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Napleton 1050, Inc. d/b/a Napleton Cadillac of Libertyville and Local lodge 701, International Association of Machinists & Aerospace Workers, AFL–CIO and William Glen Russell II. Cases 13–CA–187272, 13–CA–196991, and 13–CA–204377

September 28, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND EMANUEL

On April 4, 2018, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent and General Counsel each filed exceptions, a supporting brief, and an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions in part, to reverse them in part, and to adopt the judge's recommended Order as modified.[3]

As further explained below, we agree with the judge that the Respondent violated Section 8(a)(1) by creating the impression that employees' union activities were under surveillance and by ordering the removal of, and removing, employee toolboxes from the Respondent's facility in retaliation for employees' protected strike activity. However, we reverse the judge's finding that the Respondent unlawfully threatened employees with job loss for striking.

FACTS

On June 20, 2016, the Napleton Auto Group purchased the assets of Weil Cadillac, a car dealership, and began operating the dealership as Napleton Cadillac of Libertyville (the Respondent). In early August 2016, the Respondent's service-technician employees initiated an organizing campaign with Local Lodge 701, International Association of Machinists & Aerospace Workers, AFL–CIO (the Union). During the course of the campaign, the employees, who did not openly express support for the Union or discuss the Union at work, attended offsite union meetings. On October 18, 2016, the Union won a Board-conducted representation election.

Three days later, the Respondent's CFO Michael Jopes told the Respondent's attorney, James Hendricks, that "they had to lay off at least one technician" because of productivity concerns. On October 26, 2016, Hendricks told the Union's business representative, Bob Lessman, that the Respondent intended to lay off the least productive service-technician employee.[4] Lessman responded, "That's not how we do contracts. It's always by seniority." After Hendricks remarked that all of the employees had the same seniority—based on the date the Respondent

[1] The Respondent excepts to several of the judge's evidentiary and procedural rulings. Sec. 102.35 of the Board's Rules and Regulations provides, in pertinent part, that a judge should "[r]egulate the course of the hearing" and "[t]ake any other necessary action" authorized by the Board's Rules. Thus, the Board accords judges significant discretion in controlling the hearing and directing the creation of the record. See *Parts Depot, Inc*., 348 NLRB 152, 152 fn. 6 (2006), enfd. mem. 260 Fed. Appx. 607 (4th Cir. 2008). Further, it is well established that the Board will affirm an evidentiary ruling of a judge unless that ruling constitutes an abuse of discretion. See *Aladdin Gaming, LLC*, 345 NLRB 585, 587 (2005), petition for review denied sub nom. *Local Joint Executive Board of Las Vegas v. NLRB*, 515 F.3d 942 (9th Cir. 2008). After a careful review of the record, we find no abuse of discretion in any of the challenged rulings.

In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[2] 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.

No party excepted to the judge's finding that the Respondent violated Sec. 8(a)(1) by telling employee David Geisler that he was being laid off because the employees voted in favor of the Union in the October 18, 2016 representation election.

We affirm the judge's findings, for the reasons he stated, that the Respondent violated Sec. 8(a)(3) and (1) by terminating employee William Russell II and laying off Geisler because of their and their coworkers' union activity. Because it would not materially affect the remedy, we agree with the judge that it is unnecessary to pass on the General Counsel's allegation that the Respondent violated Sec. 8(a)(5) by failing to bargain over Geisler's layoff.

We also affirm the judge's dismissal of the 8(a)(5) allegation that the Respondent unlawfully failed to provide requested information to the Union. We agree with the judge that Union Business Representative Bob Lessman's October 27, 2016 email was not a request for additional information. To the extent the General Counsel excepts to the judge's failure to find the violation because the Respondent did not fully respond to Lessman's original October 26, 2016 oral request for documents relating to employee productivity, there is insufficient evidence to support the General Counsel's assertion that there were other relevant documents that the Respondent should have provided.

[3] We have amended the remedy and modified the judge's Conclusions of Law and recommended Order consistent with our legal conclusions herein. We shall substitute a new notice to conform to the modified Order.

[4] The judge erred in finding that Hendricks notified Lessman of the impending layoff on October 24. The documentary evidence clearly shows that the Respondent first raised the issue of a layoff with the Union and forwarded data showing employee productivity information on October 26.

acquired the Libertyville dealership in June—Lessman explained that the Respondent should use the Weil Cadillac seniority dates. Hendricks responded, "No, I want it by productivity."

On October 27, 2016, the Respondent notified the Union that it was laying off journeyman mechanic David Geisler, one of the Respondent's most highly trained employees, who had worked at the dealership for 22 years.[5] By certified letter sent that same day, the Respondent also notified employee William Glen Russell II that he was terminated and should remove his toolbox from the dealership.

On November 4, 2016, Russell returned to the dealership to move his toolbox. Service Manager Scott Inman told Russell, "I'm sorry this happened . . . but with everything that happened, [I'm] just sorry about it." During their conversation, employee Bill Osberg walked by and Inman remarked, "That's the guy who started all this," referring to the union campaign.

Over the course of the next year, the parties negotiated for an initial collective-bargaining agreement. By August 1, 2017,[6] the negotiations had stalled, and the employees joined a citywide strike against the 129 Chicago-area car dealerships belonging to the New Car Dealer Committee (NCDC), a multiemployer bargaining association. Although the Respondent was not a member of the NCDC, the Respondent's owner, Napleton Auto Group, also owned six other car dealerships that were members of the NCDC.

On August 1, the first day of the strike, the Respondent distributed a letter to its employees. The relevant portions of the letter stated:

> *We have placed ads for replacement technicians. If and when you are replaced, you will be notified. After you are replaced, should you make an unconditional offer to return to work you will be placed on a preferential hire list should an opening occur.
>
> *Make arrangements to have your tool boxes removed from the shop, as we do not want to be responsible for your tools when you are not working.

Because of the large size and hefty weight of the toolboxes, the Respondent permitted employees at all its dealerships to keep their toolboxes on the premises where they worked for the duration of their employment.[7] That was so even when they were not currently working. For instance, employee William Russell kept his toolbox at the dealership for several months while he was out on workers' compensation, and employee David Geisler kept his toolbox at the dealership for almost two weeks after the Respondent laid him off. When an employee had to remove a toolbox, it was done using a tow truck.

On August 1 or 2, Hendricks informed Lessman that the Respondent's striking employees had to remove their toolboxes. Lessman responded that removing the toolboxes was "going to take some time." On August 2, the Union and the Respondent reached an agreement giving the employees until the end of August 4 to remove their toolboxes.

On the morning of August 3, after informing the Union "that he got his rear end reamed from a dealer principal" for giving the employees until August 4 to remove their toolboxes, Hendricks told the Union that the toolboxes needed to be removed immediately. That same morning, the Respondent started rolling the toolboxes off its property and onto a service access driveway, where it left them uncovered and unattended. Later that day, the Respondent pushed the toolboxes back inside the dealership after a heavy rainfall that lasted for about 30 minutes. However, the toolboxes of employees Joseph Schubkegel and Bill Osberg sustained rain damage. On August 4, the Union and the employees arranged for a towing service to remove the toolboxes from the dealership. The Napleton Auto Group did not similarly demand the removal of, or take steps to remove the toolboxes of employees at its six other dealerships where employees went on strike.

DISCUSSION

I. NOVEMBER 4, 2016 STATEMENT ABOUT EMPLOYEE BILL OSBERG

We agree with the judge's finding that the Respondent violated Section 8(a)(1) by creating the impression that employees' union activities were under surveillance when Service Manager Inman remarked to Russell that Osberg had initiated the union campaign. It is well established that "[i]n determining whether an employer has unlawfully created the impression of surveillance of employees' union activities, the test that the Board has applied is whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance." *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005), enfd. 181 Fed. Appx. 85 (2d Cir. 2006). Here, as noted by the judge, "the undisputed record evidence is that during the union campaign the [employees] did not openly discuss the [U]nion

[5] Geisler was also a GM world-class technician ranked 28th nationally. He attended the three union organizing meetings prior to the election but did not openly support the Union at work.

[6] All dates hereafter are in 2017 unless otherwise indicated.

[7] The toolboxes were up to 15 feet long and 6 to 7 feet high and could weigh thousands of pounds.

at work for fear that management would retaliate against them." Hence, under all of the relevant circumstances, we find that Russell would have reasonably concluded that the only explanation for Inman's suspected knowledge of employees' union activity was that Inman was surveilling them.[8]

II. AUGUST 1, 2017 LETTER TO STRIKING EMPLOYEES

The judge found that the Respondent's August 1 letter to employees violated Section 8(a)(1) by (1) ordering the removal of striking employees' toolboxes from the Respondent's dealership in retaliation for the employees engaging in a strike, and (2) impliedly threatening employees that they would suffer job loss for engaging in a strike. We agree, for the reasons stated by the judge, that the Respondent unlawfully ordered its employees to remove their toolboxes and subsequently removed employees' toolboxes from the dealership because they engaged in protected strike activity.[9] The Respondent's managers admitted that they required the employees to remove their toolboxes because the employees chose to strike, and they did not make the same demand of striking employees at the other NCDC dealerships they managed. And the Respondent's purported justification, namely that its insurance policy required the removal, was discredited by the judge and not supported by the record evidence.[10]

We reverse the judge's finding, however, that the Respondent's August 1 letter constituted an implied threat of job loss by informing employees that, if and when they are replaced, they would be placed on a preferential hiring list upon making an unconditional offer to return to work. In *The Laidlaw Corp.*, the Board held that "economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; and (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons." 171 NLRB 1366, 1369–1370 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

Under *Eagle Comtronics*, 263 NLRB 515, 516 (1982), as long as an employer does not threaten that employees will be deprived of their rights, it may address the subject of economic-striker replacement without fully detailing the protections enumerated in *The Laidlaw Corp.*, supra. The Respondent did precisely that by informing employees that they would be placed on a preferential hire list if it hired replacements. Although the Respondent did not spell out that the replacements would be permanent, the letter's reference to a preferential hiring list implicitly suggests that they would be, and nothing else in the letter contradicts that suggestion. Therefore, we disagree with the judge's finding that the letter is ambiguous. Moreover, the Respondent's omission of the modifier "permanent" in describing the status of any replacements that it chose to hire is not sufficient to violate the Act. See *Rivers Bend Health & Rehabilitation Service*, 350 NLRB 184, 185 (2007) (lawful for employer to tell employees that "[i]n a strike the [c]ompany would be forced to hire replacements" and that doing so "puts each striker's continued job status in jeopardy" without specifying that the replacements could be permanent). In addition, although the judge relied on the legal presumption that replacements hired by the Respondent are temporary unless the Respondent meets its burden of proving otherwise, that presumption is irrelevant here because the Respondent had yet to hire replacements at the time it distributed the letter. Accordingly, we dismiss the 8(a)(1) allegation that the Respondent's August 1 letter constituted an implied threat of job loss.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 6.

"6. On or about August 1, 2017, and thereafter, the Respondent violated Section 8(a)(1) of the Act by ordering the removal of and/or removing employee toolboxes or other employee property from the Respondent's facility in retaliation for the employees' engaging in a strike and to

[8] Chairman Ring and Member Emanuel express no opinion on whether an employer unlawfully creates an impression of surveillance of employees' union activity merely by not naming a source for its information. They note, however, that this rationale has not met with universal acceptance. See *Greater Omaha Packing Co., Inc. v. NLRB*, 790 F.3d 816, 823–825 (8th Cir. 2015) (no unlawful impression of surveillance, even though employer accused two employees of being leaders of a work stoppage without revealing the source of its information, because widespread employee communication of the work stoppage in advance made it unlikely that employees would assume the employer learned of the plan through employee surveillance). They find the violation here based on the totality of the circumstances.

[9] The judge found that the Respondent violated Sec. 8(a)(1) by its "insistence on the removal of striking employees' toolboxes from the premises." His recommended Order appropriately required the Respondent to cease and desist both from "[o]rdering the removal" of the toolboxes and from "removing" them. The judge's Conclusions of Law, however, omitted reference to the actual removal of the toolboxes. The General Counsel excepts to that omission, and we have corrected it.

[10] Member Emanuel believes an employer is ordinarily justified in telling employees to remove their personal belongings from its property during a strike. However, in the circumstances here, where the Respondent treated its employees disparately because they decided to go on strike and failed to credibly provide a legitimate business explanation for treating them differently, he agrees that the Respondent's conduct violated Sec. 8(a)(1).

discourage the employees from engaging in this and other protected concerted activities."

2. Delete Conclusion of Law 7.

AMENDED REMEDY

The General Counsel excepts to the judge's failure to award employees Joseph Schubkegel and Bill Osberg reimbursement for the damage-repair expenses they incurred as a result of the Respondent's unlawful removal of their toolboxes from the workplace on or about August 3, and his failure to award all of the employees reimbursement for the towing expenses they incurred as a result of the Respondent's unlawful requirement that they remove their toolboxes from the workplace on or about August 4. We agree.

Section 10(c) grants the Board broad discretion to order affirmative action necessary to effectuate the policies of the Act. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898 (1984). In declining to award reimbursement, the judge analogized the situation here to cases in which the Board has required employers legally damaged by the tortious conduct of unions to resolve those claims through private remedies. Unlike this case, those cases involved damages resulting from tortious conduct, including violence, for which state courts have more experience and are better equipped than the Board to measure the impact of the conduct to make the victims whole. See *Roofers Local 30 (Associated Builders)*, 227 NLRB 1444 (1977). The Board has reasoned that the type of damages in those cases, such as medical expenses and pain and suffering, could be more readily and comprehensively remedied in state court. *Iron Workers Local 111 (Northern States)*, 298 NLRB 930, 932 (1990), enfd. 946 F.2d 1264 (7th Cir. 1991).

In contrast, in a case involving an award of medical expenses to an employee, the Board recognized that the special expertise of state courts in determining speculative tort damages was not required where the damages were specific and easily ascertained. *Nortech Waste*, 336 NLRB 554, 554 fn. 2 (2001); see also *BRC Injected Rubber Products*, 311 NLRB 66, 66 fn. 3 (1993) (awarding monetary reimbursement to an employee for the cost of her clothes, which were ruined as a result of her employer's unfair labor practice).

We find the reasoning in *Nortech Waste* applies equally here. Because the costs incurred by Schubkegel and Osberg to repair damage to their toolboxes and by all of the employees for having to hire a towing service to tow their toolboxes are specific and easily ascertainable, the determination of those costs does not require the special expertise of the courts. Moreover, making the employees whole for those costs is necessary to fully remedy the Respondent's unfair labor practice and effectuate the policies of the Act. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) (the Board's remedial policy is to seek "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination"). Accordingly, in addition to the remedies recommended by the judge, we shall order the Respondent to make Schubkegel and Osberg whole, with interest, for any expenses they incurred as a result of the Respondent unlawfully removing their toolboxes from its dealership on or about August 3. We shall also order the Respondent to make whole all of the employees, with interest, for the towing expenses they incurred when they were unlawfully required to remove their toolboxes from the dealership on or about August 4.[11] The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), 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).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Napleton 1050, Inc. d/b/a Napleton Cadillac of Libertyville, Libertyville, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(e) and reletter the subsequent paragraph.

2. Insert the following as paragraph 2(e) and reletter the subsequent paragraphs.

"(e) Make Joseph Schubkegel, Bill Osberg, and other employees whole for the costs of repairing and/or towing their toolboxes incurred as a result of the discrimination against them in the manner set forth in the remedy section of this decision."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 28, 2018

John F. Ring, Chairman

[11] We shall leave it to compliance to determine the specific amount of expenses the employees incurred as a result of the Respondent's unlawful conduct.

Lauren McFerran, Member

William J. Emanuel Member

(SEAL) 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 discharge, lay off, or otherwise discriminate against any of you in retaliation for your support of Local 701 of the International Association of Machinists & Aerospace Workers, AFL–CIO, or any other labor organization.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT tell you that we are conducting a layoff because of how employees voted in a union representation election.

WE WILL NOT order you to remove and/or remove your toolboxes or other personal property from our facility because you engage in a strike or other protected concerted activities.

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 William Glen Russell II and David Geisler full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make William Glen Russell II and David Geisler whole for any loss of earnings and other benefits resulting from their discharge and layoff, less any net interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate William Glen Russell II and David Geisler for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 13, 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.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of William Glen Russell II and unlawful layoff of David Geisler, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharge and layoff will not be used against them in any way.

WE WILL make Joseph Schubkegel, Bill Osberg, and other employees whole for the costs of repairing and/or towing their toolboxes incurred as a result of the discrimination against them, plus interest.

NAPLETON 1050, INC. D/B/A NAPLETON CADILLAC OF LIBERTYVILLE

The Board's decision can be found at www.nlrb.gov/case/13-CA-187272 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.

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Roselle, Illinois, for the Charging Party William Glen Russell, II

DECISION

INTRODUCTION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. These cases involve an employer that acquired a car dealership in June 2016. Four months later, on October 18, 2016, the employer's service employees at the new dealership voted for union representation. The following week the employer severed the employment of two longtime dealership mechanics, claiming productivity concerns required a layoff in the case of one, and claiming that the other, who had been off work for an injury since before the employer's acquisition of the dealership, had just been discovered to have been on the health insurance payrolls and was never an employee. The government and the union contend that these actions constituted an unlawful layoff and unlawful discharge and were motivated by retaliation for the employees' recent decision to unionize. As discussed herein, there is strong evidence in support of the government's case and it warrants a finding of antiunion motivation for the employer's actions. Further, the employer has failed to show that it would have taken the same actions in the absence of the union activity. Hence, I find the violations as alleged. As discussed herein, I do not reach the government's further allegation that the employer failed to bargain over the layoff, and I dismiss the government's allegation that the employer failed to provide the union information requested in conjunction with the layoff. In addition, for the reasons explained herein, I agree that the government has proven that by revealing the identity of the employee that the employer believed to have instigated the union drive, the employer gave the impression that it had engaged in unlawful surveillance of employee union activities.

These cases also involve two incidents arising months later during a strike that the employees commenced in August 2017. The government allege that employer unlawfully ordered the removal of employees' personal tools from the premises—these are expensive tools kept in toolboxes weighing hundreds or thousands of pounds and requiring a tow to move—in retaliation for the employees' engaging in a strike. As discussed herein, I agree, and find that the removal of the tools was unlawful retaliation for the strike. Finally, the government also alleges that the employer's threat of replacement for striking was framed in a way that unlawfully implied job loss. Again, I agree. As explained herein, the threat raised the prospect that even if replaced by nonpermanent replacements, at strike's end the employees would not be reinstated but put on a preferential hire list to await a vacancy. That is an unlawful threat.

STATEMENT OF THE CASE

On October 31, 2016, Local Lodge 701, International Association of Machinists & Aerospace Workers, AFL–CIO (Local 701 or Union), filed an unfair labor practice charge alleging violations of the Act by Napleton Cadillac of Libertyville, docketed by Region 13 of the National Labor Relations Board (Board) as Case 13–CA–187272. On January 27, 2017, the Union filed its first amended charge in this case, against Napleton 1050, Inc. d/b/a Napleton Cadillac of Libertyville (Napleton or Employer).

Based on an investigation into this charge, on February 27, 2017, the Board's General Counsel, by the Acting Regional Director for Region 13 of the Board, issued a complaint and notice of hearing in this case. He issued an amendment to the complaint on March 3, 2017. Napleton filed an answer denying all alleged violations of the Act on March 13, 2017. A second amendment to the complaint was issued by the Regional Director for Region 13, on May 8, 2017. Napleton filed an answer denying the allegations of the second amendment to the complaint on May 31, 2017.

On April 17, 2017, William Glen Russell II (Russell), filed an unfair labor practice charge alleging violations of the Act against Napleton, docketed by Region 13 of the Board as Case 13–CA–196991. On January June 26, 2017, Russell filed a first amended charge in this case.

On July 28, 2017, the General Counsel, by the Regional Director for Region 13, issued an order consolidating cases 13–CA–196991 and 13–CA–187272, and an amended consolidated complaint and notice of hearing. Napleton filed an answer to the amended consolidated complaint on August 4, 2017, in which it denied all alleged violations of the Act.

On August 14, 2017, the Union filed a further unfair labor practice charge alleging violations of the Act against Napleton, docketed by Region 13 of the Board as case 13–CA–204377. An amended charge in this case was filed October 30, 2017.

On October 31, 2017, the General Counsel, by the Regional Director for Region 13, issued an order consolidating case 13–CA–20437 with cases 13–CA–196991 and 13–CA–187272, and a second consolidated complaint and notice of hearing. Napleton filed an answer to the second consolidated complaint on November 8, 2017, in which it denied all alleged violations of the Act.

A trial in this matter was conducted on January 3–5, 2018 in Chicago, Illinois. At the commencement of the hearing, counsel for the General Counsel moved to amend the complaint to change the date alleged in para. 5(b) from November 4, 2017 to November 4, 2016. That motion was granted. Throughout this decision, references to the complaint are to the extant second consolidated complaint as amended at the hearing.[1]

Counsel for the General Counsel and for the Respondent filed posttrial briefs in support of their positions on March 2, 2018.[2]

On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

At all material times, Napleton has been a corporation with an office and place of business in Libertyville, Illinois, where it has been engaged in the business of the sale and service of new and pre-owned automobiles. In conducting its operations during the 12-month period ending December 31, 2016, Napleton derived gross revenues in excess of $500,000 and during the same period

[1] During the hearing, the Respondent filed a request for permission to file a special appeal over a sequestration ruling. That request was denied by the Board in an unpublished order dated January 29, 2018.

[2] The General Counsel's unopposed posthearing motion to admit General Counsel's Exhibit 18 is granted. See, GC Br. at 16 fn. 11.

of time, purchased and received goods and materials valued in excess of $5000 directly from points outside of the State of Illinois. At all material times, Napleton has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. At all material times, Local 701 has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

The Employer in this case, Napleton Cadillac of Libertyville (referred to herein as Napleton) is part of a larger group of 14 or as many as 18 (the record is unclear) car dealerships in Illinois, Indiana, Missouri, and Wisconsin, composing the holdings of Bill and Paul Napleton. Approximately six of the dealerships are unionized in addition to the Libertyville, Illinois dealership.

On approximately June 20, 2016, Napleton purchased the assets of Weil Cadillac, a longtime Libertyville, Illinois Cadillac dealer, and opened for business at the former site of Weil Cadillac as Napleton Cadillac of Libertyville, at 1050 S. Milwaukee Avenue, Libertyville, Illinois.

Napleton retained most of Weil Cadillac's workforce. The service manager for Weil, Walter "Scott" Inman, was retained by Napleton, as was the office manager, Pam Griffin, as well as (approximately) all 12 of the Weil service employees, which included—least to most skilled—the lube techs, semi-skilled technician, apprentices, and finally, journeymen mechanics.[3] Although the record is not entirely clear, there appears to have been approximately seven journeymen mechanics (including Russell, see fn. 3, supra), three apprentices/lube techs, and two additional employees, of unidentified skills who worked in the body shop. The technicians were transferred to employment from Weil to Napleton without having to interview or apply.

Typically, mechanics, at Napleton and in the industry generally, own their own tools and toolboxes. The toolboxes are large metal tool cabinets, some up to 15 feet long, some up to 6–7 feet high, mounted on retractable wheels, that can weigh thousands of pounds. They are normally moved with tow trucks or other such loading vehicles. Mechanics keep their toolboxes at their site of employment and use them in their work.

While some of Bill and Paul Napleton's auto dealers were unionized, Napleton Cadillac of Libertyville was not, at least not when Napleton assumed operation of the dealership in June 2016. However, in early August 2016, Local 701 began organizing efforts with the Napleton service employees. On September 23, 2016, the Union filed a representation petition with the NLRB seeking recognition as the employees' bargaining representative. Napleton conducted three captive-audience luncheon meetings with employees to discuss the union, which were led by Inman and Napleton Automotive Group Corporate Manager Tony Renello. In addition, Napleton mailed to employees' homes at least one lengthy letter from Inman just before the election urging employees to vote no on the Union. Employees were not open in expressing support for the union or discussing the union at work during the campaign. The Union won an election conducted Tuesday, October 18, 2016.[4]

The following week, on Thursday, October 27, adverse action was taken against two journeymen mechanics. Below, I describe the circumstances surrounding each incident.

Bill Russell

Russell had been out on workers' compensation since mid-February 2016, when he tore a bicep while employed by Weil Cadillac. Russell had worked for Weil since 1988. He did not return to work after Napleton operated the dealership but remained out of work receiving on workers' compensation.

On October 27, 2016, Napleton's office manager, Pam Griffin, mailed Russell a letter from Napleton asking him to arrange to remove his toolbox from the premises, attaching a COBRA notice, and asking him to select whether he wanted to continue health insurance through COBRA.[5]

As noted, when Napleton took over Weil Cadillac it hired the employees of Napleton en masse. As to Russell, who was out on workers' compensation, Napleton began paying his and his families' health insurance as part of the health care benefits paid for employees. Napleton paid the employee health insurance bills for Russell and family every month after June 2017 until sending him the COBRA letter on October 27, 2017. Office Manager Pam Griffin testified that she reviewed the statements and paid the bills received from the health insurance company monthly. These statements listed every covered employee and family member and the amount Napleton was paying for each. Cancelled employee or family subscribers were noted on the statements.[6]

In addition, as had been the case under Weil, once Napleton

[3] There is a dispute about the status of one Weil mechanic, Charging Party Russell, who was on workers' compensation leave at the time of the establishment of Napleton.

[4] Pursuant to the election, on October 31, 2016, the Union was certified as the exclusive collective-bargaining representative of the following employees of the Respondent:

> Included: All full -time and regular part-time Service Technicians & Body Shop Technicians including journeymen, apprentices, semi-skilled and lube rack technicians who are employed at the Employer's facility currently located at Napleton Cadillac of Libertyville, 1050 S Milwaukee Avenue, Libertyville, Illinois
>
> Excluded: All other employees including parts department employees, service writers, porters, sales employees, managerial employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

[5] The reference is to the Consolidated Omnibus Budget Reconciliation Act (COBRA), 29 U.S.C. § 1161 et seq. COBRA provides for the extension of medical care coverage to employees, their spouses and dependent children who would lose such coverage because of termination or a reduction of work hours. COBRA requires employers to give such employees, spouses and dependent children written notice of their rights under the law to continue at their own expense to participate in the employer's group medical plan for a period of 18 months subject to obtaining similar coverage through re-employment prior to that time.

[6] In addition to Griffin's testimony, handwritten notes on the statements indicate that, as one would expect, these statements were reviewed before payment. For the statement due July 1, covering July 1-August 1, someone (perhaps Griffin) noted that Napleton was being charged for the Weil family, whose coverage, according to the note, had been cancelled

took over the dealership, Russell continued to be listed as an employee on the weekly tracking of technician bookings (GC Exh. 10 at 5–10). For each week, on the listing of technicians' booked work, the word "Disabled" was handwritten across the chart where bookings would otherwise have been listed for Russell.

Russell also regularly checked in with Napleton management at the facility. Russell testified that at his doctor's appointments, which occurred every four to six weeks, the doctor's office would provide him with a "work status report" to provide to his employer. (See, GC Exh. 5.) These status reports indicated whether the employee could perform regular, restricted, or no work, and contained comments about his work restrictions. Russell testified that his doctor was located in Libertyville, and thus, after his doctor's visits he would go to the dealership and give them a report on his potential work status. This practice began under Weil in February 2016 and continued during the period Napleton operated the dealership.

The General Counsel placed in evidence work status reports that Russell credibly testified that he provided to Napleton, and that led him to visit the dealership on June 28, 2016, July 26, 2016, August 23, 2016, September 20, 2016, and October 25, 2016. Normally, on his visits he would see and provide medical forms to Napleton's HR employee Shannon Lindgren, who worked under Office Manager Pam Griffin. He would also stop and talk with Service Manager Inman, and the subject of when he thought he could return to work would come up each time. Russell testified that on June 28, 2016, he spoke with Inman in the dispatch office and on this date Inman "was asking how I was doing, and when I was coming back." Russell testified that Inman was saying, "We're really busy. We could use you. When are you coming back. I told him I have to go with the full physical therapy and see where it goes." When Russell came to the dealership after his July 26, 2016 medical appointment, this time, accompanied by his wife, Inman asked when he was returning to work and then invited Russell to a meeting planned for August 4 where Napleton was going to discuss with employees a potential change in health insurance coverage for employees. During that visit Lindgren told Russell that "there is a possibility they're going to change [health insurance]—a representative would be there for us to fill out forms to enroll." Lindgren instructed Russell to attend the August 4 meeting, and he did. Russell testified that most of the mechanics were present at the meeting, as well as Napleton Office Manager Pam Griffin, and an insurance representative, Pat Keenan, who answered questions and provided health insurance enrollment evaluation forms for the employees to complete. Russell and his wife completed the form at home and faxed it to Lindgren. About a month later, Keenan got in touch with Russell and asked for additional information on his wife's medication, which Russell provided and faxed back to Keenan.[7]

On or about August 13, Russell attended a union organizing meeting with nine or ten other employees at a Mexican restaurant in Libertyville. Later, probably in September, although the record is not entirely clear (Tr. 102) Russell told Inman that he attended this dinner (and that he had heard it was better than the employer-conducted mandatory lunch meetings that employees—but not Russell—attended in September.[8]

On August 23, Russell visited the dealership after his doctor's visit. He testified that he was with his wife and that he spoke to Lindgren and then Inman. Russell testified that when he first saw Inman, Inman told him, "I don't know why you guys couldn't have waited to see how things played out before you bring the union in." Russell told him, "Well, we really didn't have a choice because of the stuff that was being taken away from us." Russell testified that his wife mentioned that her father was "in the union, and it worked out well for him." Inman reiterated, "I just don't know why you guys couldn't have waited." Inman and Russell then discussed his medical progress and when he might be able to return to work.

On his September 20 visit, Russell testified that he talked with Inman about returning to work and Inman again raised the union, stating, "Why couldn't you just wait and see how things played out?" Inman also told Russell "that with the union coming in, people were going to get written up who were coming in late, if you punched in late, you would be written up, so you would be reprimanded that way, where, like—that's what he said."

On October 14, 2016, Russell attended a second union meeting at a pizza restaurant in Mundelein, Illinois, with ten or eleven other employees.

On October 18, Russell voted in the representation election. As noted, the Union won the election.

On October 25, Russell came into the dealership. He spoke with Office Manager Pam Griffin because Lindgren was out on leave. When he spoke with Inman, Inman told him,

> Well, it looks like you guys had your way. You got the vote in. You got the union in. And then he said to me, he goes, [i]t was kind of shitty and sneaky for me to come in there and vote and not even say hi to him. I said I didn't want to make a big deal of it. I was just coming in to vote and leave. Then we discussed when I'd be coming back.

A few days later Russell received a certified letter, dated October 27, from Pam Griffin, instructing him to make arrangements to remove his toolbox and tools from the dealership and enclosing the COBRA form. The COBRA form sent to Russell stated:

> Please make the selection below in regards to your health and

June 20. The next month there was an adjustment on the statement for the Weil family charges. There was also a note to send a follow-up fax about the cancellation of another former employee's coverage.

[7] Russell's testimony about being invited to attend and attending the insurance meeting is unrebutted. Lindgren did not testify. Griffin testified but did not address the insurance meeting. Inman testified but did not address the matter. I credit Russell's testimony.

[8] Russell's affidavit stated in a handwritten correction, as represented by the Employer's counsel—the document was not marked, admitted, or shown—that he later told Inman he attended an October 14 union meeting. However, at trial, Russell credibly explained that the meeting he "later told Scott" he attended was the August union meeting. Russell explained at trial that he did not see Inman between the union vote on October 18 and the October 14 union meeting. I found Russell credible in his explanation that he told Inman about his attendance at the August meeting and not about his attendance at the October meeting.

> dental insurance. Please return as soon as possible.
>
> I understand that as an employee whose employment has been terminated that I have **60 days** in which to elect continuation of coverage fo [sic] **18 months.** Once I elect COBRA my coverage will be reinstated and I understand that I must pay the full premium [sic] and that this payment is **DUE PRIOR TO THE 1ST OF EACH MONTH.** If that payment lapses more then [sic] 45 days at any time within the 18 months my health/dental insurance will be cancelled, and that I have no recourse for reinstatement.
>
> Payments are to be made payable to Napleton Cadillac and mailed to
> 1050 S. Milwuakee [sic] Ave
> Libertyville IL 60048
> Attention: Shannon Lindgren

(original emphasis).

The bottom of the form had space for Russell to elect or decline family or single coverage, the monthly cost to him, and a place to sign his name and date the form.

Russell came to the dealership on November 4 and picked up his tools with a trailer and truck. He spoke to some of the employees and Inman came outside and spoke to Russell in the parking lot.

Inman told Russell, "I'm sorry this happened." Inman told Russell it wasn't up to him, (Inman), "but with everything that happened, he was just sorry about it."

While they were talking, a fellow employee mechanic, Bill Oberg walked by. Inman told Russell, "That's the guy who started all this." Russell told Inman, "If you think Bill did that, there were other people who got the union in here. It wasn't Bill. And if you're going after Bill, you're going after the wrong person." Inman responded, "Really?" Russell told him "yes."

While at the dealership Russell submitted his COBRA forms, choosing the family option. However, he called back a few days later and asked Lindgren for another form so that he could choose a less expensive COBRA continuation option, covering just him and his wife. This second COBRA form letter from Lindgren now listed a space marked "Termination Date" and the date October 27, 2016, was hand-written in the space for Termination Date.

Thereafter, Russell submitted monthly checks payable to Napleton Cadillac, covering COBRA health insurance payments for himself and his wife.

Griffin testified that in October—based on Napleton CFO Michael Jopes' testimony it would have been a day or two before the October 27 letter went out—she was "reconciling" the Blue Cross Blue Shield statement and Russell's "name appeared on there" even though she knew he had not worked since the spring.

In fact, Russell and his family members had been on these statements monthly since Napleton took over in June, and Griffin reviewed the statements each month before paying the Blue Cross Blue Shield bill. In fact, Napleton paid a total of over $7000 in premium costs for Russell and his family between June and the end of October.

Griffin reviewed these statements monthly but testified that because she was busy taking care of other things involved with the transfer from Weil to Napleton, she did not notice or bring Russell's status to the attention of Jopes until October (although she and Jopes spoke at least weekly). Jopes testified that he did not know Russell was on the insurance until Griffin "caught it" in October. Griffin asked Jopes how to handle it. Jopes said he would call her back. When he did he told Griffin to send Russell "a COBRA letter."

I note that I credit Russell's testimony in full. It was offered with credible demeanor, was fully plausible and, also importantly, was essentially uncontradicted. Lindgren did not testify. Griffin testified, confirming that Russell "checked in with the girl that did payroll upstairs"—assumedly Lindgren—when he visited the dealership. Griffin did not dispute that Inman attended the August 4 employee health insurance meeting. Inman testified extensively, but for the most part did not contradict Russell's testimony, and where he might be said to have done so, at least by implication, he did not do so credibly.[9] Shop Foreman John Soffietti's testified about the time

Russell came into the shop with his wife and spoke to Inman with Soffietti nearby. He testified that there was no discussion about the union, but he also testified that he "was mainly talking to [Russell's wife]," that he "wasn't paying attention to what [Inman] was saying," did not hear everything that Inman and Russell discussed, and "was also working at the same time" on repair orders that the conversation was occurring. Given the limitations of his participation in the discussion with Inman and Russell, Soffietti's failure to hear any discussion of the union does not

[9] Inman's testimony was extremely vague, lacking in specifics, and often resorted to a lack of recollection on a variety of subjects. On direct his testimony was the product of leading questioning, and on cross-examination he exhibited particular difficulty with memory in a manner that did not build confidence in his credibility. His testimony is not credited over contrary testimony of Russell that was more credibly offered. Having said that, little of Russell's testimony was contradicted in any fashion. As to a few points where there were contradictions: Inman testified that he first learned of the union activity in "[r]oughly August '16," but then was led (Tr. 402) to say that he was not aware of the union activity prior to receiving the petition (which was filed September 23). He then testified that he first became aware of union activity "basically when they posted—they had some paperwork that they posted up in our—right by our time clocks that evidently one of th[e] mechanics brought in." I find this wholly inadequate and unconvincing to contradict or undermine Russell's credibly offered testimony that Inman first mentioned the union to Russell on August 23, 2016, and, thus, knew of the union organizing efforts by that date. Inman also testified that during the Napleton period of ownership, Russell had come in "once maybe twice randomly," and that the last time he talked to Russell was when he came in with his wife, a visit Inman recalled as being "back in 2016. Maybe October. I don't remember." However, Inman volunteered that "Now evidently he may have been coming into the dealership even without my knowledge to discuss his -- where he was." Inman denied that in the last conversation with Russell anything other than Russell's health, return to work, or his wife's health was discussed. Inman testified that he did not recall speaking to Russell when he came to pick up his tools. I do not believe him. I found Inman an unconvincing witness, and do not credit him on the few areas his testimony is different than Russell's.

rebut Russell's testimony.

David Geisler

David Geisler was a journeyman mechanic. He had worked at Weil Cadillac for 22 years before beginning with Napleton in June 2016. He supported the Union, attended the three union meetings at area restaurants, but like other employees, did not openly support the union at work out of fear of retaliation.

The union election was Tuesday October 18. On Friday October 21, CFO Jopes called Napleton's attorney, Hendricks, and told him "they had to lay off at least one technician." Jopes told Hendricks that "the productivity of the shop didn't justify having that many technicians and they needed to lay one off and try and boost" productivity. The record shows that the following Monday morning, October 24, Napleton CFO Jopes sent Napleton's attorney (and collective-bargaining representative) James Hendricks an email, subject line "Bookings," referencing their discussion the previous Friday. The note attached information showing the week-by-week bookings for the technicians as well as an excel spreadsheet summarizing the information.

On Wednesday October 26, 2016, Hendricks contacted Union Business Representative Bob Lessman. Hendricks and Lessman had worked together on different bargaining units in the past and Hendricks called to tell Lessman that he was going to be the bargaining agent for Napleton. Hendricks also called to tell Lessman that Napleton was going to lay off one of the journeymen technicians. Hendricks indicated that he did not know the name of the technician at that time but that Napleton would be laying off the least productive journeyman. Lessman told Hendricks "that's not how we do contracts. It's always by seniority." Hendricks told Lessman that everyone had the same seniority date—the date Napleton took over the facility earlier in the year. Lessman said he wanted to use the Weil Cadillac seniority dates. Hendricks said "no, I want it by productivity."

Lessman asked Hendricks "to send me any documents he had" on the productivity. Hendricks told Lessman he would send him the information on productivity that he had gotten from Jopes.

Later that day, October 26, Hendricks forwarded to Lessman the information Jopes had sent, stating:

> Attached is the info we discussed today on the staffing/hours issues at Napleton Cadillac. As you can see, the efficiency is horrible. We are proposing the layoff at weeks end of the least productive employee, until we have had negotiations on seniority issues. Please call me with any questions you have.

The next morning, October 27, Lessman responded by email, writing Hendricks:

> Jim, I received the documents you sent, thank you. Since we can not determine, just by looking at the numbers booked, if there are issues with work distribution, amount of training each technician has or lack thereof, what Classification each technician is (Journeyman, Apprentice, etc ..), overstaffed service department and other underlying issues that may be part of the problem, I would suggest that for the purposes of layoff, that you use the pure seniority of the technicians by which classification the Employer believes the employee is in at this time. (This too also needs to be negotiated.)
>
> This would be to use the original date of hire the technicians had when it was Weil Cadillac. This way the potential layoff will not be construed as retaliation or anti-Union animus. Also, I would ask for a document that gives the technician recall rights for 6 months. So that if/when the need arises to rehire at the dealership in that classification, that employee would be recalled.
>
> I believe this is a proactive way in which we can move through this issue on a positive side that shows cooperation between the parties.
>
> Thanks,
> Bob

That afternoon, Hendricks sent an email to Lessman stating: "They are laying off David Geisler, lowest booking tech for the last 10 weeks. Hendricks confirmed at trial that this 10-week period of lowest bookings was the criteria used for determining who would be laid off.

Lessman did not respond to this email. Lessman testified that in his view, Napleton was "just telling me" about the layoff, "[t]hey weren't offering to negotiate."

Lessman testified that he did not request any additional information "because I knew we were setting up for negotiations," and, in fact, the parties met to begin bargaining on or about December 8.

Lessman testified that there was one more phone call about this with Hendricks, in which Lessman told Hendricks, "this isn't the way we would negotiate that, that he should not be laid off. It should be done by pure seniority. There are too many factors." Lessman testified that Hendricks was intent on the layoff.

Near the end of the day, Thursday, October 27, 2016, Geisler was called into Inman's office. Inman told him he was being "laid off for lack of hours."

Just before Geisler got up to leave the office, Inman told Geisler "that he asked us not to vote that way."[10]

Geisler testified that he was surprised by the layoff. There had never before been a layoff of a technician in all the years that Geisler had worked for Weil or in his months with Napleton.

A few months later, in February or March 2018, Inman contacted Geisler and asked him "if he would entertain the idea of being rehired because business had increased." Geisler turned him down.

As far as the record indicates, the issue of a layoff at Napleton was first decided upon by Jopes with Hendricks on Friday October 21, three days after the union election.

However, Napleton witnesses Renello and Inman each maintained at trial that the overall lack of work as well as productivity

[10] I credit this testimony. Geisler's testimony was offered with a slow, understated, guileless, and truthful demeanor. He was not prone to exaggeration or embellishment. I do not believe he made this up. Inman, on the other hand, seemed sure of almost nothing, a font of imprecise and hazy guessing. He was noticeably less cooperative and less able to recall events when questioned on cross-examination than he had been on direct examination by counsel for Napleton. He did not deny making this statement about unions and did not mention in it in his limited account of his exchanges with Geisler.

issues, and a review of the issue over many weeks and months led them to lay off the least productive journeyman mechanic.

Inman testified vaguely that he understood from Renello from soon after Napleton took over the dealership that "It was required that we wanted to get our shop as productive as possible" so that the Libertyville store "could get on the same game plan that he [Renello] had already been on with all these other stores" that Napleton operated. According to Inman, this meant that unlike Weil, Napleton kept track of productivity more systematically. Weil had operated under "more of an honor system" in which journeymen were credited with 30 hours of booked work per week even if it was not always accurate. Inman understood that Renello wanted journeymen to book "more than 40 hours" of work weekly.

The closest Inman got to asserting that he and Renello talked in advance about the possibility of a layoff was that he and Renello discussed, at some unidentified time, "to some extent" that "if you don't have enough work in a shop to where all the technicians are making a certain amount of hours, our target would be at a minimum the guarantee [i.e., the 30 hours of booked pay], but ideally the 40 hours that they actually clock. If you don't have enough work, at some point it has to be determined that maybe we have too many bodies working in that facility versus the amount of work that we have coming through the door." Inman testified that he and Renello talked about the productivity of the facility but it "wasn't just specifically on Dave Geisler. . . . . We talked about everybody. And it wasn't any one person we wanted to single out."

Inman did not have any group meetings regarding the productivity demands of Napleton. Rather, Inman testified on direct examination, in very vague fashion, that he spoke "randomly" with some of the journeymen about productivity issues over the course of the time that Napleton operated the dealership. However, on cross examination he stated that Geisler was the only employee he "specifically" talked to about productivity issues, although others were also not making 40 hours of booked pay per week.

Inman testified that "just guessing" he raised productivity issues with Geisler in "early July, August, and then September." Indeed, Inman testified that he thought Geisler knew that "termination is coming," something Geisler denied. Geisler maintained that raising production hours had only been mentioned once or twice informally by Inman, about 6–9 months previously, during cigarette breaks the two took.

Inman testified that Renello tried increasing advertising which helped business some, but "not enough to serve the purpose we were after." This led "[ultimately" to "where we have to lay off people." Inman described the layoff decision as a "mutual" one between he and Renello, and Jopes "might have had some input but basically it was Tony [Renello] and myself." However, Inman testified that he, more than Renello, suggested Geisler as the one who should be laid off. According to Inman, "we decided to . . . go after the weakest link, the guy that was most unproductive." Asked if this was the first conversation when specifically suggested that Geisler should be the one laid off, Inman testified that "I don't know." Inman could not "recall exactly when" this decision to lay off Geisler (or any employee) was made but testified that "just speculating," the decision was made "[a]nywhere from two weeks to a month" before the layoff occurred.

Renello testified extensively about the decision to lay off Geisler. His story was different than Inman's in some significant ways.

He testified that within a few weeks of Napleton taking over the dealership he realized that the biggest problem was that a number of the journeyman technicians were not booking sufficient hours. Rarely was anyone booking 40 hours a week, which is what Renello testified was Napleton's target or goal for employees to book. Renello testified that over the weeks of review, Geisler "would stand out" as booking less than the other journeymen.

In the (frustratingly) vague manner of all of the Respondent's witnesses, Renello testified that he began having conversations with Inman specifically about Geisler "within the first six months of our ownership," and that he worked with Inman to try to find out how they could help Geisler ("let's see if we can help," "[l]et me know what he is lacking"), and that in these discussions Inman was Geisler's biggest "advocate."[11]

"At some point"—Renello could not say when—Renello testified that he told Inman, "we've got a few more weeks here" before action had to be taken against Geisler. Renello also testified that he "knows" he talked with Geisler about his productivity—on a Wednesday—the day of the week he routinely visited the store, "but I have nothing in writing to back up date, time, place." Ultimately, Renello testified that he directed that Geisler be laid off because of his productivity, although he also testified that "it was probably a joint decision between myself, Mike Jopes and Scott Inman."[12] However, Renello testified that he "can't say the date because I don't remember." He also could not recall the conversation with Jopes ("I am sure I did [talk to him about Geisler] but I can't remember, honestly. . . . There were many issues we were looking at back then"). He testified that the decision was something he made slowly, over time because people can have "bad weeks," and he waits to see if it is a trend. He testified that Geisler was not given any type of "probation period" because if "you start naming periods of time, people start holding people's feet to the fire way too quickly. . . . My job is to keep as many great people as I can. Some of them aren't great when I see them. Some of them will be great in six or eight months. I can live with that." However, Renello also testified that with Geisler he knew that "he wasn't going to change, he couldn't do this . . . [a]fter an ample time had gone by, which my general rule is five or six weeks."[13]

[11] Not only does this conflict with Inman's testimony that Geisler was not focused on between he and Renello until Inman offered Geisler's name as the employee who should be chosen for layoff, but, as Geisler was terminated just four months (and a week) after Napleton took over ownership, Renello's statement that they began discussing Geisler within the first 6 months tells us nothing.

[12] Renello was asked on cross examination whether anyone else was discussed as a potential candidate for layoff, and Renello said that they "[m]ay have."

[13] Renello also testified that in Geisler's case he looked at productivity figures in excel sheets he created, based on payroll information. He looked at "five to six week bunches of numbers three or four times before I knew," that Geisler needed to be let go because "I don't care about the

Napleton's CFO Jopes also testified but his account of his involvement was limited, and flatly contradicted by the record evidence.

Jopes testified that he was only involved in one conversation with Renello—or Inman, or both, he was not sure—about the Geisler layoff. He testified that on October 27, "the day that [Geisler] was laid off," he received a call, either from Renello, or Inman, or both "laying out the data that it may be time to lay off a technician because none of the technicians were consistently booking 40 hours of our whole staff." Jopes testified that he instructed them (Renello, or Inman, or both) "that we should lay off the least productive of the technicians." Jopes testified that "when we had presented it all," Jopes asked Renello "which technician has been consistently the low producer? At which point they presented the name and I said, well, that should be the person to go; they all have the same seniority, and the lowest producer should be the one to go." Jopes recalled that Renello agreed with this assessment. Jopes also testified that he checked with Attorney Hendricks to advise him on the layoff as this layoff—occurring at dealership with a recently certified union, but where no "rules" had been negotiated on how the layoff should be determined—was an "in-between" situation. Jopes described this as "uncharted territory" for him, so he contacted counsel to advise him on the layoff. Other than this instance, he had not been involved in the past in the decision of whom to lay off and was not otherwise involved here. Jopes also testified that he had no role in assessing productivity of the technicians or reviewing such documents.

It is clear that Jopes is making this up. Contrary to his testimony, the record evidence and Hendricks' testimony shows that on Friday October 21, 3 days after the election, Jopes called Hendricks and told him that Napleton "had to lay off at least one technician." By the next Monday morning, Napleton's attorney raised the matter with the Union and forwarded the data showing productivity information that Jopes had sent to him on Friday. This means, of course, that Jopes' testimony that he had no role in the layoff until October 27, when he was called by Renello or Inman about it, is in error. Contrary to his testimony the decision was not made or left to Renello and Inman and was not made or left to October 27.

Thus, as far as the credible record evidence suggests, the layoff decision was made not the week after the union election, but 3 days after the union election, when Jopes called his lawyer on Friday October 21 and announced that Napleton "had to lay off at least one technician." There is no documentary evidence of any earlier decision being made to lay off an employee.

The August 1, 2017 strike

In the wake of the Union's representation election victory, Napleton and the Union commenced bargaining for a labor agreement on or about December 8, 2016. By August 2017, in the Union's view, negotiations had stalled.

On August 1, 2017, the Union commenced a strike against the 129 Chicago-area cardealers who were members of a multiemployer bargaining association known as the New Car Dealer Committee (NCDC). Napleton Cadillac of Libertyville was not a member of the NCDC. However, Napleton owned about six other dealerships that were and that were the subject of the strike.

In preparation for the NCDC strike, Napleton had discussed with its Libertyville employees that the NCDC strike would provide additional work opportunities for Napleton. The afternoon of July 31, Napleton had a meeting with its employees where, as Renello recounted events, he told them:

> Said, look, you guys have an opportunity. Everybody else it looks like in the city of Chicago is going to go on strike. Obviously, I am thinking, okay, you are not, I said obviously you guys are not. What we will do for you is we will funnel the work from Foley Cadillac, 15 miles away, to this Cadillac store and you guys can come in as early as you like and stay as late as you like, we will feed you steaks, you can make as money as you want, we will bring their work here while they are on strike.
>
> Scott Inman was in the meeting with me. They were all in the room. We gave them that option. We asked them if there were any questions, how they felt about it, is everybody good with it. All I got were smiles and head shakes, yeah, yeah, yeah, yeah, we are great. Next thing I know, I wake up in the morning. I got a phone call from Scott that they are walking a picket line.

The Napleton employees struck the morning of August 1. Renello testified that "[i]t caught us totally off guard."

On the first day of the strike Napleton distributed a letter to the striking technicians, hand-delivering it to the picketers in front of the dealership. The letter, dated August 1, 2017, on Napleton Auto Group letterhead, stated:

> To All Service Technicians:
>
> This is to let you know the consequences of your strike. While we still intend to meet with your union on the 15th to continue negotiations, we will do the following:
>
> *Effective immediately you will receive a COBRA letter, as we will not be paying for your health insurance. You will be responsible for the premiums in their entirety.
>
> *We have placed ads for replacement technicians. If and when you are replaced, you will be notified. After you are replaced, should you make an unconditional offer to return to work you will be placed on a preferential hire list should an opening occur.
>
> *Make arrangements to have your tool boxes removed from the shop, as we do not want to be responsible for your tools when you are not working.
>
> It is unfortunate that you have chosen to strike, but that is the choice you have made.
>
> Napleton Cadillac

bad week or two. I care about 20 bad weeks, 15 bad weeks." Renello testified (Tr. 275–276) that the excel sheets he created and relied upon in deciding on Geisler's layoff were deleted every 4–5 weeks, and none that he relied upon in deciding on Geisler's termination was still in existence at the time of trial.

Renello testified that he and Jopes handed the letter to the strikers and as they did he told each striker: "look, the toolboxes have to be out of here in two days, if you put your uniform back on we will help you push them back in, go back to work, we will forget this ever happened. . . . [W]e'll act like you guys never walked out of the building."

On either August 1 or 2, Napleton's attorney, Hendricks, called Union Business Representative Lessman and told him that Napleton wanted the employees' toolboxes removed. Lessman told Hendricks, "Jim, these aren't toolboxes that can be put in a trunk," something that Hendricks acknowledged. Lessman told Hendricks "[i]t's going to take some time." Lessman said that "[w]e have to get ahold of [Union Representative and Organizer] Tony [Albergo]," whom the Union had given primary responsibility to for this unit.

On August 2, Albergo received a copy of the letter Napleton had distributed. He contacted Renello and told Renello that they needed to negotiate a reasonable amount of time to have the toolboxes removed. Renello told Albergo he (Renello) would have to consult with Napleton's attorney, Hendricks. Albergo told Renello that the Union would "take legal action if the toolboxes were removed." Renello told him, "I don't care. I have my orders."

Albergo called his directing business representative at the Union, Sam Cicinelli, and requested that Cicinelli contact Hendricks. Cicinelli called Hendricks while Albergo stood in his office. Hendricks agreed that the employees would have until the end of the day on Friday—August 4—to remove the toolboxes. Albergo called Renello back and told him that the Union had an arrangement with Hendricks that they would have until the end of the week to remove the toolboxes. Renello said that he would have to check on that. On Thursday morning August 3, Hendricks called Cicinelli and told him "that he got his rear end reamed from a dealer principal for giving me the authority to get the toolboxes out by Friday." Cicinelli told Hendricks "there's no way I can get these toolboxes," and Hendricks told him "do your best."[14]

Renello testified that on August 2, he again approached the Napleton strikers. He repeated that they could come back to work and "we will act like this never even happened, just go back to work." Renello testified that he told them that "tomorrow we are going to start pushing them [the toolboxes] out."

On Thursday August 3, Napleton started removing the toolboxes. That morning, Renello, Jopes, Inman, and two porters from the Napleton Ford facility across the road, rolled the employees' toolboxes outside the fenced gates of the dealership onto the service access driveway to the property. The toolboxes were left uncovered and unattended there. Napleton called the police in conjunction with this because, according to Jopes, "[w]e wanted to make sure there was no trouble" when the toolboxes were removed.

Albergo got a call from one of the employees saying that the toolboxes were being removed from the dealership. Albergo called Renello and told him there was an agreement not to remove the toolboxes until the end of the week. Renello told him, "I don't care at this point. I'm removing them."

In the morning the weather was sunny and hot. But early in the afternoon there was a heavy rainfall for about 30 minutes, described by witnesses as a "torrential downpour." Napleton then pushed the toolboxes back inside. However, the toolboxes belonging to employees Joseph Schubkegel and Bill Oberg sustained rain damage. Schubkegel's toolbox had sunk into the tar pavement and because of that and the incline it was on, the managers could not move it back into the cover of the dealership. It sat outside through the heavy rain and then was covered in plastic. Later in the afternoon, before the dealership closed, the managers came and asked the employees to help push Schubkegel's toolbox in.

The next day, Friday August 4, the Union and employees arranged for a towing service to remove the toolboxes from Napleton.[15]

Napleton did not demand removal or take steps to remove the employee toolboxes from its six other stores that were on strike against the NCDC. Renello volunteered at trial a reason why Napleton did not have the toolboxes removed from its other stores: "No, no. Most of our—the other technicians and the other stores wanted to work through the strike. They just weren't allowed to."

Analysis

I. THE UNLAWFUL DISCHARGE AND LAYOFF ALLEGATIONS (PARAGRAPH VI OF THE COMPLAINT) AND THE ALLEGATION TELLING AN EMPLOYEE HE WAS BEING LAID OFF BECAUSE OF THE WAY EMPLOYEES VOTED (PARAGRAPH V(A) OF THE COMPLAINT)

The General Counsel alleges that Russell's discharge and Geisler's layoff were in retaliation for the technicians' decision to unionize, and therefore violated Section 8(a)(3) and (1) of the Act. The Respondent contends that the employees' unionization was not a motive for its actions against Russell and Geisler. Rather, it claims that in removing Russell and his family from the employee insurance rolls it was moving to correct an oversight regarding a never-hired employee who was inadvertently transferred over from the predecessor Weil Cadillac. As to Geisler, the Respondent contends that his layoff was a nondiscriminatory business decision, having nothing to do with the union drive, but motivated by an effort to increase the dealership's productivity and rid itself of the least productive journeyman technician.

Section 8(a)(3) of the Act provides, in relevant part, that it is "an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition

[14] Lessman, Albergo, and Cicinelli's testimony about their discussions with Hendricks was undisputed. Hendricks testified but did not deny (or address) this matter. I credit the union representatives' undisputed testimony on these matters. In addition, Jopes testified that Hendricks confirmed to him that he had offered the Union until August 4, to remove the toolboxes, but Jopes had told him no.

[15] Although it is not particularly material, there was significant confusion on the part of numerous witnesses about the dates involved with the toolbox removal issue. I have set forth my findings of the date on which these events occurred in the text, which is based on the full context and accounts of multiple witnesses. There is no real dispute among the parties as to whether these events occurred, and I find that the conflicting account of dates did not undermine any witnesses' overall testimony on the issue.

of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Under Section 8(a)(3), the prohibition on encouraging or discouraging "membership in any labor organization" has long been held to include, more generally, encouraging or discouraging participation in concerted or union activities. *Radio Officers' Union v. NLRB*, 347 U.S. 17, 39–40 (1954); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963). As any conduct found to be a violation of Section 8(a)(3) would also discourage employees' Section 7 rights, any violation of Section 8(a)(3) is also a derivative violation of Section 8(a)(1). *Chinese Daily News*, 346 NLRB 906, 934 (2006), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

The Board's Supreme Court-approved standard for cases turning on employer motivation is found in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis).

In *Wright Line*, the Board determined that the General Counsel carries his burden by persuading by a preponderance of the evidence that employee protected conduct was a substantial or motivating factor (in whole or in part) for the employer's adverse employment action. Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole.[16]

Under the Wright Line framework, as developed by the Board, the elements required in order for the General Counsel to show that protected activity was a motivating factor in an employer's adverse action are union activity, employer knowledge of that activity, and antiunion animus on the part of the employer.[17]

Such showing proves a violation of the Act subject to the following affirmative defense: the employer, even if it fails to meet or neutralize the General Counsel's showing of unlawful motivation, can avoid the finding that it violated the Act by "demonstrat[ing] that the same action would have taken place in the absence of the protected conduct." *Wright Line*, supra at 1089.

As developed by the Board, for the employer to meet its *Wright Line* burden, it is not sufficient for the employer simply to produce a legitimate basis for the adverse employment action or to show that legitimate reasons factored into its decision. *T. Steele Construction, Inc.*, 348 NLRB 1173, 1184 (2006). Rather, it "must persuade that the action would have taken place absent protected conduct by a preponderance of the evidence." *Weldun Int'l*, 321 NLRB 733 (1996) (internal quotations omitted), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (approving *Wright Line* and rejecting claim that employer rebuts General Counsel's case by demonstration of a legitimate basis for the adverse employment action). In such cases, the Board will not weigh the relative quantity or force of the unlawful motive compared to the lawful motive: the violation is established if the employer fails to prove it would have taken the action in the absence of protected activity. *Wright Line*, supra at 1089 fn. 14.

Notably, evidence that an employer's rationale for adverse action is pretextual adds to the strength of the General Counsel's prima facie case of discrimination.[18] Indeed, where "the evidence establishes that the proffered reasons for the employer's action are pretextual—i.e., either false or not actually relied upon—the employer fails by definition to show that it would have taken the same action for those reasons, regardless of the protected conduct."[19]

I note at the outset that the General Counsel's theory of violation, as argued in his brief, is not that Geisler or Russell were severed from employment in retaliation for their individual union activity. Their individual union activity, to the extent known to the Employer, did not stand out. However, it is well-settled that the General Counsel need not prove that each individual discriminatee was a union supporter or that the Respondent was aware of each discriminatee's union support, where an employer takes adverse action against employees, regardless of their individual sentiments toward union representation, "in order to punish the employees as a group 'to discourage union activity or in retaliation for the protected activity of some.'"[20]

In this case the General Counsel claim is that Geisler and Russell were let go in retaliation for the unit employees' decision to unionize. Pursuant to this theory, the first two prongs of the

[16] *Brink's, Inc.*, 360 NLRB 1206, 1206 fn. 3 (2014); *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. 184 Fed. Appx. 476 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

[17] *Dish Network, LLC*, 363 NLRB No. 141, slip op. at 1 fn. 1 (2016); *Hawaiian Dredging Construction, Co.*, 362 NLRB No. 10, slip op. at 3 (2015), enfd. denied on other grounds, 857 F.2d 877 (D.C. Cir. 2017); *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014); enfd. 801 F.3d 767 (7th Cir. 2015).

[18] *El Paso Electric Co.*, 355 NLRB 428, 428 fn. 3 (2010) (finding of pretext raises an inference of discriminatory motive and negates rebuttal argument that it would have taken the same action in the absence of protected activities); *All Pro Vending, Inc.*, 350 NLRB 503, 508 (2007); *Rood Trucking Co.*, 342 NLRB 895, 897-898 (2004), citing *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) ("When the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual . . . . the factfinder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal—an unlawful motive") (internal quotation omitted); *Pro-Spec Painting*, 339 NLRB 946, 949 (2003) (noting that where an employer's reasons are false, it can be inferred that the real motive is unlawful if the surrounding facts reinforce that inference.) (citation omitted).

[19] *David Saxe Productions*, 364 NLRB No. 100, slip op. at 4 (2016); *Rood Trucking*, 342 NLRB at 898, quoting *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Frank Black Mechanical Services, Inc.*, 271 NLRB 1302, 1302 fn. 2 (1984) (noting that "a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel").

[20] *Electro-Voice, Inc.*, 320 NLRB 1094, 1095 fn. 4 (1996) (quoting *ACTIV Industries*, 277 NLRB 356 fn. 3 (1985) and citing additional cases therein); *J.T. Slocomb Co.*, 314 NLRB 231, 241–243 (1994) (layoff designed to chill employees' union support without regard to discriminatees' particular union activities or sympathies unlawful); *Birch Run Welding*, 269 NLRB 756, 764–765 (1984) (endorsing theory "that Respondent engaged in a general retaliation against its employees because of the union activities of some of its employees in order to frustrate all union activities, even though some of those employees caught in the retaliatory net were not involved in union activities"), enfd. 761 F.2d 1175, 1180 (6th Cir. 1985); *Pyro Mining Co.*, 230 NLRB 782 fn. 2 (1977) ("The layoff itself not the selection of employees, was unlawful").

General Counsel's *Wright Line* burden are easily met. Collectively the employees chose to engage in union activity—they petitioned for and then voted for union representation—and, of course, the employer was aware of this activity: after the petition was filed Napleton conducted employee meetings to discourage employees from voting for the Union and the election was conducted on Napleton's property. Moreover, the evidence shows that the Respondent, specifically Inman, was aware of the employees' union organizing by August 23.

The third prong of *Wright Line*—an assessment of the Respondent's antiunion animus and whether it meets the General Counsel's burden to persuade that protected conduct was a motivating factor for the actions against Russell and Geisler—requires more explication.

In support of this third prong of *Wright Line*, the General Counsel relies upon several indicia of discriminatory motivation.

I will begin with Russell. First, and most directly, Inman alluded to the employees' decision to unionize in comments made to Russell suggesting that this was why action was being taken against him.

Inman's comments to Russell on November 4—when Russell came to the dealership to comply with the directive to remove his toolbox—directly connected the employees' union activities to the action being taken against Russell. Inman approached Russell and apologized, telling him "I'm sorry this happened," and adding, that it was not up to him, "but with everything that happened, he was just sorry about it."

Given the remarkably close timing between the October 18 union election and the next week notice to Russell that he was effectively terminated and to get his toolbox out of the dealership, it would be reasonable—perhaps, unreasonable not—to find, with nothing more, that Inman was referencing the union drive as an explanation for Russell being severed. But there is more. Employee Olberg walked by and Inman again raised the union campaign, telling Russell that "That's the guy who started all this," to which Russell responded, "If you think Bill did that, there were other people who got the union in here. It wasn't Bill." Inman responded, "Really?" This only adds to the conclusion that when Inman attributed the action against Russell to "everything that happened," he was referencing the union drive.

And this conclusion is further reinforced by consideration of the fact that on Russell's monthly visits to the dealer after the union drive began, Inman repeatedly complained to Russell about the union drive: "I don't know why you guys couldn't have waited to see how things played out before you bring the union in" (August 23); "Why couldn't you just wait and see how things played out?" (September 20). And on October 25, one week after the representation election, Inman expressed open pique with the union drive: "Well, it looks like you guys had your way. You got the vote in. You got the union in." Then Inman complained to Russell that "It was kind of shitty and sneaky" for Russell to come in to vote on October 18, and "not even say hi" to Inman.

I find that Inman's November 4 apology to Russell impliedly referenced the union campaign and election as motivating the action against Russell. Thus, there is evidence not just of employer anti-union animus, but evidence of that animus as motivation for the action taken against Russell.

I also find support for the General Counsel's case in Inman's comment to Russell, on September 20, "that with the union coming in, people were going to get written up who were coming in late, if you punched in late, you would be written up, so you would be reprimanded that way, where, like—that's what he said." While not alleged as an unfair labor practice—and therefore I do not find it to be a violation—this is a clearly unlawful threat. *Vista Del Sol Healthcare*, 363 NLRB No. 135, slip op. at 20–21 (2016); *Jennie-O Foods, Inc.*, 301 NLRB 305, 310 (1991). It is evidence of antiunion animus that supports the General Counsel's prima facie *Wright Line* case. See, *Brinks, Inc.*, 360 NLRB 1206 fn. 3 (2014) ("it is well established that conduct that exhibits animus but that is not independently alleged or found to violate the Act may nevertheless be used to shed light on the motive for other conduct that is alleged to be unlawful").[21]

Finally, a very important indication of animus in this case is timing. The Board has long recognized that in discrimination cases unexplained timing can be indicative of animus.[22]

Here, the action against Russell occurred the week after the union election. Notwithstanding this, the Respondent's position is that the close proximity in time of the union election and the action against Russell was entirely coincidental. One had nothing to do with the other. This is unconvincing.

In the case of Russell, the Respondent's explanation simply reeks of fabrication. The Respondent claims that Griffin, busy with all manner of work arising from the transfer of Weil to Napleton, noticed for the first time in late October, while going through the health insurance provider statement, that Russell's name was there, knew he was not an employee, called Jopes, who told her to send Russell a COBRA letter to "formally inform Mr. Russell that he was not employed by Napleton." Is this possible? I do not believe it.

Here we have a longtime Weil employee, personally known to Griffin and Inman, who, although on workers' compensation, regularly comes into the dealership during Napleton's ownership to discuss with Inman his ability to return-to-work. Russell is listed on Napleton's weekly booking sheets as an employee and each week is listed as "Disabled" across from his name. His tools and toolbox remain at the Napleton dealership from the time Napleton took over the dealership in June until the time he is ordered to remove them in late October. Russell is invited and

[21] At the same time, I neither reach nor rely on the General Counsel's contention that certain of Inman's statements, which appear to be lawful statements (some, albeit perhaps only arguably so) designed to convince employees to vote against the Union, provide further evidence of animus supporting the General Counsel's *Wright Line* case. Given the other evidence of animus that I have found, it is unnecessary to consider or rely upon these other lawful, or, in any event, not clearly unlawful, statements made by Inman. See, GC Br. at 6–7.

[22] *Electronic Data Systems*, 305 NLRB 219, 220 (1991), enfd. in relevant part 985 F.2d 801 (5th Cir. 1993); *North Carolina Prisoner Legal Services*, 351 NLRB 464, 468 (2007), citing *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004) (timing of employer's action in relation to protected activity provides reliable evidence of unlawful motivation); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002), enfd. mem. 71 Fed. Appx. 441 (5th Cir. 2003); *Yellow Transportation, Inc.*, 343 NLRB 43, 48 (2004); *Structural Composite Industries*, 304 NLRB 729, 729 (1991).

then instructed to attend and does attend an August 4 employee meeting at the Respondent's worksite to learn about and sign up for new employee health insurance. Afterwards he exchanges faxes and information with the Respondent's HR representative and with the Respondent's insurance broker. Russell then shows up and votes in the onsite Napleton representation election (without any evidence of objection). Finally, and, perhaps even more significantly, Russell and his family members appear every month on the bill from the insurance company that Griffin admitted reviewing and paying every month, with their individual costs of coverage set out in plain sight. Indeed, Napleton was billed and paid a total of over $7000 for Russell and his family's health insurance from June through September. Yet with all this, the contention is that neither Griffin nor anyone else noticed this "mistake" of treating Russell like an employee on leave—it "slipped by us until it was caught in October"—until just days after the union election when Griffin reviewed the October insurance bill, at which time she alerted Jopes and Russell was removed from the rolls forthwith.

This is very farfetched. I find that it is not true that Russell and his presence on Napleton's rolls did not come to the attention of Napleton until a few days after the union election. (Surely someone wondered why he was voting in the representation election, or why Inman hand-

wrote "Disabled" across from his name on the employee list?). This is a case where the timing of the adverse action is highly suspect, not otherwise credibly explained, and therefore strongly supportive of an inference of discriminatory motive for Russell's removal.

In short, I do not believe the Respondent's explanation for how it came to terminate Russell from its insurance rolls on October 27. This conclusion that the Respondent's explanation for the Russell termination is a pretext not only adds to the weight of the General Counsel's case, but seals it shut, as it pretermits the "need to perform the second part of the Wright Line analysis." *Rood Trucking*, supra.

That is the end of the matter, but I further note that *other* than this fantastic claim that it did not notice Russell until immediately after the election, the Respondent offers nothing else of substance in an effort to show it would have taken action against Russell in the absence of the employees' union activity. Its brief is devoted to a series of ad hominem and nonsequitur attacks on Russell and his credibility. They are not compelling in any way.[23]

Finally, the Respondent claims that Russell was never hired and was not an employee of Napleton. I do not agree. The evidence is that Russell was an employee of Napleton but out on leave for disability. This is how he was treated by Napleton. Thus, his name was on the weekly employee booking hours—but marked disabled—he was told to and did keep Napleton apprised of his medical condition and regularly discussed with Inman the possibility of returning to work. He voted in the union representation election conducted at Napleton for Napleton employees. He attended employee meetings sponsored by Napleton to discuss and apply for changes to the health insurance. And, of course, Napleton had Russell and his family on the employee insurance and paid for his insurance monthly. He was an employee out on leave. The fact that Geisler transferred from Weil without performing work for Napleton is not determinative. Notably, the Respondent hired every service technician of Weil without requiring an application or other affirmative steps to secure the job.

Obviously, and intentionally, as shown by the COBRA letter it sent Russell (indicating that he was "an employee whose employment has been terminated"), by Griffin's letter telling him to make arrangements to remove his toolbox, by the follow-up COBRA letter in which the words "termination date" were typed in and the date October 27, 2016, handwritten in, it is clear and undisputed, that by terminating Russell's insurance Napleton was severing any further employment relationship or obligations of an employment relationship that existed between Russell and Napleton. This was a discharge.

In short, I find that Russell was an employee of Napleton, albeit on leave, at all times after Napleton took over the Weil car dealership in June 2016. Russell was discharged from Napleton on October 27, 2016.

For all of the foregoing reasons, I find that the Respondent discharged Russell on October 27, 2016, in retaliation for the employees' selection of union representation and in violation of Section 8(a)(3) and (1) of the Act, as alleged.

As to Geisler, the General Counsel's initial *Wright Line* burden is met by the same type of evidence indicating animus on the part of the Respondent as discussed with regard to Russell. Most prominently, as it did with Russell, the Respondent specifically linked Geisler's layoff to the union vote: Inman abruptly told Geisler near the end of the October 27, 2016 meeting in which he laid off Geisler, that he asked the employees "not to vote that way." In the context of a meeting to issue a layoff, this is a veritable admission that "vot[ing] that way" motivated the layoff, at least in part.[24]

Finally, as with the action against Russell, the timing of Geisler's layoff is highly suspect, and adds to the General Counsel's showing that unlawful animus was a cause for Geisler's layoff.

The strength of the inference of discrimination to be drawn

[23] Thus, I neither observed nor detected anything in the record, or in Russell's demeanor, to substantiate the claims of the Respondent (R. Br. at 8) that Russell was "disingenuously dishonest" or "best characterized as the greedy scheming plaintiff who is determined to generate an ill-gotten windfall for himself and his family." Nor, contrary to the Respondent's claim (R. Br. at 8), is the observation that Russell, and not the Union, filed the charge in his case probative of anything in assessing Russell's credibility. Similarly, nothing is to be gleaned from the claim (R. Br. at 8) that "Russell himself is uncertain as to how he is personally wronged, because he is maintaining a parallel charge of discrimination against Napleton." The issue is not Russell's certainty of Napleton's motives, but, rather, an assessment, in the context of a full record, of Napleton's motives. Whether disability discrimination was also at work in these events is not a matter I reach.

[24] The General Counsel alleges, referencing complaint allegation par. V(a), that in addition to serving as evidence in support of the unlawful layoff allegation, Inman's suggestion to Geisler that the layoff was the result of employees' "voting that way"—i.e., for union representation—independently violated Sec. 8(a)(1). I agree. It reasonably tends to interfere with employees' Sec. 7 right to vote for a union to suggest that this protected activity provoked a layoff.

from the timing of Geisler's layoff is accentuated by the complete lack of nonsuspicious explanation for the timing offered by the Respondent.

Here, it is useful to consider the Respondent's explanation of the layoff—a decision that three of the Respondent's witnesses (Inman, Renello, and Jopes) attributed to Geisler's productivity problems, and more generally, the entire bargaining unit's problems with productivity. However, a review of their testimony indicates that the timing of the layoff is highly suspicious.

To begin with Jopes, his version of events is flatly contradicted by the record evidence and the testimony of Attorney Hendricks. Jopes testified that his involvement in this layoff occurred on October 27, the day of the layoff, when Renello, or Inman, or both—the witness could not remember—called him "laying out the data" that it "may be time to lay off a technician." Jopes told them that the "low producer"—who they identified to him as Geisler—should be the employee laid off. Jopes also testified that because this layoff was occurring in an unfamiliar legal terrain for him—no longer a nonunion shop, but also not a union shop with a labor agreement dictating the order of layoff—he discussed the matter with Attorney Hendricks.

The problem with this testimony is that Hendricks' testimony and the email records indicate that Jopes called Napleton's attorney, Hendricks, on Friday October 21, three days after the union election, and told him "they had to lay off at least one technician." Hendricks contacted the Union about this Monday morning October 24, indicating that Napleton was going to lay off an employee at the end of the week. Thus, contrary to Jopes' testimony, he was involved in and communicated the intention to lay off a technician just three days after the union election, not the following week.

This make the timing of the decision to lay off more not less suspect, as this is the earliest record documentary reference to the decision—and it is just 3 days after the union election and contradicts the testimony of the Respondent's CFO.

The Respondent's other witnesses shed no further credible light on when the layoff decision was made, or why it was made when it was. There is no documentation—no notes, no email, no message slips, no report, nothing—that indicates any discussion of layoffs prior to the Friday October 21 reference (that is contained in an October 24 email).

It is true that Renello and Inman testified that productivity concerns leading to the layoff decision developed slowly over the course of the four months that Napleton owned the dealership. However, neither was able to date when the decision to conduct a layoff was made, or when the decision to lay off Geisler was made. Asked this question, Inman said "I don't recall exactly when." Asked how much time elapsed between the decision and the layoff on October 27, Inman said, "Anywhere from two weeks to a month. I am just speculating." Particularly given the haziness of his memory on nearly every subject he was asked about I put no stock even in this vague answer, which if credited, would not do much to aid the Respondent's defense. But as Inman was quick to add, his testimony on this point was no more than rank "speculation." Renello, for his part, resisted all attempts to date the layoff decision, repeatedly retreating to a formulation that it was a decision many months in the making, based in part on productivity records that he routinely deleted, and deleted in this instance. Renello testified that six to eight months was a reasonable time period to give an employee to turn his or her productivity around, although Geisler was laid off four months after Renello assumed management responsibilities at Napleton at Libertyville. All of this, in turn, was contradicted by Hendricks, who testified at trial that a 10-week period of lowest bookings was the criteria used for determining that Geisler would be laid off. That 10-week period, set out on an excel spreadsheet sent to the Union, ended on October 14, meaning the decision could not have been made before that time—within a few days of the representation election.

For purposes of the *Wright Line* analysis, I will assume without deciding that the Respondent had a basis rooted in productivity concerns for undertaking a layoff, and specifically for choosing Geisler to lay off. In other words, I will assume this is a "dual motive" case and that the Respondent had legitimate grounds for a layoff. However, this is plainly insufficient for the Respondent to meet its burden of proving "that the same action would have taken place in the absence of the protected conduct." *Wright Line*, supra at 1089.

As developed by the Board, for the employer to meet its *Wright Line* burden, it is not sufficient for the employer simply to produce a legitimate basis for the adverse employment action or to show that legitimate reasons factored into its decision. *T. Steele Construction, Inc.*, 348 NLRB 1173, 1184 (2006). Rather, it "must persuade that the action would have taken place absent protected conduct by a preponderance of the evidence." *Weldun Int'l*, 321 NLRB 733 (1996) (internal quotations omitted), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (approving Wright Line and rejecting employer's claim that its burden in making out an affirmative defense is met by demonstration of a legitimate basis for the adverse employment action). This means that in the face of the General Counsel's prima facie case it must prove that it would have taken the same action—i.e., that it would have laid off Geisler on October 27—in the absence of the employees' union activity. See, *Cayuga Medical Center*, 365 NLRB No. 170, slip op. at 33 (2017); *ManorCare Health Services*, 356 NLRB 202, 228 (2010) (employer's Wright Line burden requires it to prove "it would have taken the same action against" employees in the absence of union activity), enfd. 661 F.3d 1139 (D.C. Cir. 2011).

The Respondent has failed to meet this burden. Here we have a layoff, that by all (albeit limited) evidence was decided upon for the first time 3 days after the union election, carried out the week following the union election with a reproof from the service manager that he had asked the employees "not to vote that way." This firmly establishes the General Counsel's initial *Wright Line* case that the employees' union activity was a reason, at least in part, for the Respondent's actions. In rebuttal, the Respondent offers nothing to show that it would have taken this action when it did in the absence of the union activity. In particular, the suspicious timing of the layoff is completely unrebutted. The Respondent's witnesses offer no credible explanation for when the decision was made or why it was made in the wake of the union election. The record evidence suggests the decision was made three days after the election, when Jopes discussed the matter with the Respondent's attorney, which only reinforces the

suspiciousness of the timing. The General Counsel's case, which proved that Geisler's layoff was motivated, at least in part by the employees' union activity, is unrebutted and proves the violation. I find that Geisler's layoff was unlawfully motivated, in violation of Section 8(a)(3) and (1) of the Act, as alleged.

II. THE CREATION OF IMPRESSION OF SURVEILLANCE ALLEGATION (PARAGRAPH V(B) OF THE COMPLAINT)

The General Counsel alleges that Inman's identification to Russell of employee Oberg, as he walked by, as "the guy who started all this," constitutes the creation of an impression of surveillance of union activities, in violation of Section 8(a)(1) of the Act.

An employer unlawfully creates the impression of surveillance in violation of Section 8(a)(1) of the Act when, under all the relevant circumstances, its statements or actions would reasonably lead employees to assume that the protected activities were the subject of surveillance. For instance, a supervisor revealing to an employee that he has knowledge of the union activity of other employees would reasonably be construed as implied surveillance of union activity. *Liberty Kitchen, Inc.*, 366 NLRB No. 19, slip op. at 9 (2018). "Specifically, the Board has found that an employer unlawfully creates the impression of surveillance when it 'tells employees that it is aware of their union activities, but fails to tell them the source of that information' because the 'employees are left to speculate as to how the employer obtained its information, causing them reasonably to conclude that the information was obtained through employer monitoring.'" *Charter Communications, LLC*, 366 NLRB No. 46, slip op. at 4–5 (2018), quoting *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1296 (2009) (emphasis in original), affd. and incorporated by reference 357 NLRB 633 (2011). Moreover, "[t]he Board has long held that, when, in comments to its employees, an employer specifically names other employees as having started a union movement or as being among the union leaders, the employer unlawfully creates the impression, in the minds of its employees, that he has been engaged in surveillance of his employees' union activities." *Royal Manor Convalescent Hospital, Inc.*, 322 NLRB 354, 362 (1996), enfd. 141 F.3d 1178 (9th Cir. 1998).

This is precisely what Inman did here. He identified Oberg by name to Russell as "the guy who started all this." The remainder of the conversation made explicit that Inman was referring to the union drive at Napleton. He did not tell Russell the source of that information. As the General Counsel points out, the undisputed record evidence is that during the union campaign the technicians did not openly discuss the union at work for fear that management would retaliate against them. Thus, there is no basis in the record evidence that would reasonably lead Russell to believe that Inman had formed an opinion through open means as to who had started or been active in the union drive. The fact that Russell did not believe Inman was correct in his opinion is of no consequence. Inman unlawfully created the impression that the employees' union activities had been surveilled by employer. I find the violation of Section 8(a)(1), as alleged.

III. THE FAILURE TO BARGAIN OVER LAYOFFS ALLEGATION AND THE FAILURE TO PROVIDE REQUESTED INFORMATION ALLEGATION (PARAGRAPH VIII OF THE COMPLAINT)

The General Counsel alleges that the Respondent unilaterally laid off Geisler without satisfying its duty to bargain over the layoff in violation of Section 8(a)(5) and (1) of the Act.[25] In addition, the General Counsel alleges that the Respondent unlawfully failed and refused to provide the Respondent with relevant information requested by the Union concerning unit data the Union believed would be useful for analyzing the layoff situation.

Having found that the layoff of Geisler violated Section 8(a)(3) and (1) of the Act, and in light of the associated makewhole remedy, it is unnecessary, and I therefore decline, to reach the General Counsel's allegation that the Respondent violated Section 8(a)(5) by failing to bargain over the layoff. *Advanced Life Systems*, 364 NLRB No. 117, slip op. at 3 fn. 8 (2016); *Sutter Roseville Medical Center*, 348 NLRB 637, 637 fn. 7 (2006).

As to the alleged violation for failing to provide requested information, the General Counsel's brief claims that Lessman's October 27 email to Hendricks requesting that any layoff be conducted based on seniority constituted a request for information that the Respondent failed to satisfy. The problem with this allegation is that there was no unfulfilled request for information in this email, or any other time, as far as the record shows, and as Lessman admitted.

On October 26, Lessman requested and Hendricks sent him the documents on productivity that he had in his possession. Hendricks told Lessman he would send the documents he had received from Jopes. Hendricks sent this material to Lessman the afternoon of October 26. Lessman reviewed the information and responded as follows:

> Jim, I received the documents you sent, thank you. Since we can not determine, just by looking at the numbers booked, if there are issues with work distribution, amount of training each technician has or lack thereof, what Classification each technician is (Journeyman, Apprentice, etc ..), overstaffed service department and other underlying issues that may be part of the problem, I would suggest that for the purposes of layoff, that you use the pure seniority of the technicians by which classification the Employer believes the employee is in at this time. (This too also needs to be negotiated.)

This is not a request for additional information, nor can one be reasonably implied. Indeed, Lessman admitted at trial, in his direct examination, that he did not request additional information. Lessman testified that he thought the information that Hendricks sent was insufficient but "I don't believe I requested any information because I knew we were setting up for negotiations."

Upon request, an employer has the legal duty to furnish its employees' bargaining agent with information relevant and necessary to the performance of its statutory duties. *NLRB v. Acme Industrial. Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). Requests need not be made with

[25] An employer's violation of Sec. 8(a)(5) of the Act is also a derivative violation of Sec. 8(a)(1) of the Act. *ABF Freight System*, 325 NLRB 546 fn. 3 (1998); *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), enfd. 237 F.2d 907 (6th Cir. 1956).

precision, nor in any particular form. But absent a request of some kind there can be no violation. I dismiss the allegation.

IV. ALLEGATIONS RELATING TO THE EMPLOYER'S ACTIONS DURING THE FIRST DAYS OF THE STRIKE (PARAGRAPH V(E) AND (D) OF THE COMPLAINT)

The General Counsel alleges two distinct violations stemming from the employees' commencement of a strike on August 1, 2017.

First, the complaint alleges (paragraph V(e)) that the Respondent's removal of toolboxes from the premises during the strike was in retaliation for the employees commencing a strike and to discourage this activity.

Second, the complaint (paragraph V(d)) alleges that the Respondent impliedly threatened employees with job loss for engaging in the strike, through the phrasing of its warning to employees about the consequences of being replaced during the strike.

As discussed above, as soon as the strike began, the Respondent issued a letter to strikers, hand-delivered on the picket line by Renello, "to let you know the consequences of your strike." The letter detailed three consequences.

First, that employer premiums toward insurance would end and employees would receive a COBRA letter requiring them to pay their full insurance premiums in order to maintain health insurance. This is not alleged to be unlawful.

Second, that ads had been placed for replacement technicians, and that if replaced strikers who sought to return to work would be placed on a preferential hire list to await an opening.

Third, a directive to "[m]ake arrangements to have your tool boxes removed from the shop, as we do not want to be responsible for your tools when you are not working."

As to the toolboxes, Napleton proved intent on having the toolboxes removed, even overruling an agreement reached by its attorney with the Union to give the employees until the end of the week to have the toolboxes removed. On Thursday August 3, Napleton management even pushed the toolboxes outside the dealership fence, where they were rained upon. On August 4, employees arranged with a towing service to remove the toolboxes.

I agree that the requirement that the toolboxes be removed violated the Act. The evidence is clear that Napleton's insistence on removing the toolboxes was in retaliation for the employees' exercising their protected right to strike.

Indisputably, the strike prompted the demand and the occasion for the toolboxes to be removed. At the time, no explanation was given to the employees or to the Union why the tools needed to be removed.

At trial, Renello explained the reason for ordering the removal of the toolboxes in terms that are essentially an admission of discriminatory motive.

Napleton had strikes that commenced at six other dealerships the same day that the Napleton Libertyville strike began. However, Napleton did not seek the removal of striking employees' toolboxes at its other stores. Why? At trial Renello volunteered that the reason for demanding removal of the toolboxes at Napleton in Libertyville, but not at its other stores, was because at the other stores Napleton perceived that the employees did not want to strike but were forced into it through their employment at a NCDC-wide strike covering 130 dealerships. On the other hand, the Napleton employees in Libertyville comprised a standalone unit and, to the surprise and chagrin of Napleton, independently chose to strike at the last minute. As Renello explained at trial, in response to a question posed to him as to whether Napleton removed strikers' toolboxes from its other stores:

> No, no. Most of our—the other technicians and the other stores wanted to work through the strike. They just weren't allowed to."

This is an admission that it was the Napleton technicians' choice to exercise their right to strike—a choice freely made and thus, in Napleton's view, deserving of punishment—that prompted the demand to remove the toolboxes at Libertyville. Renello contrasted this choice to the perceived reluctant obeisance of Napleton's NCDC-member units at its six other stores, where Napleton perceived that employees wanted to but were not allowed to work during the strike. Their tools were not removed. This is an admission that the Napleton employees were retaliated against because of their decision to strike.

This admission is not accompanied, much less countered, by any credible legitimate justification for the demand and removal of the toolboxes. I recognize that Jopes claimed at trial that Napleton required striking employees to remove the toolboxes

> because our insurance policy would not cover . . . damage to those boxes as they [the employees] were not working employees at that point. So there was—our insurance company informed us that there would be a lack of coverage should there be damage.

However, I do not credit this claim. It is entirely unbelievable. The more Jopes explained it the more it seemed clear that the whole rationale was just another a pretext for discrimination.

First of all, it conflicts with Renello's admission as to the reason for the demand that the toolboxes be removed.

Second, Jopes' claim that Napleton's insurance company told him that this is how the insurance policy works is entirely uncorroborated, undocumented, and implausible.

It is implausible in large part, because, third, the insurance policy was introduced into evidence and it says no such thing. Jopes pointed to the portion of the endorsement page that extends coverage,

> to loss of or damage to tools and equipment owned by your employees and used by them in your business.

Jopes contended that as strikers, the employees were not using the tools in Napleton's business, hence, their tools were not covered by the insurance policy. This makes no more sense than would a claim that the tools are not covered by insurance and must be removed during a weekend or even overnight when the tools are not being used in the business, or when an employee is off on vacation, or on leave, or for any other reason that the employee, like a striker, ceases working but remains an employee.

Fourth, Jopes' claimed that the tools of employees striking at its other six stores—the employees who Renello said wanted to work through the NCDC strike but were not allowed to—

remained insured because those employees were "still under different protections due to their collective-bargaining agreement. It was a different situation there." This is piffle.

Fifth, and finally, Jopes insistence that, unlike strikers, the continued insurability for the tools of an employee out on disability was not an issue only serves to make clear the discriminatory animus motivating the Respondent. According to Jopes, the tools of an employee out on disability—for instance, Russell was out for over eight months and no one thought his tools needed to be removed from the dealership, until he was fired—does not present an insurance issue because, according to Jopes, "They're covered under FMLA or disability or worker's comp. That's a different situation."

It is a different situation. This strike involves an absence from work due to the exercise of Section 7 rights. Disability does not. The difference is that Jopes is committed to the contention that employees exercising their section 7 rights—unlike other employees not at work—must have their tools removed. At bottom, Jopes is simply admitting that discriminatory animus motivated the employer's insistence that the strikers' toolboxes be removed from the premises.

I find that Napleton's insistence on the removal of the striking employees' toolboxes from the premises was retaliation for their engaging in protected activity, and intended to discourage such activity, and in violation of Section 8(a)(1) of the Act, as alleged.

In truth, by insisting on the removal of the toolboxes, Napleton seemed to be going to lengths to demonstrate to the employees that by striking their employment status had been permanently altered—this is why Jopes admitted he no longer considered the strikers, once replaced, to still be employees (Tr. 369). That is why the Respondent, on brief (R. Br. at 13), compares permitting the strikers' tools to remain on the employer's property to permitting "an abandoned car to remain on its property." This is also relevant in considering the General Counsel's contention that Napleton's replacement threat constituted an unlawful implied threat of job loss for engaging in a strike, in violation of Section 8(a)(1).

In support of this allegation, the General Counsel points out that the same August 1 letter that unlawfully directed striking employees to remove their toolboxes as a consequence of striking, also informed them of the following consequence of striking:

> We have placed ads for replacement technicians. If and when you are replaced, you will be notified. After you are replaced, should you make an unconditional offer to return to work you will be placed on a preferential hire list should an opening occur.

The Board has long held that "an employer may address the subject of striker replacement without fully detailing the protections numerated in *Laidlaw*, so long as it does not threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with those detailed in *Laidlaw*." *Eagle Comtronics*, 263 NLRB 515, 516 (1982), referencing, *Laidlaw Corp.*, 171 NLRB 1366, 1369–1370 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

Here, however, the Respondent's account of striker rights is inconsistent with the presumptive right of reinstatement accorded to strikers after a strike. Under settled precedent, replacements are presumed to be nonpermanent and temporary.

"Because employees have the right to strike in support of economic demands, an employer violates Section 8(a)(3) by failing to immediately reinstate such employees upon their unconditional offer to return to work." *American Baptist Homes of the West*, 364 NLRB No. 13, slip op. at 3 (2016). "In certain situations, however, an employer may establish a 'legitimate and substantial justification' for failing to reinstate striking employees by showing that the strikers' positions have been filled by permanent replacements." Id. An employer that fails to prove that his failure to reinstate strikers was due to a legitimate and substantial business justification "is guilty of an unfair labor practice."[26] Proof that employees have been permanently replaced is an affirmative defense to a violation of the Act for failure to reinstate.[27]

Most significantly, absent an employer's proof that replacements are permanent, the Board has held that the presumption is that the replacements are temporary.[28]

Here, Napleton's statement to employees does not mention—it says nothing at all about—*permanent* replacement. It does not mention permanent replacement as a prerequisite to lawfully failing to reinstate strikers. It does not say anything about the Respondent's burden to prove replacements are permanent in order to avoid a finding of illegality for refusing to reinstate strikers

[26] *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378-379 (1967); *Tri-State Wholesale Building Supplies, Inc.*, 362 NLRB No. 85, slip op. at 5 (2015) ("The Board has long held that in the absence of a legitimate and substantial business justification, economic strikers are entitled to immediate reinstatement to their prestrike jobs"), enfd. 657 Fed. Appx. 421 (6th Cir. 2016). One recognized legitimate and substantial business justification for refusing to reinstate economic strikers is that those jobs claimed by the strikers are occupied by workers hired as permanent replacements, *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967)"); *Hansen Bros. Enterprises*, 279 NLRB 741, 741 (1986) ("It is well established that economic strikers are entitled to immediate reinstatement upon an unconditional offer to return to work, provided their positions have not been filled by permanent replacements"), enfd. without op. 812 F.2d 1443 (D.C. Cir. 1987).

[27] *Associated Grocers*, 253 NLRB 31 (1980) (permanent replacement "is an affirmative defense and Respondent has the burden of proof"), enfd., 672 F.2d 897 (D.C. Cir. 1981); *Augusta Bakery Corp.*, 298 NLRB 58, 65 (1990) ("it is Respondent's burden to prove its affirmative defense, raised in its answer, that the alleged discriminatees were permanently replaced"), enfd. 957 F.2d 1467 (7th Circuit 1992); *Aqua-Chem*, 288 NLRB 1108, 1110 fn. 6 (1988) ("the initial burden is on the employer to show that the replacements were in fact permanent"), enfd. 910 F.2d 1487 (7th Cir. 1990).

[28] *Hansen Bros. Enterprises*, 279 NLRB at 741; *Towne Ford Inc.*, 327 NLRB 193, 204 (1998) ("Respondent offered little evidence to overcome the presumption that the replacements were temporary"); *Montauk Bus Co.*, 324 NLRB 1128, 1128 fn.1, 1138 (1997) (presuming temporary status where employer's witnesses' testimony was conclusory and lacked weight, and was unsupported by replacement testimony: "Where replacements are hired for striking employees, the Board has held that the presumption is that replacements are temporary"); *O.E. Butterfield, Inc.*, 319 NLRB 1004 (1995) (holding that in all cases, both representation and unfair labor practice cases, presumption is that replacements for strikers are temporary, overruling cases to contrary).

at strike's end.[29]

As referenced, supra, the long-settled Board rule is that there is a presumption that replacements are temporary, unless and until proven otherwise. Here, there is not even a claim that any replacements will be permanent replacements. Thus, the Respondent's statement misstates the law and is fundamentally inconsistent with striker's rights. To threaten striking employees that if replaced—a term that, presumptively, means nonpermanently replaced—they will not be reinstated at strike's end but put on a preferential hire list, is inconsistent with strikers' reinstatement rights. Napleton's statement leaves out the critical and necessary explanation that its intent to place returning replaced strikers on a recall list can only occur in the context of permanent replacements, a status that the Respondent must prove. Without more, the Respondent's threat violates the Act.[30]

Alternatively, even if the statement of the Respondent is viewed as ambiguous—because its reference to "replacement" could mean permanent or nonpermanent replacement—the statement is still unlawful under settled precedent.

The Board has held that where a statement is otherwise unaccompanied by threats, the Board's policy is to "resolv[e] in the employer's favor any ambiguity occasioned by a failure to articulate employees' continued employment rights when informing them about permanent replacement in the context of an economic strike." In re *Unifirst Corp.*, 335 NLRB 706, 707 (2001).

By the same token: "Where, however, ambiguous comments about striker replacement are part and parcel of a threat of retaliation for choosing union representation . . . any ambiguity should be resolved against the employer." Id.

In this case, the Respondent's ambiguous statement to striking employees about their status if replaced was part and parcel of the letter unlawfully directing them to remove their toolboxes from the shop. Indeed, these statements follow one another and constitute two of the three "consequences" of striking to which the August 1 letter is directed. Given this, the ambiguity in the Respondent's warning about the consequences of being replaced must be resolved against the employer and treated as a threat that replaced strikers will not be reinstated at strike's end—regardless of whether the replacements are proven to be permanent. That is an unlawful threat.[31]

To this point, it should not be forgotten that the insistence on removal of the toolboxes—and of course, these toolboxes are large heavy metal cabinets weighing thousands of pounds and requiring a tow to move—carried with it a suggestion of job loss as a result of striking. Toolboxes of this size and value are moved when someone quits, retires, or is terminated. They are not shuffled around because someone is temporarily absent from work. Job loss is the message that Napleton sent with its directive that these strikers must remove their toolboxes from the premises as a "consequence" of striking. The accompanying threat to not reinstate replaced strikers at strike's end must be read in that context, for it is the context in which the threat was made.

For all of the above reasons I find that the Respondent's notice to employees that if replaced they would be placed on a preferential hire list amounts to an announced intention to unlawfully refuse to reinstate strikers even if they are nonpermanently replaced. This is an unlawful course of action and impliedly threatens job loss in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent Napleton 1050, Inc. d/b/a Napleton Cadillac of Libertyville is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. On or about October 27, 2016, the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Charging Party William Glen Russell II, in retaliation for the employees of the Respondent selecting the Union as their collective-bargaining representative.

3. On or about October 27, 2016, the Respondent violated Section 8(a)(3) and (1) by laying off employee David Geisler in retaliation for the employees of the Respondent selecting the Union as their collective-bargaining representative.

4. On or about October 27, 2016, the Respondent violated Section 8(a)(1) of the Act by telling an employee that his layoff was the result of the employees of the Respondent voting in a representation election to select the Union as their collective-bargaining representative.

5. On or about November 4, 2016, the Respondent violated Section 8(a)(1) of the Act by creating the impression that it had engaged in surveillance of its employees' union activity.

6. On or about August 1, 2017, and thereafter, the Respondent violated Section 8(a)(1) of the Act by ordering the removal of striking employees' toolboxes from the Respondent's facility in retaliation for the employees' engaging in a strike and to discourage the employees from engaging in this and other protected and

[29] To meet the burden of proving that replacements are permanent, an employer must show a mutual understanding between itself and the replacements that they are permanent, not simply an intent to hire permanent replacements. *Hansen Bros. Enterprises*, 279 NLRB at 741–742 (1986); *O. E. Butterfield, Inc.*, 319 NLRB 1004 (1995); *Consolidated Delivery & Logistics*, 337 NLRB 524, 526 (2002), enfd. 63 Fed. Appx. 520 (D.C. Cir. 2003); *Dino & Sons Realty Corp.*, 330 NLRB 680 (2000), enfd. 37 Fed. Appx. 566 (2d Cir. 2002).

[30] The instant case is distinguishable from *Rivers Bend Health and Rehabilitation Service*, 350 NLRB 184 (2007). In that case, the Board dismissed allegations against an employer that told employees that "In a strike the Company would be forced to hire replacements to be sure we can take care of the residents. This puts each striker's continued job status in jeopardy." The Board found that this statement was consistent with *Laidlaw.* But unlike the instant case, the statement in *Rivers Bend* warned employees only of the jeopardy—i.e., the risk or danger—to job status, a correct statement *if* the employer proved that the replacements it hired were permanent. By contrast, Napleton did not warn that there was a risk or possibility of being placed on a preferential hire list at the strike's end, if replaced. It stated that if replaced "you *will* be placed" on a preferential hire list (emphasis added). That is an unlawful threat to make to strikers with regard to nonpermanent replacements, who, as a matter of law, Napleton presumptively indicated it was hiring, as Napleton did not even claim in its August 1 letter detailing consequences of striking that it was seeking permanent replacements.

[31] This also distinguishes the instant case from *Rivers Bend*, supra. In dismissing the allegations there, the Board relied upon the rule that an ambiguity in the employer's statement must be construed in favor of the employer, because the challenged statement was not accompanied by any other threats. 350 NLRB at 185. In this case, given the accompanying threat, that rule of construction is reversed.

concerted activities.

7. On or about August 1, 2017, the Respondent violated Section 8(a)(1) of the Act by impliedly threatening employees that they would suffer job loss for engaging in a strike.

8. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent, having unlawfully discharged William Glen Russell II, and having unlawfully laid off David Geisler, shall reinstate Russell and Geisler to their former jobs or, if their positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privilege previously enjoyed. The Respondent shall make Russell and Geisler whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful discrimination against them. The make whole remedy 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), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall compensate Russell and Geisler 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 accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014), the Respondent shall compensate Russell and Geisler for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 13 a report allocating backpay to the appropriate calendar year for Russell and Geisler. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

The Respondent shall also be required to remove from its files any references to the unlawful discharge of Russell and layoff of Geisler and to notify them in writing that this has been done and that the discharge and layoff will not be used against them in any way.

The Respondent shall further be ordered to refrain from in any like or related manner abridging any of the rights guaranteed to employees by Section 7 of the Act.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Respondent's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. 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. 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 October 27, 2016. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 13 of the Board what action it will take with respect to this decision.

The General Counsel also seeks a remedy requiring the Respondent to reimburse employees whose tools were damaged when the Respondent pushed the tools outside and the toolboxes were rained upon. At the hearing, there was discussion about whether the damage was to be proved at this hearing or in a subsequent compliance hearing. There was no discussion of whether this is an appropriate remedy in an unfair labor practice hearing. On brief, the General Counsel does not cite a single case or precedent in support of the proposition that damage to personal property should be reimbursed through a Board unfair labor practice proceeding. The Respondent, for its part, suggests that the matter is one to be addressed through state tort law and in state courts. Certainly, the Board has long held that employers legally damaged by the tortious conduct of unions "might be better served by pursuing those private remedies traditionally used for the recovery of such damages."[32] In this case, the General Counsel is asking for me to recommend that the Board transform its procedures into a forum for resolution of claims involving damage to personal property that occurred during the course of an unfair labor practice. This is a matter for the Board to consider in the first instance.

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

ORDER

The Respondent, Napleton 1050, Inc. d/b/a Napleton Cadillac of Libertyville, Libertyville, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or laying off or otherwise discriminating against employees in retaliation for employees supporting Local

[32] *Roofers Local 30 (Associated Builders)*, 227 NLRB 1444, 1444 (1977); *Iron Workers Local 783 (BE&K Construction)*, 316 NLRB 1306, 1310 (1995); *District 1199, National Union of Hospital and Health Care Workers (Frances Schervier Home and Hospital)*, 245 NLRB 800, 806, 807 (1979) ("I also reject the Employer's application for property damages, for which the Employer has offered no legal authority. If I were to grant its request, that would open the door to requests of employees to seek monetary relief for personal injuries in violence cases. The Board is simply not equipped to handle such claims . . .").

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

701 of the International Association of Machinists & Aerospace Workers, AFL-CIO, or any other labor organization.

(b) Creating the impression that employees' union or other protected activities are under surveillance.

(c) Telling any employee that a layoff is the result of how employees voted in a representation election.

(d) Ordering the removal of and/or removing employee toolboxes or other employee property from the Respondent's facility in retaliation for the employees engaging in a strike or other protected and concerted activities.

(e) Impliedly threatening employees that they would suffer job loss for engaging in a strike.

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

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

(a) Within 14 days from the date of this Order, offer William Glen Russell II, and David Geisler, full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make William Glen Russell II and David Geisler whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(c) Compensate William Glen Russell, II, and David Geisler for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 13 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 for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of William Glen Russell, II, and the unlawful layoff of David Geisler, and within 3 days thereafter, notify each of them in writing that this has been done and that the discharge and layoff will not be used against them 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 Libertyville, Illinois facility copies of the attached notice marked "Appendix."[34] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. 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 October 27, 2016.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 13 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. April 4, 2018

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, lay off, or otherwise discriminate against any of you in retaliation for employees' support of Local 701 of the International Association of Machinists & Aerospace Workers, AFL-CIO, or any other labor organization or any other labor organization.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT tell you that we are conducting a layoff because of how employees voted in a union representation election.

WE WILL NOT order you to remove your toolboxes or other personal property from our facility in retaliation for you engaging in a strike or other protected and concerted activities.

WE WILL NOT impliedly threaten you with job loss for engaging in a strike.

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

WE WILL NOT in any like or related manner interfere with,

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

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 William Glen Russell II, and David Geisler, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make William Glen Russell II, and David Geisler whole for any loss of earnings and other benefits resulting from their discharge and layoff, less any net interim earnings, plus interest.

WE WILL compensate William Glen Russell II, and David Geisler for the adverse tax consequences, if any, of receiving lump-sum backpay awards and WE WILL file with the Regional Director for Region 13 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.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of William Glen Russell II and unlawful layoff of David Geisler, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharge and layoff will not be used against them in any way.

NAPLETON 1050, INC. D/B/A NAPLETON CADILLAC OF LIBERTYVILLE

Administrative Law Judge's decision can be found at www.nlrb.gov/case/13-CA-187272 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.