that drivers in years past had given out Halloween candy, but prior to Halloween 2014, she never discussed this with drivers or posted anything thereon. When I asked whether there was a reason that she started doing this in 2014, she replied that the school district was now emphasizing the dangers of peanut allergies, “So now we’re really enforcing it.”<sup>27</sup> She offered no specifics or anything from the school district confirming this.

On October 28, Tarry and another driver were in the drivers’ room, discussing giving out candy, when Giugliano told them they were not allowed to do so. Tarry replied that they did this every year. Giugliano had Safety Director Reid come over, and he said that he would check. Tarry repeated what she had told Giugliano and stated that she already had permission from children’s parents to hand out candy to them as they were getting off the bus on the afternoon run.

On the morning of October 30, Tarry saw, for the first time, a sign posted in the drivers’ room that said employees were not to give out Halloween candy. She asked Giugliano what she would like her to do with 100 bags of candy. Giugliano replied that she did not know. Tarry responded that she had purchased the candy and admittedly said, “I don’t care if I get fired if I hand them out.”<sup>28</sup> Later that day, Giugliano gave her an unspecified written warning for failure to follow instructions, safety violation, and insubordination, citing Tarry’s above comment (GC Exh. 29).

Either that afternoon or the following afternoon, Tarry announced to students on the bus that she was not authorized to give them candy while on the school bus but would be in their neighborhood on the evening of October 31, in her own blue mini-van, trick-or-treating with her daughter, and would give them candy if she saw them on the street. She did not hand out candy on duty.

Thomas testified that she was not involved in the decision to issue the October 30 warning but later learned of it and asked if anyone had followed up to see if Tarry had actually given out the candy. The answer was no, so she had the video or SD (Scan disk) card pulled from the bus. She viewed it and heard Tarry announce the above. As the same time, she observed Tarry putting her hair in a ponytail and driving with no hand while there were students on the bus. She advised Giugliano and told the safety team that they needed to view the SD card and then issue Tarry a written discipline for safety violations: driving with no hands on the wheel, giving out candy, and advising students of what kind of car she drives and that she was going to be in their neighborhood.<sup>29</sup>

Tarry testified without controversy that on November 4, Reid called her into the safety office. Lachacz, current safety manager, was also present. He gave Tarry a verbal warning for announcing that she would be in the students’ neighborhood trick-or-treating. He gave her a second verbal warning because they had seen from the videotape that she was playing with her hair and driving with her knee while operating the vehicle. She

admitted that she often guided the steering wheel with her knee but had both hands on the wheel, but denied that she had combed her hair while driving. She asked if he could produce the video, but he replied that it would take too much time. Tarry never saw the video.

General Counsel’s Exhibit 30 is a warning to Tarry dated November 6, signed by Lachacz (but not Tarry), for driving with her knee while combing her hair. However, Tarry testified that she never saw it until 2016, in connection with a charge that she filed with the State Division of Human Rights, and I credit her un rebutted account. I further note that it cites only Tarry’s driving with her knee and says nothing about the other infractions that Thomas testified warranted written discipline.

On November 5, Tarry was in the yard when Mensch called her over. He yelled at her that it was a crime to announce to the children on her school bus that she would hand out candy through her own personal vehicle, and to drive the bus with her knee. She replied that she did not know it was against the law. He repeated that it was a crime and to “get the fuck off the property.”<sup>30</sup>

On or about November 14, Tarry contacted Kumpa and began talking to other employees about organizing. There is no evidence of employer knowledge of this.

In previous years, the incentive bonus was paid before Christmas. On December 3, the Respondent posted notices in the drivers’ room that there would be no change in regard to weekly pay dates but that the Respondent would pay the \$350-incentive bonus to eligible employees on January 2, 2015 (GC Exh. 31). That afternoon, Tarry went to the payroll office, spoke with Danielle LaVallee (LaVallee), and expressed concern that this would have a negative impact on the drivers receiving unemployment. The sign was removed later that day.

The next day, the Respondent posted a revised notice, adding, “This will not affect your unemployment benefits that you apply for during the non-guaranteed week(s).” (GC Exh. 32). Tarry soon after called the unemployment office. After returning from her afternoon route that day, she spoke about the notice to about six other drivers in the drivers’ room. She told them that the unemployment office had told her that although it would not affect their collecting unemployment in 2014, it would be a problem for them in 2015. Giugliano, who was in the dispatch office, announced that she would be right back. Upon her return, she told Tarry that Mensch wanted to see her.

Tarry then met with Mensch and LaVallee in Mensch’s office. Mensch stated that she did not know his financial situation. She responded that he had never done this before, and many of the drivers depended on their bonuses for Christmas. LaVallee stated that employees could collect unemployment benefits while receiving both their regular paychecks and the bonus. Tarry stated that she had called the unemployment office. Mensch yelled that she was fired but could collect unemployment. Tarry responded that he had to be kidding and that he could not stand a woman standing up to him. Mensch got red in face and yelled, “[G]et the fuck off my property. You’re

<sup>27</sup> Tr. 1292.

<sup>28</sup> Tr. 539.

<sup>29</sup> See R. Exh. 61, a November 6, 2014 email from Thomas to the safety department.

<sup>30</sup> Tr. 549.

fired!," and she yelled back, "[Y]ou're a fucking asshole!"<sup>31</sup>

Tarry did not work after that conversation. The following Friday, she received a termination letter dated December 8 (GC Exh. 15), along with her final paycheck. It stated that her position was terminated as of December 4 "due to lack of work."

#### Tarry's Employment in 2015

Pursuant to the terms of the settlement agreement previously described, Tarry was reinstated on March 30, 2015 (all dates hereinafter in this and the following section occurred in 2015). From March 30–June 24, she was assigned route 49, which had five stops but no children. As with her route before her termination, it was a 5-1/2 hour package.

On August 27, Giugliano told Tarry that for the 2015–2016 school year, she was assigned route 52, the Bishop McGann-Mercy Diocesan High School (Mercy) route, a 5-1/2 package run. She gave her this route in writing.<sup>32</sup> The General Counsel has not alleged that either assignment violated the terms of the settlement agreement or Section 8(a)(3), and I will not consider them as evidence of unlawful animus as the General Counsel's brief contends (GC Br. at 8).

Tarry did three dry runs, but none of them fit into the 5-1/2 allotted hours, and she informed Giugliano of this each time. On the third occasion, 5 days after she received the assignment, Tarry said that the package should be 6 hours, and Giugliano replied that she would send someone on the bus without her when school started, to calculate the hours.

Tarry's school started on September 9. On the morning of September 8, Giugliano called her and stated that they were changing the route. Tarry said fine, if she was getting a 6-hour package. Giugliano said no, they were splitting up the route. The parties stipulated that before the split, Tarry's route had 28 students, and Giugliano took off six stops and seven students and assigned them to a van driver. Tarry questioned why they were adding a van when it was only a 1/2-hour package difference. Tarry lost no pay as a result.

On September 23 at about 10 a.m., Tarry and Monroig met with Kumpa at the Medford Diner, where he explained how to organize employees. That same morning, Giugliano called Tarry in and presented her with route assignment sheets keeping her on the Mercy route with a 5-1/2-hour package but changing her from a bus to a van. This resulted in a wage cut of \$3 an hour. Tarry stated that before she signed anything, she wanted to speak to Mensch or Thomas.

Later that morning, Tarry met with Thomas and Giugliano in the latter's office and asked why she was being demoted to a van and getting \$3/hour less when, according to the settlement agreement, she was supposed to keep her rate of pay. Thomas responded that they were doing that because the district wanted a van instead of a big bus. Tarry accused them of playing games with her and refused to sign for the new route. Thomas replied that there would be no other route for her. Tarry left but, after talking with a Board agent, found Thomas in the parking lot and said that she would accept the van route.

Thomas testified that Giugliano made this decision, and Giu-

<sup>31</sup> Tr. 563. Mensch and drivers regularly exchange profanity at work. No employees have been disciplined for that reason.

<sup>32</sup> GC Exh. 34, excluding the cross-outs and written notations.

gliano testified that she reviewed Tarry's attendance sheets after the split (R. Exh. 60) and decided that the number of students on the bus was insufficient to warrant a bus.

For roughly a week after her reassignment to the van, Tarry had conversations with Thomas. She complained that the van was overcrowded in the morning, when it had more children, and recommended that she drive a bus in the morning and a van in the afternoon. Thomas responded that she would check into it.

On October 15, three representatives of Local 252 stood at the facility's gate during the entire day. After Tarry had finished her morning route at about 8:40 a.m., and was on her own time, she also stood at the gate and handed out Teamsters cards to drivers pulling into the yard. That day, Tarry got 10–12 authorization cards signed, and she gave them to Monroig. She also witnessed Santana getting signatures.

That morning, Thomas came over to the gate and asked what Tarry was doing. Tarry replied that she was handing out union cards. Thomas yelled that she had no business being on the property handing out union cards and needed to go home. Tarry said no, she had the right to hand them out. Thomas asked who had told her that, and she said the Union. As Thomas was walking away, she said, "[Y]ou will regret what you're doing."<sup>33</sup> Thomas thereafter checked with one of the Respondent's attorneys and did not again say anything to Tarry on the subject.

That same day, when Tarry returned from her afternoon run, she saw that her personal van in the parking lot was blocked by a payloader (see GC Exh. 16, a photograph that Tarry took). She had earlier seen Mensch driving the vehicle. She went inside and told that to Giugliano, who said that somebody was in the yard. Tarry returned to the yard, where she encountered Mensch and asked him to move the payloader. He yelled, "I do everything for Sharon. I do anything for Sharon" and then said to her, "[W]ell, you'll have to wait to see if I can move this tractor."<sup>34</sup> She saw him move the tractor, about 15–20 minutes later. Her van had never before been blocked in.

After her morning run the following day, Tarry again stood by the gate and passed out Teamsters cards between 8:40 and 11 a.m. Local 252 had the same representatives present there.

#### Tarry's October 19, 2015 Termination

It is undisputed that on Friday, October 16, Tarry was involved in an incident with motorist Toni Gerwycki. That afternoon, Dispatcher Nunziata received a call from Gerwycki, who reported that on County Road 51, "Bus driver went into oncoming traffic to pass (her) motorist. She then swerved in front of her." (see R Exh. 18). There is no double yellow line on that road. By her own admissions to Vopat and at trial, Tarry did engage in speeding on October 16, and the videotape that was viewed at trial (Jt. Exh. 2) also appears to show that she crossed a double yellow line at some point that day, and I so find.

<sup>33</sup> Tr. 619.

<sup>34</sup> Tr. 623. I credit Tarry's account over Mensch's denial of any knowledge of a payloader parked in front of Tarry's van and denial of having any conversations with her on the subject. The General Counsel contends that this incident demonstrated animus but not that it violated Sec. 8(a)(1). See Tr. 621.

According to Vopat, after going to see Nunziata in the dispatch office and getting her note of Gerwycki's call, Vopat returned to the safety trailer and located the video clip from bus 1033 that day (see Jt. Exh. 2, relevant segments of the video clip that Vopat selected). He, Lachacz, and White, watched the video and agreed that it showed the bus had gone over a double yellow line, passed a vehicle on the right, and then went back over the double yellow line, narrowly averting a head-on collision. Later that day, he and Thomas viewed the video, and she agreed with his conclusions.

Thomas' version of her involvement did not fully match Vopat's. She testified as follows. Dispatcher Suzanne Secreto advised her of the call from Gerwycki, and she asked the safety department to find out the bus so the SD card or video could be pulled. After the bus returned, the safety department brought the SD card to her, and she brought it to Vopat's desk. Although Thomas also testified that she viewed the video, she said nothing about agreeing with his conclusions at that time. Rather, she told him to further investigate over the weekend and report back to her.

Over the weekend, Vopat reviewed GPS records, maps, and speed limits, and determined that the bus was on Lake Avenue at the time of the incident with Gerwycki and was also speeding on County Road 51. He wrote up a report recommending that Tarry be "terminated without delay" for dangerous driving and speeding, exacerbated by the presence of a student on board.<sup>35</sup>

According to Vopat, he called Thomas on Sunday evening and told her that the allegations against Tarry were substantiated, and she gave him the authority to move forward with Tarry's termination. Thomas also testified that she accepted his recommendation to terminate Tarry.

On Monday morning, October 19, Vopat instructed the dispatch office to remove Tarry from her bus and to report to the safety trailer as soon as she arrived. He had Tarry wait in the safety trailer classroom while he shared the results of his investigation with Shukri of Safety, who had not been at work on Friday, "[J]ust in case that I missed something or maybe I was wrong, get his opinion, and then we could have delayed the proceedings."<sup>36</sup>

Shukri agreed, and he and Vopat went to the classroom and told Tarry that they had a complaint against her, the investigation had substantiated the charges against her, and she was being terminated. Tarry protested that she was being terminated instead of getting a warning or a write-up. She asked to see the video, and they played it for her. She admitted that she had gone down a hill at 61 miles per hour but denied crossing over a double yellow line. Tarry was thereafter escorted off the property. She received nothing in writing that day. The following Friday, when she went to get her paycheck, she was given a copy of the safety department report dated October 18, recommending her termination (GC Exh. 40, mirroring R. Exh. 21).

I will not repeat Vopat's unconvincing testimony concerning his failure to interview Tarry prior to her termination and his purported contact with Gerwycki after the fact.

<sup>35</sup> R. Exh. 21. The video viewed in court shows a child in the bus at the time of the incident.

<sup>36</sup> Tr. 814.

I note other flaws in the Respondent's presentation of the facts surrounding the decision to terminate Tarry. First, Thomas testified that Tarry's previous safety violations played a part in her decision to agree with Vopat's recommendation of termination, including the candy/driving with no hands on the wheel incident, and an incident in which Tarry used her cell phone while driving. On the contrary, the Respondent's counsel represented (at Tr. 1341) that the cell phone incident played no role in the termination. Second, although Mensch testified that he was made aware of Tarry's termination only after it occurred, Thomas testified that she called him on Sunday evening and informed him of the incident, that she agreed with Vopat's recommendation that Tarry be terminated, and that Tarry was going to be terminated the next day.

#### Santana's Warnings and Termination

##### 2015 Warnings

Santana, who is deceased, was a bus driver for the Respondent since about November 2009. From the start of her employment, she had the same a.m. and p.m. run: Holy Angels parochial school and two public middle schools, with a 32-1/2 package hours weekly. Prior to October 2015 (all dates hereinafter in this section occurred in 2015), she received no disciplines, had never been absent from work, and had no parent complaints.

The account of Santana's union activities in her November 3 affidavit (GC Exh. 2) is corroborated by other witnesses of the General Counsel, and I find that in or about early October, Santana talked to approximately 20 drivers in favor of the Union and got most of them to sign authorization cards.

It is undisputed that in 2015, Santana had two conversations with Thomas in which she complained about work assignments; the first in early September, the second on September 28. Because of Santana's unrebutted description of her conversation with Giugliano on about October 8, I credit Santana that she had a third conversation with Thomas on about October 7. It is also undisputed that in at least one of the conversations, Santana commented that the unfairness in assignments was why the drivers needed a union.

In September, around the beginning of the school year, Santana spoke to Thomas about work assignments, complaining that some of the newer drivers were getting more hours than she was. Thomas recalled this conversation and characterized it as "cordial."<sup>37</sup> According to Thomas, Santana's demeanor changed radically between the first and second conversations. In their September 28 conversation, Santana yelled at her regarding unfairness in assignments, saying, "[T]his is bullshit, I'm so sick of this, it's not fair."<sup>38</sup> Thomas admonished Santana not to yell at her and admittedly "probably cursed back."<sup>39</sup>

On about October 7, Santana went to see Thomas in her office. She stated that she did not have any midday runs or charters although many drivers below her received them. Thomas replied that many people had charters. Santana accused management of always having a reason, said that she would not

<sup>37</sup> Tr. 1419.

<sup>38</sup> Tr. 1418.

<sup>39</sup> Tr. 1420.

complain anymore, and “this is why we need a union.” (see GC Exh.2 at 3). She then walked out.

The next day, Giugliano called her in to the dispatch office and told her she was getting a write-up for insubordination. Santana asked why, and Giugliano responded that she had an argument with Thomas in September. Santana stated that it happened a month ago and that she had not done anything wrong. She refused to sign the written warning.

The warning, General Counsel’s Exhibit 5, is dated September 28. It states that September 28 was the second incidence of Santana’s insubordination to Thomas, the first occurring at the beginning of the school year. The warning makes no mention of Santana’s October 7 conversation with Thomas. Inexplicably, the warning is signed by Mary Palagonia as manager on October 14 but, other than date, is consistent with Santana’s affidavit.

On about October 21, Santana attended a previously scheduled safety class along with about 50 other employees. Usually, those classes were conducted by the safety department. This time, Mensch ran the meeting. Instead of talking about safety, he talked about the Union. Inasmuch as the General Counsel has not alleged any of his statements as violations, I will only address Santana’s account of her interaction with him. At one point, Mensch was talking about union cards, looked at Santana, and said that she was getting other employees to sign them. She nodded her head and said okay. When Mensch said that the Union had not gotten the employees of another company a raise for the first year, Santana interrupted and said that she had the contract.

On about October 23, during her break between routes, Santana distributed flyers regarding a union meeting scheduled for October 29. There is an unresolved question of whether her statement that she was in the “Employer’s parking lot” (GC Exh. 2 at 5) referred to the yard or to the parking lot where employees parked their personal vehicles. Mensch offered no testimony on the subject of the location. In any event, Mensch came out and told her that she was loitering and was not supposed to be on his property, and that he was going to call the police. She said that she was sorry. He yelled back, “[Y]ou are not sorry. . . . [I]f you are not careful, you are going to be on the outside looking in.”<sup>40</sup> Santana repeated that she was sorry and walked back to her bus.

The handbook (Part 4 at 12) provides that distribution of any type is prohibited in work areas at any time, whether or not the employees are on working time. The General Counsel does not contend that this provision violates the Act.

On October 26, Giugliano told Santana to go see Thomas before she left on her afternoon run. When she did so, Thomas said, “[Y]ou knew that John said you were being written up.”<sup>41</sup> Santana replied that Thomas knew that this was about the Union. Mensch walked in. Santana stated that the [Union] card said she could be in the parking lot distributing union materials, and she showed it to them. Mensch responded that he did not care what the card said; the handbook said that she could not. Thomas showed her something from the handbook. Santana

did not have her glasses on and could not read it. She stated that she had not received a handbook in 6 years. Mensch said, “[T]ough,” and Thomas said that she needed to sign it.<sup>42</sup> Santana refused, saying the write up was because of the Union. Mensch said “[O]kay, let me write it down,”<sup>43</sup> and he wrote “union paperwork/literature” on the verbal warning (GC Exh. 6).

On November 6, Santana was driving her bus during her morning run when she arrived at a corner near where a shooting had just occurred. She could not proceed further down the street, and a police officer kept directing her to back up because there was a dead body ahead of the bus. He did not tell her that there was a car behind her, and she struck it when she started to back up for a U-turn. Santana then called Vopat and Mechanic to come check out the accident. After Vopat arrived, the officer told him that they (the police) were taking the blame for the accident. Santana was crying, and Vopat told her that she was fine and was not suspended. Santana drove the next day.

That same day, Santana received a written warning for the incident, for failure to follow company policy regarding backing up the bus (GC Exh. 7). Vopat testified that Santana’s infraction was failure to report to dispatch that she needed to back up the bus and that failure to do so in connection with an accident is usually grounds for termination. However, Vopat recommended to Thomas that Santana receive a warning, not a suspension, because of the extenuating circumstances, and Thomas accepted his recommendation.

Because of the written warnings for backing up and insubordination, \$200 was subtracted from her quarterly bonus of \$525 that was paid in paid on about December 23.

#### 2016 Termination

The sole reason that the Respondent has advanced for Santana’s termination was her failure to successfully complete a random blood urine test on April 22, 2016, (all dates hereinafter in this section occurred in 2016). I credit Monroig’s un rebutted testimony that Santana went to dialysis for many years and was going three times a week, between her morning and afternoon runs, by April 22. I also credit Monroig’s un rebutted testimony that on April 22, Monroig observed that Santana’s ankles were swollen to the point where she apparently could not close her shoes.

That morning, dispatch notified Santana that she was selected to do a random drug test.<sup>44</sup> The General Counsel does not contend that her selection was improper.

Santana arrived at Island Medical, the testing location, at around 9:30 a.m. Island Medical is a primary care office that also performs drug screens and breath alcohol tests for businesses. It collects samples from donors and sends them to labs for analysis.

Medical Assistant Nieves serviced Santana after her arrival. She told him that she did not think she could give enough and had a bottle of water in her car, but he told her she could not

<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> Her name appears on R. Exh. 55, the list of employees randomly selected for drug or breath alcohol testing for the second quarter of 2016.

<sup>40</sup> GC Exh. 2 at 5.

<sup>41</sup> Id.

leave the building. He brought her three cups of water but she refused to drink, saying that she had kidney problems and wanted to call her job. Nieves told her he would call her job but still needed a sample or would have to let her job know. He called the Company but was put on hold and then was cut off.

Santana called Thomas on her cell phone and said that she was at the testing facility and was having trouble producing a specimen. She said that Thomas was aware of her medical condition and asked her what she should do. Thomas responded that she would call her back. Thomas then spoke to McGarty of HR and advised her that she knew Santana was on dialysis and that Santana was having trouble producing a specimen. Thomas asked McGarty what the regulations were and what she should do. McGarty advised Thomas to tell Santana to stay at the facility and contact her medical doctor to send over a letter stating the condition, and the Company would take it from there. Thomas called Santana back and advised her to have her doctor fax a letter to the Company and the facility, but not to leave the facility.

After making a call on her cell phone, Santana tried to drink some of the water, but she gagged and threw up. She stated that she wanted to go to her own doctor for a drug screen. Nieves tried again to contact someone at the Company but he was again put on hold for a long time, and hung up. Santana then said she could give a sample. She went to the bathroom but came back with nothing, and he asked her to please try and drink some water. When Nieves returned after 40–45 minutes, Santana said that she was ready and went into the bathroom. A few minutes later, he heard the toilet flush. When Santana came out, she said that she had an accident. He looked at the sample and saw that it was barely enough and that it was too cold (a strip on the cup lights up when it reaches the necessary temperature). He told her that it was not a good sample.

In sum, Nieves testified, Santana made three unsuccessful attempts to give a valid sample and did not have the option of making a fourth attempt. General Counsel's Exhibit 9 is Nieves' collection report for Santana, which they filled out after her third attempt. She was there for about an hour.

Thomas testified that she first became aware of Santana's drug test results when she received a May 3 email from White stating Santana had not successfully completed the test (R. Exh. 56 at 1). However, the statement that "the donor did NOT stay for the 2nd collection" was at odds with Nieves' credited testimony, as well as what is contained in Santana's June 16 affidavit (GC Exh. 4). McGarty, on the other hand, testified that she brought the test results to Thomas' attention and that Thomas asked what the Company's guidelines were. McGarty replied that because it was considered a positive, Santana should be terminated, and Thomas agreed.

On May 3, McGarty called Santana in and stated that Santana had left her drug test and refused to give a sample. Santana asked if she was kidding because she had signed a paper that she had given a sample. McGarty testified that Santana provided her with an April 22 letter from a physician (GC Exh. 8) that states:

Chiarina Santana is my patient at Brookhaven Memorial Hospital Medical Center. Chiarina is receiving dialysis 3

times a week. She is unable to produce enough urine for a drug test, she is willing to do a swab or blood test.

McGarty stated that she would talk to Thomas. When she returned, she told Santana to go home and that they had to re-search the situation.

By letter dated May 4 from Thomas, Santana was notified that she was terminated based upon the results of her random drug test on April 22 (GC Exh. 10). McGarty testified that termination was required by company policy, not by law. The Respondent's drug and alcohol policy (R. Exh. 67 at 3) provides for immediate discharge for any driver or mechanic who does not pass a drug or alcohol test, unless he or she agrees to enter rehabilitation or other treatment program at the employee's expense; and refusal of a driver, matron, or mechanic to take a drug or alcohol test results in immediate discharge. Employees have been terminated for testing positive or refusing to go for a test.

#### Monroig's 2015 Warnings and Assignments

Monroig has been employed as a bus driver since August 2009. In past years, she generally had a 6-hour package route, along with middays, a 5:15 p.m. late run, and weekday and weekend and charter work. She had these assignments at the beginning of the 2015–2016 school year. She had a regularly scheduled midday run 1 day a week and also covered midday runs once or twice a week for two charter drivers. She usually went over 40 hours a week from 2009 until October 2015 (all dates hereinafter in this section occurred in 2015 unless otherwise indicated).

Monroig, along with Tarry and Santana, became actively involved in campaigning for the Union in mid-September. Tarry and Monroig met with Kumpa at the Medford Diner on September 23 at about 10 a.m. He explained how to organize employees. The following morning, after their morning runs, Monroig and Griffin handed out and collected signatures on authorization cards in the parking lot. Thereafter, and continuing until the election, Monroig regularly passed out authorization cards at the gate. Starting in early October, she also daily wore a "vote Teamsters" lanyard, union buttons, and other union insignia. She also put a union sign on the dashboard of her car.

On October 1 at 2:30 p.m., Giugliano on the radio asked another driver to cover Monroig's 5:15 p.m. middle school run because Monroig had a meeting with Mensch in the safety office at 4:15 p.m. Mensch and Thomas were there when Monroig arrived. Mensch stated, "[Y]ou've been with me since the beginning, since 2009. We know each other well. I know you're getting signatures on the cards for the Teamsters."<sup>45</sup> He went on to say, "[W]atch who your friends are, Lori. They're throwing you under the bus. Everything gets back to me. Watch who your friends are."<sup>46</sup> She denied knowing what he was talking about, but she was wearing her union lanyard.

On the evening of about October 8, Monroig attended a meeting with Local 252 representatives at the Applebee's in Medford, along with Griffin and drivers Brenda Alcorn, Eileen

<sup>45</sup> Tr. 282.

<sup>46</sup> Id.

(last name unknown), and Pat Murphy. The meeting had originally been scheduled to be held at Ruby Tuesday's. During the meeting, Monroig sat next to Murphy, who was continually texting. Monroig observed that she was texting Mensch. She read Mensch text, "Are you at Ruby Tuesday's?" and Murphy text, "[N]o, we're at Applebee's."<sup>47</sup>

I credit Monroig's un rebutted testimony as follows.<sup>48</sup> On about October 14, Monroig was in the parking lot handing a union flyer to a driver who was in her personal vehicle. Alcorn came over, and the three women talked about the Union. A few minutes later, Mensch came over to them and said, "I don't want a union in this yard." He pointed at Alcorn and said, "I know you went to that meeting at Applebee's." Alcorn replied that he had told them to get informed. Mensch then pointed at Monroig and said, "[A]nd you with the cards." Monroig responded that he was listening to chatter in the yard, and Mensch repeated that he did not want any union.

Monroig was scheduled to do a charter run for the Bellport homecoming parade on Saturday, October 17. On the afternoon of October 16, Giugliano told her in the dispatch office that her charter was cancelled. Monroig responded that they did not cancel homecoming parades. Giugliano said, "Look, Lori, don't be mad at me. It's not me," and Monroig responded that she knew it was Mensch and was not angry at her.<sup>49</sup> Monroig testified that she spoke loudly but that Giugliano did not ask her to lower her voice or to talk in private. I believe that Giugliano's testimony that Monroig repeatedly yelled at her was exaggerated, and I do not credit Giugliano's testimony that she did not raise her voice during their encounter.

Giugliano testified that she mistakenly booked four drivers for the homecoming parade and, upon realizing her error, canceled Monroig because Monroig was the last driver she called to cover it. The three drivers who kept the event had less seniority than Monroig. Giugliano testified that seniority plays no role in who is assigned charter runs, but neither of the regular charter dispatchers at times material, Nunziata and Fiorello, testified to confirm this.

On the morning of October 19, Giugliano gave Monroig a verbal warning for "insubordination to supervisor when told her charter work on Saturday was canceled." (GC Exh. 17.) Giugliano told her, "I'm so sorry, Lori, you don't have to sign this."<sup>50</sup> She repeated that Monroig did not have to sign. Monroig signed it but wrote in that it was due to her union activities.

Giugliano testified that she prepared the warning immediately after Monroig left her office on the morning of October 16, but she waited until the following Monday morning to present it to her. Giugliano offered no explanation for the delay. Inasmuch as the warning was a verbal, it had no effect on Monroig's quarterly bonus.

Thereafter, Monroig received no further charter assignments, despite asking Giugliano, Nunziata, and Fiorello for them. Moreover, she received no further midday assignments. She did continue to have her 5:15 p.m. middle school late run. See

Respondent's Exhibit 5, Monroig's weekly driver payroll sheets from September 11, 2015 through June 24, 2016, showing that her last midday run was on October 8 (p. 10), and her last charter run was on September 12 (p. 3). The Respondent submitted no documents rebutting Monroig's claim that she received midday and charter runs on a regular basis from 2009 up until the fall of 2015. Giugliano testified that she stopped giving Monroig midday runs because there was not much of such work and she wanted to equalize such work among the drivers, but the Respondent submitted no documents to substantiate this claim. As noted, neither Nunziata nor Fiorello was called, and thus the Respondent offered no evidence of why Monroig stopped receiving charter work.

Twice in October (Monroig could not recall the dates), at about 4 p.m. in the yard, she heard Mensch talk to groups of employees. On the first occasion, he stated that if the Union came in, the employees would not get what they thought they would. He asked why they were going to pay union dues when everything was negotiated through him, and stated that he could drop their 6-hour runs down to 4 hours. A couple of employees asked how he could do that, and Mensch replied that he made up the runs and could shorten them. On the second occasion, about 4 days later, she did not stay to listen but just walked through. All she heard him mention was dropping the bus runs from 6 to 4 hours.

On January 18, 2016, driver Grigg was in her bus in the yard at shortly after 1 p.m., when Mensch called her over to his vehicle. When she went over, he asked her if she was knocking on doors, or said he had heard that she was knocking on doors, with Monroig and other people from the Union the previous Saturday. Grigg replied that he had the wrong person. He shook his head and said that was what he had heard. She repeated that he had the wrong person.

As earlier noted, Monroig was one of the Union's observers at the February 26, 2016 election. During the counting of ballots in the Respondent's training trailer, Safety Officer Jessica Ghamni came up to Monroig and said she needed to see her. The Board agent said Monroig could do if she wished, but Monroig did not. The vote ended at 2 p.m., and about 10 minutes later, Ghamni returned and said the matter was time sensitive. Monroig accompanied Ghamni outside. Ghamni handed her a paper for a random drug test and said that she had to go immediately. Monroig responded that she was not working and therefore did not have to take the drug test but would do so. She went for the test. For her prior random drug tests, Monroig went on a day that she was working, and she does not know of any employees who have been sent on their nonworking days.

McGarty testified, and I find, as follows. White is responsible for administering the Respondent's drug and alcohol program. In terms of random drug testing, she receives from Energetix a list of people who have been randomly selected for either breath alcohol or urine sample testing within a quarterly period. White has flexibility with regard to when she sends an employee to get the drug test as long as it is within the quarter. She looks at schedules of drivers and matrons and randomly selects dates to make sure that everyone is tested; if an employee is on vacation, she picks another day.

<sup>47</sup> Tr. 292.

<sup>48</sup> Tr. 297.

<sup>49</sup> Tr. 301. Giugliano did not deny making such a statement.

<sup>50</sup> Tr. 306.

The Respondent offered no evidence of any other occasions when an employee has been instructed to take a random drug test on his or her nonworking day.

#### Griffin's Bonus Strikes and Unemployment Claim

Griffin has been employed as a bus driver for the Mensch family since 1998, either year-round or for summer camp. From 2002–2011, she did only summer camp. She returned to year-round status in 2012 and has since been supervised by Giugliano.

In July 2015 (all dates hereinafter in this and the following section occurred in 2015 unless otherwise indicated), Griffin attended a morning meeting in the dispatch office that Thomas held with several employees. Mensch came to the meeting after it was in progress. Thomas reviewed policies for the upcoming school year, and Griffin received General Counsel's Exhibit 13, which she signed on July 22. Regarding changes in bonuses, it stated, *inter alia*, that \$75 would be deducted from the quarterly bonus for an unexcused absence when schools were open ("insufficient documentation of illness and/or emergency."). Thomas stated orally that a doctor's note would excuse an absence but otherwise it would be treated as unexcused.<sup>51</sup> Griffin never heard anything to the contrary prior to October 30, and the Respondent never issued anything in writing that changed this policy.

Shortly after that meeting ended, Griffin spoke to Mensch about her planned vacation for a milestone birthday in November. She stated that she had already made arrangements and bought airline tickets and did not know how changes in policy regarding the bonus would affect her. He told her not to worry. Soon after, Griffin met with Giugliano in the dispatch office about that planned vacation. Giugliano asked her to sign four absence acknowledgment papers (GC Exh. 45), which had vacation days of November 19, 23, 24, and 25. None of them had the payroll consequences section checked. Griffin asked why they wanted her to sign them, and Giugliano replied that they just wanted to know that she would be out. Griffin stated that she would be back on November 27 and available to work. Griffin and Giugliano signed them.

As previously mentioned, Griffin was one of the employees who attended the October 8 meeting at Applebee's with Local 252 representatives. About a week after that, Griffin and Mensch were in the bus yard at about 4 p.m. when he asked her how Applebee's was. She replied that it was good.

On October 1, Griffin took a half day off to attend a workers' compensation hearing. On October 19 and 20, she was out sick; on October 19, she saw a doctor, who gave her a note that she could return to work on October 21 (GC Exh. 43). When she returned on October 21, she gave the note to Giugliano.

On about October 30, Griffin received a written warning for absenteeism (GC Exh. 44), along with her paycheck. It referred to the October 1 p.m. absence (noted as excused) and the October 19 and 20 absences. It further stated that \$150 would be deducted from her first quarter bonus and she would receive two strikes. After getting the warning, Griffin spoke to Giugli-

ano, who told her to go to payroll. Griffin went to payroll, where she asked LaVallee why she was getting the strikes and losing her bonus when she had a doctor's note. She pointed out that she had been at a meeting in July where she was told that employees would not be responsible for time off if they brought in a doctor's note.

Thomas testified that aside from scheduled holidays, school closings, or school is otherwise not in session, drivers are not supposed to take leave during the school year. They are authorized one excused absence a quarter, for whatever reason, but anything after that counts as strikes, even if medically documented. This testimony is inconsistent with the policy announced in July, as articulated in General Counsel's Exhibit 13, and the Respondent never issued any subsequent modifications thereto. Respondent's Exhibit 30 contains several instances from 2014–2016 (at 26, 39, 61, 82) reflecting that the reason for the absence was a doctor's appointment, and strikes were assessed. However, nothing in them shows whether or not the employee provided a doctor's note or other medical documentation.

Griffin attended a safety meeting in the safety office classroom in November. Prior to the meeting, Mensch turned to her and said, "[B]e careful who you talk to," she replied, "[R]eally? After 17 years?" and he said, "[Y]eah, exactly, after 17 years."<sup>52</sup>

Griffin worked on November 18. The schools were closed on November 19 and 20. Regardless of dates that the labor department used, it is undisputed that Griffith was off on vacation on November 23, 24, and 25 (see R. Exh. 48). She returned from her cruise to the Bahamas at around 2 p.m. on November 27. The schools were closed on November 27, and Griffin's first day back was Monday, November 30.

On the morning of December 23, Griffin spoke with Giugliano in the dispatch office. She asked if she was going to be paid for that week (when the Company was closed) or had to go to unemployment. Giugliano told her to go to payroll. There, Griffin spoke with LaValle, who told her to collect unemployment because she had lost her entire bonus. Griffin asked why she did not know about this and asked where it was in writing. Kristen Beyer produced General Counsel's Exhibit 46 (pages 1 and 4 of General Counsel's Exhibit 45). On page 1, the dates November 18–20 were handwritten in, and in the payroll consequence section stated that this was the employee's third strike and that she was on probation until March 18, 2016; on page 2 (the old page 4), the November 25 date remained the same, but her probation was extended until May 18, 2016. Griffin stated that she had signed them blank and that this was fraudulent, an assertion that Beyer denied.

Giugliano fills out the absence acknowledgment forms, signs them, and then gives them to payroll, which decides any payroll consequences. She never got back from payroll the forms for Griffin (GC Exh. 45) after payroll completed them, even though that was normal policy. She does not know who wrote in different dates on General Counsel's Exhibit 46 at 1, or who checked the boxes therein. A number of other employees have received strikes and loss of bonus for taking days off in the

<sup>51</sup> I credit Griffin's un rebutted testimony.

<sup>52</sup> Tr. 938.

period from October 2015—April 2016 (see R. Exh. 31).

#### Griffin's Unemployment Claim

Griffin filed a claim for unemployment with the New York State Department of Labor (the unemployment office) in the week that school was closed between Christmas and New Year's. She received a notice of determination mailed January 26, 2016 (GC Exh. 48), stating that she would not receive unemployment benefits for the period beginning November 23 and ending November 29, because she was on a cruise and not available for work. In addition, it was determined that she had engaged in willful misrepresentation for certifying that she was ready, willing, and able to work 4 days.

Griffin sent in further documentation, including information about her cruise, to the unemployment office. She ultimately received a revised notice of determination mailed February 24, 2016, in which the willful misrepresentation determination was rescinded (GC Exh 51). Any remaining consequences to Griffin of the original determination are solely up to the unemployment office. I am at a loss as to how the unemployment office arrived at the dates and computations it used.

Alexander in HR handles insurance, workers compensation, and unemployment claims. She is responsible for responding to unemployment claims that employees file. If she determines that the claim is illegitimate, she protests it by sending in documentation. She did that with regard to Griffin's claim for unemployment benefits for the period beginning Monday, November 23, and ending on Sunday, November 29. Along with the protest, she sent in the original absence acknowledgment forms dated November 23, 24, and 25, and the weekly driver payroll sheet that Griffin signed on November 27, reflecting her absence from work on November 23–25 and that the schools were closed on November 26 and 27.

#### Pometti's November 19, 2015 Written Warning

The Respondent has employed Pometti as a bus driver since August 2010. At the end of October 2015 (all dates hereinafter in this section occurred in 2015), Pometti, along with at least 60 other employees, attended a meeting with two or three representatives of the Union at a church in Medford.

About a week later, Giugliano called Pometti on the radio and asked her to go and see Mensch in his office after she returned from her morning run. However, after Pometti arrived back at the facility, she encountered Mensch on the sidewalk outside his office. Mensch started their conversation by saying that he had the impression that she was going to be voting for the Teamsters and/or that it looked as though that is what she wanted. Pometti said yes, explaining what company policies she considered unfair. She also stated that she understood that he had a business to run. Pometti candidly testified that the conversation was "very nice . . . very cordial."<sup>53</sup>

The facts surrounding Pometti's November 19 warning are basically undisputed. On about November 19, Pometti's doctor informed her that a procedure she had scheduled was not going to be paid by Health Republic, the health insurer that she had through the Company, because Health Republic had gone out of business. On November 19, she went on the radio and in-

formed other drivers carrying that insurance that they would not be covered by the insurance but would be liable for medical expenses that they incurred. Mensch got on the radio. He stated that was not true and not to listen to her, and he said that he wanted to see Pometti in his office right after she returned from her run.

She reported to his office as directed. Mensch told her that what she was telling everyone was not true and had nothing to do with work. She answered yes, it did, because she was informing people that they did not have health insurance and would be liable for payments. Mensch responded that had employees insured until November 30 and then would pick up other health insurance. Pometti said no. Mensch then said she was going to be written up for using the radio for a nonbusiness purpose. Pometti responded that it was business, that part of their work was his insurance. He handed her the warning (GC Exh. 12) and the radio policy and gratuitously told her to go to the Teamsters with it.<sup>54</sup> She refused to sign.

The handbook (Part 5 at 20) provides that "[t]he two-way radio provided by the Company should be used in a professional manner and only when necessary for Company matters," and that abuse of radio procedures will result in disciplinary action.

However, Giugliano's testimony showed that drivers' use of the radio for reasons unrelated to work has been a recurring practice despite the formal policy. Thus, she testified that she makes announcements between every month and 2 months reminding drivers that the radio is only for school bus purposes and "[O]nce I make it, then all of the talking stops for a while and then it will start again and then I'll just remind them what the radio is being used for and then it stops."<sup>55</sup>

In this regard, the Respondent submitted no evidence of any other written warnings for improper use of the radio. Two verbal warnings for that reason were issued to Monroig on September 24 (R. Exhs. 2 and 3, not alleged as an unfair labor practice), and one verbal warning to Nicole Arican on December 18 (R. Exh. 45).

Based on the above, I find that drivers are not disciplined for improper use of the radio on a consistent or regular basis. Moreover, Giugliano indirectly corroborated Tarry's testimony that drivers do frequently communicate on personal matters, such as meeting on off-work hours or joking around, and I also so find.

#### Moriarty's March 2016 Warnings

Moriarty was a van driver from September 24, 2014 until he voluntarily left employment on April 1, 2016 (all dates hereinafter in this section occurred in 2016). He engaged in overt union activity at the facility in February, including wearing a union lanyard and wristband; having union bumper stickers on, and a union sign in, his personal vehicle; and handing out authorization cards. He also served as one of the Union's observers at the election on February 26. Prior to March, he received no disciplines.

Moriarty's last route, in the 2015–2016 school year, was a 7-hour package plus additional hours for children who were out

<sup>54</sup> See the comments Pometti wrote on the warning notice. Mensch did not deny saying this.

<sup>55</sup> Tr. 1203–1204.

<sup>53</sup> Tr. 1024, 1025.

of the district or homeless.

In early late February or early March, as per his package hours, he was starting work at 5:30 a.m. and leaving the facility at 5:45 a.m. Because one of the two homeless children on his route had been taken off, he did not believe he needed as much time. He therefore started at 5:45 a.m. and left the yard at 6 a.m. However, because of getting delayed at a train crossing, he arrived late to Longwood Middle School (Longwood) and other schools on the first day.

When he got back after his morning run, he spoke with dispatcher Bryan Blumberg. As I earlier stated, his testimony of what he told Blumberg was contradictory,<sup>56</sup> and his testimony that Blumberg resisted his going back to his original schedule (starting work at 5:30 a.m.)—which Moriarty changed on his own volition—was not believable. Blumberg did not testify, and I decline to make any findings of fact regarding their conversations.<sup>57</sup>

Moriarty was late to the Longwood at least three times that same week. When he arrived at the school on the last occasion, Vopat and Gale Winspar, the transportation coordinator for the Longwood School District, were there. Vopat stated that Winspar was very upset that he was late again and would fix the problem if they did not. I credit Thomas that Winspar also complained to her about Moriarty arriving late, and that she spoke with Blumberg after that.

Immediately after returning from his morning run, Moriarty reported to Blumberg what had happened, and the time was added back on, regardless at whose behest.

The company policy was that van drivers were not paid for fueling the bus unless it was during their package hours. Normally, van drivers went on the fuel line on the premises for refueling. On the average, it took Moriarty 30 minutes outside of his package hours to do the fueling. Starting with the payroll sheet that he submitted on January 29, for the pay date of February 5 (R. Exh. 6 at 5), he claimed fueling time outside his package hours. The payroll department crossed out that time, noting that such time was not paid, but Moriarty continued to claim such.

At the meeting that Mensch held at Bellport Middle School on February 3, Moriarty brought up this issue. Mensch responded, in substance, that if Moriarty did not like it, he could leave. Moriarty testified that he also spoke to other drivers on the matter, but there is no evidence of employer knowledge of this.

As per the handbook (Part 1 at 14), the Company paid a driver 15 minutes in the morning for a pretrip inspection and for 15 minutes after the p.m. run for a posttrip inspection, included in the package hours. Moriarty testified that he understood that a second pretrip inspection was required before he left in the afternoon. He did not start putting in for a p.m. pretrip inspection until the payroll sheet that he submitted on February 26 (R. Exh. 6 at 9), after he had been employed for

over a year. His explanation was that that he got involved with the Union and decided to put in for time that he believed he should be paid. Payroll also crossed out that time on his payroll sheets, but he continued to claim it.

Right/left sheets are directions that drivers prepare when they first start a route. They are changed throughout the year as students are added or taken off, and are for the benefit of other drivers who might cover the route. Moriarty testified that adjusting the R/L sheets could take him anywhere from 15 minutes to an hour and that he would do that mostly at home. Drivers were not paid for that time, but starting with the payroll sheet that he submitted on March 4 (R. Exh. at 11), he put in for the time, and payroll crossed it out.

Thomas initiated and signed the four verbal warnings that Moriarty received on Friday, March 11, after he returned from his morning run at about 9:15–9:30 a.m. and was called into a meeting with Thomas in her office. LaVallee of payroll was also present. Thomas conceded at trial that she knew from the Bellport Middle School meeting on February 3 that Moriarty supported the Union. She had no discussions with Moriarty before issuing him the warnings, all of which were dated March 10. She went over them one by one:

General Counsel's Exhibit 22—"Received complaint from district that you were arriving late to Middle School in the a.m. It is your responsibility to perform your route and to be on time to the school and adjust times accordingly to be on time. No one authorized a change in your time so that would cause you to be late."

Moriarty offered his version of his contact with Blumberg. Thomas responded that there may have been a miscommunication with Blumberg but Moriarty had not been authorized to change his time.

General Counsel's Exhibit 23—Writing time on timesheets for being on the fuel line. It noted, "Not sure why this is an issue suddenly since it was never an issue the previous months or the year before," and stated that in the future, he would have to notify the dispatchers if his bus needed fuel.<sup>58</sup>

General Counsel's Exhibit 24—Writing time on timesheets for p.m. pretrip. It stated that the Company paid for one pretrip inspection in the a.m. and one posttrip inspection in the p.m., which were included in his route package hours.

Moriarty explained that he thought afternoon pretrips were required, and Thomas responded that she would further inquire.

General Counsel's Exhibit 25—Writing time on timesheet for right/left sheets. It stated that this was not authorized and would not be paid.

Thomas told him that he should do the R/L sheet changes at times between schools during his regular work hours.

#### Other Disciplines

General Counsel's Exhibit 53 (299 pages) is comprised of all disciplines issued to drivers and driver's assistants from the start of the 2014–2015 school year to April 13, 2016, including disciplines based on speed alerts and absences, but excluding speed alerts and absence acknowledgment forms per se.

<sup>58</sup> Moriarty testified that to his knowledge, no other drivers were required to do this, but the General Counsel has not alleged an 8(a)(3) violation, possibly because he quit so soon thereafter.

<sup>56</sup> See Tr. 441–442.

<sup>57</sup> Even in the absence of contrary testimony, I am not required to credit the testimony of a witness that is not otherwise credible. See *300 Exhibit Services & Events, Inc.*, 356 NLRB 415, 415 fn. 2 (2010); *Plasterers Local 394*, 207 NLRB 147, 147 (1973).

These records reflect the following (excluding the disciplines received by the alleged discriminatees). Page numbers are indicated.

(1) Speeding—Numerous drivers have received verbal warnings but no loss of bonus for speeding, for up to nine speeding violations (80) involving speed up to 70 mph (46, 70), and for having up to “several” speed alerts (104–107).

(2) Accidents:

(a) Breaking the mirror on the bus next to her when she left the yard, and not reporting it to dispatch—3-day suspension and loss of bonus (6).

(b) Turning into a dead end street and damaging a resident’s property—3-day suspension as per Thomas (60).

(c) Hitting another bus while backing into the yard with damage—verbal warning (112).

(d) Having a preventable accident—suspension and loss of bonus (122).

(e) Continuing to drive with students on board after striking a tree branch, which broke the mirror and shattered glass; and failing to stop at point of impact to call in incident—unspecified warning (126).

(f) Continuing to drive after her bus was struck in the rear, and not reporting the incident—2-day suspension (144).

(g) Backing bus into another bus in the yard and breaking a mirror—2-day suspension (145).

(h) While backing up bus to park struck another vehicle, causing no damage—verbal warning (200).

(i) Striking another bus’ mirror while parking her bus—verbal warning (293).

(j) Striking another bus while backing out of parking lot, causing minimal damage—verbal warning (294).

(3) Hazardous/unsafe driving:

(a) Using cell phone while driving—termination (227).

(b) Driving while under the influence of Nyquil – suspension for the afternoon and reassignment to another route the following Monday morning (253).

(c) Second incident of “unsafe driving in recent months” (not described)—2-day suspension (292; see also 273, same driver).

(d) Signaling late, not making complete stops, making a right turn too fast, and turning into the wrong lane—verbal warning (288).

(e) Falling asleep on bus—verbal warning and loss of pay for time it took for employee to get drug screen (295).

(4) Insubordination—Giugliano issued an unspecified warning for “insubordination” on November 26, 2014, for “uncooperative, poor attitude no regard for authority” (45).

(5) Drug testing:

(a) Termination for refusal to take a post-accident drug and alcohol test (72).

(b) Termination for having a positive drug test (285). See also R. Exh. 66.

(6) Willful damage to equipment—Unspecified warning for

driving away with the full nozzle attached and ripping it from the fuel hose (108).

(7) Drinking water and giving the students candy—termination (133).

The General Counsel also submitted documents showing that a driver received a verbal warning and retraining for driving across a hazard marking out of an HOV lane, for which she had received a traffic ticket; and that a driver who caused an accident causing damage to another vehicle was also assigned retraining (GC Exhs. 57, 58).

The Respondent submitted the following:

(1) R. Exhs. 2 and 3—Monroig received two verbal warnings on December 8, 2015, for improper use of her radio. The General Counsel does not allege them as unlawful.

(2) R. Exhs. 24 and 25, Cynthia Perry’s termination on November 3, 2015, for blatant disregard for company policy and training, and gross misrepresentation of the facts of the incident during her interview (R. Exh. 25 at 3 notes that she was terminated for “excessive physical contact with a student.”). The safety department also mentioned that she had “just been involved in a preventable accident in the very recent past,” as a result of which she had been “retrained in proper operation of a school bus and returned to service.” (Id. at 2).

(3) R. Exh. 26, Rona Gorman’s termination on about November 16, 2015, for ignoring a physical fight between students and continuing to text message, and for telling a student who was stabbed in the head with a pencil to return to her seat. Gorman also was interviewed prior to her termination.

(4) R. Exh. 27, Anthony Houston’s termination on March 3, 2016, for a variety of reasons, including making false statements to dispatch, submitting requests for work not done, using his cell phone while operating a bus with students on board, and allowing unauthorized passenger on bus. For an unexplained reason, the report recommending his termination “without delay” is dated February 10, 2016 (at 3).

(5) R. Exh. 64—Termination of Deborah Friscia on April 4, 2014, for swerving on parkway (no details provided).

(6) R. Exh. 65—Termination of Antonio Ramos on November 12, 2015, for not answering his radio and using his cell phone to call dispatch. In addition to violation of company policies, the substandard work and insubordination boxes are checked.

#### Analysis and Conclusions

##### The 8(a)(1) Allegations

Section 8(a)(1) of the Act, 29 U.S.C. §§ 158.1, provides that it is an unfair labor practice for an employer “to interfere, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.”

##### I. Surveillance

An employer violates Section 8(a)(1) when it observes employees engaged in Section 7 activity in a way that is “more than ordinary or casual,” making such conduct coercive. *Sands Hotel & Casino* 306 NLRB 172, 172 (1992), enfd. sub nom.

mem. 993 F.2d 913 (D.C. Cir. 1993); *Arrow Automotive Industries*, 258 NLRB 860, 860 (1981), enf. 679 F.3d 875 (4th Cir. 1982). Indicia of coerciveness include the nature and duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation. *Aladdin Gaming LLC*, 345 NLRB 585, 585–586 (2005), rev. denied sub nom. 515 F.3d 942 (9th Cir. 2008). An employer's surveillance of union organizing meetings attended by employees constitutes an unfair labor practice. *Athens Disposal Co.*, 315 NLRB 87, 97 (1994); *Action Auto Store*, 298 NLRB 875, 887 (1990).

During the October 8, 2015 meeting between employees and Local 252 representatives, Monroig observed coworker Murphy continually texting, and she saw one text of Mensch, which asked, "Are you at Ruby Tuesday's?" and Murphy's response, "[N]o, we're at Applebee's." For a number of reasons, and considering the above indicia, I conclude that this evidence is insufficient to establish that the Respondent engaged in unlawful surveillance. There is nothing showing that all of Murphy's texts were to Mensch; whether she or Mensch initiated their texting; or what, if anything else, Murphy texted to him. Although the texts may be suspicious, especially in light of other evidence of Mensch's conduct, a finding of unlawful surveillance cannot be based on mere suspicion alone. Accordingly, I recommend dismissal of this allegation.

On February 26, 2016, during the election, HR Director Kloss entered the Union's mini-bus and asked for a Teamsters shirt and button. Kumpa told him to get out, and he left. Kloss' presence was very brief, nothing suggests that he looked around or tried to see who was in the bus, and he said nothing that could reasonably be construed as coercive. Thus, although his appearance was no doubt unwelcome to the Union, I also recommend dismissal of this allegation.

## II. Impression of Surveillance

The Board's test for determining whether an employer has created an impression of surveillance is whether employees would reasonably assume from the statement in question that their union activities had been placed under surveillance. *Durham School Services, L.P.*, 361 NLRB 407, 407 (2015); *Fred'k Wallace & Son, Inc.*, 331 NLRB 914, 914 (2000). An employer creates such an impression by indicating that it is closely monitoring the degree of employees' union involvement. *Flexisteel Industries*, 311 NLRB 257, 257 (1993); *Emerson Electric Co.*, 287 NLRB 1065, 1065 (1988).

I conclude that the following statements of Mensch gave employees the impression that their union activities were under surveillance:

- (1) Told Monroig on October 1, 2015, "I know you've been getting signatures on the cards for the Teamsters. . . . Everything gets back to me. . . ."
- (2) Told Alcorn, in Monroig's presence, on about October 14, 2015, "I know you went to the meeting at Applebee's."
- (3) Asked Griffin on about October 15, 2015, how Applebee's was.

In view of its close proximity in time to the union meeting at Applebee's and in the absence of Mensch articulating anything

else to which he was referring, Griffin would reasonably have believed that he was speaking about the union meeting and knew that she was there.

- (4) Told Grigg on about January 18, 2016, that he heard she was knocking on doors with Monroig and other people from the Union the previous Saturday.

## III. Threats

In assessing whether a remark constitutes an unlawful threat under Section 8(a)(1) of the Act, the test is "whether the remark can reasonably be interpreted by the employee as a threat." *Smithers Tire*, 308 NLRB 72 (1992). Further, the test of interference, restraint, and coercion under Section 8(a)(1) "does not turn on the employer's motive or on whether the coercion succeeded or failed." *American Tissue Corp.*, 336 NLRB 435, 441 (2001), citing *NLRB v. Illinois Tool Works*, 153 F.3d 811, 814 (7th Cir. 1994).

- (1) Did Thomas, on October 15, 2015, threaten Tarry with unspecified reprisals for handing out union cards?

The Respondent has not contended that Tarry's activity was unlawful. Thomas' statement to Tarry, who was handing out union cards to other drives, that, "You will regret what you're doing" was clearly a threat of unspecified reprisals.

- (2) Did Mensch, on two occasions in October 2015, threaten employees, including Monroig, with reduced work hours if they selected the Union as their bargaining representative?

On the first occasion, Mensch first stated that if the Union came, the employees would not get what they expected, and he asked why they were going to pay union dues when everything was negotiated through him. He then stated that he could drop their six-hour runs down to four hours. When a couple of employees asked how he could do that, Mensch replied that he made up the runs and could shorten them. This constituted a clear threat of reduced hours if the employees selected the Union as their bargaining representative.

On the second occasion, Monroig walked through the yard and did not stay to listen to what he was saying to other employees. All she heard was that he mentioned dropping the bus runs from 6 to 4 hours. I am reluctant to find a second violation in the absence of knowing what he said in its entirety.

- (3) Did Mensch, on about October 23, 2015, impliedly threaten Santana with discharge for distributing union flyers?

On about October 23, Santana was in the parking lot distributing flyers regarding a union meeting when Mensch came out and told her, "[I]f you are not careful, you are going to be on the outside looking in."

I conclude that this clearly constituted an implied threat of discharge on account of the union activities in which Santana was engaged at the time.

- (4) Did Mensch, in November 2015, impliedly threaten Griffin with reprisals for engaging in union activity?

About 2 weeks earlier, Mensch had made a statement reflecting knowledge concerning Griffin's activity. Therefore when he said to her, "Be careful who you talk to," without any expla-

nation, Griffin would reasonably have assumed that he was referring to her union activity and threatening her with possible reprisals. This is particularly so, when she replied, “Really? After 17 years?” and he said, “Yeah, exactly, after 17 years,” thus tying in possible reprisals with her employment.

Mensch’s Statements at the February 3 and  
February 10, 2016 Meetings

In the absence of other coercive circumstances, mere statements of possible consequences of unionization do not constitute threats in violation of Section 8(a)(1). See *Benjamin Coal Co.*, 294 NLRB 572, 573 fn. 1 (1989); *Uarco, Inc.*, 286 NLRB 55, 58 (1987).

Employer predictions are lawful when “carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to the close the plant in case of unionization.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Employer predictions become unlawful threats, however, when “there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities.” *Id.*; see also *Novelis Corp.*, 364 NLRB No. 101, slip op. at 5 (2016). They also become unlawful when their context has a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Flying Foods*, 345 NLRB 101, 105–106 (2005). Implied threats of plant closure are also unlawful. See *Novelis Corp.*, *id.*; *Mohawk Bedding Co.*, 204 NLRB 277, 278–279 (1973).

At the February 3, 2016 meeting at Bellport Middle School, Mensch made the following statements:

Options ... you have an option, you can go with 1205, 252 or nonunion ... but guess what, I have options. I can accept the vote, I can negotiate in good faith with any union. I can negotiate with you guys nonunion, change the package, I can sell the contract, I can keep the contract, I can do anything you have options for, and I have options, it is what it is, that’s life. If you remember United Bus, United Bus was a union contract, they sold off to Suffolk Bus...

It’s very simple. There’s about 200 busses plus at South Country alone, there’s 200 busses plus with William Floyd. I could ship all those busses to William Floyd, I could, that’s my option. I could sell the contract without [unclear]. And I could guarantee you jobs with 1205 with Baumann, I could guarantee you jobs with 252 with Suffolk or myself. That’s my option. I don’t want to do it, I’m not putting that on the table ... [unclear] I’m okay with the vote, I’m not losing sleep over it.

The above statements about selling the contract, another company selling off its buses when it had a union contract, shipping buses, and selling the contract, taken together, would have led employees to reasonably believe that the Respondent could make the decision to sell the business on the basis of their vote for union representation. The statements did not satisfy the requirements of *Gissel* and *Novelis*, above. Therefore, they constituted unlawful threats of selling the business, as well as implied threats that the employees would lose their jobs.

I also conclude that the statements that Mensch made about his having options, one of which was to sell the business, amounted to an implied threat of plant closure. See *Ampstech, Inc.*, 342 NLRB 1131, 1135 (2004), *enfd.* 165 Fed.Appx. 435 (6th Cir. 2006); *Southern Labor Services, Inc.*, 336 NLRB 710, 710 (2001). “Plant closure” is another variation of threats to sell the business and of job loss, specific allegations in the complaint, and therefore appropriately found as a violation (as opposed to “bargaining from scratch” statements).

I do not find anything in his statements threatening loss of benefits (apart from job loss) and recommend that this allegation be dismissed.

At the February 10, 2016 safety meeting, Mensch said the following:

If Medford becomes unionized, it’s a totally separate bargaining unit. No matter what union it is [interruption with side chatter] ... so what happens is, now that you have a separate bargaining unit, no matter what union it is, I don’t care what union or what local it is, now you have to make a seniority list. The seniority list goes by East End Bus Line because East End Bus Line is the company that’s being unionized. Not [Montauk]. So, now you have the luxury of me giving you that time counted towards your time with the company. So if you’ve been working for East End for 5 years let’s say, I’m just picking on you (employee says, “yeah”), and you worked for my father for 15 years, technically, I consider you a 15-year employee, so you get certain benefits from me. If the Union gets in you’re a five-year employee. So now, on the list, if someone has worked here at East End for 7 years, they’re above you. I legally cannot count [Montauk] Buses’ time to a seniority list if I’m union. If I’m nonunion, then that’s, I can do that.

And I said at the meeting, I have options too, just like you have options. Listen, you guys would do the biggest favor for me ever, I would love you dearly, because guess what, if I sell, which I have an option to sell my contracts, everybody does it, United sold to Suffolk Bus (an employee says, “then we’d really be screwed”), if I sell South Country to Baumann, guess what?, you automatically become 1205... If I sell Longwood to Suffolk, they do the big busses, that’s 252, and guess what, at the end of the day, I don’t have to sell a bus, I’ll keep all my busses, and I’ll put my busses in my [unclear]. Done. That’s my option, I don’t want to do it, but you have options, I have options. It’s not a one-way game, it’s negotiations ...

For the reasons stated above regarding the February 3, 2016 meeting, I conclude that Mensch made an unlawful implied threat of plant closure when he talked about his options (par. 2). I also conclude that his statement about having the option to sell his contracts amounted to a threat to sell the business. Again, this specific violation is very closely akin to allegations in the complaint.

I further conclude that his remarks about seniority (par. 1) constituted a threat that senior employees would lose their seniority benefits if the employees chose union representation. See *Southern Mail, Inc.*, 345 NLRB 644, 644 (2005).

The allegation that Mensch threatened employees with loss of benefits is tantamount to his threat regarding loss of seniority, and I do not see where he threatened the loss of any other benefits. Accordingly, the allegation that he threatened loss of benefits is redundant.

#### IV. Other 8(a)(1) allegations

- (1) Did the Respondent violate Section 8(a)(1) by directing Monroig to take a random drug test on February 26, 2016, even though she was off from work?

White, who is responsible for administering the Respondent's drug and alcohol program, did not testify. However, McGarty testified that in scheduling random drug tests, White checks the schedules of drivers when she selects their dates to go; if an employee is on vacation, she picks another day. There is no evidence of any other occasions when an employee has been instructed to take a random drug test on his or her day off from work. In the absence of a satisfactory explanation from White, this might well be a violation of Section 8(a)(3), but it is not alleged.

As to 8(a)(1), the question becomes whether Monroig would reasonably have concluded that her selection for the random drug test was based on her union activities, in particular her serving as the Union's observer at the election that day, thereby constituting "interference, restraint, and coercion." For her prior random drug tests, Monroig went on a day that she was working, and she was not aware of any other employees who have been sent on their days off. Accordingly, I conclude that she reasonably could have inferred that she was being instructed to go for the random drug test because of her union activities, especially when it was on the same day that she was serving as an observer for the Union. I therefore sustain this allegation.

- (2) Did Thomas, on October 15, 2015, direct Sharon Tarry not to engage in union activity, to wit, handing out union cards?

It is undisputed that Thomas did so, prior to her speaking with one of the Company's attorneys. I therefore find this violation.

#### The 8(a)(3) Allegations

In cases in which the issue is the motive behind an employer's action against an employee (was it legitimate or based on animus on account of the employee's union or protected concerted activities?), the appropriate analysis is provided by *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). *Novelis Corp.*, 364 NLRB No. 101, *slip op.* 12 (2016). On the other hand, where the conduct for which the employee was disciplined is protected activity, the *Wright Line* analysis is not appropriate. *Id.*; see also *St. Joseph's Hospital*, 337 NLRB 94, 95 (2001).

Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee en-

gaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

If the General Counsel makes such a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. Once this is established, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in absence of the protected activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399, 403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), *enfd.* 127 F.3d 34 (5th Cir. 1997) (*per curiam*). To meet this burden, "[A]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting*, 332 NLRB 1363, 1366 (2000), citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984); see also *Bruce Packing Co.*, 357 NLRB 1084, 1086-1087 (2011), *enfd.* in pertinent part 795 F.3d 18 (D.C. Cir. 2015).

If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for the employer's actions are either false or not, in fact, relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. On the other hand, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in the employer's motivation, the employer would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

Sharon Tarry

I will not address the legality of Tarry's December 2014 termination because it was the subject of an executed settlement agreement. Nonetheless, I will consider events preceding the settlement agreement, including the October 30 and November 4, 2014 warnings that Tarry received inasmuch as the Respondent has contended they were taken into account in the decision to terminate her on October 19, 2015.

#### October 30 and November 4, 2014 Warnings

Although Tarry did not support Local 1181 in October of 2014, Mensch repeatedly accused her at the time of bringing them to the gate, where they handed out union cards and literature, and that they were her friends. In their last such conversation in October 2014, Tarry stated that Local 1181 was not her friend and, if she was going to bring in a union, she would bring in the Teamsters. During this same period, Giugliano repeatedly told Tarry that she was tired of hearing Mensch accuse her (Tarry) of bringing in Local 1181 or that they were her friends.

Giugliano issued Tarry a written warning on October 30, 2014 for failure to follow instructions, safety violations, and insubordination. This was based on Tarry's telling Giugliano that morning she did not care if she got fired if she handed out Halloween candy the following day. Although the insubordination allegation might be sustainable, Tarry had not engaged in

any actual conduct of failing to follow instructions or engaging in a safety violation. Moreover, General Counsel's Exhibit 53 shows that only verbal warnings were issued to numerous drivers for up to nine speeding violations; a couple of drivers who had accidents and struck other vehicles; a driver who signaled late, did not make complete stops, made a right turn too fast, and turned into the wrong lane; and a driver who fell asleep on the bus and had to go for a drug screen. Drivers in past years had given out candy, despite the handbook prohibition against it. In these circumstances, the issuance of a written warning to Tarry for failure to follow instructions, safety violations, and insubordination strikes me as pretextual, with the real motivation being animus for her perceived or expressed union sympathies. Similarly, I find that the Respondent's reliance on it to justify Tarry's October 2015 termination is also pretextual.

Regarding the November 4, 2014 warning, Thomas testified that she reviewed the bus' video to see if Tarry distributed candy on the bus on Halloween and, in the process, heard Tarry announce to students on the bus that she was not authorized to give them candy while on the school bus but would be in their neighborhood on the evening of October 31, in her own minivan, trick-or-treating with her daughter and would give them candy if she saw them. She also observed Tarry playing with her hair and driving with her knee while operating the bus. According to Thomas, she told the safety team to issue Tarry a written discipline for the following safety violations: driving with no hands on the wheel, giving out candy, and advising students of what kind of car she drives and that she was going to be in their neighborhood. However, on November 4, Reid issued Tarry two verbal, not written, warnings: for announcing that she would be in the students' neighborhood trick-or-treating, and for playing with her hair and driving with her knee while operating the vehicle. Tarry did not see the warning that was put in writing (GC Exh. 30) until 2016, in connection with a charge that she filed with a state agency. In any event, that document is inconsistent with Thomas' testimony. First, the only offense cited is "driving with her knee while combing her hair with her hands." Second, although the warning on its face does not specify whether it is "written" or "verbal," the Respondent's brief (at 64) characterizes it as a verbal warning.

Taking into account the above inconsistencies, I find that any warnings issued to Tarry stemming from Thomas' viewing of the video were also motivated by animus for her perceived or expressed union sympathies, and that any reliance on them to justify Tarry's 2015 termination is pretextual. Significantly, the Respondent has never provided any evidence to establish that Tarry's statement to students was illegal or that it had a legal right to bar Tarry from distributing candy from her personal vehicle on nonworking time.

#### Tarry's Activity on December 4, 2014

On December 4, 2014, Tarry discussed with approximately six other drivers the negative impact on their unemployment benefits from the Respondent's changing the date of paying the quarterly bonus, despite the Respondent's assurances to the contrary.

The initial question is whether Tarry's actions were concerted in nature. An individual employee acting with or on the

authority of other employees and not solely on his or her own behalf is engaged in concerted activity. *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), revd. sub nom. *Prill v. NLRB*, 755 F.2d 942 (D.C. Cir. 1985), cert. denied 474 U.S. 971 (1985), decision on remand *Meyers Industries (Meyers II)*, 281 NLRB 882, 885 (1986), enfd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activity encompasses an individual employee who seeks to initiate, induce, or prepare for group action, or who brings group complaints to management. *Meyers II*, 281 NLRB at 887. I conclude that Tarry's activity clearly was of a group nature, not particular to her own situation.

Bonuses upon which employees rely as part of their "wages" have long been held to be part of wages, and as such a term or condition of employment. See *NLRB v. Niles-Bemont-Pond Co.*, 199 F.2d 713, 713 (2d Cir. 1952), enforcing *Niles-Bemont-Pond Co.*, 97 NLRB 165, 166-167 (1951); see also *Exxel-Atmos, Inc.*, 323 NLRB 884, 885-886 (1997); *NLRB v. Electric Steam Radiator Corp.*, 321 F.2d 733, 736-737 (6th Cir. 1963), enforcing *Electric Steam Radiator Corp.*, 136 NLRB 923, 924-925 (1962).

The Respondent has not contended that Tarry's protected activity prior to her termination on December 15, 2014 constituted misconduct because of the manner in which she acted, and a separate analysis under *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), is therefore unnecessary.

Accordingly, I conclude that Tarry engaged in protected concerted activity and that any actions the Respondent took against her for such activity after December 2014 violated Section 8(a)(1).

#### Changes in Tarry's Assignments in September 2015

A threshold issue is deciding whether, if such changes were motivated by unlawful animus, that animus was on account of Tarry's protected concerted activity in December 2014, and/or her expressed support for the Teamsters or perceived support for Local 252. Based on my findings that the disciplines of October 30 and November 4, 2014—which preceded Tarry's protected concerted activity—inferred animus on account of Tarry's expressed or perceived union sympathies, the answer is both. I note that I have found that Mensch committed numerous violations of Section 8(a)(1) starting on October 1, 2015, and there is nothing to suggest that his attitude toward unionization changed dramatically from October 2014, when he accused Tarry of being for Local 1181.

#### Reduction in Number of Stops on September 8, 2015

Tarry had a 5-1/2-hour package prior to her 2014 termination, and she had the same number of hours after her reinstatement on March 30, 2015. Prior to the start of the 2015 school year, she was assigned the Mercy route, also a 5-1/2-hour package. After Tarry complained to Giugliano after each of three dry runs that the route needed to be 6 hours, Giugliano took off six stops and seven students and assigned them to a van driver. Tarry's question of why they were adding a van when she needed only another half hour for the run was a good one. However, Tarry kept her 5-1/2-hour package and suffered no financial detriment, and she initiated the reduction in stops. In

these circumstances, I cannot conclude that the reduction in her number of stops carried any connotation of animus.

#### Demotion to a Van on September 23, 2015

As opposed to the September 8, 2015 reduction in stops, the Respondent lowered Tarry's pay rate by \$3 an hour on September 23, when it changed Tarry's Mercy route to a 5-1/2 van package. Although Thomas told her that the district wanted a van instead of a bus, Thomas did not so testify, and the Respondent produced nothing to support that reason. Rather, Thomas testified that Giugliano made the decision, and Giugliano testified that she reviewed Tarry's attendance sheets after the split and decided that the number of students on the bus was insufficient to warrant a bus.

Tarry engaged in protected concerted activity that was known to the Respondent, and Mensch expressed anger at her for engaging in such activity. In October 2014, Tarry expressed pro-Teamsters sentiment to Mensch, and he accused her of being in favor of Local 1142. Antiunion animus can be inferred from the suspicious nature of the October 30 and November 4, 2014 disciplines that Tarry received. She received a pay cut on September 23, 2015. Thus, the General Counsel has established a prima facie case under *Wright Line* as to both union and protected concerted activity.

Turning to the second prong of *Wright Line*, I conclude that the Respondent has not rebutted the General Counsel's prima facie case. First, I find it suspect that Giugliano made the decision to demote Tarry after only 2 weeks following the split. Second, the Respondent did not offer any explanation for why it could not have restored to Tarry's bus the stops that were split off on September 8, 2015, rather than needing two van drivers to service the route. I also take into account that after being a van driver for the first year, Tarry was a bus driver continuously for about 4 years prior to her December 4, 2014 termination, that the Respondent provided no evidence that any other bus driver has been reassigned from a bus to a van, and that the Respondent has a general policy of letting drivers retain their routes. I therefore conclude that the Respondent's demotion of Tarry from a bus to a van on September 23 2015 violated Section 8(a)(3) and (1) of the Act.

#### October 19, 2015 Termination

As I stated above, Mensch knew of Tarry's support for the Teamsters, and suspected she supported Local 1142, as far back as October 2014, and he knew on December 4, 2014 that she spoke out against his change in the date of paying the bonus. In terms of Tarry's activity on behalf of the Teamsters, Thomas knew that she was distributing authorization cards at the gate on October 15, 2015. The General Counsel has therefore satisfied the elements of protected activity and knowledge under *Wright Line*.

As I also previously stated, Mensch expressed anger at Tarry for objecting to the change in date for payment of the bonus (and terminated her on the same day). On October 15, 2015, Thomas told Tarry as she was distributing authorization cards that she had no right to be doing so and that "You will regret what you're doing." Thus, there is direct evidence of animus. In addition, animus can be inferred from the following. First was the timing of Tarry's termination – almost immediately

following the Company's knowledge of her protected activity. See *Aliante Casino & Hotel*, 364 NLRB No. 80, slip op. 1 at fn. 3 (2016); *Kajima Engineering & Construction, Inc.*, 331 NLRB 1604, 1604 (2000). Second was the Respondent's payloader being parked to block Tarry's van on the afternoon of October 15—the first such incident in her almost 5 years of employment. Mensch's remarks to Tarry when she asked him to move the payloader reflect lack of surprise and complicity in the situation. Animus can also be inferred from the issuance of the October 30 and November 4, 2014 warnings, previously described.

For purposes of establishing a prima facie case, this is more than sufficient evidence of animus, and I find it unnecessary at this point to recite or rely on the numerous 8(a)(1) violations that I have found. I conclude, therefore, that the General Counsel has established all four elements necessary under *Wright Line* to establish a prima facie case that Tarry was terminated for union and other protected concerted activities.

I next turn to whether the Respondent has rebutted this prima facie case. There is no doubt that Tarry did engage in unsafe driving on October 16, 2015, and she admitted on October 19, and also at trial, that did speed on that date. Moreover, I am satisfied that she crossed a double yellow line that day. The fundamental issue is whether the Respondent would have terminated her but for her union and/or protected concerted activities.

The Respondent's witnesses did not offer a consistent or convincing account of how the Company reacted after Gerwycki called in and reported to Nunziata that "Bus driver went into oncoming traffic to pass (her) motorist. She then swerved in front of her." As I explained earlier, Vopat appeared to deliberately exaggerate the extent of Tarry's misconduct as his "investigation" went on, an indication that he was looking to maximize her infractions rather than objectively ascertain them.

As to the investigation, Vopat and Thomas were inconsistent on whether, when they talked on the afternoon of the incident, he voiced any conclusions and she agreed with them. They both testified that Thomas asked him to continue his investigation over the weekend, and he spent considerable time doing so before calling her back on Sunday evening. The seeming rush with which he conducted the investigation is suspicious, in the absence of evidence that he ordinarily conducts such investigations on weekends. Tarry was not scheduled to drive again until the following Monday, and the Respondent could have waited until then to suspend her pending further investigation.

Vopat testified that he wanted the investigation to be thorough, and he shared the results of his investigation with Shukri of Safety on Monday morning, October 19, 2015, after the decision to terminate Tarry had already been made, "Just in case I missed something or maybe I was wrong . . ." If so, then one has to ask why he did not even talk to Tarry or the complaining motorist prior to Tarry's termination? This is particularly glaring when both he and Mensch testified that the practice is to give an employee accused of misconduct the opportunity to present his or her side of the story before imposing discipline, and this was done in the case of at least one other driver who was subsequently terminated. Furthermore, I cannot fathom

why, if Vopat's testimony is credited that he spoke to Gerwycki after the termination, he admittedly did not take any notes, and the Respondent provided nothing from her.

In sum, the Respondent has failed to show it undertook to adequately or fairly investigate Tarry's alleged misconduct before terminating her, a significant factor in concluding that the Respondent's motivation was discriminatory. See *Johnson Freightlines*, 323 NLRB 1213, 1222 (1997); *Publishers Printing Co.*, 327 NLRB 933, 938 (1995); *Emergency One, Inc.*, 306 NLRB 800, 808 (1992).

Similarly, the Respondent's failure to follow its normal practice when it did not afford Tarry an opportunity to give her side of the story is another strong indication of improper motive. See *Case San Miguel*, 320 NLRB 534, 554 (1995); *United States Gypsum Co.*, 259 NLRB 1105, 1107 (1982); *Grand Central Partnership*, 327 NLRB 966, 975 (1999); *Woodlands Health Center*, 325 NLRB 351, 362 (1998). I reject Vopat's explanation that the Respondent did not interview Tarry prior to the decision to terminate her—that he had all the evidence he needed to support that decision—based on his own testimony that he later spoke to Shukri and Gerwycki to confirm that he had all the facts right.

General Counsel's Exhibit 53 shows the following:

- (1) Numerous drivers have received verbal warnings but no loss of bonus for speeding, for up to nine speeding violations (80) involving speed up to 70 mph (46, 70), and for having up to "several" speed alerts (104–107).
- (2) Drivers involved in accidents received disciplines ranging from verbal warnings to at most a 3-day suspension; none were terminated. These included accidents that drivers caused that resulted in property damage to company vehicles or the property of members of the public, accidents that were not reported as per company policy; and one instance in which the driver continued to drive with students on board after striking a tree branch, which broke the mirror and shattered glass, instead of stopping at the point of impact to call in the incident (the driver was given a warning but not suspended).
- (3) For hazardous/unsafe driving, one driver was terminated for use of cell phone while driving (R. Exh. 64 is also a termination, for swerving on parkway, with no description of the offense). However, other drivers who engaged in hazardous/unsafe driving received lesser disciplines, ranging from a verbal warning to a 2-day suspension:
  - a. Driving while under the influence of Nyquil—the discipline was suspension for the afternoon and reassignment to another route the following Monday morning.
  - b. A second incident of "unsafe driving in recent months" (not described)—a 2-day suspension was imposed.
  - c. Signaling late, not making complete stops, making a right turn too fast, and turning into the wrong lane—a verbal warning resulted.
  - d. Falling asleep on bus—the driver received a verbal warning and loss of pay for time it took for him to get drug screen.

Measured against the disciplines that the Respondent meted out for the above misconduct, the penalty of termination that the Respondent imposed on Tarry was unduly and unexplainably harsh. Other terminations of record were for violations that were not of the same nature as Tarry's: assault on a child (Perry); ignoring injury to a student (Gorman); a number of violations, including false statements and fraud (Houston) (who was not terminated until about 3 weeks after the report that recommended he be immediately terminated); and a number of violations, including substandard work and insubordination (Ramos). The termination of Friscia for swerving on the parkway cannot be considered because there is nothing showing how egregious her conduct was.

Based on the above, I find that Tarry was disparately treated, another significant factor in concluding that the respondent has failed to meet its burden of demonstrating that it would have taken the same action against Tarry absent her union and other protected concerted activities. See *Avondale Industries*, 329 NLRB 1064, 1066 (1999); *New Otani Hotel & Garden*, 325 NLRB 928, 941 (1998); *Timken Co.*, 236 NLRB 757, 759 (1978).

I also take into account the Respondent's articulated progressive discipline system, Tarry's status as a long-term employee with no substantiated pattern of reckless or unsafe driving, the warnings that Tarry received in 2014 due to her actual and perceived union activity, and the numerous 8(a)(1) violations that the Respondent has committed in response to employees' unionizing efforts.

In light of all of the above circumstances, I conclude that Tarry was terminated on October 19, 2015, rather than been subject to lesser discipline, because of her union and other protected concerted activities. Therefore, her termination violated Section 8(a)(3) and (1) of the Act.

Chiarina (Rina) Santana

Santana engaged in union activities in early October 2015, and in at least one of her conversations with Thomas on about October 7, Santana told her that because of the unfairness in assignments, the drivers needed a union. The elements of union activity and employer knowledge are therefore satisfied.

October 8, 2015 Written Warning

Aside from other expressions of Mensch that demonstrated animus in October 2015, animus can be inferred from the timing of the warning—1 day after Santana expressed union sympathies. See *Aliante Casino & Hotel and Kajima Engineering & Construction, Inc.*, supra. This inference is particularly strong when the circumstances surrounding the issuance of the warning are so suspect. Giugliano told Santana on October 8 that the warning was for Santana's insubordination to Thomas on September 28. The written warning itself was signed by another manager on October 14 and stated that Santana had also been insubordinate to Thomas at the start of the school year, but it mentioned nothing about their October 7 conversation. The Respondent offered no explanation for the delay in issuing Santana the warning or why the written warning was not dated until a week later and not signed by Giugliano. Accordingly, I conclude that the General Counsel has made out a prima facie case that this warning was motivated by antiunion animus.

Based on the very suspicious timing, the fact that no employees have ever been disciplined for using inappropriate language (even directly toward Mensch), and the fact that Santana did not engage in any conduct of refusing to follow orders or instructions, I conclude that the Respondent has failed to rebut its burden of persuasion to show that it would have taken the same adverse action even in absence of the protected activity. Accordingly, the written warning and the strike off her quarterly bonus violated Section 8(a)(3) and (1).

#### October 26, 2015 Verbal Warning

This warning was expressly for Santana's distributing union literature in the yard or parking lot (I will assume the former), on nonworking time, on October 23, 2016. The Respondent's sole defense is that she was properly disciplined for violating its policy against distribution in work areas, as contained in the handbook. The Respondent does not contend that she otherwise engaged in any misconduct. Nor does the General Counsel contend that the policy was discriminatorily applied to Santana. Therefore, analysis under *Wright Line* or *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), is inapplicable.

The Board has consistently held presumptively valid rules that prohibit employees, on their working or nonworking time, from engaging in distribution in working areas. See *Beverly Enterprises-Hawaii, Inc.*, 326 NLRB 335, 335 (1998); *Times Publishing Co.*, 231 NLRB 207, 207 (1977), enf. in relevant part and remanded on other grounds 576 F.2d 1107 (5th Cir. 1978).

However, the Respondent's defense that Santana violated its ban against distribution in work areas fails because parking lots are not considered working areas, absent a showing that any work performed there is integral to the business operation. *Meijer, Inc.*, 344 NLRB 916, 917 (2005), enf. in relevant part 463 F.3d 354 (2006); *National Steel Corp.*, 173 NLRB 401 (1968), enf. 415 F.2d 1231 (6th Cir. 1969). The Respondent's mere assertion (R. Br. 80) that the parking lot is a "work area" by virtue of the nature of the Respondent's business is not supported by any evidence in the record, and I will not make such an assumption. Accordingly, the verbal warning impinged on Santana's right to engage in distribution in a nonworking area on her nonworking time. See *Casino Pauma*, 363 NLRB No. 60, slip op. at 1 fn. 1 (2015). Therefore, the Respondent violated Section 8(a)(3) and (1) of the Act.

#### November 7, 2015 Written Warning

I note that on October 23, 2015, when Santana was in the parking lot distributing flyers, Mensch threatened to call the police and threatened her that "[I]f you are not careful, you are going to be on the outside looking in."

On November 6, 2015, Santana struck the car behind her when she was following an officer's repeated directive to back up because there was a dead body lying in the street ahead of her. When Vopat arrived, the officer stated that he was taking the blame for the accident. Vopat testified that Santana's infraction was failure to report to dispatch that she needed to back up the bus in connection with an accident.

Inasmuch as Santana was following the directives of a police officer to back up near a homicide scene, and the officer took responsibility for the ensuing accident, issuing her a written

warning for not calling dispatch before backing up seems beyond the pale of reasonable. I note that disciplines imposed on drivers involved in other accidents have ranged from a verbal warning to a 3-day suspension, indicating that management does exercise discretion when deciding the appropriate level of discipline when drivers have accidents. In the circumstances, I cannot find that the Respondent has met its burden of persuasion to show that it would have taken the same adverse action even in absence of Santana's protected activities. Accordingly, the written warning and the strike off her quarterly bonus violated Section 8(a)(3) and (1).

#### May 3, 2016 Termination

Based on the above, the General Counsel has established a prima facie case that Santana's union activity was the motivation behind her termination.

Turning to the second prong of *Wright Line*, Santana was an employee for 6-1/2 years and never had any drug or alcohol issues prior to failing the random drug test on April 22, 2016. The Respondent was aware prior thereto that she was on dialysis. When Santana was at the drug testing facility, she informed Nieves that she had kidney problems and was having trouble producing enough urine for a sample. She called Thomas, advised her of the problem, and asked what she should do. Although Thomas advised her to have her doctor fax a letter to the Company and the facility but not to leave, Nieves testified that after Santana made three unsuccessful attempts to give a valid sample, she did not have the option of staying for a fourth attempt.

On May 3, 2016, when the drug test results came back invalid, Thomas immediately decided to terminate Santana. White's statement to Thomas that Santana did not stay for the second collection was at odds with both Nieves' testimony and Santana's affidavit. At Santana's May 3 termination interview, Santana produced a letter, dated April 22 from her physician, explaining that she was receiving dialysis three times a week, was unable to produce enough urine for a drug test, but could do a swab or blood test.

The Respondent's drug policy provides for immediate discharge of employees who do not pass a drug or alcohol test "unless he or she agrees to enter rehabilitation or other treatment program at the employee's expense," and for refusal to go for the test. Employees have been terminated for refusal to take a post-accident drug and alcohol test or for having a positive drug test. However, Santana did not fit either category, and her termination was not mandated by law.

I need not address whether the Respondent was required under the Americans with Disabilities Act to try to accommodate Santana's medical condition in terms of offering her alternative testing, as her physician indicated. Nor is it my role to judge whether the Respondent should have followed a more humanitarian approach. Nevertheless, based on all of the above circumstances, I conclude that the Respondent has failed to meet its burden of persuasion to show that it would have terminated Santana but for her union activities. The Respondent knew that Santana had gone for the test but was having problems giving a valid sample because of her serious medical condition, yet failed to follow up with her between April 22 and May 3, 2016,

to ascertain what happened at the drug testing facility after Santana spoke to Thomas. Moreover, Santana was allowed to continue driving during that period, a manifest indication that the Respondent did not have a concern that was using illegal substances and posed any kind of danger to students or the public.

Significantly, the Respondent was not required by law to terminate Santana but did so its own volition. Furthermore, if the Respondent's policy is to allow employees who fail a drug or alcohol test to go to rehabilitation in lieu of discharge, there is no logical reason why Santana, who failed the test for a known and documented medical reason, was immediately terminated. In sum, it appears that the Respondent seized on the drug test results as an opportunity to discharge Santana for her union and/or other protected concerted activities.

Accordingly, I conclude that Santana's termination violated Section 8(a)(3) and (1) of the Act.

#### Lori Monroig

Monroig was an active Teamsters supporter, who engaged in handing out authorization cards in the parking lot and regularly wore various union insignia. On October 1, 2015, Mensch told her that he knew she was getting signatures on cards for the Teamsters. Furthermore, on about October 14, Mensch came over to Monroig as she was handing out union flyers in the parking lot. He told her that he did not want a union and that he knew she had gone to a meeting with Local 252 representatives. Animus can be inferred from Mensch's statements, as well as the timing of the October 16 cancellation of her scheduled October 17 charter run for the Bellport homecoming parade. See *Aliante Casino & Hotel and Kajima Engineering & Construction, Inc.*, supra. The Respondent took the following actions against her. Therefore, the General Counsel has established all of the elements necessary for a prima facie case.

#### Cancellation of Assigned Charter Run on October 16, 2015

Giugliano testified that she mistakenly scheduled four drivers for the homecoming parade on October 17, 2015, and, when she realized that only three were needed, canceled Monroig because Monroig was the last of the four drivers whom she called. The three drivers who kept the charter run all had less seniority than Monroig. I do not find Giugliano's testimony convincing, because the other drivers would have had no way of knowing the order in which she called them, and the Respondent has a loose policy of giving some weight to seniority in terms of assignments. Significantly, Giugliano specifically told Monroig, "Look, Lori, don't be mad at me. It's not me," and she did not deny Monroig's response that she knew it was Mensch.

#### October 19, 2015 Verbal Warning

The following Monday morning, when Giugliano gave Monroig a verbal warning for "insubordination to supervisor when told her charter work on Saturday was canceled," she apologized to Monroig and told her she did not have to sign it—an implicit admission that the verbal warning was not warranted. I agree. Although Monroig had been upset and raised her voice, her conduct did not amount to "insubordination" under any reasonable interpretation of the term. She did not engage in

any refusal to follow directions but at most spoke to Giugliano in an agitated manner—behavior that appears to be quite common at the facility. I also find suspicious Giugliano's unexplained delay in waiting until October 19, 2015, to issue the warning, when she testified that she prepared it immediately after Monroig left her office on the morning of October 16.

#### Refusal to Assign Monroig Charter Work and Midday Runs Since about October 19, 2015

Monroig had regularly received midday and charter runs from 2009 until the fall of 2015. Starting on about October 19, 2015, she stopped receiving them. The Respondent submitted no documents to support Giugliano's assertion that she stopped giving Monroig midday runs because she wanted to equalize such work among the drivers, and the Respondent did not call either of the charter dispatchers to offer a reason or reasons why Monroig stopped receiving charter runs.

Based on the above, particularly the timing of the Respondent's actions, I conclude that the Respondent has failed to meet its burden of persuasion of showing that the October 16, 2015 cancellation of Monroig's scheduled charter run, her October 19 verbal warning, and her failure to receive charter or midday runs after about October 19 would have occurred absent Monroig's union activities. Accordingly, by such conduct, the Respondent violated Section 8(a)(3) and (1) of the Act.

#### Linda Griffin

Griffin attended a meeting at Applebee's with Local 252 representatives on October 8, 2015, and about a week later, Mensch asked how Applebee's was. Animus can be inferred from the Respondent's numerous violations of Section 8(a)(1), as well as Mensch's comment to Griffin the following month, "Be careful who you talk to." The Respondent took the following actions. Accordingly, the General Counsel has established a prima facie case of unlawful conduct.

#### October 30, 2015 Written Warning

In July 2015, the Respondent distributed a document stating that \$75 would be deducted from the quarterly bonus for an unexcused absence ("insufficient documentation of illness and/or emergency."), and Thomas stated orally that a doctor's note would excuse an absence. Thereafter, the Respondent thereafter never issued anything in writing to the contrary, and Griffin was never told of any change in the policy. However, even though Griffin submitted a doctor's note for her absences on October 19 and 20, the Respondent counted those days as unexcused absences and issued her a written warning for absenteeism on October 30, along with a \$150 deduction from her first quarter bonus for having two strikes. Although the Respondent submitted evidence that several other employees who have had doctor's appointments received strikes, from the period from 2014–2016, nothing therein shows whether or not the employees provided a doctor's note or other medical documentation.

In the absence of documentation definitively showing that the Respondent changed the policy that was announced both orally and in writing in July 2015, the Respondent has failed to meet its burden of persuasion of showing that it would have charged Griffin with those absences if it were not for her union

activities. Therefore, such action violated Section 8(a)(3) and (1).

Placement on Probation and Loss of Quarterly Bonus  
on December 23, 2015

How the Respondent handled Griffin's absence acknowledgment papers is troubling. Giugliano had Griffin sign four blank absence acknowledgment papers, none of which specified the payroll consequences. On December 23, 2015, Griffin received two of her absence acknowledgement forms back. The one for November 19 had the dates November 18–20 written in, and stated that she had three strikes school year to date, was losing her entire quarterly bonus, and was being placed on probation until March 18, 2016. The other, with the date of November 25, extended her probation to May 18, 2016. The person or persons who handwrote the changes is not known. Also unknown is why Giugliano did not previously receive them back from payroll, as is the normal practice.

In any event, Griffin worked on November 18, and the schools were closed on November 19 and 20. She was off on vacation on November 23–25 (November 26 was Thanksgiving), and returned from abroad on the afternoon of November 27.

There is no question that Griffin was on vacation on November 25, 2015, and could be charged for that day, consistent with the general policy of having 1 excused day of leave per quarter (leaving aside medically-documented leave). The Respondent produced records showing that other employees have received strikes, loss of bonuses, and probation for bonus purposes due to absences. Those records are sufficient to rebut an inference of improper motive based on the above circumstances (and Mensch's casual statement to Griffin in July 2015 not to worry about her taking vacation in November). However, the Respondent offered nothing to justify why Griffin was charged a day between November 18–20, when Griffin worked on November 18, and the schools were closed on November 19 and 20.

In sum, the Respondent has met its burden of persuasion of showing that Griffin would have been penalized for the November 25 absence regardless of her union activities, but failed with regard to the November 18–20 absence, for whichever of the 3 days it was. Therefore, charging her with a strike, reducing her bonus for that strike, and placing her on probation for that strike violated Section 8(a)(3) and (1).

Willful Misrepresentation to the State  
Unemployment Office

Alexander filed a protest with the state unemployment office after Griffin filed a claim for the period beginning November 23 and ending November 29, 2015. Along therewith, Alexander sent the absence acknowledgment forms for November 23–25 that Griffin had signed, along with the weekly payroll form that Griffin signed on November 27, confirming her absence from work on those days and that the schools were closed on November 26 and 27. Griffin did not get back from her cruise to the Bahamas until 2 p.m. on November 27 and, assuming that Alexander reported to the unemployment office that Griffin had been on a cruise and unavailable to work from November 25–27, that was a true statement of fact, or at the very least an

honest mistake. Griffin also sent in documentation pertaining to her cruise to the unemployment office, so how they came up with certain conclusions is a matter of conjecture.

Therefore, the evidence is insufficient to establish that the Respondent made any kind of willful misrepresentation, and I recommend dismissal of this allegation.

Rosehanna Pometti's November 19, 2015  
Written Warning

This warning stemmed from Pometti's telling other drivers over the radio on November 19, 2015, that their medical expenses would not be covered by Health Republic, the health insurance that they had through the Company. This followed her doctor informing her that a procedure she had scheduled was not covered because Health Republic had gone out of business.

Employees protesting loss of health insurance benefits are engaged in protected concerted activity. See *Hahner, Foreman & Harness, Inc.*, 343 NLRB 1423, 1424 (2004); see also *EF International Language Schools, Inc.*, 363 NLRB No. 20 (2015). Where a complaint regarding such is made to fellow employees, it is "inherently concerted because it involves a speaker and listeners." *Belle of Sioux City*, 333 NLRB 98, 105 (2001). I therefore conclude that Pometti's conduct was protected concerted activity.

Pometti was engaged in protected activity that was known to the Respondent and served as the basis for the warning. Mensch expressed implicit animus toward her by gratuitously telling her to go to the Teamsters with the warning and animus can be inferred from the Respondent's commission of numerous unfair labor practices, including the terminations of Tarry and Santana. Therefore, the General Counsel has established a prima facie case under *Wright Line*.<sup>59</sup>

Giugliano's and Tarry's testimony clearly shows that drivers use their bus radios to talk about nonworking-related matters on a frequent and recurring basis. Indeed, Giugliano makes announcements between every month and 2 months reminding drivers that the radio is only for school bus purposes ("[O]nce I make it, then all of the talking stops for a while and then it will start again . . ."). Yet, the Respondent provided only three other disciplines (to two drivers) for improper use of the radio and, as opposed to the written warning that Pometti received, they were verbal warnings.

Based on the above, I find that Pometti was disparately treated because of the nature of her use of the radio, to engage in protected concerted activity. This leads me to conclude that the Respondent has failed to meet its burden of demonstrating that it would have taken the same action against her absent her protected concerted activity. See *Avondale Industries, New Otani Hotel & Garden, and Timken Co.*, supra. Mensch's reference to the Teamsters when he gave her the warning reinforces the

<sup>59</sup> The situation is something of a hybrid because Pometti's activity in question was protected concerted activity, but Mensch implied animus toward her for her support for the Teamsters. Inasmuch as the activity itself was the primary focus of the warning, which was issued the same day, I will treat this as an 8(a)(1) protected concerted activity matter, noting that the finding of an additional 8(a)(3) violation would not affect the remedy.

conclusion that his motivation was unlawful rather than bona fide.

Therefore, the Respondent violated Section 8(a)(1) by issuing Pometti a written warning.

#### David Moriarty's March 2016 Warnings

Moriarty engaged in overt union activity at the facility in February 2016, including wearing a union lanyard and wristband; having union bumper stickers on, and a union sign in, his vehicle; and handing out authorization cards. He also served as one of the Union's observers at the election on February 26. Thomas testified that she knew Moriarty supported the Teamsters from statements that he made at the Bellport Middle School meeting on February 3. Thus, the elements of union activity and employer knowledge thereof have been established. Animus can be inferred from the Respondent's commission of numerous unfair labor practices. The Respondent, through Thomas, issued Moriarty four verbal warnings on March 11. The General Counsel has therefore made out a prima facie case.

I recognize that Thomas did not talk to Moriarty before issuing him the March 11, 2016 warnings. Nevertheless, they were only verbal warnings that had no impact on his bonuses and carried no other financial consequences. I therefore do not consider this to have been a significant breach of the Respondent's normal policy of affording an employee an opportunity to present his or her side of the story before issuing discipline. Moreover, three of the four disciplines were based on what he had put in writing on his timesheets.

The first of the warnings was for Moriarty's late arrivals to Longwood Middle School resulting from his admittedly unauthorized decision to leave the yard later. Absent extraordinary circumstances, not present here, it is axiomatic that a bus transportation company such as the Respondent has the inherent management right to set drivers' schedules, to ensure proper service to customers and at the same time be cost-effective from a business standpoint. Moriarty's unauthorized change to his schedule was the direct cause of his late arrivals to the school and of the resulting complaint from the school district. I conclude that the Respondent had good cause to issue Moriarty this warning and would have done so in the absence of any union activities on his part.

The three remaining warnings dealt with Moriarty claiming time on his time sheets for fueling his bus (starting on Jan. 29, 2016), doing p.m. pretrip inspections (starting February 26), and completing right/left sheets (starting March 4). He continued to put in for fueling and p.m. pretrip inspections even after the payroll department crossed out such times and wrote in that they were not paid. Nothing in the record contradicts the Respondent's assertion that none of these three activities constituted additional paid worktime outside of a driver's normal work hours. Indeed, prior to January 29, Moriarty never put in for such times. As General Counsel's Exhibit 23 (related to fuel time) noted, "Not sure why this is an issue suddenly since it was never an issue the previous months or the year before." I find weak Moriarty explanation for why he did not put in for p.m. pretrip inspections until February 26, after over a year of

employment: that he "got involved with the Union and decided . . . not . . . to let it slide anymore."

In these circumstances, I conclude that the Respondent would have issued verbal warnings to Moriarty in the absence of any union activities on his part. His sudden putting in for time that he had not previously claimed for over a year, and continuing to claim it after payroll told him it was not paid, appears to have been more of an attempt to irritate or annoy the Company than a genuine effort to secure pay to which he believed he was entitled. In the employment law context, harassment usually is by an employer against an employee, but an employee can harass his or her employer as well. I take into account that Moriarty knew from the outset of his employment that the Respondent did not pay employees for these activities outside their regular package hours, that there is no evidence that he received new information in early 2016 that he was entitled by law to such pay, and that the verbal warnings had no negative impact on his bonuses or otherwise.

I therefore recommend dismissal of the allegations pertaining to Moriarty.

#### CONCLUSIONS OF LAW

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

2. International Brotherhood of Teamsters Local 1205 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act:

(a) Demoted Sharon Tarry from a bus to a van on September 23, 2015.

(b) Terminated Tarry on October 19, 2015.

(c) Issued Chiarina Santana a verbal warning on October 26, 2015.

(d) Issued Santana written warnings on October 8 and November 7, 2015.

(e) Terminated Santana on May 3, 2016.

(f) Canceled a scheduled charter run of Lori Monroig on October 16, 2015.

(g) Issued Monroig a verbal warning on October 19, 2015.

(h) Refused to assign Monroig charter work and midday runs since on about October 19, 2015.

(i) Issued Linda Griffin a written warning dated October 30, 2015.

(j) Placed Griffin on probation and deducted money from her quarterly bonus on December 23, 2015.

4. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act:

(a) Issued Rosehanna Pometti a written warning on November 19, 2015.

(b) Directed an employee to go for a random drug test on her nonworking day.

(c) Directed an employee not to engage in union activities.

(d) Gave employees the impression that their union activities were under surveillance.

(e) Threatened or impliedly threatened employees with discharge for engaging in union activities.

(f) Threatened or impliedly threatened employees with unspecified reprisals for engaging in union activities.

(g) Threatened employees with plant closure, selling the business, or loss of their jobs if they selected the Union as their bargaining representative.

(h) Threatened employees with loss of seniority or reduced hours of work if they selected the Union as their bargaining representative.

#### REMEDY

Because the Respondent has engaged in unfair labor practices, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having discriminatorily terminated Sharon Tarry, it must offer her full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights or privileges previously enjoyed, and to make her whole for any losses of earnings and other benefits suffered as a result of her termination.

Chiarina Santana, the other discriminatee who was terminated, is deceased. The death of a discriminatee does not obviate the need for backpay that is intended to reestablish the situation as it would have existed absent the unfair labor practices. *U.S. Service Industries*, 325 NLRB 485,487 (1998), enfd. 72 F.3d 920 (D.C. Cir. 1995); *St. Regis Paper Co.*, 285 NLRB 293, 295 (1987). The backpay period for a deceased discriminatee is limited to the period from the date of the discrimination until the date of death. *Id.* Therefore, the backpay due to Santana shall be paid to the legal administrator of her estate or to any person authorized to receive such payment under applicable state law. *U.S. Service Industries*, *id.*; *ABC Automotive Products Corp.*, 319 NLRB 874, 878 fn. 8 (1995).

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). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate Tarry and Santana for search-for-work and interim employment expenses regardless of whether those expenses exceed their 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*, *supra*, compounded daily as prescribed in *Kentucky River Medical Center*, *supra*. In addition, the Respondent shall compensate Tarry and Santana's administrator or heirs for the adverse tax consequences, if any, of receiving a lump-sum backpay award and file a report with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. See *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016); *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

The Respondent shall also make whole for any loss of earnings and other benefits suffered the following individuals, with backpay to be computed in the manner set out in the previous paragraph:

(a) Sharon Tarry, for her September 23, 2015 demotion.

(b) Chiarina Santana, for her October 8 and November 7, 2015 written warnings.

(c) Lori Monroig, for canceling her November 17, 2015 charter run.

(d) Monroig, for refusing to assign her charter work and midday runs since on about October 19, 2015.

(e) Linda Griffin, for her October 30, 2015 written warning.

(f) Griffin, for placing her on probation and deducting money from her quarterly bonus on December 23, 2015.

(g) Rosehanna Pometti, for her November 19, 2015 written warning.

The Respondent shall expunge from its records any and all references to the terminations of Tarry and Santana, and to the adverse actions listed above.

The General Counsel also requests that I order John Mensch to read the notice to the assembled employees or to have a Board agent read the notice in the presence of a responsible management official. A public reading of the remedial notice is appropriate where "[t]he Respondent's violations of the Act are sufficiently serious and widespread that the reading of the notice is necessary to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices, and to enable employees to exercise their Section 7 rights free of coercion." *Casino San Pablo*, 361 NLRB 1350, 1355-1356 (2014); see also *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007), enfd. 273 Fed.Appx. 32 (2d Cir. 2008); *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995). In this regard, the participation of high-ranking management officials in unfair labor practices compounds the coercive effect. *McAllister Towing & Transportation Co.*, 341 NLRB 394, 400 (2004), enfd. 156 Fed.Appx. 386 (2d Cir. 2005); *Consec Security*, 325 NLRB 453, 454-455 (1998), enfd. 185 F.3d 862 (3d Cir. 1999).

I conclude that a reading of the notice as requested by the General Counsel is appropriate in light of (1) the large number of unfair labor practices that the Respondent committed, many directly by Owner Mensch or Vice President Thomas, including discrimination against five employees, two of whom were terminated; (2) the long period of time over which they were committed (approximately 7 months); (3) and the large number of employees who attended meetings at which Mensch's threatened loss of their jobs or other benefits if they selected the Union as their representative. I note that employees at the safety meeting were a captive audience, aggravating the coercive effect of his threats.

The General Counsel also urges that I also order the Respondent to reimburse the discriminatees for "consequential economic harm" that they suffered as a result of the Respondent's unlawful discrimination against them. However, I am obliged to follow existing Board precedent. See *Pathmark Stores, Inc.*, 342 NLRB 378, 378 fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984). Board precedent does not pro-

vide for this additional remedy, and the General Counsel's request for such is denied.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>60</sup>

#### ORDER

The Respondent, East End Bus Lines, Inc., Medford, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating, demoting, issuing warnings to, or otherwise discriminating against employees for engaging in activities on behalf of International Brotherhood of Teamsters Local 1205 (the Union) or any other labor organization, or for otherwise engaging in protected concerted activity.

(b) Directing employees to go for a random drug test on their nonworking days because of their union activities.

(c) Directing employees not to engage in union activities.

(d) Giving employees the impression that their union activities have been under surveillance.

(e) Threatening or impliedly threatening employees with discharge for engaging in union activities.

(f) Threatening or impliedly threatening employees with unspecified reprisals for engaging in union activities.

(g) Threatening employees with plant closure, selling the business, or loss of their jobs if they select the Union as their bargaining representative.

(h) Threatening employees with loss of seniority or reduced hours of work if they select the Union as their bargaining representative.

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

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

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

(b) Make Sharon Tarry, Linda Griffin, Lori Monroig, Rosehanna Pometti, and Chiarina Santana whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful terminations of Sharon Tarry and Chiarina Santana, and to the other discriminatory actions that it took against Sharon Tarry, Linda Griffin, Lori Monroig, Rosehanna Pometti, and Chiarina Santana, and within 3 days thereafter notify them in writing that this has been done and that the terminations and other discriminatory actions will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such addi-

<sup>60</sup> 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.

tional 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.

(e) Within 14 days after service by the Region, post at its facilities in Medford, New York, copies of the attached notice marked "Appendix."<sup>61</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, 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 set, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 23, 2015.

(f) Within 14 days from the date of the Board's Order, hold a meeting or meetings, scheduled to ensure the widest possible attendance, to fully communicate with employees, at which the attached notice marked "Appendix" will be publicly read by John Mensch in the presence of a Board agent or, at the Respondent's option, by a Board agent in the presence of John Mensch.

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

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

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

#### APPENDIX

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

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

<sup>61</sup> 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."

**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT terminate, demote, warn, or otherwise discriminate against you for engaging in activities on behalf of International Brotherhood of Teamsters Local 1205 (the Union) or any other labor organization, or for otherwise engaging in protected concerted activity.

WE WILL NOT direct you to go for a random drug test on your nonworking days because you engaged in union activities.

WE WILL NOT direct you not to engage in union activities.

WE WILL NOT give you the impression that your union activities have been under surveillance.

WE WILL NOT threaten or impliedly threaten you with discharge for engaging in union activities.

WE WILL NOT threaten or impliedly threaten you with unspecified reprisals for engaging in union activities.

WE WILL NOT threaten you with plant closure, selling the business, or loss of your jobs if you select the Union as your bargaining representative.

WE WILL NOT threaten you with loss of seniority or reduced hours of work if you select the Union as your bargaining representative.

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 Sharon Tarry full reinstatement to her former job or, if

that job no longer exists, to a substantially equivalent positions, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Sharon Tarry, Linda Griffin, Lori Monroig, Rosehanna Pometti, and Chiarina Santana whole for any loss of earnings and other benefits suffered as a result of our discrimination, with interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any references to the unlawful terminations of Sharon Tarry and Chiarina Santana, and to the other discriminatory actions that we took against Sharon Tarry, Linda Griffin, Lori Monroig, Rosehanna Pometti, and Chiarina Santana, and within 3 days thereafter notify them in writing that this has been done and that the terminations and other discriminatory actions will not be used against them in any way.

EAST END BUS LINES, INC.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/29-CA-161247](http://www.nlr.gov/case/29-CA-161247) 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.

