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Con-Way Freight, Inc. *and* Jaime Romero.

Con-Way Freight, Inc. *and* Juan Placencia.

Con-Way Freight, Inc. *and* International Brotherhood of Teamsters, Local 63. Cases 21–CA–135683, 21–CA–140545, 21–RC–136546

August 27, 2018

DECISION, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN RING AND MEMBERS PEARCE, AND MCFERRAN

On November 5, 2015, Administrative Law Judge Eleanor Laws issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Union each filed an answering brief, and the Respondent filed reply briefs. The General Counsel also filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

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,[2] findings,[3] and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.[4] We also adopt, for the reasons stated by the judge, her overruling of the Respondent's election objections. We therefore certify International Brotherhood of Teamsters, Local 63, as the exclusive bargaining representative of the employees in the unit.[5]

I. SUSPENSION AND TERMINATION OF JAIME ROMERO

Facts

The Respondent, Con-Way Freight, transports freight across North America; this case involves the Respondent's Los Angeles facility, where it employs about 44 drivers. Jaime Romero had worked for the Respondent since 1990 and had received various safety-related awards. International Brotherhood of Teamsters, Local 63 began organizing at the Respondent's facility in 2009. The judge found that Romero was a member of the Union's organizing committee and "the leader among employee organizers." Romero had collected around 20 authorization cards from coworkers and had attended about 35 Union meetings, including during the months leading up to the filing of the September 2014 representation petition at his facility. In addition, Romero had previously assisted drivers in organizing at the Respondent's Laredo facility, where a union election was held in September 2014, and at other Con-Way facilities throughout the country. The Respondent, through its managers and supervisors, knew that Romero was engaged in Union activity. In March 2014, 4 months before

[1] Member Emanuel is recused and took no part in the consideration of this case.

[2] On July 22, 2016, the Board granted the parties' Joint Motion to Sever Allegations and Partially Remand to the Regional Director for Approval of Partial Withdrawal Request. Pursuant to the parties' motion, the Board severed from the consolidated complaint paragraph 11, which alleged that the Respondent unlawfully suspended and discharged Charging Party Juan Placencia, and unlawfully filed criminal charges against Placencia, resulting in his arrest. Accordingly, we need not pass on the Respondent's exceptions to the judge's findings of those violations, and we have amended the conclusions of law to reflect the severance of the allegations.

[3] 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.

In adopting the judge's findings, discussed below, that the Respondent violated Sec. 8(a)(3) and (1) by suspending and terminating Charging Party Jaime Romero, and Sec. 8(a)(1) by threatening Placencia with unspecified reprisals, we find it unnecessary to rely on the judge's references to the Respondent's various lawful antiunion statements and actions in November 2011 and during the spring of 2014.

[4] We shall modify the judge's recommended broad order requiring the Respondent to cease and desist from violating the Act "in any other manner." We find that a broad order is not warranted under the circumstances of this case, and shall substitute a narrow order requiring the Respondent to cease and desist from violating the Act "in any like or related manner." See *Hickmott Foods*, 242 NLRB 1357 (1979).

Further, in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy. We shall modify the judge's recommended Order and substitute a new notice to reflect these remedial changes and the Board's standard remedial language.

In accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

[5] Pursuant to a stipulated election agreement between the parties, a secret-ballot election was conducted on October 23, 2014. The Regional Director issued a Revised Tally of Ballots on July 20, 2015, which finalized the vote at 22 ballots in favor of the Union and 20 against. Under Sec. 102.69 of the Board's Rules, the Board itself has the authority to issue a certification. Because the Union prevailed in the election, we so certify. See *Talmadge Park*, 351 NLRB 1241, 1241 fn. 4 (2007).

the incident at issue, Romero—during a conversation about the Union with Service Center Manager Paul Styers—stated that he knew that he was "being targeted" by the Respondent because of his protected activity and that "any little thing he did would get him fired but that was okay with him."

The Respondent's trucks are equipped with DriveCam, a recording device that has lenses facing both toward the driver and outward. DriveCam continually records but does not save the footage unless there is an accident or a sharp brake or turn, or the driver manually activates a save. Once a save is activated, DriveCam captures footage 8 seconds before the trigger until 4 seconds after.

On August 15, 2014, Romero was driving a tractor-trailer from the Los Angeles terminal to Blythe, California. About 10 minutes after leaving the terminal, Romero was driving in the center lane when his passenger mirror—which extended about 18 inches from the body of the truck—made contact with another tractor-trailer in the lane to Romero's right. Romero manually activated DriveCam's saving feature and tried to get the other driver's attention, but the driver did not stop. Romero pulled over and, following procedure, called Tricia Plonte at the Respondent's line haul center to report the incident. Romero described the incident—stating that the other vehicle had drifted to the left—and indicated that there were no significant damages or injuries. Romero also filed a telephone report with the highway patrol. After completing the assignment, Romero returned to the Respondent's facility and filled out an accident report. There was no damage apart from paint residue on the mirror. The judge found that, based on the video, Romero was holding a device in his hand before the accident, but that it was impossible to discern what the device was; the judge credited Romero's testimony that he was holding an iPod and changing a song. Romero did not mention the iPod in his reports.

The next day, Plonte sent an email to the Respondent's Safety Event Notification group stating that Romero's accident was non-preventable. Director of Operations Mike Wattier responded by asking if there was a way to verify that the other vehicle left its lane. Service Center Manager Styers suggested that Safety Manager Don Andersen review the DriveCam recording. Having reviewed the recording, Andersen determined that the other vehicle did not leave its lane, but that it came close to Romero's truck when Romero drifted to the far right of his lane. Andersen also noted that Romero was looking at an electronic device. Andersen then concluded that Romero had falsified his report because: (1) the other vehicle had not left its lane; and (2) Romero omitted mention of being distracted. Andersen concluded the accident was preventable, stating that Romero was "seen with a cell phone in his right hand texting . . . and because of [his] driving distracted he failed to react to the other truck coming close to his unit while at the same time [he] is seen drifting to the far right of his lane . . . ."

On August 20, Romero met with management. Andersen read Romero the accident report, showed him the recording, and said that he believed Romero was at fault. Romeo disagreed that he was distracted or at fault. Andersen maintained that Romero had falsified the accident report by failing to mention that he was distracted by the cell phone in his hand. Romero maintained that he was changing a song on an iPod, not texting. Styers then suspended Romero, noting in his report that Romero was distracted and texting while driving, which led to his accident. In response, Romero wrote that, "I'm being suspended for other reason this is being created to terminate me" (sic).

The Respondent discharged Romero on September 3. Human Resources Director Kevin Huner made the final decision to discharge, testifying that the Respondent viewed the falsification of an accident report as a "cardinal sin." In the termination documents, Styers indicated, by checking a box, that Romero did not work well with customers and other people.

Discussion

To support his initial burden under *Wright Line*,[6] "the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action." *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007). The elements commonly required to support such a showing are protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. Id. As part of his initial showing, the General Counsel may also offer proof that the employer's reasons for the personnel decision were pretextual.[7] A finding of pretext defeats any attempt by the Respondent to show that it would have discharged the discriminatees absent their union activities. This is because where "the evidence establishes that the reasons given for the Respondent's action are pretextual—that is,

[6] 251 NLRB 1083 (1980), enfd 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[7] *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003) (citing *National Steel & Shipbuilding Co.*, 324 NLRB 1114, 1119 fn. 11 (1997)). See also *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995) ("[W]hen 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 … .'") (quoting *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)).

either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis."[8] It follows that "the mere existence of a valid ground for [discipline] is no defense to an unfair labor practice charge if such ground was a pretext and not the moving cause."[9]

First, we agree with the judge that the General Counsel met his initial burden. Romero had participated in union organizing activities and the Respondent was well aware of this activity. Further, there is an ample basis for finding animus here, including the judge's findings that the Respondent violated Section 8(a)(1) by telling Juan Placencia, Romero's partner on the Union organizing committee, not to wear the Union insignia, threatening Placencia with unspecified reprisals, and implicitly threatening Placencia with physical harm because of his union support.[10] In fact, Styers, the highest ranking manager at the facility and the person who initiated the video review and drafted Romero's suspension notice and termination report, was also responsible for ordering Placencia to remove his union lanyard and threatening Placencia. Tellingly, Styers' assertion in Romero's termination report—that he did not "work well with customers and others"—was unrelated to the incident at issue and unfounded,[11] and it is a recognized euphemism for union animus.[12] We also note the timing of the Respondent's disciplinary actions against Romero, which occurred as the Respondent became increasingly concerned about the Union's organizing drive—of which Romero was a recognized leader—and only weeks before a petition was filed.[13]

Second, we agree with the judge's findings that the Respondent "manipulated the situation to trump up a disingenuous claim of falsification" and that "the reason the Respondent offered for terminating Romero was a pretext to mask unlawful retaliation." Specifically, the General Counsel has shown that the Respondent seized on a relatively minor incident—which resulted in no damage beyond the paint residue on Romero's mirror – in order to discharge the leader of the Union's organizing campaign as it reached its climax.

The Respondent asserts in its brief that it took action against Romero solely because he falsified his accident report—what the Respondent characterizes as a "cardinal sin." This claim is undercut, however, by the Respondent's sustained effort to inflate and mischaracterize the nature of Romero's conduct, as well as the Respondent's obviously false attempts to supplement and bolster the rationale for Romero's discharge. See *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007) (finding that "an employer's shifting explanation for a discharge, or . . . its post hoc attempt to rationalize such a decision, are suggestive of a pretext").[14]

The most jarring example of this is the Respondent's assertion, in its termination documents, that Romero did not work well with customers and others – a claim that seemingly came out of nowhere, and indeed, had no predicate in Romero's 24-year career with Con-Way.[15]

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[8] *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981)). See also *Sanderson Farms, Inc.*, 340 NLRB 402, 402–403 (2003), enfd. 112 Fed. Appx. 976 (5th Cir. 2004)).

[9] *McKenzie Engineering Co.*, 326 NLRB 473, 484 (1998) (quoting *NLRB v. Yale Mfg. Co.*, 356 F.2d 69, 74 (1st Cir. 1966)), enfd. 182 F.3d 622 (8th Cir. 1999).

[10] Although these violations occurred after Romero's discharge, they remain relevant to the issue of the Respondent's animus. See, e.g., *SCA Tissue North America LLC v. NLRB*, 371 F.3d 983, 990 (7th Cir. 2004) ("[the employer] argues that events occurring after termination are insignificant to determining a company's motivation at the time of the discharge . . . . We disagree."), enfg. 338 NLRB 1130 (2003).

Our dissenting colleague posits that, because the Respondent's additional unfair labor practices occurred after the petition was filed, "[t]he reasonable inference to draw . . . is that it was the filing of the petition that aroused the Respondent's unlawful animus." This position, however, ignores the fact that Romero was "the leader among employee organizers," had assisted in organizing campaigns at other Con-Way facilities, and had collected a significant number of authorization cards at this facility. Surely it is not a stretch to find that the Respondent's post-petition animus is relevant to the Respondent's disciplinary action against the primary employee proponent of that petition in the period shortly before its filing. This is especially true here, where, as discussed, Styers played a central role in this incident as well as the unlawful post-petition conduct. Indeed, as early as in March 2014 – months before this incident and the filing of the petition – Romero had already identified himself as a likely target of the Respondent's anti-union retribution.

[11] Documentary evidence in the record does not provide any examples of Romero's failure to get along with other individuals, and Styers could not recall at the hearing any employees with whom Romero did not get along.

[12] See *Schaumburg Hyundai, Inc.*, 318 NLRB 449, 458 (1995) (finding animus based, in part, on witness's post-discrimination comment that discriminatee did not work well with his team and had a bad attitude).

[13] Our dissenting colleague, in attempting to undercut our animus finding, asserts that a finding of pretext alone cannot sustain the General Counsel's initial burden of proof. Here, however, we rely on the multiple sources of animus set forth, including the Respondent's unfair labor practices, Styers' assertion that Romero did not work well with others, and the timing of Romero's discharge – particularly in light of the fact that Romero was a recognized leader of the campaign.

[14] See also *Harrison Steel Castings Co.*, 262 NLRB 450, 479 (1982) (finding that employer's defense "bore all the trappings of pretext" where it involved "exaggeration, implausibility, and contradiction"), enfd. in relevant part 728 F.2d 831 (7th Cir. 1984).

[15] Our dissenting colleague dismisses the import of this assertion, arguing that the Respondent never cited Romero's inability to work well

Further, Safety Manager Andersen testified at the hearing that Romero left his lane and hit the other vehicle even though his earlier report states only that Romero drifted to the far right of his lane. Moreover, despite the judge's findings that "it [was] completely impossible to discern from the video what type of device Romero was holding," and that Romero's recorded actions "were particularly inconsistent with the act of texting," the Respondent's final ruling on the accident concluded that Romero was seen in the video "with a cell phone in his right hand texting." Indeed, over the course of the Respondent's investigation, it appeared to escalate the severity of this assertion—from holding an electronic device, to holding a cell phone, to texting—all contrary to the video evidence and Romero's own account.

Our dissenting colleague repeatedly asserts that "the Respondent's belief that Romero was texting on a cell phone was reasonable." But the judge found that, after reviewing the video evidence at the hearing, the Respondent "was no longer able to plausibly assert with certainty that Romero was texting on a cell phone." Accordingly, Safety Manager Andersen—who had initially written in the final accident report that Romero was, in fact, texting on a cell phone—scaled back his initial account to testify only that he saw Romero's thumb touching a screen. In other words, when confronted with the video evidence, Andersen was essentially forced to acknowledge that his written account in the accident report was *not* reasonable. Rather, it was an inflated and distorted interpretation of Romero's recorded conduct that was specifically intended to form a potential basis for disciplinary action.

Even the initial impetus for the Respondent's investigation is suspect. Notably, Wattier requested a review of the accident in order to verify specifically that the other vehicle had left its lane. But Romero had never asserted – in his report to Plonte, his written statement, or his diagram—that the other vehicle had left its lane.[16] It follows that any evidence that Romero may have falsified his report—the purported official basis for the Respondent's disciplinary actions—would have been uncovered by the Respondent pursuant to an investigation that was initiated for an implausible reason. See *Kidde, Inc.*, 294 NLRB 840, 840 fn. 3 (1989) (collecting cases) (holding that employee misconduct discovered during an investigation undertaken because of an employee's protected activity does not render a discharge lawful).[17] Moreover, contrary to our colleague, the fact that the Respondent had conducted video reviews in select previous instances does not automatically validate its actions here.[18]

To be fair, Romero may not have been blameless in failing to mention that he was holding an iPod before the accident. But the Respondent's reaction was wildly out of proportion to any omission that Romero—a longtime employee with a track record of safe driving—committed. Indeed, Romero followed the Respondent's accident protocol in full: he activated DriveCam after the collision, he reported the incident through the appropriate channels, and he cooperated with the Respondent's investigation.[19] Presumably, Romero would have known that the video would show his iPod use. Nonetheless, he adhered to all the required reporting steps. Had Romero truly been dishonest—as the Respondent vehemently claims—he would not have activated his DriveCam and reported the accident in the first place. In this light, the

with customers and others "as a *reason* for the discharge" and points to the fact that Styers merely checked a box on Romero's separation documents 6 days after the discharge. This begs the question of why Styers would check the box at all if not to bolster its primary assertion that Romero falsified his accident report. The fact that Styers added this information 6 days after Romero's actual discharge only lends credence to our conclusion that, even after the fact, the Respondent continued to generate new rationales to support its disciplinary action against Romero. Likewise, our dissenting colleague ignores the fact that this assertion was simply not accurate and could not be substantiated by the Respondent at the hearing.

[16] We disagree with our dissenting colleague's assertion that the accident would have "require[d] [the other] vehicle to drift out of its lane." Romero's mirror extended 18 inches and, in Romero's account and diagram of the accident, he indicated that the other vehicle had drifted to its left.

[17] In light of our finding that the Respondent's given rationale was pretextual, we find it unnecessary to rely on the judge's finding that Romero did not falsify his report because he "was not asked if anything was in his hand" and because he did not believe that he had been distracted before the accident.

[18] Although the record does not establish the Respondent's specific investigatory protocol, it does make clear that the Respondent did not review the DriveCam footage for every road accident; in fact, absent Wattier's request, the inquiry into Romero's accident would have been closed without any review of the footage. Andersen testified at the hearing that he did not know why Wattier was interested in verifying that the other vehicle left its lane.

By the same token, we reject the applicability of the other instances, cited by our colleague, in which the Respondent disciplined employees pursuant to its falsification policy. Unlike the employees in those cases, Romero's conduct was investigated solely because he engaged in protected concerted activity, and the purported violation of the falsification policy was discovered pursuant to that unlawfully motivated inquiry.

[19] Contrary to our dissenting colleague, we do not rely on this evidence to show that "it was unfair of the Respondent to discharge Romero for this single omission." Instead, this evidence underscores the Respondent's disproportionate response to a minor incident and the disingenuousness of the Respondent's assertion that Romero was discharged for his dishonesty about the incident. To the contrary, Romero made every effort to comply with the Respondent's protocols and knowingly activated the recording device even though it would obviously show him using an iPod. Paradoxically, the Respondent has supported its assertion that Romero omitted key information from his accident report by relying on evidence that Romero himself chose to record as part of his accident report.

Respondent's purported reliance on Romero's falsification as the basis for his discharge is simply not credible.

Accordingly, we find that the evidence establishes that the Respondent's proffered reason for suspending and discharging Romero was pretextual—that is, it was not in fact relied upon. Rather, the evidence shows that the Respondent discharged Romero for engaging in union activity.

Our dissenting colleague presents this as a straightforward situation in which the Respondent simply acted on a reasonable belief that Romero falsified his accident report. But "the mere existence of a valid ground for discharge is no defense to an unfair labor practice charge if such ground was a pretext and not the moving cause."[20] Indeed, our colleague turns a blind eye to the Respondent's multiple misrepresentations of Romero's conduct as well as its shifting and post-hoc disciplinary justifications, all of which render the Respondent's entire course of action to be inherently unreasonable. Here, for the reasons stated, we find that the Respondent violated Section 8(a)(3) and (1) by suspending and discharging Romero.

II. IMPLIED THREAT OF PHYSICAL HARM TO JUAN PLACENCIA

The Union filed a representation petition on September 11, 2014. The Respondent subsequently hired labor consultant Luis Camarena, who held meetings at the facility, talked to employees, rode with drivers, and spread the Respondent's views regarding the Union. The General Counsel's allegation stemmed from a discussion between Camarena and employee Juan Placencia on October 6. Placencia, in the context of discussing the organizing drive, told Camarena that the Respondent's employees "felt like battered wives." Camarena responded by describing himself as "the type of person that if you owe him money, that he will call you. If you ignore his calls, he will go down to your house and . . . kick the door down, come up, push you to the ground, put his foot on your chest and . . . stick a gun out, pull my .45, put it to your head and I'll get my money one way or the other." Camarena then mimicked kicking down a door, pushing someone down, placing his foot on that person's chest, grabbing that person by the hair, and aiming a gun at his head.

The judge found that Camarena's words and gestures "indicated a willingness to resort to physical violence to protect his interests" and that, in light of the recent filing of an election petition, this conduct was reasonably construed as a threat. We agree. Specifically, Camarena responded to Placencia's suggestion that employees needed a union because they felt "battered" by making a pointed statement about his own aggressive and vengeful nature in the face of opposition. The implication was that Camarena was willing to do anything—including committing acts of physical violence—to stop the Union.[21] The seriousness of Camarena's threat was underscored by the vivid language that he used, as well as the lurid, graphic nature of his accompanying gestures.[22]

Our dissenting colleague argues that there is insufficient evidence to support a reasonable inference that Camarena threatened physical violence because of Plancencia's union activities; instead, he argues that it was more likely that Camarena was merely making the point that if he were attacked and "battered," he would fight back himself and not ask a third party for help. But the issue is not whether Camarena made his statement because of Plancencia's union activities; it is "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *ITT Federal Services Corp.*, 335 NLRB 998, 1002 (2001) (quoting *American Freightways Co.*, 124 NLRB 146, 147 (1959)). Here, Camarena—who had been hired to disseminate the Respondent's antiunion message—responded directly to Plancencia's statement about the need for the Union with a graphic account of his own propensity for violence when opposed.[23] Even if Camarena intended to convey only that he would fight back generally, Camarena's words and gestures did not clearly express this thought; he therefore "ran the risk that his statement—or any ambiguity in his statement—could be construed by an em-

[20] *McKenzie Engineering Co.*, 326 NLRB at 484 (quoting *NLRB v. Yale Mfg. Co.*, 356 F.2d at 74).

[21] See *Evenflow Transportation*, 358 NLRB 695, 696 (2012), affirmed by 361 NLRB 1482 (2014) (unlawful threat where employer stated that "he'd call his dogs out from the street to come and get the union out."); *Thalassa Restaurant*, 356 NLRB 1000, 1017 (2011) (same, where in response to protected activity, employer referred to his military training and stated he "could take care of" employees).

[22] See *Hagerstown Kitchens*, 244 NLRB 1037, 1040 (1979) (unlawful threat where employer threatened to oppose the union by blocking the driveway with his jeep and shotgun so that he could "blow [the] head off" of ringleader).

[23] This case therefore is distinguishable from *Children's Services International*, 347 NLRB 67 (2006), and *Mid-State, Inc.*, 331 NLRB 1372 (2000), cited by the dissent. In *Children's Services*, a supervisor, responding to a question about her mental state, said she needed to hit something. In *Mid-State*, the supervisor said he would "kick [a union's representative's] ass" based on his belief that the union was spreading rumors about the supervisor. Thus, the cases cited by our dissenting colleague involved circumstances where it would have been apparent to employees that the remarks at issue had no relationship to their protected activity, whereas employees present for Camarena's response to Placencia's explanation for seeking union representation could reasonably believe that the conduct of the Respondent's labor consultant was connected to the employees' union organizing at the Respondent's facility.

ployee as containing an unlawful threat." *ITT Federal Services Corp.*, 335 NLRB at 1003. Thus, as the judge found, Camarena's statement violated Section 8(a)(1).

AMENDED CONCLUSIONS OF LAW

Insert the following as Conclusion of Law 1 in the judge's decision.

"1. By instructing employees not to wear union insignia, threatening employees for supporting the Union, suspending employees, and terminating employees because they supported the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Insert the following as Conclusion of Law 3 in the judge's decision.

"3. The Respondent violated Section 8(a)(3) and (1) of the Act by suspending and terminating employee Jaime Romero because of his union activity and to discourage employees from supporting the Union."

ORDER

The National Labor Relations Board orders that the Respondent, Con-Way Freight, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from wearing union insignia.

(b) Threatening employees because they support the International Brotherhood of Teamsters, Local 63, or any other union.

(c) Suspending employees because of their support for and activities on behalf of the International Brotherhood of Teamsters, Local 63, or any other union.

(d) Discharging or otherwise discriminating against employees for supporting the International Brotherhood of Teamsters, Local 63, or any other union.

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

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

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

(b) Make Jaime Romero whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the judge's decision as amended in this decision, plus reasonable search-for-work and interim employment expenses.

(c) Compensate Jaime Romero for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 21, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and suspension of Jaime Romero, and within 3 days thereafter notify Romero in writing that this has been done and that the suspension and discharge will not be used against him 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 Los Angeles, California facility copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 20, 2014.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the

[24] 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."

Region attesting to the steps that the Respondent has taken to comply.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Brotherhood of Teamsters, Local 63, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time driver sales representatives and driver sales representative students employed by the Employer at its service center located at 1955 E. Washington Boulevard, Los Angeles, California; but excluding all other employees, office clerical employees, plant clerical employees, confidential employees, customer service representatives, freight class specialist employees, temporary employees, temporary agency employees, staffing agency employees, sales employees, professional employees, managerial employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

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

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN RING, dissenting in part.

I join my colleagues in adopting the judge's decision to overrule the election objections filed by Respondent Con-Way Freight, Inc. (Con-Way or the Respondent) and to find that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by telling employee Juan Placencia not to wear union insignia and by threatening him with unspecified reprisals. I also agree that a broad cease-and-desist order is not warranted in this case. However, I disagree with my colleagues' finding that the Respondent violated Section 8(a)(3) and (1) of the Act when it suspended and discharged employee Jaime Romero. I also disagree with their finding that the Respondent violated Section 8(a)(1) by impliedly threatening Placencia with physical harm because of his support for the Union. Accordingly, I respectfully dissent in part from my colleagues' decision.

1. *The Respondent's suspension and discharge of Romero were lawful.* The Respondent transports freight across North America. Its trucks are equipped with a video recording device called DriveCam. On August 15, 2014,[1] Jaime Romero, a driver operating out of the Respondent's Los Angeles facility, was involved in a traffic accident with another tractor-trailer in the lane to his right. Romero was holding an electronic device (an Apple iPod) while he was driving. Romero reported, in writing, that the accident was a hit-and-run,[2] but he failed to report that he was using an iPod immediately before the accident.

Upon receiving Romero's written accident report portraying the accident as non-preventable, Director of Operations Mike Wattier asked to verify if the other vehicle had left its lane, and Regional Safety Manager Donald Andersen reviewed DriveCam footage of the accident. In an email to Wattier and three other management personnel, Andersen explained that the footage showed that roughly one second before the accident, Romero looked down at an electronic device and pressed it with his thumb.[3] Andersen's review of the footage also revealed that the other vehicle did not leave its lane. Andersen explained that the accident occurred when the other vehicle "came close to [Romero's vehicle] while at the same time [Romero] is seen drifting to the far right of his lane." Given Romero's concurrent use of the electronic device, Andersen determined that Romero "was distracted leading up to [the] crash" and "failed to react" to the other vehicle. Andersen concluded, "It is my opinion [Romero] falsified what exactly lead [sic] to this accident happening" as "he left out some very important detailed information" in his accident report (R. Exh. 20). The Respondent suspended Romero on August 20 and discharged him on September 3. Director of Human Resources for the Western Area Kevin Huner, a final decisionmaker in Romero's discharge, testified that Romero was discharged for falsification of an accident report in violation of Con-Way Policy 541—Employee Conduct.[4]

[1] All dates are in 2014 unless stated otherwise.

[2] The Respondent's accident-report form directs drivers to "[p]rovide a detailed description of the accident." Romero wrote: "I was going on the 3rd lane . . . when a truck in the 4th lane passed by me hitting the rear view mirror on the passenger side . . . I flashed the headlights on the other driver; however . . . [h]e continued driving" (GC Exh. 2). In an initial phone call to the Respondent, Romero similarly reported that the second vehicle "started to drift to the left . . . [and] made contact with [Romero's vehicle's] mirror."

[3] The judge found that it was impossible to discern from the video what type of device Romero was holding. Although the Respondent believed that the electronic device looked like a cell phone, the judge credited Romero's testimony that he was holding an Apple iPod. The judge found that Romero looked at his iPod and pressed down on it once with his thumb, and these actions started 1.25 seconds before the moment of impact and continued until .75 seconds before impact.

[4] This policy prohibits "Falsification of Company Records/Dishonesty," which includes "making false/untrue statements to

Huner testified that the Respondent regards "dishonesty/falsification" as one of the "cardinal sins" warranting immediate termination (Tr. 1471).

On September 9—6 days after Romero was discharged—Los Angeles Service Center Manager Paul Styers completed an employee separation checklist for Romero's personnel file. There, he noted "Involuntary-Violation of P&P" as the "[r]eason for [s]eparation." In addition, he checked the boxes for the items Romero had returned (such as car keys and uniforms) as well as for three questions about Romero's employment. One of the questions asked whether "this employee work[ed] well with customers and others." Styers checked the box for "no" (GC Exh. 13).

Applying *Wright Line*,[5] the judge found that the General Counsel had met his initial burden by showing that Romero engaged in union activities, the Respondent knew about his union activities, and his union activities were a motivating factor in the Respondent's decision to discharge him. The judge further found that the Respondent had failed to meet its burden of showing that it would have discharged Romero even in the absence of his union activities. The judge rejected the Respondent's stated reason for the discharge as pretextual because, in her view, "there was no falsification." The judge acknowledged that Romero "did not affirmatively report" that he had been holding an iPod immediately before the accident happened. But she found that this omission did not constitute falsification because Romero "was not asked if anything was in his hand." And the judge credited Romero's testimony that he did not report his use of the iPod because Romero did not believe "he had been distracted" by it. Having concluded that "there was no falsification," the judge found inapposite the evidence introduced by the Respondent to show that it has consistently discharged employees for falsification, and she summarily rejected the Respondent's reliance on this evidence to meet its *Wright Line* defense burden. Finally, the judge cited the "suspicious" nature of the Respondent's "decision to inquire into" the accident as evidence of pretext. The judge questioned why Wattier would request DriveCam review, considering Romero had filed a written report that cited no damage to his vehicle and did not claim the other vehicle had left its lane. The judge also noted that Andersen could not explain why Wattier wanted to verify the details of the accident.[6] My colleagues adopt and bolster the judge's findings.

Contrary to my colleagues, I would reverse the judge's violation finding. Preliminarily, the General Counsel's evidence that Romero's union activities were a motivating factor in the Respondent's decision to discharge him is weak at best.[7] But even assuming, arguendo, that the

company management." The policy provides that such misconduct "may be subject to discipline up to and including termination" (R. Exh. 25). The General Counsel has not alleged that this policy is unlawful.

[5] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[6] The judge found that the Respondent's decision to verify the details of the accident "lend[s] a strong sense of untrustworthiness" to the Respondent's case.

[7] In adopting the judge's animus finding, my colleagues rely on the Respondent's commission of other unfair labor practices, Styers' September 9 answer on the employee separation checklist to the question whether Romero "work[ed] well with customers and others[,]" and what the judge characterized as the "suspicious" timing of Romero's discharge for a "very minor incident . . . in the weeks leading up to the [election] petition being filed" on September 11. Unlike the judge, they do not rely on certain lawful antiunion statements cited by the judge or a video shown at new employee orientation depicting the closure of a unionized facility.

In my view, the above evidence is insufficient to establish that Romero's union activities were a motivating factor in the Respondent's decision to discharge Romero. First, all of the other unfair labor practices found in this proceeding were committed *after* Romero's September 3 discharge. Although events occurring after termination are "*sometimes* relevant in assessing motive," *Dresser-Rand Co.*, 362 NLRB No. 136, slip op. at 1 fn. 3 (2015) (emphasis added), enf. denied in relevant part 838 F.3d 512 (5th Cir. 2016), my colleagues' explanation fails to show why this is such a case. In this regard, I note that the Respondent's unfair labor practices postdating Romero's discharge also postdated the September 11 filing of the representation petition. In other words, Romero was discharged, then the petition was filed, then the unfair labor practices were committed. The reasonable inference to draw from this chronology is that it was the filing of the petition that aroused the Respondent's unlawful animus. Accordingly, I believe this is *not* a case in which postdischarge violations shed light on the motive for the discharge retrospectively.

Second, the Respondent never claimed that Romero was discharged for not working well with customers and others. Six days after the discharge, Manager Styers filled out an employee separation checklist. The checklist included a question asking if the separated employee worked well with customers and others, and Styers checked the "no" box. This is not evidence that the Respondent cited not working well with customers and others as a *reason* for the discharge, and there is no evidence that the Respondent ever so claimed. Thus, the Respondent did not put forward "shifting and post-hoc disciplinary justifications," as the majority contends.

Third, even if Romero was "the leader among union organizers," as my colleagues suggest, the timing of his September 2014 discharge is not shown to be related to any particular union activities of Romero, who had assisted with the Union's organizing efforts since 2009. Finally, there is no evidence suggesting that, when the Respondent discharged Romero, it could foresee that the Union's 5-year-old organizing campaign was about to culminate in the filing of an election petition a week later. The Respondent suspended and discharged Romero for giving a misleading account of the accident, which took place almost one month before the filing of the petition. The close proximity between Romero's discharge and the Union's *subsequent* filing of the election petition falls short of satisfying the General Counsel's *Wright Line* burden.

That leaves my colleagues' finding that the Respondent's stated reason for Romero's discharge was pretextual. As explained below, I

General Counsel did meet his initial burden under *Wright Line,* I find that the Respondent has met its defense burden of showing that it would have discharged Romero even absent his union activities.

As a preliminary matter, the judge and my colleagues have misconstrued the nature of the Respondent's burden. To meet its defense burden, the Respondent need only show that "it had a reasonable belief that the employee committed the offense, and that it acted on that belief when it discharged him." *McKesson Drug Co.*, 337 NLRB 935, 937 fn. 7 (2002); see also *Cellco Partnership v. NLRB*, 892 F.3d 1256, 1262 (D.C. Cir. 2018) ("The only question is whether the company excused someone it *reasonably believed* was lying. . . . [The employer] has made a legitimate business judgment—a not unusual one—that an employee lying during an investigation is a serious threat to management of the enterprise.") (emphasis added), denying enf. to 365 NLRB No. 93 (2017). Thus, this case does not turn on whether the judge, my colleagues, or Romero believe that Romero engaged in falsification or whether Romero actually engaged in falsification. It turns on what the Respondent reasonably believed.

Applying the appropriate *Wright Line* standard, I find that the Respondent reasonably believed that Romero's omission from the accident report of his use of an electronic device immediately before the accident occurred constituted falsification.[8] Romero was required to provide "a detailed description of the accident." To state the obvious, when someone is involved in a vehicular accident, the most important thing to address in any detailed description is what may have caused or contributed to the accident. This is especially true for a professional driver working for a motor freight company. The DriveCam recording showed that roughly one second before the accident occurred, Romero was holding, looking at, and pressing down on an electronic device. However, when Romero provided his "detailed description of the accident," he made no mention of an electronic device, let alone that he was looking at one immediately before the accident occurred. The recording also showed, seemingly contrary to Romero's characterization of the accident as a hit-and-run, that Romero's truck drifted to the far right of his lane. Accordingly, it was reasonable for the Respondent to believe that Romero was at least partially responsible for the accident by using an electronic device while driving, contrary to the picture of the accident Romero painted in his written report that it was a hit-and-run without any fault of his own.

Moreover, Director of Human Resources for the Western Area Huner testified, without contradiction, that the Respondent regards "dishonesty/falsification" as one of the "cardinal sins" warranting immediate termination, and the record evidence confirms Huner's testimony. Prior to Romero's discipline, the Respondent consistently applied its policy prohibiting "Falsification of Company Records/Dishonesty" to discharge other employees for making false statements. Importantly, it discharged employees pursuant to this policy both for making affirmative misrepresentations *and* for omitting important facts.[9] This evidence of the Respondent's similar treat-

disagree with that finding. But even assuming that "falsification" was not the real reason for Romero's discharge, that alone cannot sustain the General Counsel's burden of proof. See *Union–Tribune Publishing Co. v. NLRB*, 1 F.3d 486, 491 (7th Cir. 1993) ("A finding of pretext, *standing alone*, does not support a conclusion that a firing was improperly motivated.") (emphasis added). Under *Wright Line*, the General Counsel must show that animus against Romero's union activity was a motivating factor in his discharge. To the extent that he relies on pretext to make that showing, the General Counsel must prove, not merely that the Respondent's stated reason for discharging Romero was false or not in fact relied upon, but that the *real* reason was animus against Romero's union activity. And as explained above, the record evidence in this case does not support such a finding.

[8] As stated above, the judge found that Romero's failure to report his use of an electronic device immediately before the accident (and, thus, his failure to alert the Respondent to the fact that he might have been distracted) did not constitute falsification because the Respondent did "not ask[] if anything was in his hand" and because Romero believed the device did not in fact distract him. My colleagues distance themselves from the judge's faulty reasoning, but instead fault the Respondent for mistakenly finding that Romero was holding a cell phone and texting before the accident when he denied doing so and when the DriveCam did not show the type of device he was holding. Of course, these findings, like the judge's, erroneously focus on what actually happened rather than what the Respondent reasonably believed happened. See *Sutter East Bay Hospitals v. NLRB*, 687 F.3d 424, 435–436 (D.C. Cir. 2012) ("If [an employer's] management reasonably believed that [employee misconduct] occurred, and the disciplinary actions taken were consistent with the company's policies and practices, then [the employer] could meet its burden under *Wright Line* regardless of what actually happened."). It is undisputed that immediately before the accident, Romero was holding and looking down at an electronic device and pressing it with his thumb, and that the video footage only captured 3.5 seconds of the period before the accident. A cell phone is an electronic device, and people often use their thumbs to type text messages on a cell phone. Thus, the Respondent's belief that Romero was texting on a cell phone was reasonable, notwithstanding that the video only captured Romero "press[ing] the device once with his thumb" during the extremely brief pre-accident time period that the video captured.

[9] Employee Adam Phillips reported an accident as a hit-and-run, when he actually hit a fixed object. The Respondent discharged him for falsifying an accident report and dishonesty (R. Exh. 26E). Employee Alex Soria reported hitting tree branches, but he failed to report that he had also hit a gate. The Respondent discharged him for providing a false statement (R. Exh. 26 F). Employee Scott Mielnicki did not report an accident where his trailer was punctured. The Respondent discharged him for dishonesty (R. Exh. 26D). In addition, the Respondent discharged employees David Zollinger, William Petion, and Keith Johnson for failing to report an accident in violation of Con-Way Policy 541 (R. Exh. 26A-26C).

ment of other employees for similar offenses further supports my finding that the Respondent met its *Wright Line* defense burden. See, e.g., *Merillat Industries*, 307 NLRB 1301, 1302–1303 (1992).[10]

Finally, contrary to the judge and my colleagues, the record does not support a finding that the Respondent's defense is undermined by its decision to verify the details of the accident by reviewing the DriveCam footage. To begin, there is nothing suspicious in Wattier's request to verify whether the other vehicle had left its lane. Romero reported the accident as a "hit-and-run" by a vehicle in the lane to his right (a fact omitted from the majority's decision), a type of accident that could not have been prevented by proper driving. If Romero was faultless—i.e., if he was properly centered in his lane—a "hit-and-run" by an adjoining vehicle would require that vehicle to drift out of its lane, so it was reasonable for Wattier to inquire if the other vehicle did leave its lane.[11] Moreover, the judge failed to acknowledge record evidence suggesting that a post-accident review of DriveCam footage is not unusual and perhaps even common. Specifically, Andersen testified that he had reviewed about 10,000 DriveCam videos in the two years since the Respondent implemented that technology (Tr. 1429). Andersen also testified that Wattier had requested verification of details in an accident report on a "dozen" occasions and that Wattier's request was not unusual in his experience working with him for 15 years (Tr. 1348, 1430).[12] Accordingly, there is no basis in the record evidence to find that there was anything suspicious, untrustworthy, or unusual about the Respondent's decision to review the footage of Romero's accident, as the judge and the majority speculate.

Although the Respondent mistakenly believed that Romero was holding a cell phone and texting immediately before the accident, the credited evidence shows that Romero was changing a song on his iPod. But this does not establish that the Respondent's belief was unreasonable or in bad faith. As the majority notes, "it [was] completely impossible to discern from the video what type of device Romero was holding," and therefore the Respondent's multiple attempts to discern what type of electronic device Romero was holding, looking at, and pressing with his thumb were at least reasonable.[13] Additionally, Romero was not discharged for using his cell phone or texting. He was discharged for falsifying his accident report by reporting the accident as a hit-and-run without any mention of his use of an electronic device immediately before the accident.[14]

Following Romero's discharge, the Respondent has continued to apply its lawful policy prohibiting employee dishonesty and falsification, and it continued to treat omission of material facts as a violation of the policy. In late 2014, the Respondent discharged employee Benjamin Scholes for failing to report that he was looking out of the window and talking on the phone right before an accident (R. Exh. 26H), and employee Martin Relles for failing to report that he had drifted into another vehicle's lane (R. Exh. 26I). In 2015, the Respondent discharged employees Ignacio Munoz and Raymond Deanda, who reported an accident as a hit-and-run but failed to report that Munoz was drowsy and that his vehicle crossed into another lane (R. Exh. 26G).

[10] The evidence discussed above contradicts the majority's finding that the Respondent's discharge of Romero was "wildly out of proportion to" Romero's omission, as it shows that the Respondent regards omission of material facts from accident reports as falsification and grounds for discharge. My colleagues evidently believe that it was unfair of the Respondent to discharge Romero for this single omission in light of his long tenure, his safe driving record, his voluntary recording of the accident, and his procedural compliance with the reporting requirement. Be that as it may, it is well established that "'[t]he decision of what type of disciplinary action to impose is fundamentally a management function.'" *Nepteo, Inc.*, 346 NLRB 18, 20 fn. 15 (2005) (quoting *Midwest Regional Joint Board v. NLRB*, 564 F.2d 434 (D.C. Cir. 1977)).

[11] Having gone to the expense of installing the DriveCam system, the Respondent was within its rights to use it to verify whether, as Romero claimed in his accident report, the accident had actually been caused by the other vehicle drifting to the left.

[12] My colleagues brush off this evidence. Instead, they claim that Romero's conduct was investigated solely because he engaged in protected concerted activity. The General Counsel never advanced this theory, and the record does not support it. The Respondent conducted numerous reviews of video footage of accidents prior to Romero's accident, and the General Counsel failed to present any evidence that the Respondent's review of the video of Romero's accident was different from the previously conducted reviews.

Further, the Respondent's investigation here is markedly different from that in *Kidde, Inc.*, 294 NLRB 840 (1989), cited by the majority. There, the employer directed a private detective to follow a driver on his route, shortly after asking the driver if he was organizing a union. The investigation was unprecedented, and implemented without any prior indication of misconduct on the driver's part. Here, in contrast, the Respondent reviewed Romero's video only after it learned of his accident, consistent with its review of other similar incidents.

[13] I disagree with my colleagues insofar as they imply that Anderson acknowledged that his conclusion that Romero had been texting was unreasonable, or, for the reasons stated above, that such an admission can be reasonably inferred from the fact that he initially reported that Romero was texting, while testifying at the hearing that Romero "only" held a device in his hand and touched it with his thumb. Besides, what gets lost in the debate over texting versus tapping a song on an iPod is the fact that Romero was using, and looking down at, some kind of digital device seconds before the accident and, more importantly, that he failed to disclose this material fact in his accident report.

[14] The majority's characterization of Romero's misconduct as a "minor incident" is not supported by the record. As noted above, Huner testified that the Respondent regards "dishonesty/falsification" as one of the "cardinal sins" warranting immediate termination. The fact that Romero's accident caused no damage is simply irrelevant when the reason for his discharge was not based on the severity of the accident, but on the application of the company policy prohibiting falsification.

Harrison Steel Castings Co., 262 NLRB 450 (1982), enfd. in relevant part 728 F.2d 831 (7th Cir. 1984), cited by the majority, is not to the contrary. There, the employer discharged employee Watkins for clocking in at the gatehouse and then remaining there for some time instead of using his assigned timeclock in the machine shop. In finding

On these facts, I find that the Respondent has demonstrated by a preponderance of the evidence that it would have suspended and discharged Romero even absent his union activities on the basis that it reasonably believed that by omitting a material fact from his accident report, Romero had falsified his report in violation of the Respondent's lawful policy, and that it has treated similar omissions of material facts from accident reports as falsification. Accordingly, I would dismiss the allegations that the Respondent's suspension and discharge of Romero violated Section 8(a)(3).

2. *The Respondent did not impliedly threaten Placencia with physical harm for engaging in protected activity.* Nearly a month after the election petition was filed, employee Juan Placencia had a conversation with Luis Camarena, a labor consultant whose services the Respondent retained during the union organizing drive. Placencia stated that the employees felt like "battered wives," prompting their decision to seek representation. Camarena responded that he would not let himself be a battered wife but would fight his own fight and knock down doors if he had to. As he said this, Camarena pantomimed someone kicking down a door, pushing someone to the ground, reaching for a gun, and pointing it.

The judge found that Camarena's actions "indicated a willingness to resort to physical violence to protect his interests." I agree. The judge further found that Camarena thereby impliedly threatened Placencia with physical harm for supporting the Union, and the sole basis the judge provided for this finding was that "the petition for election had recently been filed." Here, I disagree. The petition was filed on September 11. The encounter between Placencia and Camarena took place nearly a month later, on October 6. This is insufficient to support a reasonable inference that Camarena threatened physical violence because of Placencia's union activities. Rather, Camarena's statements and actions are more reasonably understood as having been triggered by Placencia's reference to employees seeking union representation because they felt like "battered wives." That is, if he (Camarena) were attacked and "battered," he would fight back himself rather than ask a third party for help. While I do not endorse or condone Camarena's message, I do not believe his words and actions had the requisite tendency to interfere with the free exercise of Section 7 rights. It goes too far to say, as my colleagues do, that Camerena's implicit *agreement* with Placencia that he would fight back if battered, while disagreeing as to how, represented a threat to use physical force *against* Placencia for supporting the union. Accordingly, I would reverse and dismiss the judge's 8(a)(1) finding. See *Mid-State, Inc.*, 331 NLRB 1372, 1372 (2000) (no 8(a)(1) violation where supervisor's remarks, including that he would "kick [a union's representative's] ass," were based on supervisor's belief that the union was spreading lies about him, not on employees' protected activities); *Children's Services International*, 347 NLRB 67, 68–69 (2006) (no 8(a)(1) violation where supervisor's statement that she needed to hit something was in response to a question about her mental state, and employees would not reasonably believe she literally intended to hit them).[15]

For the reasons set forth above, I respectfully dissent in part from my colleagues' decision.

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

John F. Ring, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

pretext, the Board relied on the fact that the employee was not normally required to remain in the machine shop as well as the employer's explicit linkage of dishonesty with union activity by stating that the employee's word was "no good" because he continued to support the union after telling the employer that he had had a change of heart. No such facts are present here.

[15] My colleagues' reliance on *Evenflow Transportation*, 358 NLRB 695 (2012), reaffirmed by 361 NLRB 1482 (2014), *Thalassa Restaurant*, 356 NLRB 1000 (2011), and *Hagerstown Kitchens*, 244 NLRB 1037 (1979), is misplaced. In *Evenflow Transportation*, the employer said that "he'd call his dogs out from the street to come and *get the union out*." 358 NLRB at 696 (emphasis added). In *Thalassa Restaurant*, a supervisor responded to employees' protected concerted complaints by stating that he had been trained in the Turkish Army and could "take care of" one of the employees engaged in that protected activity. 356 NLRB at 1017. In *Hagerstown Kitchens*, the employer's president and owner, Richard Young, asked an employee whether he was the "ringleader" of employees trying to organize a union. After the employee replied affirmatively, Young told him that "no union and no one else is going to come in here and tell me how to run this business . . . if I have to, I'll close it down and I'll block the driveway with my jeep and my shotgun and I hope that the *ringleader* is in the front line, so I can blow his head off." 244 NLRB at 1040 (emphasis added). In each of these cases, unlike here, the employer's remarks were threats of physical violence explicitly linked to union or other protected activity.

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 prohibit you from wearing union insignia.

WE WILL NOT threaten you because of your support for the International Brotherhood of Teamsters, Local 63, or any other union.

WE WILL NOT suspend, discharge, or otherwise discriminate against any of you for supporting the International Brotherhood of Teamsters, Local 63, or any other union.

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

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

WE WILL make Jaime Romero whole for any loss of earnings and other benefits resulting from the discrimination against him, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Jaime Romero for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 21, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

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

CON-WAY FREIGHT, INC.

The Board's decision can be found at www.nlrb.gov/case/21-CA-135683 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

Mathew J. Sollett, Cecelia Valentine, for the General Counsel.
Mark W. Robbins, Gordon A. Letter, for the Respondent/Employer.
Gena B. Burns, for the Charging Party.

DECISION AND REPORT ON OBJECTIONS

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Los Angeles, California, on July 27–31 and August 5–7, 2015.

Charging Party Jaime Romero (Romero) filed the original charge in Case 21–CA–135683 on August 28, 2014 and an amended charge on October 9. Charging Party Juan Placencia (Placencia) filed the original charge in Case 21–CA–140545 on November 6, and an amended charge on December 1. These charges were consolidated in a complaint the General Counsel issued on March 31, 2015. Con-Way Freight, Inc. (the Respondent or Company), filed a timely answer denying all material allegations.

On October 30, 2014, the Company filed objections to the conduct of the International Brotherhood of Teamsters, Local 63 (the Union) surrounding its employees' selection of the Union as their representative. On April 15, 2015, the Regional Director issued a report on challenged ballots and elections, and consolidated the objections Case 21–RC–136546, with Cases 21–CA–135683 and 21–CA–140545.

The complaint alleges numerous violations of Section 8(a)(3), and (1) of the National Labor Relations Act (the Act) in connection with a union organizing campaign at the Respondent's Los Angeles, California, facility, commonly referred to as the ULX facility. The allegations include threats to employees, prohibitions on wearing union insignia, telling employees selecting the Union would be futile, and the suspensions and terminations of the respective Charging Parties.

Con-Way Freight's objections contend the Union engaged in threatening, intimidating, coercive, and abusive conduct which affected the results of the election.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Union, I make the following[1]

[1] The Respondent filed an unopposed motion to correct the transcript, which is granted, and hereby admitted into the record as ALJ Exh. 5. There are other errors as well. On page 867 "compelled to buy" should be "compelled by." Other typos are noted below.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with a facility in Los Angeles, California, transports freight across North America. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES COMPLAINT—FACTS AND CONTENTIONS

A. The Los Angeles Facility

This case concerns the Respondent's Los Angeles facility, commonly referred to as ULX. The ULX facility employs approximately 44 driver sales representatives (drivers). Some drivers perform local pickup and delivery (P&D). Others are line drivers, who transport freight over longer distances.

At all relevant times, Paul Styers (Styers) was the ULX service center manager and the highest ranking manager at the facility. Steve Roman (Roman) and Armando Rosado (Rosado) were freight operations supervisors, and Kevin Huner (Huner) served as human resources director for the western area.

B. The Charging Parties

Charging Party Jaime Romero (Romero) worked for the Respondent from October 1990 until his suspension on August 20, 2014. He was terminated on September 3. Romero received a 10-year award for safety and a million mile safety award in 2010. Romero reported to Rosado. At the time of his termination he was a line driver. (Tr. 44–50.)[2]

Charging Party Juan Placencia (Placencia) worked for the Respondent from October 7, 2011, until his termination on October 7, 2014. Placencia worked as a P&D driver. (Tr. 163.)

C. Early Organizing Efforts.

The Union began organizing efforts at ULX in 2009. The Union's lead organizer was Louie Diaz, who was assisted by Ernie Baraza, Robert Amaya, and Mark Moran, and other organizers employed by the Union. (Tr. 1570, 1575.)

Romero started speaking with coworkers in 2009.[3] He attended about 35 union meetings up until his termination and was the leader among employee organizers. The Respondent, through managers and supervisors including Styers, knew that Romero assisted the Union and engaged in concerted activity from 2009 until his termination. (Tr. 54, 63, 142.)

D. Orientation Videos

During new employee orientation, employees view various videos. One concerns the Company's purchase of a union facility and depicts how the facility was shut down.[4] (Tr. 1234–1235.) Driver John Cabrera (Cabrera) described the video as depicting a union company Con-Way had purchased, a picket line, and the message that the union was no longer at Con-Way. (Tr. 515.)

After Placencia saw the video, Styers said Con-Way was a nonunion facility and if employees wanted to work there, that's how it would stay. (Tr. 155, 277.) Styers admitted he said Con-Way was union free, but denied stating that's how it would need to remain. (Tr. 1254, 1257.) When Placencia asked Styers what about the union he disliked, Styers said employees were treated fairly at Con-Way and stated "there's thuggery. There's all kinds of different things that go on in that type of environment . . ." (Tr. 1256–1257.) Styers told Placencia line drivers were the biggest crybabies in the Company, and to stay away them, especially Romero. (Tr. 158–163.)

During another video about the importance of sleep, a former employee referred to as "Chucky" was depicted. Styers commented that Chucky no longer worked for Con-Way because he talked about union activity. He and driver trainer Ramsey Robles laughed about it.[5] (Tr. 157–159.)

E. Union Organizing Efforts in 2013–2014

Placencia learned about the organizing campaign a couple months after he started working at ULX. He became involved in early 2013, talking to drivers about the union. A union organizing committee was formed, consisting of Romero, Placencia, and some other drivers. Romero began collecting authorization cards in December 2013, collecting a total of about 20–23 cards. Placencia collected 5 or 6 authorization cards from drivers in early 2014. (Tr. 172–179, 351.) Romero and Placencia also assisted drivers at the Respondent's Laredo, Texas facility.[6] (Tr. 177.)

F. Spring 2014

In March 2014, in the employee break room, Styers asked Romero why the employees were looking for third party representation, and mentioned Company was going to give them a raise. Romero responded that the union organizing wasn't about a raise but was about respect to the employees. Romero also said he knew he was being targeted and that any little thing he did would get him fired but that was okay with him.[7] (Tr. 57–59.)

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[2] Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for the Respondent's exhibit; "GC Exh." for the General Counsel's exhibit; "CP Exh." for Charging Party's exhibit; "GC Br." for the General Counsel's brief; "R. Br." for the Respondent's brief, and "U Br" for the Union's brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited but rather are based my review and consideration of the entire record.

[3] The Union organizing efforts at ULX were part of a Teamsters' campaign to organize the Respondent across the nation. Joint Council 42 as well as Teamsters' Locals 952 and 63, were also involved.

[4] This video is referenced in a script Styers later read to employees, as discussed below. (R. Exh. 13.)

[5] Styers denied making this comment, telling Placencia to stay away from Romero, and stating that if employees wanted to work at Con-Way it needed to remain union-free. These conflicts are resolved below. Though Robles testified for the Respondent, he was not asked about this incident.

[6] A representation election occurred at Respondent's Laredo facility on September 12, 2014. (Tr. 353.)

[7] Styers was asked whether this conversation occurred during the meeting where he read the script, and he denied it. (Tr. 1233–1235.) He was not asked about the earlier conversation in the break room.

In March–May 2014, Styers met with employees, either one-on-one or in groups of 2. He read aloud a script setting forth the Company's position about the Union. (R. Exh. 13; Tr. 1222–1233.) Styers stated that union members and union officials both share a common fear of losing their jobs. He reiterated the Company's position that unionized companies will not be able to compete in transportation and logistics distribution industry due to excessive costs incurred by unionized companies. Styers stated that many Teamsters' organized businesses had gone out of business, and pointed to some examples from Con-Way. The script Styers' read further stated:

> The Teamsters like to advertise that they want to represent you in 'negotiations for better wages, hours, and working conditions.' What gets lost in their sales pitch is that Teamster representation is only the beginning of a **NEGOTIATION FOR EVERYTHING. YOU DON'T START WITH WHAT YOU ALREADY HAVE.** It is a clean sheet of paper negotiation that may result in improved wages, hours and working conditions; no changes; or that may result in lesser wages, hours, and working conditions.

(R. Exh. 13, emphasis in original.)

Styers discussed that wages had been restored to pre-recession levels, and there had been wage increases and bonuses since. He pointed out the Teamsters negotiated 15 percent and 7 percent wage decrease at unionized facilities that had yet to be restored. Styers stated he wanted to ensure Con-Way remained an industry survivor rather than an industry statistic. Styers next mentioned that employees might be approached to sign an "innocent looking card" requesting Teamster representation. He warned that union representative might only provide only some of the facts, and urged employees to seek information from the Company. He warned that the cards are legally binding, and stated employees have the right not to choose the Union. The final paragraph noted that none of Con-Ways facilities were unionized, and the customers did not have to worry about strikes or other labor disputes. He added, "Our Account Executives can surely tell you just how important that message is." Styers concluded by stating, "Now more than than ever, it is important that we work together to remain competitive in a very competitive business. We are counting on the fact that the day will never come when our union-free message will change, and I hope you will help deliver that message to other Con-way employees. Thank you for your attention and for the good work you do, day in and day out. I am always available to discuss this and any other topic with you." (R. Exh. 13.)

Styers' one-on-one meeting with Romero took place in Styers' office in May 2014. (Tr. 66–67, 119.)

G. Romero's August 2014 Accident and Termination

The Respondent's trucks are equipped with DriveCam, a recording device on a 30 second continuous loop. There are two lenses, one facing toward the driver and one facing away. If there is an accident or event, the driver triggers DriveCam and it saves the recording from 8 seconds before the trigger and 4 seconds after. DriveCam may also be triggered automatically by external events such as braking, a sharp steering wheel turn, or an accident. Every day, during off peak hours, it downloads any events that are saved on it. DriveCam sends notifications to the Company if an event triggers DriveCam, but not if it is manually activated. (Tr. 1335–1337.)

In the event of an accident, breakdown, or other problem while on the road, drivers are to pull over in a safe place and call the Respondent's main dispatch, referred to as line haul. If a driver has an accident that is seen on DriveCam but not called in, the driver is instructed to call it in after the fact. (Tr. 1446.)

On August 15, 2014, Romero was driving a tractor-trailer from the ULX terminal to Blythe, California. He was about 10 minutes from the ULX facility, in the center lane of Highway 60 East. The passenger side mirror of Romero's truck, which extended out about 18 inches, made contact with the tractor-trailer in the lane to Romero's right. Romero activated Drive Cam and tried to get the other driver's attention. The other driver did not pull over. (Tr. 90.) Romero pulled over and called line haul to report the incident. He spoke with Tricia Plonte (Plonte), who described Romero's report as follows:

> SOS Description: Hit/Run V2 side swiped. V2 – tractor pulling a contained trailer, no other information. CWF damage – tractor #432-3575 – p/s mirror pushed forward, paint scuffed; No V2 damage. No injuries. DSR was traveling/b HWY 60 in the third lane (of six lanes) when V2 started to drift to the left. The d/s of V2's container trailer made contact with DSR's p/s mirror. V2 did not stop. DSR called police but they said he would have to go to police station to make a report.

(R Exh. 21.)

Romero called the California Highway Patrol and filed a report over the phone. (Tr. 92–93.) Romero continued to complete his work assignment, returning to the ULX facility at about 8 a.m. He filled out an accident report, with a diagram and a written description of what occurred. The written description stated:

> I was going on the number three lane, driving eastbound on 60 Freeway when a truck in the 4th lane passed by me hitting the rear view mirror on the passenger side. As a result, paint residue from the hit is visible. I flashed the headlights on the other driver; however, the driver of the other truck did not stop. He continued driving.

(GC Exh. 2.) There was no damage to the vehicle, and the accident was ruled non-preventable.

Romero was holding an iPod while he was driving.[8] He looked at for .5 second and pressed down on it once with his thumb, from -6.25 seconds to -5.75 seconds. From that point until the time of impact at -5 seconds to -4.5 seconds, Romero was looking forward. At the time of impact, the front wheels of the other vehicle were touching the left side of line separating the two lanes. (Jt. Exh. 1.)

An email grouping entitled "ULX Safety Event Notification" includes Regional Safety Manager Don Andersen (Andersen), Director of Operations Mike Wattier (Wattier), Human Resources Generalist Dan Degener (Degener), and Styers. On

[8] Drivers commonly use Bluetooth devices and other wired listening devices. (Tr. 669.)

August 16, Plonte sent an email to ULX Safety Event Notification stating Romero's accident was non-preventable. That same day, Wattier sent an email asking if there was any way to verify that the other vehicle had left its lane. Styers suggested having Andersen review the tape. (R. Exh. 20.) Andersen did not know why Wattier was interested in this verification. (Tr. 1430.)

Andersen reviewed the DriveCam video and reported the second vehicle "never left there (sic) lane and came into ours, this is clearly seen." He noted that the other truck came close to Romero's truck while Romero drifted to the far right of his lane. He detailed the timeline of events, and sent it via email to Styers and Wattier, copied to Huner and Degener:

> 1. At -8.0 to seconds you can see an electronic device in his right hand
> 2. From -7.50 to -6.50 Jamie is looking out the driver's side window at the vehicle next to him
> 3. From -6.25 to -5.75 Jamie is seen looking down at the electronic device in his right hand
> 4. At -4.50 seconds it appears contact is made between him and the truck next to him on the right as you can see his hand holding the steering wheel moves in the down direction more then it normally should
> 5. At -3.75 to -3.50 Jaime looks at the camera to see if it went off
> 6. At -3.25 to -3.0 it appears he looks over to the mirror that was just hit
> 7. At -1.50 Jaime is seen switching the electronic device from his right hand into his left
> 8. At -1.25 to 0.0 Jaime is seen reaching for the event recorder to manually trigger it to capture this event
> 9. At 2.25 Jaime is seen trying to hide the electronic device from the event recorder that's in his left hand.

(R. Exh. 20.) Andersen had reviewed the video about a dozen times before he sent this message, using the frame-by-frame technology.[9] (Tr. 1427.) Huner became aware of the incident when he received the email from Andersen. He also reviewed the DriveCam video. (Tr. 1459–1462.)

Andersen concluded the report was falsified because the second vehicle had not left its lane and Romero did not report that he was distracted by operating an electronic device while driving.[10] Andersen concluded the accident was preventable and had the ruling changed accordingly. (Tr. 1352–1353; R. Exhs. 21, 22.) The revised final ruling status report states that Romero was "seen with a cell phone in his right hand texting and from what I seen both trucks move toward each other and because of Jaime driving distracted he failed to react to the other truck coming close to his unit while at the same time Jaime is seen drifting to the far right of his lane then contact is made between both trucks." (R. Exh. 22.)

Andersen sent an email to Styers later that afternoon stating, "I just looked at this again and he not only has an electronic device I believe is a cell phone, but he is actually texting using his thumb just for (sic) contact is made."[11] (R. Exh. 20.)

On August 20, Romero met with Licon, Styers, and Andersen. Andersen read the accident report to Romero, showed Romero segments of the DriveCam video, and said he believed the accident was Romero's fault. Romero disagreed that he was distracted or at fault. (Tr. 102; Tr. 1236–1239.) Andersen then said Romero falsified his accident report because he failed to mention he had been distracted by a cell phone in his hand. Romero said he was not texting, he was just selecting a song. (Tr. 103, 1405.) Andersen informed Huner about the meeting. (R. Exh. 23.)

Styers suspended Romero pending further investigation of the accident. (Tr. 137–138, 1240.) Licon asked Romero to provide a written statement. Romero submitted the following statement: "I'm being suspended for other reason this is being created to terminate me." (Tr. 103–104; GC Exh. 3.)

Styers prepared an out of service report (essentially a suspension), stating that Romero was distracted by texting on a cell phone, which led to the accident. He said Romero drifted to the far right side of his lane, causing contact between his truck and the other truck. Styers noted that Romero had failed to report that he was distracted, which was a falsification of his accident report. (R. Exh. 14; Tr. 1242.) Romero was terminated effective September 3. (R. Exh. 16.) Huner, who decides for all terminations, was the final decisionmaker. When asked why he did not implement progressive discipline, Huner stated, "There are certain policies within the Company that we regard as cardinal sins, and dishonesty/falsification is one of them."[12] (Tr. 1471.)

Styers completed an employee separation checklist in connection with Romero's termination. (Tr. 1317, GC Exh. 13.) He indicated that Romero did not work well with customers and other people.[13]

Between September 2011 and January 2013, Romero received four warnings from the company. Two were based on accidents, one for taking too long to connect a trailer, and an-

[9] Andersen did not have the access to the sound graph when he reviewed the DriveCam footage; He first had it a week before the hearing. (Tr. 1428.) It therefore could not have played a role in Andersen's assessment of Romero's accident. Andersen testified for the first time at the hearing that at -7.25 seconds, a lane departure warning system installed in Romero's tractor-trailer was activated, resulting in a beeping sound. (Tr. 1369, 1371.) This observation was not included in any of the correspondence leading up to Romero's termination and there is no evidence Andersen or anyone else relied on this in determining Romero was distracted and at fault prior to his termination. Moreover, at time of beep, -7.00, the graph shows very minimal change of the truck's position.

[10] For the first time at the hearing, Andersen stated his belief that Romero had left his lane and hit the other vehicle. (Tr. 1352.) This does not appear in any of the contemporaneous correspondence. (R. Exhs. 20–23.)

[11] On cross examination, when asked why this detail was now included, Andersen stated he wanted to make sure this was conveyed because operation of a cell phone is against the law and Company policy. (Tr. 1353–1354.)

[12] According to Huner, had Romero admitted he had been distracted, a point would have been assessed for having a preventable accident and he would have received a coaching event with a driver coach. (Tr. 1464–1465.)

[13] At the hearing, Styers testified that Romero did not get along with all of his fellow employees, but could not name any employees with whom Romero did not get along. (Tr. 1318).

other for failing to put a chock on a wheel. (Tr. 140; R. Exhs. 15.)

H. September 2014

The Union filed a representation petition on September 11, 2014.

Soon after, Placencia told Rosado he was a union supporter. Rosado told him to stick to his guns and fight for what he believed in.[14] (Tr. 184, 516–517, 184.)

Around this same time period, Placencia and some employees wore blue lanyards with yellow letters depicting "Local 63." Placencia was in the process of getting work instructions from Roman when Styers approached, pointed to the lanyard, and asked Placencia what it was. After Placencia told Styers it was his lanyard, Styers told Placencia to take it off because it was against Company policy.[15] (Tr. 187–191.)

Placencia clocked out for his lunch break. Styers left the break room for a few minutes, then returned to tell Placencia he had not chocked his truck.[16] Placencia explained why the truck wasn't chocked, and then went to Licon's office. Placencia complained about the way Styers was treating him, and referenced the lanyard incident. Placencia said the "drama" occurring because of the campaign was unnecessary. Licon told Placencia he could wear a union button but not a lanyard. Styers walked into Licon's office and asked what Licon and Placencia were discussing. Placencia stated again that the "drama" between drivers and management was unnecessary. Styers responded, "You haven't seen nothing yet." Placencia replied, "What else can you do. You already harassed me. Are you going to fire me?" (Tr. 192–195.) Placencia continued to wear the lanyard up through his suspension and no manager or supervisor mentioned anything about it. (Tr. 335–336.)

The Respondent hired Cruz & Associates in response to the union drive. Labor Consultants Edward Echanique (Echanique) and Luis Camarena (Camarena) from Cruz & Associates provided services to the Respondent from September 23–October 21, 2014.[17] Shortly after they were hired, Camarena and Echanique held meetings and talked to employees one-on-one. (Tr. 632–634.) Camarena rode along with employees on their routes to answer questions starting the week of September 29. (Tr. 520–522, 632–634, 724–725, 783–784.) When they introduced themselves they said they were there on Con-Way's behalf, as representatives of Con-Way. (Tr. 737–739, 793.)

As part of their work at Con-Way, Camarena and Echanique assessed which employees were pro-union and which employees were antiunion. Employees were rated on a scale of 1–5, with a rating of 1 indicating pro-Company, and a rating of 5 being prounion. (Tr. 914–919.)

During the week of September 23, Placencia attended a meeting Camarena conducted. At least one other driver, Victor Rivas, was also present. (Tr. 197, 726.) Camarena spoke, and Echanique was in the room but remained silent. There are different versions of what occurred. I find no particular version entirely credible, and address my salient credibility findings in the context of my decision and analysis.

According to Placencia, Camarena said that if the Union won, they would start negotiations from zero. Camarena also said the company was not going to negotiate with the Union. Placencia said wages and benefits freeze during an election and if the employer didn't want to negotiate, a mediator would be brought in. (Tr. 202.) At that point, Camarena's demeanor changed, and other drivers spoke up and expressed that Camarena was there to talk them out of joining the union. (Tr. 283, 341.) Placencia discussed his parents coming to the country more than 50 years ago to better their lives and he was always taught to look out for other people. (Tr. 346–347.)

According to Echanique, Camarena conducted the meeting with Placencia and one other driver, Rivas. Echanique was present but did not speak. Camarena talked about the upcoming election. He said that under Section 7 of the Act, employees have the right to choose representation or not to choose representation. If they choose representation the company would have to negotiate in good faith. Employees could end up with more, less, or the same.[18] Placencia asked why anyone would vote for the union if things could go down. Placencia then talked about people dying to protect rights in our country and inquired about Camarena's military service. He also discussed immigrants and how they have suffered, and said people like Camarena are hired by the company to make sure people don't exercise their rights. Placencia became tearful and upset, and talked about the need to protect rights and how he had embedded this belief in his son. Rivas asked to be excused from the meeting and Camarena concluded the meeting. (Tr. 726–730.)

According to Camarena, the meeting was an introduction to labor relations. He discussed the Act and the election process. Camarena explained that during negotiations employees' wages and benefits could go up, down, or stay the same. He drew a diagram on a whiteboard depicting the Company and the Union at a bargaining table with arrows going back and forth between them. Placencia called Camarena a liar and said things could only stay the same or go up. Camarena corrected him utilizing the basic guide to the Act. (R. Exh. 4.) Placencia said Camarena was wrong and became upset. He said no matter what, the employees were going to fight for their rights. He then went on a "rant" about immigrants fighting for their rights and the military. Placencia compared the employees' fight to organize to the soldiers' fight, and referenced bloodshed overseas. He was visibly upset and began to cry. Camarena encouraged him to calm down, stated it was an election for representation, not life or death. At that point, Placencia got up and the meeting concluded. (Tr. 785–794.)

[14] Placencia recalled Rosado stating that there were "eyes on him." Resolution of what Rosado said in response is unnecessary because it is undisputed that Placencia informed Rosado of his support for the Union.

[15] Other drivers wore lanyards with sports team logos. (Tr. 196.)

[16] The transcript erroneously says "chalked" instead of "chocked."

[17] Echanique was at another Con-Way facility September 9–October 8. (Tr. 745.)

[18] According to Camarena and Echanique, Camarena never said negotiations would start from zero. (Tr. 731–732; 794.)

I. October 6

On October 6, Placencia asked Rosado if he was done for the day. Rosado was standing by Camarena, and a conversation between Placencia and Camarena ensued. There are different versions of what occurred. I address my salient credibility findings in the context of my decision and analysis.

According to Placencia, Camarena said, "Are you aware under Article 8, that the company does not have to negotiate with the Union?" Placencia said the Union did not look for them (meaning the employees), they looked for the Union. Placencia said the employees felt like battered wives. (Tr. 370.) He told Camarena they were not going to change their minds, they had done everything possible to try to communicate with management, and it wasn't about money. Camarena described himself as "the type of person that if you owe him money, that he will call you. If you ignore his calls, he will go down to your house and he said that he'll kick the door down, saying when I kick the door down, come up, push you to the ground, put his foot on your chest and then he said I'll stick a gun out, pull my .45, put it to your head and I'll get my money one way or the other." Placencia, described Camarena's bodily actions as pretending to kick the door down, push someone down, place his foot on the person's chest, grab the person by the hair, and reaching behind his back like he had a gun, pulling it out and pointing it to someone's head. Placencia asked Rosado if that was all, and he left. (Tr. 205–208.) He did not report feeling threatened to any supervisor. (Tr. 367.)

Later that afternoon, Placencia prepared a statement,[19] which described the interaction. With regard to Camarena's response to Placencia commenting that the organizing drive was not about the money, Placencia wrote, "I am the type of guy if you owe me money, $1000, I will call you. If you ignore my calls I will go to your house, kick down the door and grab you by the head, put my foot on your chest with my 45 pointing at your head and I will get my money one way or the other." (GC Exh. 7.)

According to Camarena, Placencia approached him and said, "We're taking this shit nationwide."[20] Placencia asked who was selecting attendants at the meetings. He then went on a weird rant and said he and the rest of the guys felt like battered women. Placencia said Styers mistreated them like an abusive spouse and they were in this fight because of their families. In response, Camarena stated, "I told him that I—about my family, you know, and the fight as well. That I am willing to do anything for my three kids. I'll kick doors down and anything that I need to do to help my family." Camarena also said "That I was the type of person that could speak on my behalf, that I didn't believe in anyone representing me. And that I didn't believe that they needed any representation, that he could do it himself." They continued to talk about rights and the union. The conversation ended by Camarena saying he would continue to give Placencia information to help him. (Tr. 797–804.)

According to Rosado, the conversation began with Placencia and Camarena making introductions. Placencia asked why he was not included in the LEAN meetings. Camarena said he was not in charge of who attended the meetings. The two discussed pros and cons on unionizing and debated. Camarena said everything would have to go to bargaining and there were no guarantees. When Camarena began discussing the Union's constitution, Placencia became "a little frustrated, a little taken aback, a little emotional" but "[t]he whole conversation was very professional." Placencia referred to himself as a battered wife and said he couldn't' take it anymore and that is why he and the employees had organized. Camarena said that as father, he would not let himself be a battered wife and he would take a stand for what he believes in, "fight his own fight, knock down doors if he has to. But he would not let himself be a battered wife." Camarena said he would support the union if it could guarantee certain benefits, but since it cannot, the union should not collect fees. He said that until the union could guarantee benefits, he would continue to expose it for what it really is. The conversation ended very amicably and professionally, and the two parties wished each other their best. During the conversation, Rosado was pulled away from time to time for a total of 7–8 minutes.[21] (Tr. 1106–1112.) At human resources' request, on October 9, Rosado made a statement about his observations of the conversation. (R. Exh. 8; Tr. 1114.)

J. October 7

1. Background

After clocking in, the drivers report to the dispatch office to receive their assignments. The dispatch office is attached to the break room. Separating the rooms is a four-foot counter, on top of which sits a glass wall with two window openings, which splits the counter in half. Drivers communicate with dispatch through the two windows, which are at chest level. Around the corner from the dispatch counter there are three tables in the break room. It is not possible to see the entire break room from the dispatch office. (R. Exh. 9; Tr. 1125–1126.)

During the relevant time period, Freight Operations Supervisor Roman and driver Sal Navarro (Navarro) sat in the dispatch office. Though classified as a driver, Navarro's primary duties were dispatch. (Tr. 622.) Facing the dispatch windows, Roman's workstation was to the left and Navarro's to the right. (R. Exh. 9(a); Tr. 1125.)

On October 7, Navarro led two LEAN meetings in the morning. One went from 8:30–9:30, and the other from 9:30–10:30. The drivers who started their shifts at 10:30 attended the 9:30–10:30 LEAN meeting, which ran a little long.[22] Placencia and Cabrera were not invited to attend the LEAN meetings. (Tr. 635–639, 685.)

2. The knife incident

Most drivers carry either a knife or box cutter because they sometimes have to break down pallets and cut shrink wrap. (Tr. 227–228; 534–536, 645, 1016–1017.)

[19] The statement is missing the word "not" (Tr. 363.) Though Placencia testified he wrote the statement on October 6, he did not email it to himself until October 10.

[20] Camarena claimed to not know what Placencia was referring to with this comment. (Tr. 798.)

[21] Rosado did not see or hear Camarena talk or act in the manner Placencia described. (Tr. 1111.)

[22] Driver Elvis Martinez was at the LEAN meeting from 9:27 a.m. to 10:34 a.m. (Tr. 1527; R. Exh. 28.)

Placencia and Cabrera both clocked into work at 10:30 on October 7 and entered the break room at about the same time. (Tr. 523, 579; R. Exhs. 1, 2.) Placencia had been filling in for another driver on the Beverly Hills route, so he thought he would be driving that route again, but was not certain. (Tr. 457.)

What occurred next is the subject of much dispute.

According to Placencia and Cabrera, Placencia dumped his work items out of a small backpack onto the table in front of the dispatch office. Roman and Navarro were at their usual positions in the dispatch office. (Tr. 212, 523–525.) A couple of drivers, Elvis Martinez and Hector Sanchez, entered the break room after attending a LEAN meeting. (Tr. 454.) The drivers were joking about all the things Placencia carried in his little backpack.

Placencia asked Camarena if he wanted to go on a ride along, stating his route covered Hollywood and Beverly Hills so they could check out the celebrities. Cabrera asked Camarena if he wanted to go on a ride along with him, because his route covered Santa Monica and Malibu so they could check out the girls.[23] Camarena looked toward Placencia, who was holding his work knife,[24] and quoting from the movie Crocodile Dundee, said, "That's not a knife," gestured pulling a knife out from behind him, and said, "This is a knife. (Tr. 528.) Placencia responded, "That's not a knife, that's a machete." The exchange was done in a joking manner.[25] After this exchange, Navarro led a safety meeting for Cabrera and Placencia. (Tr. 217–224; 527–529, 649; GC Exhs. 6–7.) Cabrera and Placencia then proceeded to their work assignments. (Tr. 531.)

Navarro recalled coming upstairs from LEAN meetings a little after 10:30. He saw Placencia and Cabrera talking with Camarena about doing ride-alongs and touting their respective routes. The LEAN meeting Navarro had conducted had just ended, so there were others in the break room including Elvis Martinez, and drivers named Jermaine and Moe. Navarro was at his printer getting documents for the drivers when he heard Placencia, Cabrera, and Camarena laughing and being kind of loud. When Navarro turned around, he heard Camarena say "That's not a knife, this a knife," and saw him pretend to pull out a knife. Afterward, Navarro led a safety meeting for Placencia and Cabrera. (Tr. 639–642, 653.)

According to Camarena, he came to the dispatch office at around 10 or 10:15 the morning of October 7. Roman was assisting him to figure out who he could do ride-alongs with. Placencia came in and approached the dispatch counter. Placencia and Camarena greeted each other, and Placencia asked why Camarena was in the dispatch office. Camarena said he was doing ride-alongs to help answer any questions drivers might have. Placencia sarcastically said he had a lot of questions, and suggested Camarena ride along with him. Camarena declined, and Placencia persisted in asking him to ride along with him. Camarena told Placencia he would let him know in the future when he would ride with him. Placencia reached into his pocket, pulled out a knife, flipped open the blade. He looked down at it and said, "What, are you scared?" twice.[26] Camarena was overcome with shock and saw his wife and children flash before his eyes. He wasn't sure if Placencia was going to try to jump over the counter and stab him or try to throw his knife at him. Camarena said, "That's not a knife" reached behind his back pretending to pull out a knife and wave it forward, and said "This is a knife." He did this because he was scared and wanted to diffuse the moment. At that point, Placencia turned around and left. Camarena did not see anyone else in the break room.[27] He immediately looked over to Roman, and asked if he had heard that.[28] Roman said that he did. Camarena told Roman he was going to prepare a statement, and asked him to prepare one too. (Tr. 806–821.)

According to Roman, Placencia approached the window around 10:40–10:45 to receive his assignment. Right after that, Roman saw Cabrera leave the break room. Camarena then came into the dispatch area. Placencia was still at the dispatch window, and his backpack was on a table. Placencia asked about ride-alongs and repeatedly told Camarena he should ride with him. Placencia reached down his right side and pulled out a closed knife. He put his elbow on the counter and held it forward at a 45 degree angle toward Camarena. Placencia clicked the knife open and said, "Why don't you go with me? You don't have to be afraid. Nothing's going to happen."[29] He then closed the knife and opened it again and said the exact same words.[30] Camarena appeared shocked. He then made the "That's not a knife" statement and gestures. Placencia did not appear to be joking, and he was looking directly at Camarena. There was nobody else in the break room and nobody laughed. Cabrera then came back into the break room after the incident occurred. Camarena asked Roman about Placencia, wondering if he was going to come after him. Roman responded he wasn't sure, as he had never seen this happen before. (Tr. 1142–1163.) Camarena walked away before Placencia. (Tr. 1216–1217.)

3. Management's actions after knife incident

According to Camarena and Styers, Camarena went to Styers' office after the knife incident. Only the two of them were present. Camarena told Styers that Placencia had threatened him with a knife. Styers called Licon, who came into Styers' office and they discussed the incident. (Tr. 821–82.) After Camarena left, Styers called Roman on the phone and

[23] Cabrera had been driving a route that included Santa Monica and Malibu. Camarena and Roman said there was no discussion about the route Placencia had or what routes would afford an opportunity to see celebrities. (Tr. 850–851, Tr. 1185–1186.) Camarena testified Cabrera did not ask for a ride-along. (Tr. 850–851.)

[24] The blade of Placencia's knife is approximately 4 inches. (GC Exh. 9.)

[25] Placencia said he did not point his knife at Camarena. (Tr. 222–223.)

[26] According to Styers, Camarena reported saying the way Placencia looked at him scared him. "Said it was the eyes." (Tr. 1262.) Navarro and Roman denied Placencia asked Camarena if he was scared. (Tr. 644, 1205.)

[27] He could not see who was on the other side of the break room because a wall impedes the view. (Tr. 913.)

[28] He referred to Roman as his supervisor. (Tr. 820.)

[29] Cabrera testified that Placencia did not make such a comment. (Tr. 530.)

[30] Camarena recalled that Placencia flipped his knife open just once. (Tr. 906.)

asked him to come to his office. At that point, Roman came and told Styers what had occurred. (Tr. 1263.)

By Roman's account, following the knife incident, Roman went to Styers' office and told him what had occurred. Camarena then joined them and told Styers what had occurred. (Tr. 1163–1164.)

Styers called Kimball Hinds, human resources generalist. Hinds instructed Styers to get statements from Roman and Camarena, and to place Placencia out of service. (Tr. 1264–1265, 1269–1270.)

When Camarena left Styers' office, he went downstairs to the training room, which he used as his office. Camarena next called his wife and his employer, and said he felt scared and uncomfortable. He then prepared the following statement.

> At approximately 10:45a.m. on Tuesday October 7, 2014 I was threatened at knife point by driver Juan Placencia at the Conway ULX facility. I was behind the dispatching counter with supervisor Steve Roman when Mr. Placencia began to interrogate me regarding my scheduled ride a longs for the day. He wanted to know whom I was going to ride with and then began to say, "Why don't you ride with me?" He continued to say, "You really should ride with me." I began to get tired with his persistence and told him that in the coming days I would choose a day to ride with him. He did not like my answer as he was trying real hard to get me in his truck today. He then reached into his pocket and proceeded to open up a blade and stated "what are you scared?" He held the knife in his right hand as he looked back and forth between the knife and myself. He then folded the knife, smiled at me and put it back in his pocket and proceeded to walk away.
>
> This direct threat comes as no surprise as other drivers have recently been dealing with threats and violence as well. One driver just reported having the windshield of his vehicle smashed in two nights ago outside his home. I am a family man with three wonderful kids at home, at this time I have great concern over my wellbeing and getting home safely to my family. I cannot and will not tolerate being threatened with my life while on the job.

(R. Exh. 5; Tr. 821–830.) After writing the statement, Camarena called his wife again and ate lunch. (Tr. 832–833.) He did not know where Placencia was at the time.[31] (Tr. 863.)

Roman sent Styers an email at 1:33 recounting what he saw.[32] (R. Exh. 10.) At Styers' direction, he sent an amended statement at 5:16 p.m., stating there was nobody else in the room when the knife incident occurred.[33] (R. Exh. 11; Tr. 1179–1180.)

In an October 10 email to Huner, responding to the question of whether Placencia pointed the knife at Camarena, Roman stated, "No he did not point the knife at him, as he was talking with he pulled out the knife holding it in his hand and began telling him when he will go on a ride along with him, as Luis said he didn't know that is when Juan snapped the knife open and said don't worry nothing will happen to you, he did that same thing twice looking straight at him." (R. Exh. 12.)

4. Placencia's Arrest and Termination

After Camarena and Placencia left the break room following the safety meeting, they went to their assigned trucks. Robert Salas, freight operations supervisor for inbound, approached them and asked if they knew the standard work instruction for loading a long box. Placencia broke down pallets with his knife so they would fit in his truck. (Tr. 531–534.)

Later that afternoon, Licon drove Camarena to the Newton police station to file a police report about the knife incident. (Tr. 833–836.) Camarena spoke with Officer Bell and made a report at 3:45 p.m. (Tr. 425; R. Exh. 6.) Licon drove Camarena back to the ULX facility at about 4. Camarena gave Styers a copy of the police report and then went to his hotel room. (Tr. 846–847, 1272–1273.)

At 4 or 4:30, Styers asked Roman for Placencia's location. A little before 5, at Styers' request, Roman instructed Placencia to come back to the facility. (Tr. 1168–1169, 1277.) Placencia stopped at a strip mall about 2 miles from the ULX facility to take a lunch break.

Styers called the Newton Station so an officer could be present when Styers put Placencia out of service. (Tr. 1275.)

Officers in the field are contacted when somebody calls for service. (Tr. 420, 436.) At 5:30 p.m., Officer Mario Lagac received a call to report to the Respondent's ULX facility because there was a business dispute. Styers was the individual who had placed the call. (Tr. 376–378, 398–399.)

Officer Lagac and his partner, Officer Flores, reported to the ULX facility, and Styers told him there had been a verbal argument at approximately 11 a.m. Styers showed Lagac a copy of the police report. Lagac contacted the Newton Police Station and spoke with Officer Bell, who advised that a criminal reports investigation report had been completed. (Tr. 382.) Officer Bell relayed that Camarena had reported Placencia had pulled out a five-inch pocket knife, tapped it on his own chest, and said, "Are you in fear?" or "Are you scared?" (Tr. 378–384; GC Exh. 9.) Officers Lagac and Flores were then directed by their detective supervisor to arrest Placencia for criminal threats if he returned. (Tr. 385.) Had Styers not called the police station, Placencia would not have been arrested that day. (Tr. 437.)

After waiting for a while at ULX , Styers told the officers where Placencia's truck was parked and they proceeded to Placencia's location. (Tr. 385–386, 418–419.) Styers and Licon went with them so that Styers could retrieve the vehicle. (Tr. 1284.) At about 6, Wattier told Roman the police needed him to go to identify Placencia.[34] Wattier drove Roman to the strip mall, and Roman identified Placencia and the knife. (Tr. 1171–1174.)

The police approached Placencia, took his knife, handcuffed

[31] Camarena could not give a reason for why he stayed at facility. (Tr. 883).

[32] He did not recount Camarena's action of reaching for the fake knife and stating, "That's not a knife, this is a knife." Roman also opined that Placencia's actions were not done in a friendly manner, but were more of an intimidation or threat. (R. Exh. 10.)

[33] Styers faxed both statements to Hinds. (R. Exhs. 17–18, Tr. 1269.)

[34] Wattier was retired at the time of the hearing.

him, and arrested him at 6:15 p.m. (Tr. 235–236, 387, 410. 418–419; 423–424, GC Exh. 9.) At Styers' request, the officers told Placencia he was placed out of service. (Tr. 1286; R Exh. 19.) Placencia was taken to jail where he remained until he was bailed out about 1 a.m. on October 8.

Though it was Officer Lagac's normal practice to contact the victim, he never spoke with Camarena. This is because Styers advised him that Camarena had already left work and could not be contacted since he resided out of town in Chula Vista.[35] (GC Exh. 9; Tr. 390–391, 405, 408–409.)

Placencia spoke with Huner on the phone. Huner instructed Placencia to write a statement. Placencia mentioned there were witnesses to the incident, and Huner said to get statements from them. (Tr. 247.) At Placencia's request, Martinez, Navarro, and Cabrera wrote statements.[36] (CP Exhs. 1–3; Tr. 544–546.)

Cabrera wrote his statement on October 8. That same day, he went to Styers' office and informed Styers and Licon that no threat was ever made, there were witnesses, and he was not going to stay quiet about it. (Tr. 547.) Styers explained that Con-Way had nothing to do with the incident, and it was between Placencia and Camarena. (Tr. 1293.) Huner contacted Cabrera and asked for a statement. Cabrera told him he had already provided one, and he emailed his October 8 statement to Huner. (Tr. 549–551.)

Placencia wrote a statement recounting his recollection of the events of October 7. He sent it, along with his statements about the events of October 6, to Huner on October 9 or 10. (Tr. 260.)

Placencia was terminated for violence in the workplace. As with all terminations in the Western area, Huner was the decisionmaker. (Tr. 1296–1297, 1482, 1503, 1541; R Exh. 29.) In a report created between October 13–15, Huner determined that the conversation began with lighthearted banter, but Cabrera left the room before the conversation turned threatening. Huner discredited employee statements because they were nearly identical in detail.[37] (R. Exh. 30.) Though he claimed to believe Cabrera, Navarro, and Martinez were each dishonest in their respective statements, none of them were disciplined. (Tr. 564, 1548.)

The criminal case against Placencia was dismissed. (Tr. 263–264.)

III. DECISION AND ANALYSIS

A. Witness Credibility

Many of the disputes at issue can be resolved only by assessing witness credibility. A credibility determination may rest on various factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *Hills & Dales General Hospital*, 360 NLRB 611, 617 (2014), citing *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950).

The Board has agreed that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center,* 348 NLRB 1016, 1022 (2006). Moreover, an adverse inference is warranted by the unexpected failure of a witness to testify regarding a factual issue upon which the witness would likely have knowledge. See *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977) (adverse inference appropriate where no explanation as to why supervisors did not testify); *Flexsteel Industries*, 316 NLRB 745, 758 (1995) (failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact).

Testimony from current employees tends to be particularly reliable because it goes against their pecuniary interests. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, 1304 fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Div. of Unarco Industries*, 197 NLRB 489, 491 (1972).

It is impossible to reconcile all of the different recollections of the witnesses for both sides. In evaluating the various different versions of events, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have considered the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or the lack of it; consistencies or inconsistencies within the testimony of each witness and between witnesses with similar apparent interests. See, e.g. *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Testimony in contradiction to my factual findings has been carefully considered but discredited. Where there is inconsistent evidence on a relevant point, my credibility findings are incorporated into my legal analysis below.

B. Alleged 8(a)(1) violations

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

The basic test for a violation of Section 8(a)(1) is whether under all the circumstances the employer's conduct reasonably tended to restrain, coerce, or interfere with employees' rights

[35] Lagac thought Camarena was an employee of Con-Way based on what Styers had told him. (Tr. 409.)

[36] Navarro wrote his statement the same night Placencia called him and told him about his arrest, without talking to Cabrera or Martinez. He provided the statement to human resources. (Tr. 662–664.) Cabrera did not talk to Navarro or Martinez before making his statement. (Tr. 551.)

[37] Huner reported that Placencia provided all of the statements, but Navarro provided his own statement to Huner. (Tr. 664, 1528.)

guaranteed by the Section 7 of the Act. *Mediplex of Danbury*, 314 NLRB 470, 472, (1994); *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992), citing *American Freightways Co.*, 124 NLRB 146, 147(1959). Further, "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *American. Tissue Corp.*, 336 NLRB 435, 441 (2001) (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946)).

1. Union insignia

Complaint paragraphs 6, 7(b), and 12 allege that the Respondent violated Section 8(a)(1) of the Act when Styers and Licon prohibited Placencia from wearing union insignia on or around September 15, 2014.

In *Republic Aviation Corp v. NLRB*, 324 U.S. 793, 801–803 (1945), the Supreme Court held that employees have a protected right to wear union buttons and other insignia at work. This right is balanced against the employer's right to maintain order, productivity, and discipline. The Board has struck this balance by permitting employers to prohibit employees from wearing union insignia where the employer proves that "special circumstances" exist. Id. at 797–798; see also *Boch Honda*, 362 NLRB No. 83, slip op. at 2 (2015); *Sam's Club*, 349 NLRB 1007, 1010 (2007); *Control Services*, 303 NLRB 481 (1991).

Placencia provided unrefuted testimony that Styers instructed him, on one occasion, to remove the lanyard bearing the Union's insignia. Placencia further testified that Licon told him he could wear a button with the Union's insignia, but not a lanyard. Licon did not testify at the hearing. Though Styers testified, he did not deny instructing Placencia to remove the lanyard.

The Respondent contends that any alleged violation should be dismissed as *de minimis*. The fact that the infraction only occurred on one occasion, however, does not render it *de minimis*. See *Regency at the Rodeway Inn,* 255 NLRB 961, 961-962 (1981); *Golub Corp.*, 338 NLRB 515, 516 fn. 13 (2002). This is particularly true considering other violation of the Act that occurred during the organizing campaign, as discussed below. Based on the foregoing, I find the Respondent violated the Act as alleged.

2. Alleged threats

a. Styers' September 15 comment to Placencia

Complaint paragraphs 7(a) and 12 allege that on or around September 15, 2014, the Respondent threatened Placencia with unspecified reprisals because he supported the Union. More specifically, the allegation is that, in response to Placencia saying all the drama surrounding the union campaign was unnecessary, Styers responded, "You haven't seen nothing yet."[38]

In assessing whether a remark constitutes a threat, the appropriate test is "whether the remark can reasonably be interpreted by the employee as a threat." *Smithers Tire*, 308 NLRB 72 (1992). The actual intent of the speaker or the effect on the listener is immaterial. *Smithers Tire*, 308 NLRB 72 (1992); see also *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981) (inquiry under Sec. 8(a)(1) is an objective one which examines whether the employer's actions would tend to coerce a reasonable employee). The "threats in question need not be explicit if the language used by the employer or his representative can reasonably by construed as threatening." *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970). The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *KSM Industries*, 336 NLRB 133, 133 (2001).

Styers recalled the conversation at issue generally, but denied that he made the comment Placencia attributed to him. The only other individual to witness the conversation, Licon, did not testify. The General Counsel asks that I draw an inference that Licon would have testified in a manner unfavorable to the Respondent. Because Licon is the Respondent's agent and there was no explanation for his failure to testify at the hearing, I agree an inference is warranted. See *International Automated Machines*, supra; *Roosevelt Memorial Medical Center,* supra.

Even without the adverse inference, however, I find Styers made the comment and it constituted a threat.[39] First, as the General Counsel notes, Styers did not testify about how what happened after Placencia's comment about the unnecessary drama. In addition, it is clear Styers was hostile to the organizing campaign. Admittedly, in response to Placencia asking him what he disliked about the union, Styer's responded that there was "thuggery" and "all kinds of different things that go on in that type of environment." I also find Styers told Placencia that Con-Way needed to remain a nonunion facility. Styers admitted stating that Con-Way was union-free, and the context was the orientation video depicting a unionized facility closing down. Placencia's version is more in line with this context and it is consistent with the message Styers sent to employees when he read the script to them detailed above, in the Spring of 2014. (R. Exh. 13.) Moreover, I find Styers commented that "Chucky" no longer worked for the Company because of his support for the union. Though Styers denied making this comment, Robles, who testified at the hearing and who Placencia recalled as being present, was not asked about it. The Respondent did not present evidence to negate that "Chucky" was depicted in the orientation video about the importance of sleep. I find it highly implausible that Placencia would fabricate this specific video and the comments that accompanied it.

Against this backdrop, considering the totality of the circumstances, I find Styers' made the comment, "You haven't seen nothing yet," and it constituted a threat.

b. The September 23 meeting

Complaint paragraphs 8 and 12 allege that on or about September 23, the Respondent, by Luis Camarena, threatened employees with loss of wages and benefits if the Union won the election, and told employees the Respondent would not negotiate with the Union.[40]

As a threshold issue, I must determine whether Camarena

[38] This allegation was amended at the hearing; initially it alleged Licon made the threat.

[39] I note that neither Styers nor Placencia is a disinterested witness.

[40] The complaint alleges Echanique also engaged in these threats, but the evidence is clear that he was silent at the meeting where the alleged threats occurred.

was an agent of the Respondent while he performed labor consulting services there.

Section 2(13) of the Act states: "[i]n determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." In other words, an individual need not be actually authorized by the employer to take the actions at issue if it appears he or she possesses such authority. In determining whether an individual has apparent authority, the Board applies common law principles which it summarized in *Mastec North America, Inc.*, 356 NLRB 809, 809–810 (2011):

> Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe the principal has authorized the alleged agent to perform the acts in question. Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such a belief. [Citations and internal punctuation omitted.]

Moreover, under the common law of agency, a principal may be responsible for its agent's actions if the agent reasonably believed from the principal's manifestations to the agent that the principal wished the agent to undertake those actions. See Restatement 2d, Agency, § 33. The Board has found the question of whether the individual serves as a conduit of information to employees particularly useful in determining agency status. *A.D. Conner Inc.*, 357 NLRB 1770, 1790, and cases cited therein; see also *Blankenship & Associates*, 306 NLRB 994, 1000 (1992), enfd. 999 F.2d 248 (7th Cir. 1993).

In the instant case, Camarena stated at the outset of the meeting at issue that he was present on Con-Way's behalf. It is undisputed his purpose was to serve as a conduit of information to the employees. I find, therefore, that Camarena was an agent of the Respondent within the meaning of Section 2(13) of the Act.

With regard to the statement about loss of benefits, there is a dispute regarding what precisely Camarena said. According to Placencia, Camarena stated negotiations would start from zero. According to Camarena and Echanique, Camarena said negotiations could result in employees going up, going down, or staying the same. I find it likely the parties were prone to recall the points that solidified their respective positions, and that both comments were made. I credit Placencia's testimony that he challenged the comment about negotiations starting from zero by stating wages and benefits freeze during an election process. His testimony on this matter was certain and straightforward. I also find, however, that Camarena conveyed the various results that could occur as the result of bargaining. This testimony is consistent with what Camarena stated at another meeting with employees and is consistent with the scripted message Styers conveyed to employees during his previous meetings with them.

Though I have found Camarena to lack credibility generally for the reasons detailed below, I believe he never came right out and said Con-Way would not bargain with the Union. First, as noted directly above, Camarena's testimony is corroborated by Echanique and is consistent with what another driver was told in a similar meeting. It is also consistent with what Rosado recalled Camarena saying to Placencia on October 6. Though there was at least one other employee in the meeting, this employee was not called to testify.[41] I find it implausible that Camarena, who works as a labor consultant, would so blatantly state the Company would refuse to bargain. I do not doubt that Placencia, given his viewpoint about the Union and his clear skepticism of the labor consultants' information, took away the message that the Company would not be eager to bargain. The evidence, however, does not establish that Camarena explicitly said the Company would not bargain with the Union.

Turning to the "negotiation sill start from zero" comment, such statements are not a per se violation of the Act. In *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), enfd. mem. 679 F.2d 900 (9th Cir. 1982), stated:

> It is well established that "bargaining from ground zero" or "bargaining from scratch" statements by employer representatives violate Section 8(a)(1) of the Act if, in context, they reasonably could be understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore. On the other hand, such statements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations.

In *Coach and & Equipment Sales Corp.*, 228 NLRB 440, 440–441 (1977), the Board emphasized that such statements must be read in context, noting that the "presence of contemporaneous threats or unfair labor practices is often a critical factor in determining whether there is a threatening color to the employer's remarks."

Because I have found Camarena never affirmatively said the Company would not negotiate, I find his comments that negotiation would "start from zero" came close to the line of constituting a threat, but did not cross it. I therefore recommend dismissal of this complaint allegation.

c. October 6

Complaint paragraphs 9 and 12 allege that on October 6, Camarena: (a) impliedly threatened Placencia with physical harm because he supported the Union, and (b) made statements implying support of the Union would be futile.

The conversation at issue is the subject of much dispute. Resolving every little inconsistency is unnecessary, and I therefore focus on the material disputes. The only disinterested witness is Rosado, who was present for most of the conversation.[42] I find Rosado to be credible, based on his straightforward demeanor along with the fact that he did not appear to embellish his testimony. He also strikes me as impartial based on the fact that his testimony does not wholly support either Placencia or

[41] It is undisputed that Victor Rivas was also present. His sympathies regarding unionization are unknown.

[42] Though Rosado is a supervisor, his feelings about the employees organizing is not a matter of record.

Camarena. Where his testimony resolves a conflict between Placencia and Camarena, I credit it.

With regard to the allegation regarding the Union's futility, this stems from Placencia's testimony regarding what occurred immediately after Placencia approached Camarena and Rosado. According to Placencia, Camarena said that under Article 8 the Company does not have to negotiate with the Union. By Camarena's account, the conversation started by Placencia stating, "We're taking this shit nationwide." Rosado was present at the outset of the interaction, and his testimony contradicts both versions. By Rosado's account, the interaction began with introductory pleasantries, Camarena and Placencia discussed the pros and cons of unionization, and Camarena said negotiations came with no guarantees.[43] Rosado's testimony is credited, and I therefore recommend dismissal of complaint subparagraph 9(b).

With respect to the other relevant portion of the conversation, Rosado's recollection was that, in response to Placencia stating that the employees felt like battered wives, prompting their decision to seek representation, Camarena responded that he would not let himself be a battered wife, would "fight his own fight and knock down doors" if he had to. This is largely consistent with Camarena's recollection, and I find Camarena made such a comment.[44]

It is important to note, however, that though Rosado was present at the outset of the conversation, he was absent for about 7–8 minutes of its later portions. The question therefore remains as to whether, outside of Rosado's presence, Camarena also made the comments and gestures Placencia attributed to him in response to Placencia stating the union drive was not because of money. I resolve this conflict in Placencia's favor. First, and foremost, I find Camarena generally lacks credibility.[45] His repeated denials that he was present at the ULX facility to dissuade employees from choosing the Union were easily shown to lack credence. He denied his job was to stop unionization and he claimed not to understand that Con-Way did not want a union in place. (Tr. 896, 898.) The following exchange shows Camarena's evasiveness:

> Q. Did Cruz & Associates give you any instructions on what you were supposed to do to address the Union organizing at Con-Way?
>
> . . .
>
> THE WITNESS: To inform the employees of their rights under the National Labor Relations Act.
>
> Q. BY MR. RUTTEN: Anything else?
>
> A. I'm there to provide information regarding the Act.
>
> Q. And was it your understanding that you were to provide the information in a way to discourage unionization?
>
> A. No.
>
> Q. Do you believe that your employer is pleased when the result of your labor relations efforts result in unionization?
>
> A. I believe we inform the employer at the time of hiring that we don't have a crystal ball to know what the outcome of an election can be. And that we will do our best to provide the most factual information to help employees make an informed decision, but we have nothing—no power to know how everything can end up after an election?
>
> Q. That wasn't my question. My question was, is your boss pleased when unionization occurs after your labor relations efforts?
>
> MR. LETTER: Objection. Vague as to who boss is.
>
> JUDGE LAWS: Sustained.
>
> Q. BY MR. RUTTEN: Is Cruz & Associates pleased when they send you out on an assignment as a labor relations consultant and unionization occurs?
>
> A. Yes.
>
> Q. They're pleased when unionization occurs?
>
> A. We lose. It happens. We don't win every time.

(Tr. 899–900.) Yet, when pressed, he admitted that it's "common knowledge when we're hired on to try to help a company, that their preference would be to continue to work directly with their employees." (Tr. 898.)

Similarly, when asked whether he got a sense of which employees were prounion and which were anti-union, Camarena responded that he did not. When it became clear to him the Union was aware of the point system he used to evaluate employees' sympathies, he changed his testimony:

> Q. When you worked at Con-Way ULX, did you get a sense of which employees were pro-union and which employees were anti union?
>
> A. No.
>
> Q. You didn't? That wasn't part of your duties on this campaign?
>
> A. My duty is to inform them of their rights and to help them understand the process, yes.
>
> Q. So part of your duties weren't—you didn't do a number system where you rated the employees on this campaign?
>
> A. We do sometimes.
>
> Q. But on this campaign, did you do that?
>
> A. Yes, we did.

(Tr. 914–915.) Even in light of this reluctant admission, Camarena still remained evasive:

> Q. Can you kind of describe how that rating system works?
>
> [objection and ruling]
>
> THE WITNESS: Yes, we gauge, you know, whether or not we believe that they're understanding the information.
>
> Q. BY MS. BURNS: Okay.
>
> A. And yes, we—
>
> JUDGE LAWS: Understanding what information?
>
> THE WITNESS: The Act.
>
> JUDGE LAWS: So it's based on understanding the Act, not

---

[43] Although Placencia and Camarena had met at the meeting in late September, there is no evidence that they interacted between the meeting and October 6, and therefore Rosado's recollection of introductory pleasantries is highly plausible, particularly considering the number of employee meetings Camarena conducted.

[44] Though Placencia did not reference this comment in his statement or his testimony, it is clear none of the witnesses recounted everything that transpired during the conversation, which Rosado recalled took place over the course of about 30 minutes.

[45] That I believed he never said the Company would not bargain, I disbelieved most of the rest of his testimony regarding material disputes. See *NLRB v. Universal Camera Corp.*, supra.

whether they're pro-union or anti-union?
THE WITNESS: Well, depending on how much they're understanding the info we believe then, you know, sometimes it affects their view.
JUDGE LAWS: I know, but I need you to listen to my question.
THE WITNESS: Okay.
JUDGE LAWS: Because you're saying two different things and I want to try to make sense of it.
THE WITNESS: Okay, ma'am.
JUDGE LAWS: You responded that you do assign a number based on whether they're pro-union or anti-union.
THE WITNESS: Yes.
JUDGE LAWS: But then you said you assign the number based on how much they understand the information you're giving them. So is that also true?
THE WITNESS: Yes, because when --
JUDGE LAWS: Now, hold on. Just yes.
THE WITNESS: Yes.
JUDGE LAWS: How do those two things relate to each other? Are there two numbers? One, this person understands the information, I'm going to give them this number and then another number for your assessment of where they fall with regard to support of the union, or is it one number?
THE WITNESS: It's one number.

(Tr. 915–917.)

I also find Camarena had a tendency to exaggerate and embellish when it served him. His attempt to paint Placencia as "mentally unstable" is not supported by objective evidence. No supervisor or coworker who worked with Placencia on a daily basis testified or insinuated that Placencia behaved in a manner warranting such a conclusion. Though Rosado observed Placencia become "a little emotional" during the October 6 exchange, he viewed the conversation as professional throughout. The record as a whole fails to support a conclusion that Placencia was an employee with emotional problems. Other examples of Camarena's tendency to exaggerate are discussed below in connection with Placencia's termination.

Though Placencia was clearly in favor of the Union, and like any witness with similar leanings would tend to view things with a pro-union lens, his testimony was clear and forthright, and lacked the evasive, slippery, and at times outright dishonest qualities Camarena's testimony exhibited. In addition, Placencia's account of Camarena pantomiming the actions of pretending to kick down a door, push someone to the ground, reach for a pretend gun, and point it, are similar to Camarena's admitted actions of reaching for and wielding a fake knife the following day.

Having resolved the conflicting testimony, I find Camarena's actions indicated a willingness to resort to physical violence to protect his interests. Given the fact that the petition for election had been recently filed, this conduct was reasonably construed as a threat. Accordingly, I find the General Counsel has met his burden that Camarena made an implied threat to Placencia, as alleged.

C. 8(a)(3) and (1) Allegations

1. Romero's suspension and termination.

Complaint allegations 10 and 13 allege the Respondent violated Section 8(a)(3) and (1) of the Act when it suspended and terminated Romero.

The General Counsel Contends that Romero was suspended and discharged because of his union activities. The Respondent contends it took these actions because Romero falsified an accident report. In cases involving dual motivation, the Board employs the test set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). To prove a violation under *Wright Line*, the General Counsel must make an initial showing "sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." 251 NLRB at 1089. If this is accomplished, the burden shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." Id. The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade, by a preponderance of the evidence, that the action would have taken place absent the protected activity. *Dentech Corp.*, 294 NLRB 924, 956 (1989).

There is no question that Romero engaged in union activity and the Respondent knew about it. It is clear management knew not only that he engaged in union activities, but he was among the leaders of the ongoing campaign. The remaining question turns on the Respondent's motivation for suspending and terminating Romero.

A discriminatory motive or animus may be established by: (1) the timing of the employer's adverse action in relationship to the employee's protected activity; (2) the presence of other unfair labor practices, (3) statements and actions showing the employer's general and specific animus; (4) the disparate treatment of the discriminatees; (5) departure from past practice; and (6) evidence that an employer's proffered explanation for the adverse action is a pretext. See *Golden Day Schools v. NLRB*, 644 F.2d 834, 838 (9th Cir. 1981); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) (timing); *Mid-Mountain Foods, Inc.*, 332 NLRB 251, 260 (2000), enfd. mem. 169 LRRM 2448 (4th Cir. 2001); *Richardson Bros. South*, 312 NLRB 534 (1993) (other unfair labor practices); *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1473–1474 (6th Cir. 1993); *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999) (statements); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999) (disparate treatment); *JAMCO,* 294 NLRB 896, 905 (1989), affd. mem. 927 F.2d 614 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991) (departure from past practice); *Wright Line*, 251 NLRB at 1089; *Roadway Express*, 327 NLRB 25, 26 (1998) (disparate treatment).

It is very clear the Respondent has gone to great lengths to keep the Union out of its ULX facility. Among the evidence of the Respondent's animus are: (1) The video shown at new employee orientation depicting the closure of a union facility, (2) Styers' comments regarding the Company's need to stay union-free and his comments about "Chucky," detailed above, and (3)

the conduct found to have violated Section 8(a)(1), above.[46]

The timing of Romero's termination is likewise suspicious. Management clearly knew the organizing campaign was gaining strength—Styers' scripted message to the employees in meetings during the spring of 2014 underscores this. Though Romeo had been written up for a few infractions, including accidents, between 2011 and January 2013, this very minor incident led to his termination in the weeks leading up to the petition being filed.

I find, therefore the General Counsel has established an inference that Romero's union activity was a motivating factor in the Respondent's decision to terminate his employment.

The Respondent must prove that Romero would have been suspended and terminated even absent his union activity. I find highly significant the lack of explanation as to why Wattier asked if there was any way to verify the other vehicle had left its lane, and why Styers suggested having Andersen review the tape. The very decision to inquire into this incident is suspicious, particularly considering Romero followed reporting protocols and there was no damage to the vehicle.

Moreover, at its inception, the unexplained decision to look into Romero's report shows embellishment that continued and built over time. Significantly, Romero never reported that the other vehicle left its lane, so Wattier's initial request to verify that the other vehicle left its lane stands on faulty ground based on its substance as well as its unexplained origin. Indeed, though Romero did not have the benefit of reviewing DriveCam before making his report, his picture of the incident does not show the other vehicle crossing over the lane line, nor does his narrative make such a report. (GC Exh. 2.) The report he gave to Plonte likewise does not state the other vehicle left its lane. (R. Exh. 21.) From the start, therefore, both the decision to look into Romero's report, and the misstatement of what Romero reported, lend a strong sense of untrustworthiness to the Respondent's actions.

The Respondent's embellishment of the situation is compounded by Andersen's testimony, for the first time at the hearing, that it appeared Romero crossed over his lane line and hit the other vehicle. This is not reflected in any of the documents contemporaneously explaining what occurred. It is likewise contradicted by evidence that there is no way to tell where in the lane Romero's vehicle was by looking at DriveCam. Finally, it does not square with Andersen's testimony that at -7.25 seconds, a lane departure warning system installed in Romero's tractor-trailer was activated, resulting in a beeping sound. No such beeping sound can be heard shortly before or at the time of impact at -4.50 seconds.

The Respondent's justification that Romero was distracted because he was texting on his cell phone is belied by a wealth of evidence. In Andersen's initial report, which was made after reviewing DriveCam frame-by-frame about a dozen times, he referred to an "electronic device" Romero was holding. Later, after reviewing the video again, he expressed his belief it was a cell phone. When asked why he reviewed the footage again to glean this fact, Andersen stated, "As time permitted, I went back after things had slowed down that day from taking calls, and I looked at this event again just to look at the details of it." (Tr. 1353.) In the final status ruling report, it states that in fact Romero was using a cell phone and texting, thus apparently transforming what was once purported to be Andersen's belief into a matter established fact. This "fact" was relied upon when Romero was put out of service and subsequently terminated. This strikes me as a convenient after-the-fact determination, particularly considering review of the DriveCam contradicts any notion Romero was texting, and it is completely impossible to discern from the video what type of device Romero was holding.[47] At the hearing, where the DriveCam was reviewed, Andersen scaled things back, and returned to stating that it "looked like he had his cell phone in his hand" and "his thumb was actually touching the screen" in one clip. (Tr. 1353.) Thus when it was clear the recording was being placed into the hearing record, the Respondent was no longer able to plausibly assert with certainty that Romero was texting on a cell phone.

Romero consistently stated he was holding an iPod.[48] I credit Romero's testimony in this regard because it is most consistent with what the DriveCam recording shows. The video clearly depicts Romero pressed the device once with his thumb, consistent with the use of an iPod or similar mp3 player, inconsistent with the operation of a cell phone, and particularly inconsistent with the act of texting. Moreover, Romero's demeanor when testifying was consistent and straightforward.[49] Compared with the inconsistencies of the Respondent's assertions, detailed above, along with my own opportunity to view the DriveCam footage, Romero's account is easily credited.

The Respondent contends that when Andersen showed Romero the DriveCam video depicting him lowering the electronic device out of sight to hide it, he "really didn't argue that point." (Tr. 1407.) First, this does not show Romero had a cell phone. In addition, Romero voluntarily activated the DriveCam to record himself. Had he wanted to hide the fact that he was holding something, it is curious he would choose to record himself.

Turning to the Respondent's contention that falsification is a "cardinal sin" worthy of immediate termination, I find, for the reasons set forth above, that there was no falsification.[50]

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[46] Though some of this conduct occurred after Romero's termination, it nonetheless supports an inference of union animus.

[47] This was my observation both when the video was depicted on a large screen at the hearing, and in my repeated review of it on 24-inch computer screen, with any eye specifically focused on trying to determine what Romero was holding.

[48] Given how ubiquitous Apple products are in these times, the need to take judicial notice that an iPod is an mp3 player and not a phone seems akin to the need to take judicial notice that a radio is a device that plays music. There really can be no dispute.

[49] The word "knife" appears as a clear error on p. 103 of the transcript, and should read "iPod."

[50] The Respondent's Policy 541—Employee Conduct, states the following regarding falsification:

"Falsification of Company Records/Dishonesty, For example, falsification of employment application or resume information, personnel records, medical history forms, insurance claims, payroll records, time cards, trip sheets, DOT logs, business expense reports, among others as well as making false/untrue statements to company management." It

Romero did not affirmatively report that he was holding an iPod, but he was not asked if anything was in his hand. I credit Romero's testimony that he did not believe he had been distracted, and that is why he did not report he was distracted. His actions of turning on DriveCam and reporting the incident according to protocol belie that he was attempting to conceal anything. Moreover, as detailed below, the Respondent was faced with what it deemed to be false statements in connection with the termination of Placencia, yet the employees who made those statements were not terminated.

The Respondent presented evidence of other individuals terminated for allegedly similar infractions. Because I find there was no falsification, and I further find the Respondent knew this and manipulated the situation to trump up a disingenuous claim of falsification, I find Romero is not similarly situated to these other employees, and therefore any comparisons are unhelpful.

Based on the foregoing, I find the reason the Respondent offered for terminating Romero was a pretext to mask unlawful retaliation. I therefore find the General Counsel has sustained his burden to prove this complaint allegation.

2. Placencia's arrest, suspension, and termination

Complaint paragraphs 11 and 13 allege that the Respondent violated Section 8(a)(3) and (1) of the act by filing criminal charges against Placencia resulting in his arrest, and suspending and terminating him because of his Union activities.

The General Counsel Contends that Placencia was arrested, suspended and discharged because of his union activities. The Respondent contends it took these actions because Placencia pulled a knife on Camarena and exhibited violence in the workplace. As such, the *Wright Line* framework applies.

Placencia had, by this time, identified himself to management as a union supporter and leader. Coupled with the 8(a)(1) violations and the evidence of animus set forth above, I find the General Counsel has established an inference of unlawful motivation. The Respondent, therefore must prove Placencia would have been arrested, suspended, and terminated even had he not engaged in protected activity.

In determining what actually occurred the morning of October 7, I note that many of the witnesses were asked to go back and recall highly specific details of that morning, essentially in real time. It is not realistic to expect witnesses to recall in such detail the minutiae of what, at the time, seemed like just any other morning at work. Resolving disputes over exactly where witnesses were standing and the other seemingly unending details of what various individuals did at precise moments that morning is neither helpful nor material.[51] I therefore resolve the material disputes.

For the reasons set forth above, I find Camarena lacks credibility. I credit Placencia's version of what occurred the morning of October 7 because it is more plausible and better corroborated.

First, I find Cabrera to be a very credible witness. He was resolute in his position that there was foul play in connection with Placencia's termination, he knew there were witnesses, and he was not going to sit idly by in the face of what he perceived as an injustice. As a current employee testifying against his own pecuniary interests, I find his testimony particularly reliable. I note that Cabrera's testimony is corroborated by Navarro, another current employee who I likewise find credible.

The Respondent relies on Roman's corroboration of Camarena's account to establish Placencia threatened Camarena. Roman's account is flawed, however. He admittedly could not see if there were other employees in the break room and he initially did not note the absence of other employees when he made his initial statement shortly after the events occurred. He then added that there were no other employees in the room when prompted by Styers. (R. Exhs. 10, 11.) During his testimony, he said that Cabrera came back into the break room after the knife incident was over. Yet in his interview with Hinds, Roman said he could not be certain Cabrera was not still in the room. (R. Exh. 27.)

Tellingly, the fact that at 1:33 p.m. on October 7, Roman wrote he did not think the knife incident was done in a friendly manner but was more of an intimidation or threat shows it was written to dispel such a notion. (R. Exh. 9.) Yet why would there be a need to dispel the notion that pointing a knife at someone was not done in a friendly manner unless the incident was arguably done in jest? At 1:33 p.m., Roman, who had seen the incident, would have no idea Placencia was going to make such a claim unless it was grounded in fact. In addition, Roman initially stated Placencia did not point the knife at Camarena. He attempted to explain this statement by testifying that he thought pointing the knife meant holding it straight out. (Tr. 1184–1185.) I do not credit this explanation, as it rings false and is contradicted by more reliable testimony.

Moreover, Roman's testimony that Navarro was not in the dispatch office when the incident occurred is unworthy of belief. It is contradicted by Navarro, who testified he heard the entire incident, saw the end of it, and described the atmosphere as light-hearted and joking. I accord high reliability to Navarro's testimony based on his open and forthcoming demeanor, and the fact that he is a current employee testifying against his pecuniary interests. Roman's testimony that Navarro left the dispatch office and came back in at 10:46 or 10:47 is contradicted by the weight of the evidence, and less plausible than Navarro's account. The Respondent contends that the other drivers could not have witnessed what occurred, because they had already left the break room and proceeded to their assigned routs. There is no dispute that Navarro generates the paperwork the drivers need for their routes. Yet, to explain Navarro's absence from the break room during the knife incident, Roman testified the drivers receive their paperwork any time between about 10:46 up to 11:30. (Tr. 1204.)

Turning to Camarena, in addition to his credibility problems detailed above, his purported fear of Placencia was grossly exaggerated. The manner in which he testified about the knife incident struck me as practiced and disingenuous. He said he felt fear for his wife and children during and after the knife

does not prescribe a specific form of discipline for falsification. (R. Exh. 25.)

[51] These details have not been overlooked; they just are not things I would expect witnesses to recall with a precise degree of certainty given how long ago the events occurred.

incident, yet even crediting Camarena's account, Placencia never did anything to suggest Camarena's family was in danger. Moreover, Camarena delayed hours before contacting the police and never alerted authorities in his home town near San Diego about the threat. It also strikes me as unlikely Camarena really believed Placencia would jump over the counter and through the window and attack him, or throw his work knife at him. Camarena's overreaction coupled with the failure to notify authorities about what Camarena ostensibly perceived as a threat to his family, supports the conclusion that the incident did not occur as Camarena alleged.

Moreover, Camarena could offer no explanation as to why he waited more than four hours to file the police report. (Tr. 884.) He admittedly did not know where Placencia was when he went downstairs after the incident, called his wife, wrote his statement, and ate his lunch. When asked why he stayed at the facility, Camarena testified, "I just did." (Tr. 883.) This leads to the conclusion that Camarena was not in fear for his life because the incident did not occur as he alleged.

When it comes to a key element of Placencia's alleged threat of violence, Camarena and Roman's accounts differ. Camarena recalled Placencia stated, "What, are you scared?" twice, as he pointed the knife at him. Roman recalled Placencia stated, "Why don't you go with me? You don't have to be afraid. Nothing's going to happen." Camarena denied Placencia made such a comment. This inconsistency about a primary piece of the alleged threat points to pretext. There are also other inconsistencies between Camarena and Roman, including how many times Placencia opened the knife, and whether it was Placencia or Camarena who walked away from the incident.

Another anomaly stems from Huner's conclusion in the investigative report that the conversation started out as lighthearted banter, but the witnesses had left the room before the conversation turned threatening. Yet, by Camarena and Roman's accounts, the incident did not start out has lighthearted banter, but was marked from the outset by Placencia being aggressive, pushy, and sarcastic.

In addition, while I find the timing of events cannot be nailed down with precision, the disparity between Camarena and Roman regarding Camarena's arrival in the dispatch office is highly disparate. Camarena recalled going to the dispatch office at 10 or 10:15 to go over assignments with Roman. According to Roman, Camarena did not come into the dispatch area until after Placencia had approached the dispatch window.

The Respondent's failure to offer a legitimate explanation for discrediting the employee witnesses who corroborated Placencia's version of what occurred also points to pretext. Huner asserted that the employee and former employee witnesses could not be believed because their statements matched too closely. The record belies this, however, and it is readily apparent that the witness' testimony, while generally corroborative, is not exactly the same. None of the employees were disciplined despite having ostensibly committed the "cardinal sin" of falsification. This leads me to conclude that the statements were not false and the Respondent knew it.

The witness's presence in the break room at the time of the incident is further corroborated by the LEAN meetings that occurred the morning of October 7. The 9:30 meeting ended after 10:30, after which time employees proceeded to get their work assignments. This dovetails with the testimony that drivers witnessed the incident, and makes it highly improbable the attendees of the 9:30 meeting had received their assignments and cleared out of the break room by 10:30.

The Respondent contends that Huner also reviewed time records for Cabrera and Martinez, showing Cabrera clocked in at 10:30 a.m., and that Martinez swiped in his dock work code at 10:34 a.m., which supported Huner's conclusion they both had left the break room to handle their work assignments before the knife incident occurred. (R. Exhs. 2, 28.) Placencia also clocked in at 10:30, however, and he was obviously in the break room when the knife incident occurred. Cabrera's clock-in time therefore lacks probative value. Moreover, this conclusion does not square with the version of Roman's account that has Cabrera coming back into the break room after the knife incident.

With regard to Martinez, Huner testified that at 10:34, his time card showed code 913, which is inbound dock. (Tr. 1502–1503.) Yet, on cross-examination Huner testified Martinez's time card indicated he was attending a meeting between 9:27 and 10:34. (Tr. 1527.) This is consistent with Navarro's testimony about the LEAN meeting running a few minutes late. It is undisputed employees left the LEAN meeting and went upstairs to get their assignments. Huner's attempt to establish Martinez was not present in the break room at the time of the incident therefore does not hold up.

There is also significant evidence the Respondent's managers seized on opportunities to paint Placencia in a negative light. Regarding the events of October 6, Huner testified that Rosado had communicated to him that the interaction between Placencia and Camarena the evening of October 6 "had elements to it that of an escalation type thing where it wasn't a totally amicable conversation."(Tr. 1486.) Yet Rosado viewed the conversation as "professional the whole time" and described it as "a spirited debate of sharing opinions" that ended amicably. Despite this, Huner attempted to paint a different picture, stating, "It then carried over into the next morning when Placencia came into work and addressed Mr. Camarena which was the event where the knife was pulled on Camarena and the threat of violence was made." (Tr. 1486.)

Finally, Placencia and the driver witness's account of what occurred is much more plausible. Camarena's actions of pretending to grab a knife from behind his back and mimicking the line from Crocodile Dundee fits with the multiple witness's description of lighthearted banter. Camarena's attempt to couch his actions as a frightened and shocked response made to diffuse a tense situation does not ring true.

The Respondent contends other employees who did not engage in union activity were terminated for similar infractions. Because I find there was no threat of violence, and I further find the Respondent knew this and manipulated the situation to fabricate a disingenuous claim of violence in the workplace, I find Placencia is not similarly situated to the other employees who were terminated for violating the Respondent's policies against violence in the workplace. For this reason, a comparative analysis is of no utility.

The Respondent argues at length that Camarena was not acting as the Respondent's agent when he filed the police report leading to Placencia's arrest. Unlike the Respondent's argument, however, my analysis is grounded in my findings that there was never a real threat and never a legitimate police report, and the Respondent knew it. Camarena's delay in making the police report, which occurred only after consultation with Styers and Licon, underscores this. Moreover, the Respondent ratified Camarena's actions by driving him to the police station, calling the police later that day to come to the facility because of a workplace dispute, and leading the police to Placencia's truck to facilitate his arrest. Office Lagac's testimony is clear that had Styers not initiated the call for service, Placencia would not have been arrested that day.

Other evidence casts considerable doubt on Styers' motivations for calling the police. When Officer Lagac asked Styers for Camarena's phone number so that he could interview him, Styers said Camarena was out of the area in Chula Vista where he resided, when in fact he had gone back to his hotel room. Moreover, neither Styers nor any other supervisor or manager has explained why Placencia, who had supposedly made a violent threat with a knife in the morning, was permitted to work almost his entire shift before any action was taken.

The Respondent's attempts to disavow responsibility for Placencia's arrest are disingenuous. In short, I find Camarena was acting as an agent of the Respondent when he filed the police report. His actions set in motion a course of action, ratified by the Respondent's managers, culminating in Styers' call to the police. This led to Placencia's arrest and, in turn, his suspension and termination.

As to the Respondent's argument that Camarena's police report was protected by the First Amendment, this is easily resolved by two findings: (1) The police report was false; and (2) The police report was made with retaliatory motivation.

Based on the foregoing, I find the General Counsel has proved Placencia was terminated based on his union activity.

IV. THE OBJECTIONS

A. Background

After the petition for representation was filed Con-Way and the Union entered into a stipulated election agreement for an election to be conducted on October 23, 2014, which was approved on September 24, 2014. The employees included in the agreed-upon unit eligible to vote consisted of all full-time and regular part-time driver sales representatives and driver sales representative students employed by Con-way at its ULX facility. The election was conducted as scheduled. 22 votes were cast for the Union and 20 votes were cast against. Con-Way challenged the ballots of Romero and Placencia because that they had been terminated prior to the election. (GC Exh. 1(x).) Both parties filed objections to the election. On July 20, 2015, the Board approved of a stipulation between the Company and the Union whereby the Union agreed to withdraw its objections to the election. The parties also stipulated not to open or count Romero's or Placencia's ballots. The Board issued a Revised Tally of Ballots which finalized the vote count at 22 being cast in favor of the Union and twenty 20 cast against. (GC Exh. 1 (ab)).

The Regional Director set the following Objections for Hearing:

Objection No. 1

During the critical period, the Union and its representatives, agents and supporters engaged in threatening, intimidating, coercive and abusive conduct directed at the Employer's employees, supervisors, managers, consultants, and others, which threatened, intimidated, and coerced employees, placed them in reasonable fear for their safety, and placed them in reasonable fear of retaliation, retribution, and other reprisals if they did not support or vote for the Union in this election.

Objection No. 2

On the day of the election, the Union and its representatives, agents, and supporters threatened, intimidated, and coerced employees while they were on their way into the Employer's facility to vote in this election.[52]

Objection No. 3

Even if the conduct set forth in Objections 1 and 2, above, cannot be attributed to the Union or its agents, this conduct constituted improper third party conduct that, either singularly or cumulatively, destroyed the minimum laboratory conditions necessary for a free and fair election and interfered with the election result inasmuch as it constituted improper pressuring, threatening, coercion, and intimidation of eligible voters.

Objection No. 4

A general atmosphere of fear, coercion, and confusion was created during the critical period by the Union and its representatives, agents, or supporters, or by third parties, that interfered with the employees' ability to exercise a free, fair, and uncoerced choice in this election, and interfered with the conduct of the election and the election result.

Objection No. 5

The conduct set forth in Objections 1, 2, 3, and 4, above, either singularly or cumulatively, destroyed the minimum laboratory conditions necessary for a free and fair election, interfered with the employees' ability to exercise a free, fair, and uncoerced choice in this election, and interfered with the conduct of the election and the election result.

Objection No. 6

During the critical period, the Union and its representatives, agents and supporters engaged in additional improper or objectionable conduct that interfered with this election or rendered a free and fair election impossible.

More specifically, the alleged objectionable conduct consisted of: (1) Dissemination of Placencia's knifepoint threat the Camarena; (2) Receipt of silent calls by a unit employee who opposed the Union on his personal cell phone; (3) Employees, including Placencia, forming an intimidating gauntlet outside the entrance to Con-Way's facilities during the evening polling session; (4) Placencia contacting unit employees at home during the last few days before the election; (5) Styers' receipt of a

[52] This objection was withdrawn at the hearing. (Tr. 926.)

threatening text message on his cell phone, about which unit employees became aware; (6) Receipt of a threatening text message by a unit employee; (7) Employees circulating comments about employees' cars at Con-way's Laredo, Texas facility being scratched before the NLRB election there on September 12, 2014; and (8) The Union posting objectionable message on its "Change Con-Way to Win" blog.

Some of the facts relevant to the objections case are intertwined with facts relevant to the unfair labor practices complaint, and are set forth above. Additional facts were adduced at the hearing and are set forth below in connection with the specific objections.

B. Objections Lacking Evidentiary Support

No evidence was presented that Styers received a threatening text. I therefore recommend overruling of any objections based on this allegation.[53] Likewise not evidence was adduced to support the allegation concerning rumors circulating at the ULX terminal regarding vandalized cars at the Company's Laredo, Texas facility. I therefore recommend overruling any objections based on this allegation.

No evidence was presented that Placencia visited employees at home in the days preceding the election. I therefore recommend overruling any objections based on these factual assertions.

C. Employees' Discussions about the Knife Incident

The only other objection potentially related to Placencia is that the knife incident between him and Camarena was widely disseminated among drivers. I find it unnecessary to determine whether Placencia was an agent of the Union because I find there was no evidence that any of the conduct attributed to him occurred.

It is undisputed that after Placencia's arrest, the knife incident was widely discussed among drivers at the ULX facility.[54] For the reasons set forth in my analysis of the unfair labor practices complaint, I find Placencia never threatened Camarena with a knife. Placencia was not at work after October 7, so whatever scuttlebutt was circulating among the drivers was not of his making. There was no evidence presented that anyone from the Union circulated information about the knife incident. The incident was only fodder for employee gossip because the Company distorted it and used it to justify terminating Placencia.

Because the evidence shows Placencia never threatened Camarena with a knife, any objection based on this allegation lacks a factual foundation and recommend overruling it.

D. Change Con-Way to Win Blog

1. Facts

Some of the objections are based on the "Change Con-Way to Win" blog, which displayed pro-union, anti-management commentary. (R. Exh. 7.) The blog's administrator controlled what was posted. The Union did not create and or manage the blog, the Teamsters logo appeared on it and Diaz was aware of it and visited it on a few occasions. (Tr. 1589, 1599.)

One entry, dated September 19, 2014, entitled "Outing The Rats at ULX" denigrates Styers and Robles for allegedly spreading lies about the Union. Driver Gerardo Lopez was sent a link to this post on his personal cell phone. The entry states:

> Paul Styers and his henchmen have done it again. They are out spreading lies about the union. Steyers' [sic] lead liar and master kiss-ass, Ramsy [sic] Robles are deceiving employees regarding the union. They are reaching into their bag of tricks and pulling out some of the most common lies. Stating that with a union in place, we would be paying for ABF and YRC pensions, that ABF and YRC drivers can come to Conway and dovetail into the roster with their company seniority. They need to be a little more original, these are old, tired, and frankly just lazy lies. We don't expect any less of Paul Styers, he is a known liar and bigot. He's not fit to be a manager with his dirty tricks. As for Ramsy [sic] Robles, he is a lazy employee that is only kept around because he does Steyers' [sic] dirty work. As we continue to push forward with our efforts we will be outing any employees that are knowingly lying about the union. If they can go around spreading lies, then they can proudly look at their names here and stand behind their words and actions. Out with the rats!

(R. Exh. 7.) There were 82 comments regarding the post. Other comments on the blog were made by someone named "Jaime" and by other individuals identified only by first names or by pseudonyms.[55] Driver Clemente Fuentes was mentioned in a post as follows:

> Richard said. . .
>
> Clemente Fuentes from ulx, I thought you were a man you sorry ass punk.
>
> October 10, 2014 at 3:07 PM Jaime said. . .
> Clemente pay your child support that you're complaining about and don't be ignorant saying you will pay someone else's pension, you stupid fool.
>
> October 12, 2014 at 5:52 PM

(R. Exh. 7.)

Lopez initially perceived "outing the rats" entry as a threat, but his perception changed when he looked at the comments posted with it.[56] He showed the text message to Roman, but he did not make a record of it. Robles saw the "outing the rats" entry and thought on was that it was funny. It did not upset him. (Tr. 959.) Driver Clemente Fuentes' reaction to the website was it was a bunch of lies. (Tr. 988.) Driver Leonard Loya's reaction was that the blog was childish. (Tr. 1008.) Mario Cruz saw the entry and was curious to see whether his name was mentioned. He felt relieved that his name was not

[53] Camarena briefly mentioned a text Styers purportedly received, but Styers did not testify about it and it was not otherwise authenticated.

[54] The record is replete with testimony that this was a common topic among drivers at the time.

[55] It has not been established that the "Jaime" who posted on the blog was Romero. He was not asked about the blog during his testimony.

[56] Employees were unsuccessful when they attempted to post comments contrary to the comments that appeared on the blog.

included. (Tr. 1033–1034.)

Victor Cruz was afraid his name would appear on the blog if he put up a fight. He thought somebody might hurt him or his family. He thought people were afraid to speak out because their names might appear on the blog. (Tr. 1057–1058, 1090.)

Viewing the "Change Con-Way to Win" blog did not cause any witness to change his mind about how he voted in the election. No witness heard of any other employee changing his or her mind about the election based on the blog.

2. Analysis

"The burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one. The objecting party must show, inter alia, that the conduct in question affected employees in the voting unit and had a reasonable tendency to affect the outcome of the election." *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005) (internal quotations omitted). The objecting party must prove that the specific conduct in question had a reasonable tendency to affect the outcome of the election. *Affiliated Computerizing Services*, 355 NLRB No. 163 (2010).

The Respondent has failed to establish that a union agent published the "Change Con-Way to Win" blog. I therefore find that the standards for evaluating conduct by a third party are applicable to objections based on the blog.

Where misconduct is attributable to a third party, the Board will overturn an election if the misconduct is "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Beaird-Poulan Division, Emerson Electric Co.*, 247 NLRB 1365, 1388 (1980); see also *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). The Board applies an objective standard. See *Emerson Electric Co.*, supra; *Picoma Industries, Inc.*, 296 NLRB 498, 499 (1989) In determining whether a threat is serious and likely to intimidate prospective voters, the Board evaluates not only the nature of the threat itself, but also: (1) whether the threat encompassed the entire bargaining unit; (2) whether reports of the threat were disseminated widely within the unit; (3) whether the person making the threat was capable of carrying it out, and (4) whether it is likely that the employees acted in fear of this person's capability of carrying out the threat; and (5) whether the threat was 'rejuvenated' at or near the time of the election." *Accubuilt, Inc.*, 340 NLRB. 1337 (2003) (citing *Westwood Horizons*, supra). While the Board will pay particular attention to the fairness of close elections, the *Westwood Horizons* standard applies even where the election margin is narrow. Id.

While very critical of Styers and, to a slightly lesser extent Robles, there is insufficient evidence to prove the "Outing the Rats" entry, or any other part of the "Change Con-Way to Win" blog specifically had a reasonable tendency to influence the outcome of the election. The employees voluntarily chose to view the website. The "threat" implicated by the blog is that employees who made false statements about the Union would be named, or "outed." Although the blog was viewed by many of the drivers, the statements in it lacked specificity regarding the election. While the comments were certainly derogatory and unkind, I find they did not instill fear in employees so as to render a free election impossible. Accordingly, I recommend any objection based on the "Change Con-Way to Win" blog be overruled.

E. The Phone Calls

After the election petition was filed, Robles received calls on his cell phone that were silent. The calls occurred 2 or 3 times a day for a couple of weeks. A number showed up but he never tried to find out who the caller was. (Tr. 963–965.) He did not feel scared or threatened by the calls. He told Styers about the calls. Styers did not ask for the number from which the calls originated, and he took no action. (Tr. 981–982, 1321.)

No evidence, aside from timing, ties the phone calls to the election, and there is nothing to establish who initiated the calls, despite the fact that a number showed up on Robles' phone. Had there been a reasonable perception of a threat by virtue of the calls, it is hard to believe Robles and Styers thought the best course was to take no steps to identify who was making that threat. In addition, the evidence regarding the calls is inconsistent. Styers thought it was Victor Cruz who received the calls. (Tr. 1321.) Loya testified the calls to Robles were obscenities. (Tr. 1015.)

For the foregoing reasons, I recommend overruling any objections based on the silent calls to Robles' cell phone.

IV. CONCLUSIONS OF LAW

(1) By instructing employees not to wear union insignia, threatening employees for supporting the Union, filing criminal charges against an employee, suspending employees, and terminating employees because they supported the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(2) The Respondent violated Section 8(a)(1) of the Act by instructing employee Juan Placencia not to wear union insignia and threatening him.

(3) The Respondent violated Section 8(a)(3) and (1) of the Act by filing criminal charges against employee Juan Placencia, suspending employees Jaime Romero and Juan Placencia, and terminating employees Juan Placencia and Jaime Romero because of their union activities and to discourage employees from supporting the Union.

REMEDY

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

Having told an employee not to wear a lanyard bearing the Union's insignia, the Respondent shall be ordered to cease and desist from this action.

Having threatened an employee because of his support for the Union, the Respondent shall be ordered to cease and desist from this action.

Having unlawfully caused employee Juan Placencia to be arrested, the Respondent shall be ordered to cease and desist from this action.

Having unlawfully suspended and terminated Juan Placencia and Jaime Romero, the Respondent will be required to restore the status quo ante by rescinding their unlawful suspensions and terminations and removing all references to them from the Respondent's files.

The Respondent, having discriminatorily terminated Juan Placencia and Jaime Romero, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc.*, 358 NLRB 823 (2012), reaffd. 361 NLRB No. 137 (2014); *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

The General Counsel seeks, as part of the remedy, that Placencia and Romero be reimbursed for search-for-work and work-related expenses, regardless of whether interim earnings are in excess of these expenses. The General Counsel is seeking a change in Board law, and the Board has declined to grant this remedy absent a full briefing by the affected parties. See *East Market Restaurant, Inc.*, 362 NLRB No. 143, slip op. at 5 fn. 5 (2015). Accordingly, I decline to include the requested remedy in my recommended order.

The General Counsel has also requested a broad remedial order. Because of the Respondent's egregious misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

I will order that the employer post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11, 15–16 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[57]

ORDER

The Respondent, Con-Way Freight, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from wearing union insignia;

(b) Threatening employees because they support/supported the Union;

(c) Causing the arrest of employees because they joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities;

(d) Suspending employees because they joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities;

(e) Terminating employees because they joined or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities;

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

2. Take the following affirmative actions.

(a) Within 14 days from the date of the Board's Order, offer employees Jaime Romero and Juan Placencia immediate and full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make employees Jaime Romero and Juan Placencia whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

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

(d) 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.

(e) Within 14 days after service by the Region, post at its facility in Los Angeles, California, copies of the attached notice marked "Appendix."[58] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 15, 2014.

[57] 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.

[58] 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."

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

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

Dated, Washington, D.C. November 5, 2015

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising these rights.

WE WILL NOT instruct you to remove lanyards or other items bearing the Union's insignia.

WE WILL NOT threaten you because of your support for the International Brotherhood of Teamsters, Local 63, or any other union.

WE WILL NOT suspend, discharge, or otherwise discriminate against any of you for supporting the International Brotherhood of Teamsters, Local 63, or any other union.

WE WILL NOT take actions to cause you to be arrested because of your support for the International Brotherhood of Teamsters, Local 63, or any other union.

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

WE WILL, within 14 days from the date of this Order, offer Juan Placencia and Jaime Romero 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 Juan Placencia and Jaime Romero whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

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

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

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspensions or discharges of Juan Placencia and Jaime Romero, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

CON-WAY FREIGHT, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-135683 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.