

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.**

**MICHIGAN BELL TELEPHONE COMPANY, AND
AT&T SERVICES, INC., JOINT EMPLOYERS**

Respondents

and

**LOCAL 4034, COMMUNICATIONS WORKERS
OF AMERICA (CWA), AFL-CIO**

Charging Party

**Cases 07-CA-161545
07-CA-165384
07-CA-166130
07-CA-170664
07-CA-176618
07-CA-177201
07-CA-182490
07-CA-184669
07-CA-190631**

**THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENTS'
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. INTRODUCTION

Brian Hooker was employed by the Respondents as a technician since 1996. Over the years, he held several steward positions for Local 4034, CWA, and was frequently excused from work to perform union functions – grievance processing, for example – consistent with the parties’ contract. Upon being appointed the Union’s administrative assistant in 2010, Mr. Hooker ceased performing work as a technician and became a full-time Union official, just like all administrative assistants before him since at least 1994. Representative Hooker frequently clashed with Respondents and, at times, their relationship was acrimonious. To be sure, Hooker was a forceful advocate who zealously represented the Union’s members and assertively enforced their contract. In the fall of 2015, Respondents decided it had had enough of Hooker’s aggressive style, and resolved to do something about it.

On October 7, 2015, one day after Hooker testified at an NLRB hearing, Respondents abruptly announced to the Union that they would no longer excuse Hooker to perform Union duties full-time because, as the Union’s administrative assistant, he was not an elected representative, a criteria that Respondents had never applied when excusing Union officials from work. Respondents mandated that Hooker go back on the work schedule as a technician – just a day or so per week at first, but, over time, more frequently – resulting in less time for Hooker to perform his duties on behalf of the Union. Respondents simultaneously demanded that Hooker start providing a weekly log of his Union activities, a requirement that applied only to Hooker and not any other Union steward or official.

The two central issues in this case are: (1) whether Respondents unlawfully changed the parties’ longstanding practice of not distinguishing between elected and appointed Union representatives when excusing employees from work to function as full-time Union

representatives under Article 10 of the parties' contract; and (2) Respondents' true motivation for rescinding Hooker's status as a full-time Union official. Following 13 days of hearing, Administrative Law Judge Ira Sandron correctly answered these questions in the affirmative. Respondents now seek to have the Board overturn the Judge's Decision.

Respondents would like the Board to believe that this case is about Hooker's performance as a technician. It is not. All of the discipline at issue in this case, including Hooker's discharge, resulted from the same triggering event: Respondents' unlawful unilateral change of Hooker's full-time Union status, made with the discriminatory motive of interfering with his ability to perform his duties on behalf of the Union. But for Respondents' unlawful acts, Hooker would not have been working as a technician and would never have received the discipline at issue in this case. Respondents created the allegedly "for cause" basis for discharge by unlawfully targeting Hooker and the proper remedy here is reinstatement and a make whole order.

The right of employees to designate and be represented by agents of their own choosing is a basic statutory policy of the Act and a fundamental right guaranteed by Section 7. Where, as here, an employer endeavors to undermine and obstruct the functioning of a designated representative of its employees, it interferes with the most basic of employee rights that the Board is entrusted with protecting. For the reasons set forth above, the General Counsel respectfully urges the Board to affirm the Administrative Law Judge's findings and conclusions and issue the Judge's recommended remedial order.

II. STATEMENT OF THE CASE

On October 6, 2015, Local 4034 of the Communications Workers of America (CWA), AFL-CIO (the Union) filed the first in a series of unfair labor practice charges against

Respondents Michigan Bell Telephone Company (Michigan Bell) and AT&T Services, Inc. (AT&T Services) [GC 1(a)].¹ The original charge was followed by eight additional charges and several amendments filed between November 13, 2015 and February 16, 2017. On January 31, 2017, following several months of investigation, the General Counsel issued a consolidated complaint [GC 1(qq)] which was subsequently amended and further consolidated on February 27, 2017 [ALJD at 1; GC 1(vv)]. The complaint alleges that Respondents violated Sections 8(a)(3) and 8(a)(5) of the National Labor Relations Act by unilaterally, and discriminatorily, changing the working conditions of its employee, Brian Hooker. The complaint further alleges that the Respondents issued multiple disciplinary warnings and suspensions, and ultimately discharged Hooker because of his protected union activity in violation of Section 8(a)(3). In addition to these allegations, the complaint alleges that Respondents violated Section 8(a)(5) by failing and refusing to provide the Union with requested information; and Section 8(a)(1) by maintaining an overbroad policy directing its employees to report the disclosure of information regarding their terms and conditions of employment [GC 1(vv)].²

On February 14 and March 13, 2017, Respondents filed timely answers to the complaints, denying the substantive allegations and asserting several affirmative defenses [GC 1(ss) and (xx)]. On August 14, 2017, Respondents filed an amended answer to the complaint [GC 1(ccc)]. A hearing was conducted before Administrative Law Judge Ira Sandron over 13 days between August and December 2017 [ALJD at 1].

¹ Throughout this brief, references to the transcript will be delineated as [Tr. at page number]; General Counsel exhibits as [GC followed by exhibit number]; Respondents' exhibits as [R followed by exhibit number]; Charging Party Exhibits as [CP followed by exhibit number] and joint exhibits as [J followed by exhibit number]. References to the Administrative Law Judge's Decision will be delineated as [ALJD followed by page number].

² At the hearing, the General Counsel amended complaint paragraph 1(v), and paragraph 2(e) of the prayer for relief [GC 1(vv) at pgs. 3 and 9, respectively]. The General Counsel withdrew complaint paragraphs 15 and 16 [Tr. at 522], and paragraph 9 [Tr. at 935].

On June 21, 2018, Judge Sandron issued his decision finding that Respondents violated Sections 8(a)(3) and (5) of the Act by assigning Hooker to work as a technician, requiring him to fill out union activity logs, and by issuing him disciplines – culminating in his discharge – which, the Judge concluded, never would have arisen had Respondents not unlawfully placed him back “in the load” [ALJD at 46]. Judge Sandron further found that Respondents violated the Act by failing to provide the Union with requested information regarding its decisions to assign Hooker to work as a technician and requiring him to submit weekly union activity logs [ALJD at 47]. Finally, ALJ Sandron found that Respondents’ “Reporting Privacy Related Incidents” policy in violation of Section 8(a)(1) [ALJD at 47]. On September 14, 2018, Respondent filed exceptions to nearly every aspect of the Judge’s Decision.

III. STATEMENT OF FACTS

A. Background

Respondents are telecommunications companies providing telephone, internet and television services to customers in Michigan [ALJD at 8; J. Ex.1]. For many years, the Communications Workers of America (“CWA”) has been the collective bargaining representative for employees working in Respondents’ Michigan operations [ALJD at 9; J. Ex. 1]. The parties’ current collective bargaining agreement is effective April 12, 2015 through April 14, 2018, and covers a bargaining unit of more than 12,000 employees working in District 4, a geographic subdivision of CWA [ALJD at 9; J. Ex. 1; GC 2; Tr. at 76]. District 4 is comprised of approximately 34 local unions representing employees in Michigan, Indiana, Ohio, Wisconsin and parts of Illinois [ALJD at 9; Tr. at 212, 659].

Local 4034 is one of the largest of the District 4 local unions [Tr. at 2701-2702]. It is an authorized agent of CWA and operates as a servicing unit representing nearly 500 employees

working for Respondents in a wide geographical region that includes Grand Rapids, Lansing, Cadillac, Jackson and Howell, Michigan [ALJD at 9; GC 1(ccc) at ¶5; J. Ex. 1; Tr. at 75]. Local 4034 enforces the parties' collective bargaining agreement on behalf of its members by negotiating local agreements; representing employees in meetings with management; investigating and processing grievances; making information requests; and working with Respondents and employees on issues related to contractual benefits [Tr. at 82, 84, 102-103, 2642; GC 2 at 12, 17-19, 49]. In addition to representing employees of Respondents, Local 4034 represents an additional 200 employees working under 19 separate contracts negotiated by the Local with 18 different employers [Tr. at 75-76; GC 3].

Since at least 1994, Local 4034 has carried out its representational duties utilizing a staff of officers, administrative assistants, and stewards [Tr. at 78-79; GC 4]. The Union has three officers, each elected by the membership at large: the president, the executive vice-president, and the secretary-treasurer [ALJD at 10; Tr. at 78-79; GC 4]. There are two chief stewards, each appointed by the president, who serve employee/members in multiple work groups; several lead stewards who are elected annually by co-workers in their work group; and several lower level stewards who are also appointed by the president [ALJD at 10; Tr. at 78, 348-349; GC 4].³ The stewards are overseen largely by administrative assistants, also appointed by the president [Tr. at 109]. All of the Union's officers, and most of its other representatives, are employees of Respondents [Tr. at 72, 178, 183-184].

At all times from at least 1994 until October 2015, Local 4034's president, executive vice-president, secretary-treasurer and administrative assistants to the president were designated

³ Each of the District 4 local unions determine their administrative structure with regard to the number, titles and functions of their representatives [Tr. at 212, 317]. As one of the largest locals in District 4, the structure of 4034 is unique in two respects. It is the only District 4 local with the administrative assistant position [Tr. at 212] and it is the only local to utilize its secretary-treasurer as a full-time Union official [R 25].

by the parties as full-time Union representatives [ALJD at 10; Tr. at 82-83, 220, 354, 2668].⁴

What this meant in practice was that the individuals holding these positions were not assigned to perform Company work (e.g., repair and installation tasks), commonly referred to by the parties as working “in the load” or “on the load” [ALJD at 8; Tr. at 95, 204-205, 311-312]. Instead, full-time representatives spend all of their forty-hour work week engaged in duties on behalf of the Union [ALJD at 10; Tr. at 83-84, 95]. Because they do not work “in the load,” employees designated as full-time Union representatives do not bid on work schedules or vacation schedules [ALJD at 10; Tr. at 359-360, 368, 426-434].

There is no formal process utilized by the parties for designating employees as full-time Union representatives [Tr. at 109-111, 355]. When an employee is elected or appointed as an officer, or appointed as an administrative assistant, the Union simply notifies Respondents that the employee will be functioning as a full-time Union representative and, as such, will no longer be available to work “in the load” [Tr. at 109-111].⁵ Once an employee is designated as “full-time Union,” Respondents cease assigning work to the employee and remove him or her from work and vacation schedules [ALJD at 10; Tr. at 73, 97-100, 359-360, 429, 744-745, 2704-2706].

Historically, once notified that an employee will be working as a full-time Union official, Respondents have not asked the Union or the employee to renew or reconfirm their “full-time Union” status [Tr. at 93-94, 111]. There is no evidence that prior to the events of the instant case Respondents ever revoked, or sought to revoke, an employee’s full time Union status; not even temporarily in response to fluctuating workloads or emergencies [Tr. at 97-100, 368].

⁴ Each local union also determines the number of officials it deems necessary to perform representational duties on a full-time basis [Tr. at 82-83, 2702].

⁵ There is no evidence in the record of any instance prior to the events of this case where Respondents declined to designate an official – elected or appointed – as full-time Union [Tr. at 2706-2707].

Full-time Union representatives are compensated by the Company or the Union, depending on the particular duties being performed [ALJD at 9-10; Tr. at 83-89]. This system of payment is facilitated by Article 10 of the parties' collective bargaining agreement [ALJD at 9-10; Tr. at 84-85; GC 2 at 13-14]. Article 10 states:

**ARTICLE 10
UNION OFFICERS AND REPRESENTATIVES**

Payment For Joint Meeting Time

- 10.05 For purposes of processing grievances, the Company agrees for authorized Union representatives to confer with representatives of the Company without loss of pay during such employees' regularly scheduled working hours. In addition, such employees shall suffer no loss in pay for time spent during such regularly scheduled working hours in traveling for grievance meetings. All time so paid will be at the basic hourly wage rate plus applicable differentials or premium rate, however, such will not be paid at an overtime rate.
- 10.06 When the Company meets with a Union representative(s) during such employee's regularly scheduled working hours for purposes other than the processing of grievances and further agrees to pay for the time involved, all time so paid will be at the basic hourly wage rate plus applicable differentials or premium rate, however, such will not be paid at an overtime rate.
- 10.07 Employees who are excused in accordance with the provisions of this Section and Article 8 (Collective Bargaining Procedures), shall give their immediate Supervisor reasonable advance notice of the intended absence and of the probable duration of the absence.

Absence For Union Business

- 10.08 The Company, insofar as work schedules permit, agrees to grant to any employee who is an Officer or properly designated representative of the Union reasonable time off of up to one thousand and eighty (1,080) hours during a calendar year, unless mutually agreed otherwise, without pay, to transact business of the Union, provided that the Company is given reasonable advance notice of such absence.

Under Article 10, Respondents compensate authorized Union representatives for meetings with Respondents held for the purpose of processing grievances [ALJD at 9-10; GC 2 at §10.05; Tr. at 90, 96-97, 206-211]. Meetings between Respondents and Union representatives for purposes

other than grievance processing may also be compensated by the Company at Respondents discretion [GC 2 at §10.06; Tr. at 96-97, 206-211]. Article 10 requires Union representatives taking time to confer with Company representatives under Sections 10.05 or 10.06 to give their immediate supervisor “reasonable advance notice of the intended absence” and probable duration [ALJD at 9-10; GC 2 at §10.07; Tr. at 90-92]. “In the event an employee takes leave for Joint Meeting Time or for Union business without providing advance notice to his or her supervisor, time reporting and record retention is handled on the local level” [GC 55 at 3].

All other duties related to representation are compensated for by the Union [Tr. at 93]. In this regard, Article 10 provides for up to one thousand and eighty (1,080) hours during a calendar year, unless mutually agreed otherwise, without pay, for Union officers and representatives to transact business of the Union [ALJD at 9-10; GC 2 at §10.08]. Like joint meeting time, the contract requires representatives to provide reasonable advance notice of an absence for Union business. Unlike joint meeting time, an absence for Union business is granted “insofar as work schedules permit” [ALJD at 9-10; GC 2 at §10.08; Tr. at 93-96].⁶

Around October 2010, Local 4034’s president and executive vice-president retired simultaneously [ALJD at 10; Tr. at 106]. At that time, the Union had two administrative assistants, Ryan Letts and Pam Beach [ALJD at 10; Tr. at 106]. The outgoing president, Jay Egan, appointed Letts as his successor and Pam Beach as executive vice-president [Tr. at 73,

⁶ Historically, full-time Union representatives were not required to provide Respondents with advance notification for joint meeting time under Section 10.05, or for time taken for union business under Section 10.08 [ALJD at 10-11; Tr. at 93-96]. Instead, they simply coded their time sheets using “MXUP” to indicate paid time taken pursuant to Section 10.05, or “MXUU” for unpaid time taken under Section 10.08 [ALJD at 10-11; Tr. at 95-96; GC 5].

106; 309-310].⁷ Soon after receiving his appointment, Letts appointed Brian Hooker to fill the vacant administrative assistant position [ALJD at 10; Tr. at 106-107, 354].⁸

Brian Hooker began working for Respondents in 1996 [ALJD at 10; Tr. at 344]. Prior to becoming a full-time Union representative, Hooker worked as a Customer Service Specialist (“CSS”), installing and repairing telephone lines [ALJD at 10; Tr. at 345]. He worked in the department known today as Technical Field Services (TFS) and was assigned to Respondents’ 36th Street garage [ALJD at 9-10; Tr. at 346, 366]. Over the years, Hooker held several steward positions with the Union, both appointed and elected [ALJD at 10; Tr. at 348-349], and was frequently excused from work for grievance meetings and other Union business [ALJD at 10; Tr. at 110-111, 228]. Upon appointing Hooker as administrative assistant, President Letts contacted Hooker’s immediate supervisor at the time, Mike Jarema, and notified him that, going forward, Hooker would be a full-time Union representative [Tr. at 109-110, 354, see also 1762-1765; GC 11 at 1]. About a week later, Hooker confirmed his appointment as a full-time Union representative with Jarema [Tr. at 355-358]. Hooker ceased performing technician work entirely; he was removed from the work schedule and stopped bidding on the vacation schedule [ALJD at 10; Tr. at 359-360; GC 11 at 1].

As the sole administrative assistant, Hooker had many varied duties [ALJD at 10-11; Tr. at 102-106]. He trained and mentored his fellow stewards, oversaw grievances at the first and second step and chaired grievance meetings with Respondents’ managers [ALJD at 10-11; Tr. at 102, 167]. He was responsible for investigating grievances and making information requests [ALJD at 10-11; Tr. at 102, 353-354] and also served as the Union’s liaison to state and federal

⁷ Letts and Beach held these positions by appointment for several months until an election was held in accordance with Union’s bylaws. [Tr. at 310, 317].

⁸ For several years prior to Hooker’s appointment, the administrative assistant position was held simultaneously by as many as four people [Tr. at 83, 101]. Hooker was the first administrative assistant to hold the position alone [Tr. at 101].

agencies, including the NLRB, OSHA and MIOSHA. Hooker communicated with these agencies frequently and filed charges and complaints on behalf of the Local and its members [ALJD at 10-11; Tr. at 104-106]. He was the editor of the Union’s newsletter and responsible for overseeing its website and presence on social media [ALJD at 10-11; Tr. at 103, 353]. In addition to his duties on behalf of the Local, Hooker was also the safety coordinator for all of the District 4 locals in Michigan and a safety instructor for the International Union [ALJD at 11; Tr. at 351].

After several years as a steward, and nearly five years as administrative assistant, Hooker had a well-established reputation as an exceptionally aggressive Union representative who enforced the parties’ contract with zeal and passion [ALJD at 12-13, fn. 10, 36; GC 41 at 184-188, 155-156; GC 42 at 10-11; Tr. at 140, 1100, 1697, 2679]. The record is replete with evidence of Respondents’ enmity toward Hooker and the manner in which he carried out his duties on behalf of the Union. Prior to their October 2015 decision to put him back “in the load,” Respondents had at various times described Hooker as “patronizing” [GC 73 at 3]; “combative” [GC 41 at 156]; “harsh” [GC 41 at 161]; “antagonistic” [GC 42 at 11]; and “offensive” [Tr. at 140]; with a “proclivity for filing ULP charges ... (making) broad, inappropriate, and overreaching requests for information” [GC 73 at 3], and a “well-documented history of using his position in the Union to attempt to intimidate and bully managers” [ALJD at 13; GC 73 at 3]. Respondents once accused Hooker of “us(ing) his experience and background as a Union representative to intimidate and bully his relatively inexperienced supervisor” by *filing an information request* [GC 73 at 12].⁹

⁹ There is no evidence that Respondents ever disciplined or even counseled Hooker for misconduct while acting in his official capacity during the more than 17 years he served as a Union representative. In this regard, the Board has long recognized that “[T]he language of the shop is not the language of ‘polite society,’ and that tolerance of some deviation from that which might be the most desirable behavior is required.” *Dreis & Krump Mfg.*, 221 NLRB 309, 315 (1975), *enfd.* 544 F.2d 320, 329 (7th Cir. 1976); see also *Success Village Apartments, Inc.*, 347 NLRB 1065, 1069 (2006); *Stanford Hotel*, 344 NLRB 558, 558-559 (2005); *Winston-Salem Journal*, 341 NLRB 124, 126-127 (2004); See also ALJD at 36-37 and cases cited therein. Notwithstanding Respondents’ distaste for Hooker’s

B. The Instant Matter

Respondents' operations are organized into various "market business units" (e.g., Technical Field Services ("TFS"); Internet & Entertainment Field Services ("IEFS")) [ALJD at 8; J. Ex 1 and 2; Tr. at 73, 86, 205, 346].¹⁰ In January 2014, George Mrla became a director of network services in the TFS business unit [ALJD at 9; GC 1(ccc) at ¶6; Tr. at 120, 2551-2552].¹¹ TFS performs installation and repair work on Respondents' network infrastructure [J. Ex. 2]. Mrla's jurisdiction includes all TFS operations in Michigan [ALJD at 9; Tr. at 946-947, 2551-2552]. Bargaining unit employees within Mrla's jurisdiction are represented by one of approximately twelve local unions under District 4 [Tr. at 2563].

In April 2015, Ted Brash was appointed as one of several TFS area managers reporting directly to Mrla [ALJD at 9; GC 1(ccc) at ¶6; Tr. at 937, 348]. As an area manager, Brash oversees the day-to-day operations of approximately eight garages, including facilities in Grand Rapids, Lansing and Howell, Michigan [ALJD at 9; Tr. at 936-937]. He directly supervises the frontline managers at each garage and approximately 100 TFS technicians [Tr. at 951-952].

In 2015, the work performed by TFS consisted mostly of two types: demand work and rehab work [ALJD at 8; Tr. at 311, 317, 970]. Demand work is customer-initiated installation, repair and service [ALJD at 8; Tr. at 311, 972]. Rehab work is preventive maintenance repairs to network infrastructure [ALJD at 8; Tr. at 311, 973]. There are two kinds of rehab work: bad plant condition repairs (sometimes referred to as BPCs) and work packages [ALJD at 8]. Bad plant condition repairs are defects, usually identified by technicians, such as a damaged pedestal, cross

aggressive style, the parties have otherwise enjoyed a mostly peaceful and productive bargaining relationship during Hooker's long tenure as a Union representative [Tr. at 54].

¹⁰ District 4 locals, including Local 4034, represent employees working in multiple market business units [GC 3, Tr. at 649].

¹¹ Until August 2016, the business unit known currently as "TFS" was called Business Services and Infrastructure Management ("BSIM"); prior to August 2016, it was called Network Infrastructure and Business Service ("NIBS") [J. Ex 1 and 2; Tr. at 942]. The business unit known currently as "IEFS" was called Service Delivery and Assurance ("SD&A") until August 2016 [J. Ex 1].

box or cable that could potentially affect the integrity of the “plant” if not repaired¹² [ALJD at 8; Tr. at 976]. Work packages are maintenance projects such as replacing sections of cable or terminals to address issues affecting service for multiple customers in the same area [Tr. at 976].

When Mrla and Brash took their positions in TFS, Brian Hooker had been functioning as a full-time Union representative for more than three years [Tr. at 106-107, 354]. Even though he no longer performed work for Respondents, like all other full-time representatives, Hooker had a job title (customer service specialist), was assigned to a market business unit (TFS), and had a direct supervisor (Sidney Bragg) [Tr. at 344-348]. Hooker’s designated, albeit nominal, work location was Respondents’ 36th Street garage, one of the facilities that came under the authority of Mrla and Brash when they took their positions in TFS in early 2014 [ALJD at 9; Tr. at Jt. Ex. 1; 346, 366, 916, 946].

- **George Mrla’s January 3, 2014 Call To Brian Hooker**

On January 3, 2014, in one of his first acts as director of network services in the TFS business unit, Mrla called Brian Hooker [ALJD at 11; GC 82; Tr. at 406-408, 735-738, 2571-2573, 2673].¹³ Prior to this, Mrla and Hooker had never met or spoken to each other [Tr. at 407-408]. When Mrla placed the call to Hooker, he knew that Hooker was a full-time Union official and that he had been appointed to his position [Tr. at 2573]. When they spoke, Mrla asked Hooker: “When are we going to get you in a truck?” (i.e., on the work load) [Tr. at 408, 737, 2571]. Hooker replied sarcastically: “That sounds awesome. Just let me check with my boss.” Mrla said: “I’m your boss.” Hooker replied: “Well, Ryan Letts is my other boss and that’s the

¹² The “plant” refers to the network infrastructure between a central office (i.e., a building that houses the switching equipment for a geographic area) and the customer (e.g., the aerial cable, cross box and pedestal) [Tr. at 973-974, 965].

¹³ Mrla testified that Hooker initiated the call, but his testimony is contradicted by phone records which show that Mrla called Hooker, left a message introducing himself, and asked Hooker to call him [ALJD at 6; GC 82].

person you have to check with to get me (back in a truck)” [ALJD at 11; Tr. at 408-409, 737]. The call ended with Mrla asking Hooker for Letts’ cell phone number [Tr. at 408].

More than two months later, on March 14, 2014, Mrla and acting Area Manager Mike Pake and Local President Letts discussed Hooker during a conference call [ALJD at 11; R 71; Tr. at 2574-2576]. Mrla testified that he asked Letts why Hooker was not in the work load and Letts explained “that’s the way his organization was set up; it’s always been set up that way, and that the (administrative assistant) ... did not work in the load” [ALJD at 11; Tr. at 2575]. Mrla asked if there was a local agreement regarding the administrative assistant being a full-time Union official. Letts replied that there was no written agreement; that “it was just agreed upon.” Mrla testified that he told Letts that in his experience appointed officials had not been excused from the load full-time and that Hooker should be in the load [ALJD at 11; Tr. at 2575-2576]. But nothing came of this [ALJD at 11]. For the next 19 months no one – not Mrla, nor any other official of Respondents – questioned Hooker’s full-time status again. Hooker continued to perform his Union duties full-time, just as he had since his appointment in December 2010, and just as every other administrative assistant before him had done for more than 20 years [Tr. at 82-83, 220, 354, 2668].

- **The Flores Grievance and Information Request**

In the summer of 2015, the Union was processing a grievance on behalf of its member Ron Flores, an employee of Respondents who had received a disciplinary suspension from Ted Brash [ALJD at 12; Tr. at 370, 712; GC 37]. On May 11, Flores had a minor accident while driving his Company vehicle [ALJD at 11; Tr. at 712, 1070].¹⁴ During the investigation that preceded Flores’ suspension, Brash pulled Flores’ cell phone and GPS records which, when used

¹⁴ According to Brash, the accident was not serious. Flores “backed into a stationary object: a pole, a corner of a building, something” [Tr. at 1070].

together, would have shown that on the same day as the accident, Flores had been talking on his cell phone while driving [ALJD at 11-12; Tr. at 715-716, 1070-1071, 1073].¹⁵ After reviewing Flores' cell phone and GPS records, Brash conducted an investigatory interview of Flores [ALJD at 11-12; Tr. at 1070]. During the interview, Flores admitted to Brash that he had been on his phone while driving [ALJD at 11-12; Tr. at 1070]. On May 12, Respondents issued Flores a written warning and one-day suspension for talking on his phone while he was driving [ALJD at 12; GC 36; Tr. at 1072].

While processing Flores' grievance, Hooker questioned whether Brash had violated a memorandum of agreement between the parties by not limiting his review of Flores' cell phone records and GPS information to the circumstances surrounding the accident, but instead monitoring or "looking-back" at his entire day [ALJD at 12; Tr. at 372, 375-376, 713, 717; GC 2 at 131-133]. Brash and Hooker discussed the appropriate scope of Respondents use of technology when conducting investigations and issuing discipline, the so-called "look-back policy" [Tr. at 375, 719]. Hooker explained to Brash his concern that employees might be less likely to report accidents or injuries if doing so resulted in Respondents conducting a broader investigation and possibly issuing discipline [Tr. at 375-376].

On August 10, 2015, for reasons that are not entirely clear, George Mrla called Hooker to discuss the "look-back policy" [ALJD at 12; Tr. at 376, 720, 2610, 2673; GC 82].¹⁶ Mrla and Hooker discussed the issue for nearly 45 minutes [GC 82; Tr. at 377]. The conversation did not begin well [Tr. at 378]. Mrla said: "What the hell is going on with all of this crap I'm hearing about your objections to making your members safer by making sure they're not driving with cell phones" [ALJD at 12, 37; Tr. at 378]. Hooker told Mrla that he believed the "look-back

¹⁵ Flores' was not talking on his cell phone at the time of his accident [Tr. at 1071]. There is no evidence, nor any contention, that the accident resulted from any misconduct or policy violation by Flores.

¹⁶ Mrla testified that Hooker initiated the telephone conversation [Tr. at 2673]. That isn't true [GC 82].

policy” violated the parties’ contract and that it could have a “chilling effect” causing employees to fear reporting accidents [ALJD at 12; Tr. at 378]. Mrla told Hooker he was just being stubborn and accused Hooker of not caring about the safety of the employees [ALJD at 12; Tr. at 378].

Hooker testified that he told Mrla:

[T]hat if he was “so goddamn in love with keeping employees safe, he should perhaps consider instructing his managers to follow the same lifesaving behavior that the employees were following that he insisted that they follow. Specifically, I told him I see your managers driving all over the place yakking on the phone, texting at stoplights, doing these other things. It’s very difficult for me, George, and for my stewards to – to take your policy back to them and say that it’s a rational and reasonable policy for your safety when you allow your managers to violate this policy on a continuing basis [Tr. at 379].

Mrla told Hooker he agreed and said he would instruct his managers to stop talking on their phones while driving [ALJD at 12; Tr. at 379, 720, 2673]. Hooker, surprised, thanked Mrla and their conversation came to an end [Tr. at 379]. Mrla testified that he believed his conversation with Hooker had ended well, and that “Brian was right” about managers being held to the same safety policies as unit employees [Tr. at 720, 2673].

But Hooker was not ready to let the issue go. Three days after his conversation with Mrla, Hooker sent Respondents a substantial information request regarding Respondents’ use of technology to monitor the employees in Mrla’s business unit [ALJD at 12; GC 38; Tr. at 278-279, 379-380, 720, 1074, 1697]. Mrla and Brash were not pleased with the request [Tr. at 1697, 2612, 2676]. Mrla called Hooker’s information request “a tactic” and “intentionally burdensome,” and accused the Union of making the request “for harassment of management only” [ALJD at 37; Tr. at 2674, 2676, 1697]. The parties’ dispute over the information request and the grievance continued for the next 12 months [Tr. at 1500-1501, 1565-1566, GC 37 at 2].¹⁷

¹⁷ The grievance was ultimately resolved in Flores’ favor on August 17, 2016, when Respondents agreed to rescind the warning and allowed him to work 5.5 hours of overtime [GC 37 at 2].

- **September 25 – Hooker’s Public Dispute with Area Manager Jarema**

On the morning of September 25, 2015, Hooker became embroiled in a dispute with SD&A Area Manager Mike Jarema at Respondents’ Howell, Michigan facility [ALJD at 12; Tr. at 389]. Hooker was in Howell that morning for a previously scheduled meeting to discuss safety issues with a manager [Tr. at 387; GC 71]. Hooker was also there because the previous day, Respondents had threatened to discipline Union Steward Erik Buker, an employee in the SD&A business unit [GC at 76, Tr. at 387]. Hooker was concerned that Respondents might be retaliating against Buker who had just recently been appointed as a steward [Tr. at 384; GC 71].

Hooker arrived at the Howell garage around 7:45 a.m. [Tr. at 389]. He met Buker in the parking lot and the two began talking. Soon thereafter, Buker noticed that Manager Jarema was standing in a nearby window staring at him and Hooker [Tr. at 390]. A few moments later, Jarema approached Hooker and Buker in the parking lot [Tr. at 392]. As he walked up, Jarema began shouting: “I never denied him a steward” [ALJD at 12; Tr. at 392]. Hooker turned around and said: “Mike, you know that this is improper, you shouldn’t be out here. This is before work and we’re not on work property” [Tr. at 392]. Jarema ignored Hooker and continued toward Buker, stating: “Eric, tell him I didn’t deny you a steward” [ALJD at 12; Tr. at 392]. Buker, appearing frightened, said: “You gave me a steward.” Jarema said to Hooker: “See?” and walked away [Tr. at 392].

Hooker and Buker went inside the garage and attended the morning meeting [Tr. at 393]. Also in attendance at the meeting were Buker’s supervisor, Don Amante, and several unit employees – both TFS and SD&A technicians [Tr. at 394]. A few minutes after the meeting began, Jarema stuck his head in the door and said: “Brian, would you mind coming down to my office for a few minutes?” Hooker replied: “Mike, I’d be happy to, but right now I’m in this

meeting [ALJD at 12; Tr. at 395]. Jarema persisted. Hooker declined again, stating: “Mike, I’m in a meeting right now and have another meeting scheduled at 9:00 a.m., but if time permits, I’ll be happy to stop at your office” [Tr. at 394-395]. As Hooker and Jarema went back and forth, the meeting came to a standstill [Tr. at 395]. Manager Amante and the employees sat by quietly, as Jarema twice asked Hooker who he was meeting with at 9:00 a.m. [Tr. at 395]. Hooker declined to tell Jarema who he was meeting with, explaining that the meeting was confidential [ALJD at 12; Tr. at 395]. Hooker then said: “Do you really want to have this conversation right now in front of the troops, Mike?” [Tr. at 395]. Jarema turned and walked away “very quickly and loudly down the hallway” [Tr. at 395]. Amante attempted to continue the meeting but was interrupted again by Jarema who returned to the doorway, shook a finger at Hooker, and said: “You better not interrupt this meeting [ALJD at 12; Tr. at 395]. Hooker said he had no intention of interrupting the meeting and Jarema walked away [Tr. at 395]. The meeting continued without further incident [Tr. at 396].

After the meeting, Hooker went to Jarema’s office and knocked on the door [Tr. at 396]. Jarema did not answer, so Hooker continued on to his scheduled meeting [Tr. at 397]. On his way to the meeting, Hooker ran into Ted Brash in the parking lot [Tr. at 397]. Hooker told Brash about his confrontation with Jarema that morning and relayed to Brash that the Local was having issues with Jarema [Tr. at 397-398, 1041-1042]. Hooker asked Brash for the notes Brash took during Buker’s disciplinary meeting the previous day and Brash agreed to provide the notes [Tr. at 398, 1041-1042].¹⁸

¹⁸ Hooker continued to pursue the Buker matter by filing an information request on October 5 [GC 39] and an unfair labor practice charge on October 6 [GC 1(a)].

Brash told Mrla about the September 25 altercation between Hooker and Jarema [Tr. at 2683]. According to Brash, it was right around this time – late September 2015 – that he and Mrla decided that Brian Hooker should return to the load [Tr. at 1012].

- **George Mrla’s October 5, 2015 Call To Brian Hooker**

Just over a week later, on October 5, Mrla called Hooker [ALJD at 12-13; GC 82; Tr. at 404-405]. When Mrla called, Hooker was gathering documents to respond to a subpoena from Respondents related to an NLRB hearing scheduled for the next day [Tr. at 404-406]. The NLRB hearing stemmed from an unfair labor practice charge Hooker filed in April 2015, alleging that Respondents violated the Act by refusing to provide the Union with information requested by Hooker [GC 40; Tr. at 119, 404]. During the October 5 call, Mrla told Hooker that he was going to need to get some training; and that Mrla was going to get him some tools and get Hooker “back in a truck (i.e., “on the load”) [ALJD at 13]. Hooker told Mrla that he did not have time to talk because he was busy gathering documents in response to the Respondents’ subpoena [Tr. at 405]. The call began to break up and Hooker asked Mrla to call back to the Union hall. But Mrla never called back [Tr. at 406].¹⁹

- **The October 6, 2015 NLRB Hearing**

The next day, October 6, Hooker was the General Counsel’s sole witness at the NLRB hearing [ALJD at 13; Tr. at 119; GC 41; *Michigan Bell Telephone Company*, Case 07-CA-150005, JD-66-15, 2015 WL 7873609 (2015)]. Respondents called two witnesses at the hearing, both supervisors, each of whom testified about their negative experiences dealing with Hooker in his capacity as a Union representative [ALJD at 13]. Supervisor Andrew Maki testified:

A: **(Hooker) has shown in the past to me that he can be a bully and intimidating.** I can give a specific example.

¹⁹ Mrla testified that he had no recollection of his October 5 call to Hooker, nor could he think of any reason he would have called Hooker on the day before his testimony at the NLRB hearing [Tr. at 2674-2675].

A: ... Mr. Hooker was yelling at Stan Wilk, went to my boss' office. Stan at that time made a statement, I don't know, even know who you are ... Where Mr. Hooker said, "I'm fucking Hooker" [GC 41 at 153-154].

Q: Okay. Other than the one description – or the incident that you described, have you observed Mr. Hooker's behavior and demeanor in general in meetings with managers?

A: Yes.

Q: And this is during the time that you've been a manager yourself?

A: Yes.

Q: And can you describe what you have observed relative to his demeanor?

A: **Very short, combative. I used the word "bully" earlier, that same type of attitude toward management, very much so. Harsh, I guess, is a good word for it as well** [GC 41 at 156].

Q: And you had also said that **Mr. Hooker is combative and harsh in his demeanor, in your opinion or in your experience. And that's when he's speaking to managers,** correct?

A: Correct [GC 41 at 161].

Supervisor Mike Ten Harmsel testified similarly [ALJD at 13]:

Q: All right. Mike, did you attend a grievance meeting with Mr. Hooker on January 16 of 2015?

...

A: Yeah. It was a meeting where we had some – I'll call them business as usual – BAU items to take place on that day. We were in the process of developing a new garage, some rules. It was just a normal thing we probably had pre-scheduled prior to, because it was business that needed to be taken care of.

Q: And what was Mr. Hooker's demeanor at that meeting?

A: He was angry. I mean I think I could tell the difference in his body language. **He was very forward in his stance, short, agitated,** and I don't remember all the actual conversation. A lot of it doesn't matter. But what I do remember through the conversations is, things are gonna change, things are gonna change.

Q. Who said that?

A. Brian Hooker did.

Q. And what did you take that to mean, or did he explain to you what it meant?

A. Well, at the time I took that to be some sort of a threat, and based on the previous Sunday's activity, I didn't know what that looked like, but again, just – to me **it was an act of intimidation and bullying** again that I had been subject to, based on a decision I had made.

Q. Did you ask Mr. Hooker if it was a threat?

A. I did.

Q. And what did he react? How did he respond?

A. Something to the effect of call asset protection if you feel threatened, which is our corporate security [GC 41 at 184-185].

Q. And what was Mr. Hooker's demeanor at that (grievance) meeting?

A. Very matter of fact. **He let it be known right away this is his meeting; he's going to run it in the way that he wishes to.** And I was not able to ask questions to other people. It was just a very unusual situation in that particular grievance meeting. I hadn't been to one like that in quite some time where it was that overtly confrontational from the get-go.

Q: At some point during that meeting did Mr. Hooker pound on the table?

A. Yes [GC 41 at 185-186].

Q. Have you observed Mr. Hooker's treatment of new managers over the years?

A. Yeah. He tends to be really rough. Part of my job, as we do have a lot of new managers in my organization – it's a newer organization. I have new managers. And part of that really is to prep them for dealing with the grievance process in general, and **it goes without saying that his reputation comes before him as far as being somebody who is – he likes to intimidate people, I will say push them around in a meeting, make it known who's the boss in these meetings, and then just making it very uncomfortable** [GC 41 at 187-188].

- **George Mrla’s October 7, 2015 Call to Union President Ryan Letts**

During the same week of the NLRB hearing, George Mrla called Ryan Letts to talk about Hooker [Tr. at 120-125, 420, 2595-2606; GC 6]. On October 7, Letts returned Mrla’s call from either October 5 or 6 [ALJD at 13; Tr. at 2596]. According to Mrla, he began the conversation by telling Letts that Respondents were returning Hooker to the work schedule [Tr. at 2596]. Letts asked: “Why? Why now? Why him?” [Tr. at 121; GC 6]. Mrla replied that Hooker was the only appointed official in “(Mrla’s) organization” who didn’t work in the load [ALJD at 13; Tr. at 2597]. Mrla said that he was “going to treat Brian Hooker like every other appointed steward” [ALJD at 13; Tr. at 122, 232]. Letts stated that the parties’ contract made no distinction between elected and appointed officials [ALJD at 13; Tr. at 122]. According to Mrla, when Letts asked whether Respondents were going to negotiate the decision to return Hooker to the load, “I (Mrla) told him, I said, we’re not negotiating whether or not he’s going to go in the load or not. He’s going in the load ... I just kept saying, you know, him going in the load, we’re not negotiating that. [Tr. at 2598, 2604].²⁰

The conversation then turned to a discussion of Hooker’s MXUP time (i.e., paid union time) [Tr. at 121, 2600]. Mrla and Letts began arguing about whether union time paid for by Respondents (MXUP) was limited to face-to-face meetings or included telephone calls [Tr. at 122, 248, 2600-2601; GC 6].²¹ Mrla then told Letts that Respondents were also going to begin requiring Hooker to document his MXUP time; specifically, who he was meeting with [ALJD at

²⁰ Indeed, during his testimony, Mrla acknowledged that prior to the October 7 call, the decision to put Hooker on the work load had already been made [Tr. at 2667].

²¹ Letts testified without contradiction that in his experience, union time paid for by Respondents (i.e., MXUP) did include telephone conversations between management and Union officials regarding labor relations matters [Tr. at 235, 239, 245]. Mrla’s contention that MXUP time is limited to “face-to-face” meetings finds no support in the plain language of the parties’ contract or any other record evidence [GC 2 at 14]. Mrla nevertheless repeated the same baseless assertion at the hearing [Tr. at 2601, 2628].

13; Tr. at 123, 125; GC 6]. At the conclusion of the call, Mrla told Letts that Ted Brash would be contacting Brian Hooker to begin implementing these changes [Tr. at 2602].

- **October 20 and 21, 2015**

Nearly two weeks later, on October 20,²² Brash called Hooker and told him that for the first time since 2010, Respondents were going to require him to bid on the vacation and work schedules [ALJD at 13]. Brash told Hooker that if he pulled an “off-shift” tour (i.e., a schedule with a weekend or afterhours shift) he would be required to work “on the load” that day instead of doing Union business [Tr. at 421; GC 43]. Brash also told Hooker that he was going to be required to provide a timesheet or log of his joint meetings, including the names of the managers at the meetings [ALJD at 13-14; Tr. at 422; GC 43]. As Brash stated each new “expectation,” Hooker pointed out the impracticalities of the directives given his duties as a full-time Union official [Tr. at 422; GC 43]. Finally, Hooker told Brash that he did not want to continue the conversation without Union representation and the call came to an end [ALJD at 14; Tr. at 748; GC 43]. There is no evidence that during this conversation Brash offered Hooker any explanation for the decision to rescind his position as a full-time Union representative – no discussion of “rehab” work; “consistency in Mrla’s organization;” “fairness,” or Brash’s “declining workforce” [Tr. at 59-60].

The following day, Hooker and Brash met at a previously scheduled grievance meeting in Lansing [ALJD at 14; Tr. at 425, 1050]. Additional Union and Company representatives were also in attendance [Tr. at 425, 1051]. At the meeting, Brash told Hooker that “he was going to be treated consistent with the rest of the organization as far as non-elected stewards go” and then

²² Brash and Mrla testified that their decision to put Hooker back in the load was made around late September 2015 [Tr. at 1012, 2584-2587]. Upon making the decision, Mrla and Brash agreed that Mrla would call Letts, and Brash would call Hooker [Tr. at 1018-1019, 2594,]. Neither Brash nor Mrla was asked to explain the two-week delay between Mrla’s initial call to Letts on October 5 or 6 [Tr. at 120, 2595-2596] and Brash’s call to Hooker on October 20 [Tr. at 1019].

reiterated Respondents new “expectations” of Hooker [Tr. at 425-437]. Again, Hooker challenged Brash’s directives, telling him that they “seemed to not make much sense because I was going to be out of the load almost all of the time. Between my MXUU time and my MXUP time, there would be very little time that I would be able to perform my functions as a CSS” [Tr. at 434]. When Brash reiterated the special timesheet requirement, Hooker became heated. He told Brash that he believed that Respondents were retaliating against him for his Union activities including his participation in the board hearing on October 6 [ALJD at 14; Tr. at 437]. As the meeting came to a close, Hooker told Brash:

I haven’t touched a tool in years. I don’t know what the hell I’m doing. I’m not familiar with their policies. I will obey and grieve, but I am following every single written rule and policy that you have because I feel that you are out to get me, and will try to fire me ... [Tr. at 442].

- **The October 23, 2015 Meeting**

Two days later, on October 23, Mrla and Brash met with Ryan Letts and Union Vice President Pam Beach [ALJD at 14; Tr. at 133]. According to Mrla, he requested the meeting to “build a relationship with the union” [Tr. at 2612, 1077]. But the parties spent nearly the entire meeting arguing about Hooker and his activities on behalf of the Union [Tr. at 134-140, 1077-1100, 2615-2630].

The meeting began with a discussion of the information request Hooker sent to Respondents in August related to the Company’s use of surveillance technology in the discipline process [ALJD at 14; Tr. at 134, 1082, 1697, 2611; GC 38]. The request sought a significant amount of information and Mrla remarked that he had “never seen anything like it before” [Tr. at 2675]. The parties went through the request item by item [ALJD at 14-15; Tr. at 278, 1084, 2615]. As they did, Mrla became increasingly frustrated when Letts disagreed with him regarding the relevance of the requests [Tr. at 134, 1085, 2616]. After reviewing only a few

items, Mrla declared that there was no reason to continue [ALJD at 14-15; Tr. at 1085, 2616, 2676]. Mrla then accused Hooker of submitting the information request solely for the purpose of harassing management [ALJD at 15; Tr. at 1697-1698, 2679].

At that point, the conversation turned to Hooker returning to the load [ALJD at 15; Tr. at 1085, 1698, 2680]. Mrla told Letts that going forward Hooker would be required to select a work schedule, participate in vacation scheduling, and report his MXUP time [ALJD at 15; Tr. at 1086]. Letts said that Respondents' distinction between elected and appointed officials for excusing full-time Union officials was a change in policy that would adversely affect the Union [ALJD at 15; Tr. at 1086-1088, 1698, 2680]. Letts asked if Respondents' decision was non-negotiable and Mrla replied: "Right now it's non-negotiable about him going in the load" [ALJD at 15; Tr. at 1087, 2680].

Mrla then showed Letts and Beach a report he claimed indicated that Hooker had more MXUP time than other Union officials [ALJD at 15; Tr. at 1262, 1699].²³ Letts told Mrla and Brash that if they had specific questions about Hooker's time, they should raise them for the parties to discuss [Tr. at 137]. Brash said that Respondents did not know why Hooker was at the Howell facility on September 25, the day of Hooker's altercation with Area Manager Mike Jarema [Tr. at 137]. Letts told Mrla and Brash that Hooker was at Howell on September 25 to attend a meeting set up by Engineering and Construction Director Jim Styf between Hooker and Manager Brandon Fields [Tr. at 139]. Mrla demanded to know what the meeting was about [Tr. at 139]. Letts explained that Styf had requested that Hooker meet with Fields for an "off the

²³ As a full-time Union official with signification responsibilities in the areas of grievance processing and safety, Hooker's relatively high MXUP numbers are not at all surprising [Tr. at 353-354]. In any event, there is no contention in this case, much less any evidence, that Hooker ever inaccurately reported his MXUP or MXUU time or otherwise abused his position as a Union representative. [Tr. at 789]

record conversation” about safety [Tr. at 138-139]. Mrla told Letts that there were no “off the record conversations” and said he would “fix Styf” [Tr. at 139].

Letts brought up the argument between Hooker and Jarema, and Brash replied that there was one individual in Local 4034 that was difficult to deal with [ALJD at 15; Tr. at 140]. Letts twice asked Brash who he was referring to and Brash said the “difficult to deal with” individual was Brian Hooker – that Hooker’s personality and language were “offensive” [Tr. at 140].

Offended by Brash’s remarks, Letts replied:

[T]hat there was individuals on their side of the fence that I – I think I used the word “real winners” that I had to deal with over the years. I would have cited some names of company representatives that I had to have dealt with in the past ... I stated that unfortunately we didn’t get to pick each other’s sides or who sat on each other’s sides [Tr. at 140].

Mrla said he was not aware of any other appointed full-time union official [Tr. at 280], but if there were any, he would “fix them.” Mrla closed the meeting by telling Letts that Respondents were “going to do what (they) were going to do” with respect to the decision to put Hooker on the load and that his expectation was that Hooker report to Respondents who he is meeting with, where he is meeting and for how long [Tr. at 141].

On November 10, in an e-mail to Mrla, Letts reiterated the Union’s objections to Respondents’ unilateral changes [ALJD at 15; GC 8]. The e-mail stated, in pertinent part:

On Nov 10, 2015, at 3:58 PM, Ryan Letts <ryanletts@cwa4034.org> wrote:

George,

This is a follow up to our discussion on October 7th and our meeting from October 23rd.

This email is a formal objection to your stance regarding Brian Hooker's status within the Communications Workers of America.

As I have stated previously, there is a long standing application of our Collective Bargaining Agreement regarding those individuals that are properly designated Union representatives.

There has been a close to 30 year application in my Organization alone, that is contrary to what you have explained as your understanding of a properly designated Union Representative, and the distinction that you place between Elected and Appointed Union Representatives.

Former Directors such as Bill Reid, Bruce Downey, Joe Waske, Nic Mamone, Ken Chapman, and Frank McNeil would be able to validate that this is not new.

Don Staney from Labor Relations would also have knowledge regarding my Organization, as I have worked with him in this capacity prior to my current position. He should also remember my predecessors and peers that served as Administrative Assistants; Greg Hobart, Blanche Dame, Linda Weidenfeller, Moise Taylor, and Pam Beach.

According to his own testimony, Mrla completely disregarded Letts' e-mail regarding the parties' past practices; and the Union's claims in this regard had no effect on his decision to unilaterally rescind Hooker's status as a full-time Union official [Tr. at 2630-2631].

On November 16, Letts and Beach met with Brash and Mrla again and discussed Hooker's return to the work load [Tr. at 144-148]. Letts testified that during the meeting, Mrla said that Hooker was "going to let them know who he was meeting with, when he was meeting, and that he would be on the work and vacation schedules" [Tr. at 147]. Letts further testified that Brash stated "that what he needed from Mr. Hooker was for the union activity time sheet to be filled out, and that he would need Hooker in the work load one day a month in order to do compliance training" [ALJD at 16; Tr. at 147].

- **Implementation of the Unilateral Changes**

During the meetings and telephone calls between the parties in October and November 2015, Mrla and Brash made several representations to the Union regarding Hooker's return to the

load. At the October 23 meeting, Mrla told Letts if the Union needed Hooker “Monday through Friday at the time – I didn’t have a problem if he had union business, as long as we knew that – because a Sunday shift is still four days a week is going to be during the weekdays. As long as we had prior knowledge that he was going to be out of the load so we didn’t ... put him on the schedule” [Tr. at 2626, 1086]. In this regard, Mrla testified that he told Letts that “[a]t that time during the week I said you can have him during the week, and he’s on the Sunday shift, we’ll train him on the Sundays [Tr. at 2627]. Mrla explained that he “wanted to extend an olive branch to Ryan ... he said (putting Hooker on the load) was having a significant impact on his organization, so I said okay, if you need a Monday through Friday right now, then you can have a Monday through Friday” [Tr. at 2627].²⁴

Respondents immediately reneged on Mrla’s “olive branch.” In late November, Hooker bid on his first work schedule after being returned to the load [Tr. at 459, 2183]. TFS employees choose five-week schedules, by seniority within their applicable work group [Tr. at 155, 461]. At the end of 2015, Hooker’s seniority was such that he was not able to pick a Monday through Friday, consecutive-day schedule [Tr. at 155]. Instead, for the five week period starting December 13, Hooker was on the schedule four weekdays and Sundays [GC 50].

After choosing his schedule, Manager Sharp directed Hooker to pick a day from the schedule for training [ALJD at 16; R 24 at 5]. Hooker advised Sharp that he would be available to train on Sundays and, during one week, a Saturday [R 24 at 4-5]. This was consistent with Mrla’s “olive branch” directive to Letts that the Union could continue to utilize Hooker Monday

²⁴ Mrla gave the Union these assurances at a meeting in mid-December [Tr. at 153-154]. During a telephone call around this same time, Mrla told Letts: “[Y]ou can still have your MXUU time; that doesn’t bother me, as long as we know about it so we don’t take work for him so that he’s not built into the schedule” [Tr. at 2606; see also 2689-2690].

through Friday; and “you can have him during the week, and he’s on the Sunday shift, we’ll train him on the Sundays” [Tr. at 2627].

Contrary to what Mrla told the Union at the October 23 meeting (in the presence of Brash), on December 4, Brash told Letts that Hooker training on his off shift was “not acceptable” and that Hooker needed “to make 1 (sic) weekday available each week for training” [R-24 at 4]. Brash relented only after strong objection by Letts [R 24 at 2-3].

A few days later, before Hooker had worked a single day in the load, Brash vastly expanded the information that Hooker was required to include in the union activity log [R 24 at 1]. Instead of limiting the activity log to Hooker’s *MXUP time*, reported *after the fact*, as Respondents first decreed [Tr. at 123, 125, 1023-1024, 2602; GC 6; GC 43], Brash directed Hooker and Letts to also provide: (1) information about Hooker’s *MXUP time in advance*; and (2) information about Hooker’s *MXUU time* (i.e., union time not paid by Respondents).

On December 8, Letts provided Brash with several upcoming dates in December when Hooker would not be available to work in the load [R 24 at 2-3]. Brash replied to Letts: “I appreciate the breakdown of his (upcoming) schedule, but I was looking for *specifics on his management meetings* [R 24 at 2, emphasis added]. On the same day, Brash told Hooker to document and provide Respondents with his *MXUU time*: “In instances where you are working for District 4 or out of town, or for the international (sic), or for Ryan, you can wait until the next day of regular work to fill out the sheet” [GC 45 at 2]. Over the next several months, Respondents repeatedly made changes to Hooker’s reporting requirements, causing an ongoing state of acrimony between the parties [Tr. at 303, 305-306, 449; 1538; GC 10; GC 11; GC 20; GC 52; GC 74].

- **Hooker Goes Back in the Load**

December 13, 2015, was Brian Hooker's first day working in the load in more than five years [ALJD at 17; Tr. at 462, 1690].²⁵ Things did not start well. When Hooker arrived at work, he found that Respondents had not assigned him a truck or any work [Tr. at 464]. Hooker called the duty manager, Mike Wyant, and left a message. Wyant called Hooker back and told him to ask a dispatched co-worker, Richard Manguse, to return to the garage so Hooker could ride with him [466-467]. Hooker told Wyant that he had not been provided with any tools and did not even have basic safety gear, such as safety glasses, gloves, or rain gear. Wyant replied sarcastically, telling Hooker that maybe he should just sit in the truck [Tr. at 466]. Hooker accompanied Manguse on a single job [Tr. at 466-467]. At Wyant's direction, Manguse and Hooker spent the rest of the day putting stock away at the garage due to a lack of work [Tr. at 467].²⁶

Hooker's second day in the load, December 20, did not go much better [Tr. at 467-468]. Still without any tools or basic safety gear, Hooker again rode along with a co-worker and observed [Tr. at 469]. Hooker's immediate supervisor, Andrew Sharp, was the duty manager that day, and at one point, he stopped by Hooker's jobsite [Tr. at 468]. Hooker told Sharp that he still did not have any tools or safety gear. He also expressed to Sharp his apprehension about the effectiveness of the ride-along training given how much time had passed since he had worked in the load. [Tr. at 469]. Sharp responded with the verbal equivalent of a shrug, telling Hooker: "I'm just a soldier [Tr. at 469-470]."²⁷

²⁵ In the two years prior to becoming a full-time Union official, Hooker's duties as a chief steward kept him off the work load all but 8-12 hours per week [Tr. at 462].

²⁶ Apparently, there was no "rehab" work for Manguse and Hooker to perform [Tr. at 1006].

²⁷ Around this time, Brash complained to Letts that Hooker was "not taking advantage of the opportunity" to train with Sharp, described by Brash at the hearing as one of his "most technically sound managers." [Tr. at 1154]. However, Sharp testified that Brash never told him to be personally engaged in Hooker's training [Tr. at 2453]. Moreover, when asked if he did any training with Hooker when, as duty manager, he had the opportunity to do so, Sharp testified: "No. I'm not the trainer." [Tr. at 2453].

On January 31, 2016, Hooker was assigned to work on his own for the first time in more than five years. Hooker described the experience as “an exercise in humiliation and frustration” [ALJD at 17; Tr. at 495].

I struggled with fixing things, just fixing things. I didn't know the procedures. I didn't have a good grasp of the skill ... I had to call for help just to fix what was a simple – what seemed to be a simple case of trouble. So we ended up having three technicians on the site to get one job fixed because I didn't have the tools, I didn't have an understanding. I didn't have a basic understanding of the way the new technology worked. It was frustrating. I was nervous the whole time being in the field because of the strained circumstances that placed me there [Tr. at 495-496].

Hooker's difficulties when he returned to the field should have come as a surprise to no one. He had not touched a tool in seven years [ALJD at 17; Tr. at 462-463]. He had not performed any field work whatsoever for more than five years [Tr. at 462-463]. Hooker had not been offered, or taken part in, any technical training in more than 10 years [Tr. at 464]. Notwithstanding the substantial gap in his experience and training, Respondents provided Hooker a mere seven days of “ride along training” before throwing him to the proverbial wolves [R 26]. The inadequacy of the training Respondents provided Hooker in 2015 seems especially peculiar in light of the significant technological changes that had taken place since he was last in the load. In this regard, Hooker testified:

Q. Now, when you went back into the load, had the work changed since you last performed it?

A. Yes.

Q. And how had it changed?

A. It had changed radically in those 6 or 7 years. We had changed technologies used to deliver internet to customers' houses. We had changed the tools that we used to maintain the telephone and internet network. We had changed meters. We had changed practices. Almost every – it seemed like almost everything had changed.

Area Manager Brash corroborated Hooker on this point, testifying: “[T]he work we were doing in 2010 is nothing close to the work we were doing in 2015” [Tr. at 1043-1044].²⁸

- **Respondents’ Evolving Demands of Brian Hooker**

The difficulties Hooker encountered performing his work were exacerbated by the parties’ ongoing dispute. Hooker endeavored to fulfill his duties as the Union’s administrative assistant – still a full-time job – and meet Respondents’ constantly changing demands. Brash and Sharp repeatedly disregarded Mrla’s “olive branch” to the Union that Hooker would be allowed to continue performing his duties on behalf of the Union, Monday through Friday. On February 25, Supervisor Sharp, told Hooker that he was required to attend a weekly safety meeting each Wednesday [ALJD at 20; GC 11 at 6]. Similarly, on March 17, Brash told Letts that “there are needs” for Hooker to be available on weekdays to work in the load [ALJD at 21; GC 74].²⁹ Brash and Sharp also ignored Mrla’s assurance to Letts: “You can still have your MXUU time; that doesn’t bother me” [Tr. at 2606; see also 2689-2690]. Over the next several months, Respondents denied Hooker’s requests for MXUP and MXUU time on multiple occasions, including: April 8 [GC 70]; June 4 [GC 18 and 19]; August 16 [R-54]; and August 18 [R 56]. This was entirely without precedent. There is no evidence in the record that Respondents ever denied anyone, except Brian Hooker, MXUP or MXUU time sought or requested under Article 10 of the parties’ contract [Tr. at 368, 98, 708-709, 2444-2445].

²⁸ According to Supervisor Sharp, the only work Hooker was qualified to perform was POTS or “Plain Old Telephone” work [Tr. at 2456-2457, 2535; GC 76]. Brash testified that at the time he and Mrla decided to put Hooker in the load, most POTS work had been moved from TFS to SD&A (i.e., outside of Mrla’s and Brash’s area) [Tr. at 1046, 962].

²⁹ Brash’s March 17 representation to Letts that Hooker was “need[ed]” in the load was contradicted by the testimony of both Brash and Mrla, each of whom testified that Respondents did not “need” Hooker on the load, they “wanted” him on the load [ALJD at 6, fn. 3, 38; Tr. at 1816, 2589, 2670, 2701]. Indeed, the record is devoid of evidence of any change in circumstances around this time necessitating Hooker to work in the load instead of performing his Union duties.

During this same period, Respondents repeatedly made changes to the requirements of Hooker's union activity log [ALJD at 21]. On March 17, in an e-mail titled: "Brian Hooker Reporting Responsibilities," Brash advised the Union:

[B]eginning with the weekly schedule of April 3, 2016, Brian Hooker will be required in accordance with Article 10.07 of the collective bargaining agreement to provide advance notice each week of needed Union time for any and all time needed as it applies under Article 10.08 and 10.05/10.06. For time associated with Article(s) 10.05/10.06 Mr. Hooker will need to provide advance notice of time needed as well as what Management person(s) he will meet with and the associated details of the meeting need (i.e., grievance meeting/review board hearing /other mutually agreed to meetings with Management, etc.) for payroll verification [GC 74].

On June 9, Respondents issued an expanded activity log form and mandated additional reporting requirements in what it referred to as "a further accommodation of Mr. Hooker" [ALJD at 21; GC 20 at 4]:

... [T]he Company's expectation is that Mr. Hooker will account for his Joint Meeting Time each week as follows:

1. In accordance with Section 10.07, Mr. Hooker is expected to provide his supervisor with reasonable advance notice of any intended absences for which he seeks pay under 10.05 or 10.06, and of the probable duration of the absences.
2. In addition, at the end of each week in which Mr. Hooker reports payment for Joint Meeting Time under 10.05 or 10.06, Mr. Hooker is expected to provide the following information on the attached Weekly Union Activity Log:
 - a. Managers at the meeting;
 - b. The date, time, location and duration of the meeting;
 - c. The purpose of the meeting; and
 - d. If the meeting was not for the purpose of processing grievances, the name of the Company manager who approved the meeting time as paid time.

On July 25, Brash sent a letter to the Union, threatening to withhold Hooker's pay if he did not comply with the requirements set forth in the June 9 letter:

Time entries coded as Joint Meeting Time (MXUP) will be considered erroneous and will not be paid unless the time reporting requirements are followed [GC 24 at 1].

There is no evidence in the record that Respondents ever required anyone, other than Brian Hooker, to provide a written report of union activities, much less under threat of discipline and loss of pay [ALJD at 38; Tr. at 2449-2450].

Throughout 2016, the Union responded in writing to each unilaterally imposed change to Hooker's working conditions – on April 1 [GC 13]; on April 8 [GC 15]³⁰ on June 15 [GC 21]; July 1 [GC 23]; and August 10 [GC 25] – in each instance, protesting the change and Respondents' refusal to bargain.

- **Respondents Discipline and Discharge Hooker**

Hooker continued working in the load, but five years removed from performing technical work, the lack of training, and the technological changes in the industry continued to pose significant challenges for him [ALJD at 17]. As the parties' labor dispute intensified, so did Respondents' scrutiny and criticism of Hooker's work performance [ALJD at 39]. Between February and October 2016, Respondents actively sought opportunities to reprimand Hooker and issue discipline for matters trifling and contrived. For example:

- 1) At Brash's direction, Sharp disciplined Hooker for working "unauthorized overtime," an incident that could have been avoided entirely had Sharp simply made a phone call to the Company manager (Russ Jordan) Sharp knew to be working right next to Hooker [ALJD at 25; Tr. at 2460, 2464, 2497-2499]. Instead of calling the manager, Sharp called Brash to report on Hooker. There is no evidence in the record of Respondents ever disciplining any employee for working "unauthorized overtime" other than Hooker.

³⁰ For example, on April 8, Letts wrote to Brash and Mrla: "Your Organization is attempting to unilaterally change (Article 10). If you wish to bargain these changes please state so, and provide a written proposal." A few days later, Mrla sent Letts this brusque response: "We appreciate your input, but we will continue with our direction" [GC 16].

2) Sharp disciplined Hooker for taking too long to assess a “BPC” job – a type of work Hooker had never performed or received training to perform [ALJD at 26; Tr. at 570-571]. This was Hooker’s third day after returning to the load (excluding “training” days).

3) Sharp disciplined Hooker for taking too long to dispatch on February 21 [ALJD at 26; GC 26]. Although Hooker explained to Sharp that his late dispatch was due to problems with his Company-issued iPad, Sharp never bothered to examine the iPad or have it examined by Respondents’ tech support to determine what caused Hooker’s late dispatch and possibly prevent it from happening again. The iPad would continue to be a problem for Hooker for the remainder of his employment.

4) Respondents issued Hooker a final warning and three-day suspension, in part, because he did not know the combination to a lock on his truck. As it turned out, Respondents had not given him the combination and the manager sent to open the lock – Sidney Bragg – also did not know the unusual combination [Tr. at 577-582].³¹

5) On April 19, after learning that the GPS in Hooker’s assigned vehicle had not been reporting, Brash initiated an AT&T Asset Protection investigation³² even though there was no indication, much less any evidence, that Hooker had engaged in any wrongdoing on the five or six days he utilized the vehicle while the GPS was not operating. Brash concealed exculpatory evidence from the Asset Protection Investigator Jody Vilks [ALJD at 7, 28, 40; Tr. at 2008] and Investigator Vilks failed to include exculpatory evidence in her report [ALJD at 5, 7-8, 29; Tr. at

³¹ Significantly, Hooker’s former direct supervisor, Andrew Sharp, who testified at length about alleged instances of “work avoidance” by Hooker, was unable to cite any occasion when Hooker was not truthful about obstacles he encountered on the job [Tr. at 2501].

³² Vilks testified that in her time as an investigator for Respondents she had never been asked to investigate a non-reporting GPS [ALJD at 27; Tr. at 1994]. Indeed, there is no evidence of any other Asset Protection investigation of non-working GPS.

2004-2006, 2736-2738]. Brash then suspended Hooker and recommended his termination based on the tainted investigation [Tr. at 2008].

6) On April 24, using the Asset Protection investigation as a pretext, Brash assigned a manager to engage in hidden surveillance of Hooker at a jobsite and write down everything Hooker did, minute by minute [ALJD at 7, 40; Tr. at 1998-2001]. Investigator Vilk testified that she could not recall ever seeing such a detailed surveillance report on an employee [ALJD at 7; Tr. at 2001]. Based largely on this report, Brash issued a “Final Written Warning” and three-day suspension to Hooker based on the surveillance [ALJD at 30, 40].³³

7) In August, Respondents disciplined Hooker for failing to turn in his union activity log [GC 31] and for attendance violations alleged to have occurred more than two months prior to issuance of the discipline – on June 6, June 10 and June 18 [GC 32].

8) Finally, on October 10, 2016, Respondents suspended Hooker, pending dismissal for “violation of tech expectations including time management,” once again disregarding exculpatory evidence [ALJD at 5, 40; Tr. at 2727-2735; GC 33]. A few days later, Brash and Mrla made the decision to terminate his employment [GC 34]. When asked at the hearing to explain the decision to terminate Hooker, Brash stated: “In the end, I didn’t think that he was going to give up the fight” [Tr. at 1650].³⁴

IV. APPLICABLE LAW AND ARGUMENT

A. Issues Presented

- Did Respondents violate Section 8(a)(5) of the Act by rescinding Brian Hooker’s position as a full-time Union representative when it unilaterally changed the parties’ long-

³³ Supervisor Osterberg, who was directed by Brash to engage in hidden surveillance of Hooker on April 24, testified that at all times after his GPS became dislodged that morning, Hooker was exactly where he was supposed to be [Tr. at 2101].

³⁴ The facts pertaining to the failure to provide information allegations and the confidentiality policy allegation are set forth below in Sections IV(C)(4) and (5), respectively.

standing practice of not distinguishing between elected and appointed representatives when excusing employees from work to serve as full-time Union representatives?

- Did Respondents further violate Section 8(a)(5) of the Act by unilaterally implementing a requirement that Brian Hooker provide Respondents with written reports of his Union activities?

- Did Respondents violate Section 8(a)(3) of the Act by: (i) rescinding Brian Hooker's status as a full-time Union official; (ii) requiring him to provide Respondents with written reports of his Union activities; and (iii) issuing him discipline on various dates between March 3, and October 10, 2016, and discharging him on October 13, 2016?

- Did Respondents violate Section 8(a)(5) of the Act by failing and refusing to provide the Union with requested information?

- Did Respondents violate Section 8(a)(1) of the Act by maintaining an unlawfully overbroad confidentiality policy requiring employees to report to Respondents disclosures of employees' terms and conditions of employment?

B. Witness Credibility

Several of Respondents' exceptions are directed toward the ALJ's findings that Respondents' actions were motivated by its animus toward Hooker's union activity [R Exceptions 12-17, 20-21]. The Judge's findings in this regard are based almost entirely on his well detailed credibility resolutions [ALJD at 5-8, 37-38, 40]. Of course, 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 shows that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Respondents have not excepted explicitly to any of the Judge's credibility resolutions, as there simply is no basis for doing so. Nevertheless, given the significance of credibility in the Judge's Decision, a brief review is warranted.

The record is replete with the misrepresentations and prevarications of Respondents' two main witnesses – Area Manager Ted Brash and Director of Network Services George Mrla – Respondents' key decision makers regarding critical issues in this case [ALJD at 5-8, 37-38, 40].

For example, during the Brash-initiated AT&T Asset Protection investigation of Hooker's alleged GPS tampering, Brash hid evidence from the investigator and lied about it [ALJD at 7, 40; CP 2; R 42]. Brash then proceeded to lie about it at the hearing in this case [Tr. at 1719-1720]. On April 19 at 11:19 a.m., Brash received an e-mail from the VTS vendor company E-Tech regarding the GPS unit in Hooker's vehicle. It stated:

The PNP GPS device 4562059615 appears to have stopped reporting on 02/28/2016. In order to ascertain that the issue is not related to the physical connection or the vehicle itself, there are a couple of steps we need to try.

Can you verify that the device is securely connected to the vehicle OBD port? **Driver usage can sometimes partially dislodge the device, especially when releasing the parking brake** [CP 2, emphasis added].

At 1:40 p.m., about two hours after this e-mail arrived in Brash's inbox, Vilk requested that Brash provide documents for the investigation, including VTS reports related to Hooker's vehicle [R 42]. At 10:19 p.m., Brash responded to Vilk's request for information. He did not provide the E-Tech e-mail he received earlier that day [ALJD at 28, 40; R 42; Tr. at 1416, 1421-1422]. Instead, Brash told Vilk:

On occasion we may receive an email from VTS asking us to investigate a non-reporting unit. I am not sure what triggers that to happen. **We have received nothing** [R 42, emphasis added].

At the hearing, Brash gave this sworn testimony:

Q. BY MR. CARLSON: Okay. And Mr. Hooker said that he knocked it out trying to push down the parking brake?

A. He said he was setting the parking brake.

Q. Setting the parking brake. Okay.

JUDGE SANDRON: And I think it's pretty clear already, but you didn't believe him?

THE WITNESS: No.

Q. BY MR. CARLSON: You were aware, though, weren't you, you became aware that was an issue sometimes with those GPS units that were installed under the dash like that ... that it sometimes would get knocked out or knocked loose when people were setting the parking brake?

A. In my experience, I had never heard of it, no. I had never seen it, never had it happen.

Q. Had you ever heard of it happening, though?

A. Not to anyone that – No. [Tr. at 1719-1720].³⁵

During her testimony, Asset Protection Investigator Vilk confirmed that Brash never provided her with the e-mail from E-Tech, or otherwise told her about the parking brake issue – not even after Hooker explained to Vilk and Brash that the GPS in his vehicle became dislodged when he was using the parking brake [ALJD at 7, 40; Tr. at 2007-2008].³⁶ After hiding, and lying about, this important evidence, Brash suspended Hooker and recommended his termination for tampering with the GPS [Tr. at 1453-1454, 1459].

The ALJ correctly found that Brash's credibility was further tarnished by his contradictory testimony regarding antagonistic remarks he made about Hooker to Union President Ryan Letts when discussing Hooker's return to the load at the October 23 meeting between the Union and Respondents [ALJD at 6]. Letts testified that during the meeting Brash said: "[T]here was one individual in our local that was difficult to deal with. I asked Mr. Brash who that was. Mr. Brash stated that I knew who he was referring to. I asked again, "Who is that individual?" Mr. Brash stated that it was Brian Hooker, that Brian Hooker's personality and

³⁵ Upon further cross-examination, Brash disclosed that the April 19 E-Tech e-mail was not the first time that he had received information that these GPS units could become dislodged when releasing the parking brake [Tr. 1785-1786].

³⁶ See also Asset Protection Investigation Report prepared by Vilk: "*Note: Based on the GPS report, Osterberg's statement and Hooker's statement, when the GPS was disconnected at 10:19 a.m. on April 24, 2016, Hooker would have been releasing the parking brake*" [R 42 at 7, italics in original].

language were offensive” [Tr. at 140]. When asked about this during his direct testimony, Brash snickered and testified:

A. I may have made a comment about just his – he liked to yell a lot in grievance meetings. I said it wasn’t helpful to the procedure.

JUDGE SANDRON: Did anybody respond to your statement?

THE WITNESS: Ryan Letts said he was aware of this, of Hooker’s style in grievance meetings [Tr. at 1101].

However, when asked about this during cross-examination, Brash suffered a sudden lapse of memory before contradicting his prior testimony[ALJD at 6]:

Q. And then there was also discussion in that meeting about Mr. Hooker’s behavior in grievance meetings, right? Didn’t you bring that up?

A. I don’t recall the conversation specifically.

Q. Didn’t you say he yelled a lot in grievance meetings and it’s not helpful, something like that?

A. I don’t recall specifically, but there may have been conversation. I don’t recall.

Q. Did you know that Mr. Hooker yelled a lot in grievance meetings at that point, October 23rd of 2015?

A. I don’t know if I – No, I don’t recall him yelling a lot [ALJD at 6; Tr. at 1699].

This was not the only occasion that Brash’s testimony during cross-examination was at odds with his testimony during direct. Brash testified about an “investigation,”³⁷ he and Mrla conducted in December and January (i.e., *after* they made the decision to put Hooker back in the

³⁷ As characterized by Respondents’ counsel: “Your Honor, this is really a simple point, and I think the General Counsel understands that the Company, and I’m not going to repeat it, has explained its reasons for its decision. General Counsel obviously doesn’t agree, believes those reasons are discriminatory but the Company did an **internal investigation** twice” [Tr. at 1203]. It just so happens that Respondents’ second “internal investigation” in December and January coincided with the filing and investigation of the NLRB charge alleging that Respondents’ decision to put Hooker back in the load violated the Act (Case 07-CA-166130 filed on December 15, 2015, addressed to Ted Brash, and served on Respondents on December 16, 2015) [GC 1g and h].

load) as to whether there were any other appointed full-time union officials under Mrla's jurisdiction.

Q. BY MR. SFERRA: At this time, Mr. Brash, in December '15, January '16, what position had the Company expressed to the Union on multiple occasions as to part of the reason for its decision to put Mr. Hooker on the load?

A. They had told them multiple times that this decision was based on a consistency of fairness, a decision on mine and George's part, that in our experience and our knowledge, that he was the only full-time non-elected union official who was excused from the load.

Q. And you communicated that to the Union?

A. Absolutely.

Q. That's your testimony?

A. Yes.

Q. And how did the Union respond to that when you communicated it to them?

A. They said the contracts made no distinction between elected or non-elected.

Q. And I think you've already testified, that on more than one occasion, Mr. Mrla wanted to – why did Mrla – you talked yesterday about the first phone call where he canvassed the areas managers.

A. Yes.

Q. Why did he canvas his area managers?

A. **He wanted to be sure that our statements were correct.**

...

A. George instructed Maureen Doyle to compile a list of all the union representatives, stewards up to president, for each local. She was to get that list from each area manager, have them provide the information for their area and then Maureen would review the information with me. **We were basically just verifying that the statements we had been making were true** [Tr. at 1196].

The General Counsel objected to admission of the so-called "Doyle Report" on hearsay grounds and also on relevance grounds pointing out that information gathered by Respondents *after* they

made the decision to return Hooker to the load was not relevant to the question of Respondents' motivation at the time of the decision [Tr. at 1208]. A decision on the admissibility of the "Doyle Report" was held in abeyance pending additional evidence [Tr. at 1210].³⁸

Several weeks later, following an adjournment of the trial, when Brash was cross-examined about the "Doyle Report," his testimony regarding Respondents' purpose for creating the list of full-time union officials changed. Now, instead of a post-decision "investigation" into the reasons Respondents had told the Union for rescinding Hooker's full-time Union status, Brash claimed he was merely gathering information to respond to a request from the Union [Tr. at 1676-1678]. This is demonstrably false. On February 5, Respondents, by Ted Brash, explicitly refused to provide this very information to the Union "on the grounds that the Union, not the Company, possesses this information" [GC 55 at 3].

Aside from demonstrating Brash's willingness to mold and manipulate his testimony to buttress Respondents' case, the timing and basis of Respondents' December-January 2016 "investigation" into the reasons it gave the Union for returning Hooker to the load in October 2015, are ultimately of little import. According to Brash, Respondents' first "investigation" of whether Hooker was the only full-time, non-elected union official was conducted in mid-October 2015 – also *after* Mrla and Brash say they made the decision to return Hooker to the load (i.e., late September) and Mrla first announced it to the Union during his October 7 call with Ryan Letts. [ALJD at 37; Tr. at 1054-1055].

The ALJ found George Mrla to be an even more unreliable witness [ALJD at 5-6]. Indeed, Mrla's testimony was plagued with obfuscation and all-too-convenient memory lapses. For example, Mrla gave this befogged response when asked about his reasons for suddenly

³⁸ Respondent's Exhibit 25 was later admitted into evidence over the objections of the General Counsel and the Charging Party [Tr. at 2663].

changing the parties' longstanding practice of not distinguishing between elected and appointed representatives when excusing employees from work full-time under Article 10:

Q. And so this elected/not elected distinction, can you explain to me what that has to do with the Company and how it performs its work?

A. I'm not sure where you're going with this.

Q. Well, you changed the practice that the administrative assistant did not work on – wasn't on the work schedule, and one of the reasons you testified was that because it was a non-elected position.

A. Correct.

Q. So my question is what that had to do with the Company and its business, the work it performs?

A. Once again, I'm not sure where you're going with this one. Basically all of my non-elected employees are in the load.

Mrla ultimately conceded the point:

Q. Okay. Do you have – is there any reason, anything that relates to how the Company does its work that you can point to today for making that distinction between elected and non-elected officials?

A. No [ALJD at 6, 38; Tr. at 2669-2670].

Mrla's credibility was also called into question by his persistent memory lapses when confronted during cross-examination with facts harmful to Respondents' case. For example, Mrla could not remember stating at the October 23 meeting that Hooker was "harassing management" with an information request. Mrla's recollection could not be refreshed even after reviewing his comments in Brash's meeting notes [ALJD at 6, Tr. at 2676-2680].

Mrla denied knowing about Hooker's argument with Manager Jarema at the Howell garage in late September 2015 – the same time as Respondents' decision to rescind Hooker's full-time Union position. When confronted with Brash's notes from the October 23 meeting,

which reflected that Mrla told Letts that he *had* heard something about what happened from Brash, Mrla initially responded with obfuscation and non-sequiturs:

Q. No. Well, let me show you the notes again and see if that refreshes.

A. Uh-huh. What is it?

Q. Right at the bottom there of page 4, the last exchange between yourself and Mr. Letts.

A. Okay. Yep, okay.

Q. Okay. And you – so Mr. Letts asked you is this related to an SDA issue, and then you told Mr. Letts, you said it wasn't, but you said you had heard something about that?

A. No, I heard that there was SD&A, you know, is doing their thing, but I – that's their thing. I don't get involved in their business.

Q. Okay.

A. I don't even know specifics, details, nothing on how they run their operation.

Q. So did you tell – did you say that you heard of something pertaining to SDA from Ted?

A. No.

Q. Okay. Well, you just refreshed your recollection, or we attempted to refresh your recollection with that, and so these notes did not refresh your recollection with respect to –

A. Well, there's always noise on that side; those are younger techs, so I don't pay attention to their – that piece. They – it's their business.

Q. Oh, I understand. I'm just talking about what was said in the meeting; that's all.

A. No, I don't – nothing [Tr. at 2680-2682].

Under further questioning, Mrla's recollection began to improve:

Q. And did you ever hear about an instance where Mr. Hooker and a manager named Mike Jarema got in a shouting match in front of employees during their morning meeting?

A. I heard something to the effect, but, you know.

Q. And did you hear that during that meeting Mr. Hooker refused to tell Mr. Jarema who he was going to meet with who he was there at Howell to meet with that day?

A. I don't know the particulars.

Q. Okay. And you heard about that from Mr. Brash you think?

A. Yes [Tr. at 2683].

Perhaps, most significantly, Mrla claimed to have no memory of calling Brian Hooker the day before Hooker testified at the October 6, 2015, NLRB hearing, to talk to Hooker about “getting back in a truck” for the first time in five years [Tr. at 2674, 404-406]. Hooker’s testimony regarding receiving the telephone call from Mrla the day before the hearing was ultimately corroborated by phone records [ALJD at 6, 38; GC 82].³⁹

1. Respondents Violated Section 8(a)(5) of the Act by Rescinding Brian Hooker’s Position as a Full-Time Union Representative and Unilaterally Changing the Parties’ Longstanding Practice of Not Distinguishing Between Elected and Appointed Representatives when Excusing Employees from Work to Serve as Full-Time Union Representatives.

a. The Applicable Legal Standards

An employer is required to bargain with its employees’ exclusive collective-bargaining representative when making a material and substantial change in wages, hours, or any other term of employment that is a mandatory subject of bargaining under Section 8(a)(5) of the Act.

³⁹ Mrla and Brash both denied knowledge of Hooker testifying at the October 6, 2015 NLRB trial [Tr. at 1020, 2606]. Their denials are unbelievable when considered in the context of surrounding events. In late September 2015, just one week before the NLRB trial, Mrla and Brash each spoke with Labor Relations Representative Donald Stanley about rescinding Hooker’s full-time Union representative status [Tr. at 1012, 2589, 2592]. It seems highly unlikely that Labor Relations Representative Stanley would not be aware of an NLRB hearing taking place the following week involving Respondents and two of its managers. Moreover, it is implausible that Stanley would not have mentioned the NLRB hearing during his conversations with Mrla and Brash who called him to talk about Hooker – a central figure in that case [GC 40; GC 41; GC 42]. Respondents did not have Stanley testify about his conversations with Mrla and Brash in late September 2015.

NLRB v. Katz, 369 U.S. 736, 737 (1962). An employer’s unilateral change in the conditions of employment is a “circumvention of the duty to negotiate which frustrates the objectives of 8(a)(5).” *Id.* at 743. Section 8(d) defines the duty to bargain collectively as the duty to “meet and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” *Id.* at 742–743. Thus, an employer may not change the terms and conditions of employment of represented employees without providing their representative with prior notice and an opportunity to bargain over such changes. *Id.* at 747.

An employer’s practices, even if not required by a collective-bargaining agreement, which are regular and long-standing, rather than random or intermittent, become terms and conditions of unit employees’ employment, which cannot be altered without offering their collective-bargaining representative notice and an opportunity to bargain over the proposed change. *Sunoco, Inc.*, 349 NLRB 240, 244 (2007) citing *Granite City Steel Co.*, 167 NLRB 310, 315 (1967); *Queen Mary Restaurants Corp. v. NLRB*, 560 NLRB 403, 408 (9th Cir. 1977); *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); *B & D Plastics*, 302 NLRB 245 fn. 2 (1991); *DMI Distribution of Delaware, Ohio, Inc.*, 334 NLRB 409, 411 (2001). A practice need not be universal to constitute a term or condition of employment, as long as it is regular and longstanding and occurs with such regularity and frequency that employees could reasonably expect the “practice” to continue. *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353-354 (2003); *Eugene Iovine, Inc.*, 328 NLRB 294, 297 (1999); *Locomotive Fireman & Enginemen*, 168 NLRB 677, 679-680 (1967).

The remuneration of union representatives for time spent administering the collective bargaining agreement is a mandatory subject of bargaining and, hence, a unilateral change therein likewise constitutes a refusal to bargain. *NACCO Material Handling Group, Inc.*, 359

NLRB 1192, 1199 (2013) citing *BASF Wyandotte Corp.*, 276 NLRB 1576 (1985); *BASF Wyandotte Corp.*, 274 NLRB 978 (1985), *enfd.* 798 F.2d 849 (5th Cir. 1986); *BASF Wyandotte Corp.*, 278 NLRB 173 (1986). In *Axelson, Inc.*, 234 NLRB 414, 415 (1978), the Board held that remuneration of union representatives for carrying out union duties and excusing them from work for that purpose are “union-related matters [that] inure to the benefit of all of the members of the bargaining unit contributing to more effective collective-bargaining representation and thus ‘vitally affect’ the relations between an employer and employee.” *Id.* at 415. Accordingly, unilateral action that substantially changes such a contractual term or past practice violates Section 8(a)(5) and (1) of the Act. *Logemann Bros. Co.*, 298 NLRB 1018 (1990) (employer violated Section 8(a)(5) and (1) when it unilaterally ceased paying employees for time spent in contract negotiations and grievance processing); *Arizona Portland Cement Co.*, 302 NLRB 36 (1991) (employer violated Sec. 8(a)(5) and (1) when it unilaterally ceased allowing employee representatives to conduct union business during work hours with compensation).

***b.* The Unlawful Unilateral Change**

The salient facts underlying this allegation are undisputed. On October 7, 2015, Respondents unilaterally changed the terms under which employees are excused from work to perform Union duties on a full-time basis. On that date, George Mrla announced to Local 4034 President Ryan Letts that Respondents would no longer excuse Brian Hooker from working “in the load” to perform Union duties full-time because, as the Union’s administrative assistant, Hooker was not an elected representative [ALJD at 13].

The credible testimony of Ryan Letts and Brian Hooker established that since at least 1994, Local 4034’s administrative assistants to the president were designated by the parties as full-time Union representatives [Tr. at 82-83, 220, 354, 2668; ALJD at 10]. The record also

establishes that since at least 1994, the administrative assistant has been an appointed position [Tr. at 109; ALJD at 10]. The parties' contract, including Article 10 which sets forth the terms and conditions for employees to be excused from work to perform union duties, makes no mention of, much less any distinction between, elected and appointed officials [GC 2].⁴⁰ There is no evidence of any instance prior to the events of this case where Respondents either removed or declined to designate an appointed representative – as a full-time Union official [Tr. at 2706-2707].

According to the testimony of Mrla and Brash, Respondents did not even consider their obligation to bargain about the longstanding practice before announcing and implementing the change [Tr. at 2671-2672]. Instead, Respondents announced the change to the Union as a fait accompli [ALJD at 35; Tr. at 2667]. When the Union asked to bargain about it, Mrla told Letts: “[W]e’re not negotiating whether or not he’s going to go in the load or not. He’s going in the load. I just kept saying, you know, him going in the load, we’re not negotiating that” [Tr. at 2598, 2604].

c. Respondents’ Defenses

Respondents defend this allegation mainly by asserting that they complied with and satisfied any contractual and statutory obligations they may have had concerning their unilateral abandonment of the parties’ established practice. But that is simply not the case. Respondents seek refuge in their contractual rights to schedule employees, yet there is no evidence that prior to the events of this case, Respondents ever revoked, or sought to revoke, an employee’s full-time Union status for any reason; not even temporarily, in response to fluctuating workloads or

⁴⁰ Article 10 does not specify, in any way, the representatives which the Union must use in processing grievances, meeting with management or engaging in any other activities on behalf of the Union. Indeed, the right of employees to designate and to be represented by representatives of their own choosing is a basic statutory policy and a fundamental right guaranteed employees by Section 7 of the Act.

emergencies [Tr. at 97-100, 368]. More importantly, the change here involves not merely altering an employee's schedule, but *the reason* Respondents proffered that change – Hooker's status as an appointed Union representative.

Furthermore, there is no basis for Respondents to argue that the Union waived its right to bargain here. It is settled law that the Board will find a waiver of the statutory right to bargain in the collective-bargaining agreement only if the contract language is specific regarding the right to bargain over the particular subject, and evinces a "clear and unmistakable waiver."

Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983); *Georgia Power Co.*, 325 NLRB 420, 420-421 (1998), *enfd.* 176 F.3d 494 (11th Cir. 1999), *cert. denied* 528 U.S. 1061 (1999).

Respondents' changes to the longstanding practice of not distinguishing between elected and appointed officials when excusing employees from work to serve as full-time union representatives are material, substantial and significant. Given Hooker's wide-ranging duties and responsibilities for the Union, the Respondents' unilaterally imposed requirements seriously interfered with the operation of the Union and extended well beyond Hooker to every employee in the bargaining unit. The ALJ correctly found that Respondents' failure to bargain in this regard was a flagrant violation of Section 8(a)(5).

2. Respondents Further Violated Section 8(a)(5) of the Act by Unilaterally Implementing a Requirement that Brian Hooker Provide Respondents with Written Reports of His Union Activities

Once again, the relevant facts are not disputed. For years, Respondents required and Union representatives have provided only verbal notice when taking time to engage in official duties on behalf of the Union [ALJD at 38]. This is true for time taken to engage with management for grievance processing or other official matters [i.e., MXUP time taken pursuant

to Articles 10.05 or 10.06], as well as requests to be excused from work to engage in other union activities not paid for by the Respondents [i.e., MXUU time taken pursuant to Article 10.08].

The only notice requirements set forth in Article 10 are as follows: (1) an employee seeking to be paid by Respondents for time taken to engage with management for grievance processing or other official matters must “give their immediate Supervisor reasonable advance notice of the intended absence and of the probable duration of the absence;” and (2) an employee seeking to be excused from work for unpaid time to engage in Union activities must give “reasonable advance notice of such absence.”

Beginning in October 2015, Respondents repeatedly altered the terms for providing notice related to union activity established by the parties’ contract and by regular and longstanding practice [Tr. at 303, 305-306, 449; 1538; GC 10; GC 11; GC 20; GC 52; GC 74]. In each instance, Respondents imposed the changes as a *fait accompli*.

- On October 20 and 21, Brash told Hooker that he was going to be required to provide a timesheet or log of his joint meetings, including the names of the managers at the meetings.

- On December 8, Brash told the Union that Hooker was required to provide: “*specifics on his management meetings* [R 24 at 2, emphasis added]. On the same day, Brash told Hooker to document and provide Respondents with his MXUU time: “In instances where you are working for District 4 or out of town, or for the international (sic), or for Ryan, you can wait until the next day of regular work to fill out the sheet” [GC 45 at 2].

- On March 17, in an e-mail titled: “Brian Hooker Reporting Responsibilities,” Brash advised the Union: [B]eginning with the weekly schedule of April 3, 2016, Brian Hooker ... will need to provide advance notice of time needed as well as what Management person(s) he will meet with and the associated details of the meeting need (i.e., grievance meeting/review board

hearing /other mutually agreed to meetings with Management, etc.) for payroll verification [GC 74].

- On June 9, Respondents issued an expanded activity log form and mandated additional reporting requirements in what it referred to as “a further accommodation of Mr. Hooker” [GC 20 at 4]:

... [T]he Company’s expectation is that Mr. Hooker will account for his Joint Meeting Time each week as follows: In addition, at the end of each week in which Mr. Hooker reports payment for Joint Meeting Time under 10.05 or 10.06, Mr. Hooker is expected to provide the following information on the attached Weekly Union Activity Log:

- a. Managers at the meeting;
- b. The date, time, location and duration of the meeting;
- c. The purpose of the meeting; and
- d. If the meeting was not for the purpose of processing grievances, the name of the Company manager who approved the meeting time as paid time.

- On July 25, Respondents threatened to withhold Hooker’s pay if he did not comply with the requirements set forth in the June 9 letter. On August 12, Respondents issued Hooker a disciplinary warning for failing to turn in the activity log.

For “joint meeting” time, Article 10.06 requires only “reasonable advance notice of the intended absence” and the “probable duration of the absence” to one’s “immediate supervisor” [GC 2 at 14]. For “union business,” Article 10.08 requires only “reasonable advance notice of the absence” to “the Company” [GC 2 at 14]. The parties’ regular and long-standing practice of requiring only verbal notice was a term and condition of unit employees’ employment. Respondents were not at liberty to alter notice requirements without offering the Union notice and an opportunity to bargain over change. *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). The unilaterally implemented, extra-contractual notice requirements imposed by Respondents on

Brian Hooker as a fait accompli, first on October 20 and repeatedly for the remainder of his employment, were contrary to the parties' established practice and made in violation of Section 8(a)(5) [ALJD at 38].

1. Respondents Violated Section 8(a)(3) of the Act by: (i) Rescinding Brian Hooker's Position as a Full-Time Union Official; (ii) Requiring Hooker to Provide Written Reports of His Union Activities; and (iii) Disciplining and Discharging Hooker

a. The Applicable Legal Standard

Under *Wright Line*, the General Counsel must show that an employee's protected conduct was a motivating factor in the employer's adverse action. *Rood Trucking Co.*, 342 NLRB 895, 897 (2004). Motive may be demonstrated by circumstantial evidence, and a pretextual explanation of the employer's action will support an inference of discriminatory motivation. *All Pro Vending*, 350 NLRB 503, 508 (2007); *Rood Trucking*, supra at 897; *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) (when a factfinder concludes that the employer's proffered basis for its actions 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—at least where ... the surrounding facts tend to reinforce that inference.'") (quoting *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)).

The General Counsel bears the initial burden of showing that the respondent's decision to take adverse action against an employee was motivated, at least in part, by antiunion considerations. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). The General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the Union or other protected activity. *Camaco Lorain Mfg. Plant*, 356 NLRB

1283, 1286-1287 (2011); *Intermet Stevensville*, 350 NLRB 1270, 1274-1275 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). Animus may be inferred from the record as a whole, including timing and disparate treatment. *Brink's, Inc.*, 360 NLRB No. 136, slip op. at 1 fn. 3 (2014). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Intermet Stevensville*, supra; *Senior Citizens*, supra.

b. The General Counsel's Prima Facie Case

The General Counsel easily met its initial burden of establishing that Hooker's union activity was a motivating factor in Respondents' decisions to rescind his position as a full-time Union official and require him to provide written reports of his Union activities, and the decisions to discipline and, ultimately, discharge him. First, there is no dispute that the elements of union activity and employer knowledge have been established. As set forth above, Hooker spent several years as a steward and nearly five years as administrative assistant, and he had a well-established reputation among Respondents' supervisors and managers as an exceptionally aggressive and passionate Union representative. [GC 41 at 184-188, 155-156; GC 42 at 10-11; Tr. at 140, 1100, 1697, 2679].

The record is replete with evidence of Respondents' enmity toward Hooker. Prior to their October 2015 decision to put him back "on the load," Respondents had at various times described Hooker as "patronizing" [GC 73 at 3]; "combative" [GC 41 at 156]; "harsh" [GC 41 at 161]; "antagonistic" [GC 42 at 11]; and "offensive" [Tr. at 140]; with a "proclivity for filing ULP charges ... (making) broad, inappropriate, and overreaching requests for information" [GC 73 at 3], and a "well-documented history of using his position in the Union to attempt to

intimidate and bully managers” [GC 73 at 3]. When Mrla and Brash met with the Union on October 23, regarding Hooker’s return to the load and his new union activity reporting requirements, Brash described Hooker as the “one individual in Local 4034 that is difficult to deal with” and said that Hooker’s personality and language were “offensive” [Tr. at 140]. At the same meeting, Mrla complained to Letts that Hooker had more MXUP time (i.e., the amount of time Hooker spent engaged in union activities) than other Union officials.

Respondents’ animus toward Hooker’s protected activity is further evidenced by the timing of their decisions to rescind his full-time Union position and make him provide a written log of his union activity. A few weeks before announcing these decisions, Hooker filed an extensive information request that Mrla described at the October 23 meeting as “harassment” of management. In late September 2015, about a week before announcing its decisions, Hooker was engaged in a very public argument with Area Manager Mike Jarema during which Hooker refused to tell Jarema the name of a manager Hooker was meeting with later that day. Most damning, Mrla called Hooker the day before he testified in an NLRB hearing and told him that he was going to get Hooker “back in a truck (i.e., “on the load”).

Respondents’ unlawful motive can also be inferred from the facts and circumstances surrounding Hooker’s discipline and discharge [ALJD at 40].⁴¹ As noted above, Respondents disciplined Hooker for matters trifling and contrived.

- Respondents disciplined Hooker for working “unauthorized overtime” when a simple phone call from Supervisor Sharp to the Company manager he knew to be working right next to Hooker would have avoided the whole matter. Instead of calling the manager, Sharp called Brash to report on Hooker [Tr. at 2460, 2464, 2497-2499].

⁴¹ Respondents’ unlawful motive regarding their requirement that Hooker fill out a “union activity log” is self-evident and needs no elaboration. It is undisputed that Hooker is the only employee ever required to provide a written report of their activities on behalf of the Union. The requirement was announced by Respondents one week after Hooker’s argument with Manager Jarema in late September 2015, during which Hooker repeatedly declined to reveal to Jarema the identity of the manager with whom he was meeting that morning.

- Respondents disciplined Hooker because on his third day working on his own in the field in more than five years, he took too long to assess a “BPC” job – a type of work he had never performed or received training to perform [Tr. at 570-571].
- Respondents issued Hooker a final warning and three-day suspension, in part, because he did not know the combination to a lock on his truck. As it turned out, Respondents had not given him the combination and the manager sent to open the lock also did not know the combination.⁴²
- As detailed above, Brash initiated an Asset Protection investigation against Hooker during which Brash concealed exculpatory evidence from the investigator, then suspended Hooker and recommended his termination based on the tainted investigation.
- Brash used the same AT&T investigation as a pretext to have a supervisor engage in hidden surveillance of Hooker at a jobsite [ALJD at 40].

In light of all of this evidence, the Judge correctly found that Respondents’ decisions to rescind Hooker’s position as a full-time Union official; require him to provide written reports of his Union activities; and the decisions to discipline and discharge him were motivated by antiunion considerations.

c. Respondents’ Wright Line Defense

At this juncture, the burden would normally shift to Respondents to show that they would have taken the same actions in the absence of Hooker’s union activities. In the circumstances of this case, however, Respondents cannot carry that burden. As to their decision to require Hooker to provide written reports of his union activity, Respondents claim that this was necessary for “payroll verification.” But this cannot possibly be true. For years, full-time officials have been exempted from having to request leave from their immediate supervisor to engage in MXUP time. Respondents’ never explained why it was necessary to verify payroll for Hooker but not for other officials.

⁴² Significantly, Hooker’s former direct supervisor, Andrew Sharp, who testified at length about alleged instances of “work avoidance” by Hooker, was unable to cite any occasion when Hooker was not truthful about obstacles he encountered on the job [Tr. at 2501].

As to the decision to rescind Hooker’s full-time status and put him back in the load, At the outset of the hearing, Respondents proffered two reasons for its decision: (1) consistency (i.e., Hooker was the only appointed full-time Union official in “Mrla’s organization”); and (2) the need for manpower to complete rehab work [Tr. at 59]. By the close of the hearing it was obvious that the first reason was entirely pretextual [ALJD at 38]. The second reason was abandoned entirely. [ALJD at 6, fn. 3].

The “consistency” defense was an obvious fabrication as demonstrated by the complete failure of Respondents’ witnesses to offer any coherent explanation of its purpose. When questioned about this, Mrla testified:

Q. And so this elected/not elected distinction, can you explain to me what that has to do with the Company and how it performs its work?

A. I’m not sure where you’re going with this.

Q. Well, you changed the practice that the administrative assistant did not work on – wasn’t on the work schedule, and one of the reasons you testified was that because it was a non-elected position.

A. Correct.

Q. So my question is what that had to do with the Company and its business, the work it performs?

A. Once again, I’m not sure where you’re going with this one. Basically all of my non-elected employees are in the load.

Q. Okay. Do you have – is there any reason, anything that relates to how the Company does its work that you can point to today for making that distinction between elected and non-elected officials?

A. No.

As noted above, it appeared that Respondents abandoned the “rehab” defense entirely at the hearing. Apparently not. Undeterred by the clear-cut record evidence, Respondents persist in pursuing this line of defense arguing in its exceptions that the ALJ “ignored ... compelling

evidence demonstrating that ‘workload considerations’ were a legitimate non-discriminatory factor in the decision to return Hooker to the load” [Respondents’ Brief in Support of Exceptions at 40]. It seems Respondents have forgotten the testimony of George Mrla, who testified:

Q. BY MR. FAYETTE: Well, what I’m trying to understand is, is the Company saying it can put him in – Mr. Hooker in the load because he’s a non-elected union official, or is the Company saying that part doesn’t matter, we can put him in if we need him? I’m trying to figure out what their claim –

JUDGE SANDRON: I don’t think he said that they put him in because they needed him. I think he said –

A: THE WITNESS: **That had nothing to do with it.**

Where “the evidence establishes that the reasons given for the respondent’s action are pretextual – that is, 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.” *Rood Trucking Co.*, supra at 898, quoting *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981) (“a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel”).

In this regard, the Judge found:

Respondent’s justification for putting Hooker back in the load was not that it needed him for workload considerations but that Mrla wanted “consistency” in his organization as far as the treatment of stewards. I find this argument flimsy in light of (1) no evidence that any stewards or union members ever complained to management that Hooker was not in the load, (2) the practice was long established that the AA was on full-time union status, and Hooker had enjoyed such status for approximately 5 years; (3) business considerations were essentially irrelevant, and the Respondent provided no cogent legitimate justification for the timing of its conduct. Accordingly, I conclude that the Respondent has not met its burden of persuasion of showing that it would have placed Hooker back in the load in December 2015 had it not been for his engagement in union activity as the Local’s AA [ALJD at 38].

The record clearly shows that the reasons advanced by Respondents were not in fact relied upon. As such, the Judge correctly concluded that Respondents have not met their burden to show that they would have taken the same actions in the absence of Hooker's union activities. In light of all of this evidence, the record clearly establishes that Respondents' decisions to rescind Hooker's position as a full-time Union official; require him to provide written reports of his Union activities; and the decisions to discipline and discharge him were motivated by antiunion considerations and violated Section 8(a)(3).

d. Reinstatement and Make Whole Relief

Respondents argue that Section 10(c) of the Act precludes an award of reinstatement and backpay to Hooker. Section 10(c) states that “[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him [or her] of any back pay, if such individual was suspended or discharged for cause.” In support of this argument, Respondents cite *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007) for the proposition that reinstatement is barred by Section 10(c) where an employee engages in misconduct, even if that misconduct is connected to a unilateral change. But, as explained by Judge Sandron in the instant matter, the employees in *Anheuser-Busch* were disciplined as a result of unilaterally-installed security cameras *detecting* their misconduct; the unilateral change *did not cause or contribute to any misconduct*, contrary to the situation here. In this case, but for Respondents' unfair labor practices, Brian Hooker would not have been working as a technician and, therefore, could not have been disciplined and discharged for violating “tech expectations.”

This case squarely fits within the exception to management's right to discharge employees enunciated in *Anheuser-Busch*, above at 644: an employer “may not discharge when

the real motivating purpose is to do that which [the Act] forbids.” As the Supreme Court stated in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 217 (1964), “[t]here is no indication . . . that [Sec. 10(c)] was designed to curtail the Board’s power in fashioning remedies when the loss of employment stems directly from an unfair labor practice” as is the case here. See *Butler Medical Transport, LLC*, 365 NLRB No. 112, slip op. at 7-8 (2017). See also *Anheuser-Busch* at 648 (“A termination of employment that is motivated by protected activity is unlawful under Section 8(a)(1) and/or (3), and is not ‘for cause.’ The termination is unlawful, and the Board can order reinstatement and backpay.”), review denied 303 Fed. Appx. 899 (D.C. Cir. 2008).

In any event, the Judge found that the Respondents’ disciplines of Hooker were, in fact, motivated by animus for his union activities, concluding that “certain conduct on management’s part after Hooker returned to the load gives rise to an inference of continued animus. In support of this conclusion, Judge Sandron cited the following:

- Brash’s handling of the GPS investigation reflected a desire to find cause to discipline Hooker rather than have impartial fact-finding;
- Brash’s failure to furnish Investigator Vilk a document from the GPS contractor that might have lent credence to Hooker’s version of the problems that he had with his GPS;
- Brash’s use of the GPS investigation as a means of having Supervisor Osterberg spend a good part of a day observing Hooker to find fault with his conduct wholly unrelated to the GPS matter;
- Investigator Vilk – who thoroughly documented her investigation of Hooker’s non-reporting GPS – inability to explain her failure to include her conversation with Caresian Campbell, who offered evidence that might have supported Hooker’s version of his problems with the GPS; and
- Supervisor Sharp’s failure to take into account Caresian Campbell’s statement on September 22 that Hooker’s mistake in diagnosing a problem on September 20 was an easy one for a tech to make [ALJD at 40].

In sum, Section 10(c) does not preclude Brian Hooker from reinstatement and make whole relief because the proffered cause for his discharge – alleged poor work performance as a

technician – would not have occurred but for Respondents’ unfair labor practices, and, in any event, the Judge found that the Respondents’ disciplines of Hooker were motivated by animus for his union activities.

4. Respondents Further Violated Section 8(a)(5) by Failing to Provide the Union with Requested Information

a. The Applicable Legal Standards

An employer’s duty to bargain collectively under Section 8(a)(5) of the Act includes the duty to supply requested information to a union that is the collective-bargaining representative of the employer’s employees if the requested information is relevant and reasonably necessary to the union’s performance of its responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); see also *Central Soya Co.*, 288 NLRB 1402 (1988). This duty applies to contract negotiations and extends to requests made during the term of the contract for information relevant to and necessary for contract administration and grievance processing. *Beth Abraham Health Services*, 332 NLRB 1234 (2000). The standard for determining the relevancy of requested information is a liberal one and it is necessary only to establish “the probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.” *Id.* at 437. Where the union’s request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant and the respondent must provide the information. When information “has been demonstrated to be relevant, the burden shifts to the respondent to establish that the information is not relevant, does not exist, or for some other valid and acceptable reason cannot be furnished to the requesting party.” *House of Good Samaritan Medical Facility*, 319 NLRB 392, 397 (1995), citing *Somerville Mills*, 308 NLRB 425 (1992).

b. The December 23, 2015 Request (Complaint ¶17)

On December 23, 2015, the Union filed a grievance protesting Respondents' decision to rescind Hooker's assignment as a full-time Union official [ALJD at 19; Tr. at 471-472; GC 51]. Along with the grievance, the Union sent a request for information seeking documents for the purpose of investigating and processing the grievance [ALJD at 19; Tr. at 472-476, 480, 490; GC 52]. Over the next several weeks the parties exchanged correspondence regarding the information request [GC 53-60; Tr. at 477-480]. Respondents provided some of the information [Tr. at 481-494; GC 54; GC 58], but refused to provide much of it, including the documents listed below. Following each item is the specific reason for the request as testified to by Mr. Hooker at the hearing [Tr. at 481-494]:

Item 2: Work group schedules for the Network Infrastructure Business Services Market Business Unit (NIBS MBU) from January 1, 2010, to the present [GC 51 at 3].

Hooker testified that the Union requested this information to challenge Respondents' assertions to the Union that the demands of Respondents' business necessitated his return to the work schedule after five years as a full-time Union official [ALJD at 19; Tr. at 480-481]. As Hooker explained, the Union would use this information to show the number of times that Respondents' work demands necessitated full-time Union officials being returned to the workload during the previous five years [Tr. at 481]. In response to this request, Respondents objected that the information was not relevant and that the request was overbroad and "made for the improper purpose of harassing the Company" [GC 55 at 1]. Over the Union's objection, Respondents provided only the work schedules for 2015 through early 2016 [GC 55 at 1].

Item 3: Work group vacation-selection schedules, rosters, and canvassing-sheets for NIBS MBU from January 1, 2010, to the present [GC 51 at 3].

In response to this request, Respondents again objected that the information was not relevant and that the request was overbroad and “made for the improper purpose of harassing the Company” [GC 55 at 1]. Respondents also asked the Union for an explanation of the relevance of the information, to which the Union responded:

The relevance of this request is that Union is seeking to verify statements of the Company agent(s) involved in this matter have asserted “schedule fairness” as one of the Company’s shifting rationales for unilaterally upending its decades-long practice, as agreed with the Union, of removing entirely from workgroup schedules and vacation schedules certain properly designated Union representatives. We again ask that the Company provide the requested information [GC 56 at 2].

Without further explanation or comment, much less any good faith bargaining regarding the request, Respondents provided about a year of the requested documents. Again, the Union objected [GC 59 at 2].

Item 7: Lists from the January 1, 2010, to the present of all designated representatives of the Charging Party who have to fill out the “special timesheet” which Brian Hooker is required to fill out and their job titles, which MBU he or she works in, his or her title as a Union representative, his or her status as appointed or elected, copies of the special timesheets submitted, and all other time reports of Union activity that have been submitted to us. Respondents’ policy which mandates the use of the “special timesheet” and the length of retention of the special timesheet.

Hooker testified that the Union requested this information to investigate whether Respondents had required any other employees to provide a written account of Union activities [Tr. at 491-492]. In response to this request, on February 5, Respondents again objected that the information was not relevant and that the request was overbroad and “made for the improper purpose of harassing the Company” [GC 55 at 3]. Respondents further objected to this request “on the grounds that the Union, not the Company, possesses this information [GC 55 at 3]. On March 4, responded:

The Company, through its agents, has indicated quite forcefully and repetitively that it in fact does possess this information and further has stated that such

information was a motive behind the Company's unilateral abandonment of previously negotiated changes in practice regarding its application of certain articles of the CBA. Company agents have further stated that this report is maintained for all properly designated Union representatives in the Midwest. The Union repeats its request that the Company provides this information. [GC 57 at 4].

The Union reiterated its requests, to no avail [GC 57 at 4; GC 59 at 2].

c. Analysis of the Alleged Violation (Complaint ¶17)

The Judge correctly found that Respondents violated Section 8(a)(5) and (1) of the Act by failing to furnish the information with Items 2, 3, 6 and 7, first requested on December 23, 2015, for the Union's investigation and processing of the grievance challenging Respondents' rescission of Hooker's full-time Union official status. Initially, it should be noted that Respondents' claims that the Union's information request were made in bad faith and harassment find absolutely no support in the record. In any event, bad faith is an affirmative defense that must be pled, and Respondents did not raise it in their answer [GC 1(ccc)]. *Island Creek Coal Co.*, 292 NLRB 480, fn. 14 (1989).

As to Respondents' arguments regarding the relevance of the information, it is well established that information requests pertinent to a union's decision to file or process grievances are presumptively relevant, and an employer is obliged to provide information that is requested for the handling of grievances. *Acme Industrial*, supra at 436; *Beth Abraham Health Services*, 332 NLRB 1234, 1234 (2000); *Safeway Stores*, 236 NLRB 1126 fn. 1 (1978). A liberal, "discovery-type" standard is used to determine the relevance, or potential relevance, of requested information. *Acme Industrial Co.*, supra at 435-37. Therefore, employers must provide information "if there is a probability that such data are relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees" ... representative. *Associated*

General Contractors of California, 242 NLRB 891, 893 (1979) enfd. 633 F.2d 766 (9th Cir. 1980).

Here, the information sought by the Union to investigate Hooker's grievance easily meets the liberal standard of relevance. Each request was prompted by specific claims made by Respondents' managers regarding its reasons for returning Hooker to the load and requiring him to advise Respondents of his Union activities in writing [Tr. at 480-494, GC 56; GC 60].

At trial, through the testimony of Ted Brash, Respondents attempted to show that the some of the information requested was not relevant simply because Respondents' workloads have fluctuated over the last five years [Tr. at 943-944, 1000, 1190]. But the Board has long held that the obligation to provide information applies regardless whether the information is dispositive. *Acme Industrial*, supra.

Respondents' claims that certain information did not exist were belied by the record evidence, including admissions of Respondents' witnesses at trial [Tr. at 1689-1690]. In any event, it has long been held that when an employer does not have the requested information, the employer must promptly convey that it does not have the requested information and the failure to do so, or an unreasonable delay in doing so, violates the Act. *Postal Service*, 332 NLRB 635, 638-639 (2000); *Endo Painting Service, Inc.*, 360 NLRB 485, 486 (2014).

In addition, the requested information concerns bargaining unit employees' terms and conditions of employment and therefore is presumptively relevant to the Union's performance of its duties as the bargaining representative of the unit employees. See, e.g., *Ralphs Grocery Co.*, 352 NLRB 128, 134 (2008), reaffirmed and incorporated by reference 355 NLRB 1279 (2010).

In sum, Respondents were obligated to furnish the information upon request unless they rebutted the presumption of relevance or established a legitimate affirmative defense to its

production. Id. As to Items 2, 3, 6 and 7, the Judge correctly found that Respondents failed to make that showing here and the failure to provide the Union with the information requested on December 23, 2015, violated Section 8(a)(5) of the Act.

d. The March 8 and 31, 2016 Requests (Complaint ¶18)

On February 24, Supervisor Sharp reassigned company vehicles used by Hooker and two other employees – Jim Smith and Caresian Campbell [ALJD at 23; Tr. at 502-510]. The Union filed a grievance on February 29, because the reassignment adversely affected Campbell and Smith, and it appeared to the Union that Sharp had re-assigned the vehicles to cause discord among the employees [ALJD at 23; GC 61; Tr. at 502-503, 511-513, 542, 2474]. During the first step grievance meeting held on March 8, Supervisor Sharp claimed that the purpose of the reassignment was to better match the vehicles to the versatility of the respective employees [ALJD at 23; Tr. at 529-532, 855-858]. Specifically, Sharp said that Campbell was arguably the most qualified technician in the district and that he needed a truck that could go up in the air and underground⁴³ [Tr. at 532]. Based on Sharp’s stated reason for the reassignment, the Union made an oral request for information which he followed up with a written request made to Supervisor Sharp on March 31 [GC 62 at 2], and to Ted Brash on April 7 [GC 62 at 1; Tr. at 532-533, 1373]. The information requested included:

(1) A list of vehicles provided to or associated with by Respondents Caresian Campbell, Jim Smith and BA Hooker from January 1, 2009, through the current date.

⁴³ Based on the record evidence, the Union’s suspicions regarding the reasons proffered by Respondents for the “truck swap” were well-founded. It is undisputed that Smith was qualified to, and did perform, aerial work, and that the truck assigned away from Hooker to Smith was a utility van not equipped for aerial work [Tr. at 1363]. It is also undisputed that Hooker was not qualified to perform underground work and that the truck taken away from Campbell and assigned to Hooker was equipped specially to perform underground work [GC 66 at 4-5; Tr. at 543]. It is also undisputed that at the time of the truck re-assignment, and for several weeks thereafter, the truck newly assigned to Campbell was not equipped to do underground work [GC 66 at 3]. Around this time, Hooker was working one day per week on an off-shift. At the trial, when Sharp was asked to explain why Campbell could not continue to use the specialized truck on the days that Hooker was not working (i.e., Monday through Friday), Sharp answered: “I don’t know.”

(2) A list of all employees in the district and the qualifications of all employees in the district.

Sharp ignored both the March 8 and March 31 requests [GC 64; Tr. at 533]. On April 8, Ted Brash responded to the Union's third request for this information sent by Hooker on April 7 [GC 62]. In his response, Brash questioned the relevance of the information the Union was seeking and stated that Respondents needed additional time to respond to the request. Brash also claimed that Respondents do not maintain records "in the form requested." The Union responded to Brash on April 11 [GC 64]. In the response, Hooker stated the Union's willingness to meet to discuss the concerns expressed by Brash in his April 8 e-mail. Brash never responded to the Union's offer to meet [Tr. at 534, 1376-1377]. On April 18, the Union sent its fourth request for this information to Respondents [GC 65; Tr. at 535]. Brash finally provided a substantive response on April 25 [GC 66]. In the response, Respondents "object[ed]" to the requests "because they seek information that is not relevant to the Union's statutory duties." Brash further stated that "the Company retains discretion to distribute ... Company vehicles." [GC 66 at 2]. Respondents refused to provide the Union with the requested list of vehicles provided to Campbell, Hooker and Smith from 2009 to the present, stating that "the Company does not have this information in its possession and this information is not reasonably accessible" [GC 66 at 2]. In response to the request for a list of all employees in the district and their qualifications, Respondents limited its response to the employees in Sharp's crew [GC 66 at 3]. On May 26, the Union responded to Respondents' letter of April 25.

e. The May 26, 2016 Request for Additional Information (Complaint ¶19)

On May 26, the Union responded with comments, rebuttals and supplemental requests for information in an e-mail to Brash [ALJD at 24; Tr. at 535-544; GC 67]. In the response, Hooker

explained in detail the basis of the grievance and the Union's need to investigate [GC 67 at 2].

The Union requested:

(1) List the specific tasks and business requirements contemplated by Respondents when it moved Jim Smith into the utility truck.

(2) A detailed listing of training and/or other requirements for "underground work" and "air work" as referenced by Respondents when explaining Caresian Campbell's move into his current vehicle.

(3) The date prior to the conversion of Caresian Campbell's bucket-truck in which any other bucket-truck was converted to a combination air-work and underground-work in a manner similar to Campbell's truck within the geographical scope of George Mrla's responsibility.

(4) The dates Caresian Campbell, Brian Hooker, and Jim Smith achieved qualifications listed on Respondents' call-out list.

(5) Any and all information which describes how to assign qualifications to employees within the work-group.

Hooker testified that he requested this information for the purpose of processing the grievance and, specifically, to investigate the representations made by Brash in his April 26 e-mail regarding the reasons for Respondents decision to make the reassignments [Tr. at 540-544; GC 67 at 3-4]. The Company did not respond to May 26 request for additional information [ALJD at 25].

f. Analysis of the Alleged Violations (Complaint ¶19)

The Judge correctly found that Respondents violated Section 8(a)(5) and (1) of the Act by failing to furnish information in response to the Union's May 26 request.⁴⁴ Again, information sought by the Union to investigate and process grievances easily meets the liberal standard of relevance. Each request was prompted by specific claims made by Respondents' managers regarding its reasons for the "truck swap." Moreover, the requested information here concerns

⁴⁴ The Judge found no violation regarding the Union's first request of March 31, concluding that Respondents timely answered that it did not maintain or have readily available the requested information or had already provided the information [ALJD at 44].

bargaining unit employees' terms and conditions of employment and therefore is presumptively relevant to the Union's performance of its duties as the bargaining representative of the unit employees. *Ralphs Grocery Co.*, 352 NLRB at 134.

Respondents failed to answer in any way the Union's May 26 request seeking further information supporting Respondents' claim that certain documents were not maintained or readily available and its claim that certain information had already been provided to the Union. Respondents are not at liberty to simply ignore the Union's request. *Columbia University*, 298 NLRB 941, 945 (1990). Accordingly, the Judge correctly found that Respondents' failure to provide the Union with the information set forth in Complaint paragraph 19 violated Section 8(a)(5) of the Act.

5. Respondents Violated Section 8(a)(1) of the Act by Maintaining an Unlawfully Overbroad Confidentiality Policy

Since at least March 22, 2016, Respondents have maintained a corporate policy entitled "Reporting Privacy Related Incidents" [GC 1(vv) at ¶8 and GC 1(ddd) at ¶8].



Reporting Privacy Related Incidents

Corporate Policy

Effective: March 22, 2016

| | |
|----------------------|--|
| Application | This policy applies to all business activities and employees at AT&T including all wholly owned subsidiaries and operations controlled by AT&T. |
| Purpose | AT&T possesses sensitive, detailed information about our employees and customers who rely on us to safeguard that information. Laws and regulations tell us how to treat such data. Preserving our employees' and customers' trust by safeguarding their private data is essential to our reputation. This policy outlines AT&T's process for reporting any potential misuse or improper disclosure of personal or confidential information. |
| Definitions | <p>CPNI (Customer Proprietary Network Information) – Information about existing services and service usage billed to the customer. (e.g. account balance, minutes used/unused, call details, rate plan information, features)</p> <p>PI / PII (Personal Information / Personally Identifiable Information) – Information that directly identifies or reasonably can be used to figure out the identity of a customer or user, such as your name, address, phone number and e-mail address. PI / PII does not include published listing information.</p> <p>SPI (Sensitive Personal Information) – Information that identifies or can link to the customer, which, if compromised, could lead to identity theft. (e.g. social security number, driver license number, bank account number, credit card number, PINs, passwords, passcodes, authentication hints) SPI is a subset of PII/PII that requires a higher degree of protection by law.</p> |
| Policy | <p>AT&T depends on our employees to report improper use or disclosure of customer or employee information. It is important that employees report a potential data privacy incident quickly and appropriately to Asset Protection, do not delay.</p> <p>If you suspect any potential misuse or improper disclosure of personal or confidential information, contact Asset Protection at 800-807-4205. From outside the U.S., call 908-658-0380.</p> <p>Examples of incidents to report to Asset Protection:</p> <ul style="list-style-type: none"> • Suspected improper or fraudulent use of customer or employee information • Theft or loss of sensitive customer or employee information, including: <ul style="list-style-type: none"> o Social Security Number, any form of national ID, date of birth, financial account information or other SPI o Outside the US – name, address, phone number or other PII/PII • Accidental or intentional disclosure of sensitive customer or employee information to a third party, including <ul style="list-style-type: none"> o Social Security Number, any form of national ID, date of birth, financial account information or other SPI o Customer call records, billing information or other CPNI o Outside the US – name, address, phone number or other PII/PII • Improper access to, or disclosure of, employee medical information, health-related records or other human resource records • Improper storage, disposal, or retention of confidential AT&T customer or employee files or records • Other customer or employee privacy-related issues or incidents that may negatively impact employees or customers or result in negative financial and/or reputational consequences to AT&T. <p>If a complaint of unauthorized access, use or disclosure of CPNI is received from a domestic AT&T customer, in addition to contacting Asset Protection, immediately report the incident using CPNI Complaint Tracking system via the Process Center form.</p> |
| Contacts | Questions regarding this Policy should be directed to Nena Romano, nr1828@att.com |
| Content Owner | Nena Romano – Director, Chief Compliance Office |

Effective Date: 3/22/16

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[GC 35, highlighting added].

The ALJ correctly found that the policy violates Section 8(a)(1) because it requires employees to report, and implicitly prohibits, protected employee disclosures of information to third parties, including union representatives, concerning wages, hours, and other working

conditions without legitimate justifications that outweigh the adverse impact on employees' Section 7 rights in this regard [ALJD at 45-46].

The Board recently adopted a new standard for evaluating an employer's workplace rule, policy, or handbook provision. *The Boeing Company*, 365 NLRB No. 154, slip op. (2017). The Boeing test takes into account both the legitimate justifications associated with the disputed rule and any adverse impact the rule may have on NLRA protected activity. A "facially neutral" policy, rule, or handbook provision (i.e., a rule that does not expressly restrict NLRA-protected activity, was not adopted in response to NLRA-protected activity, and has not been applied to restrict NLRA-protected activity) should be declared unlawful only if the legitimate justifications an employer may have for maintaining the rule are outweighed by its potential adverse impact on Section 7 activity. *Ibid.*

In the instant case, Respondents' policy is "facially neutral" because it does not expressly restrict Section 7 rights, was not promulgated in response to NLRA-protected activity, and has not been applied to restrict NLRA-protected activity. *Id.* at fn. 1. Yet, the policy requires employees to report to Respondents "improper use or disclosure" of "employee information," "employee files or records," employee privacy-related information," and "human resource records," without defining any of those terms.⁴⁵ Moreover, the policy does not include any provision exempting discussions about employee wages, hours, and other working conditions. As such, when reasonably interpreted, the policy potentially interferes with employees' rights to discuss wages and other terms and conditions of employment with their co-workers and

⁴⁵ The policy defines three types of customer "information": CPNI – information about services billed to "the customer"; PI/PII – information that identifies a "customer or user"; and SPI – information that identifies or can link to "the customer." The policy does not define "potential misuse" or "improper disclosure" for customer or employee information [GC 36].

nonemployees such as union representatives. *Rocky Mountain Eye Center*, 363 NLRB No. 34 (2015).

Under the new *Boeing* standard, when reviewing facially neutral employment policies that, when reasonably interpreted, would potentially interfere with Section 7 rights, the Board said it will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the requirement(s).” The Board further stated that it will conduct this evaluation, consistent with the Board’s “duty to strike the proper balance between ... asserted business justifications and the invasion of employee rights in light of the Act and its policy.” *Id.* at 14 quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967).

In this case, the nature and extent of the potential impact of Respondents’ policy on NLRA rights is severe. The ability of employees to communicate freely regarding their terms and conditions of employment is the genesis of all other rights granted by the Act. Even under the *Boeing* standard, confidentiality provisions that prohibit and otherwise chill employees from discussing among themselves, or sharing with others, information relating to wages, hours, or working conditions, have consistently been found to violate Section 8(a)(1). *Rocky Mountain Eye Center*, above at fn. 1 (Member Miscimarra expresses disagreement with test in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), but nonetheless finds facially neutral confidentiality agreement violated Section 8(a)(1) “because it would prohibit protected employee disclosures of information to third parties, including union representatives, concerning wages, hours, and other working conditions without other important justification”); *MCPC, Inc.*, 360 NLRB 216, fn. 4 (2014) (Member Miscimarra disagrees with *Lutheran Heritage* test but finds

confidentiality rule violated Section 8(a)(1) “because it would prohibit protected employee discussions regarding compensation without other important justifications.”).

After taking into account the nature and extent of the potential impact on NLRA rights, the Board next considers the proffered legitimate justifications associated with the policy to strike the proper balance between the asserted justifications and the invasion of employee rights. *Boeing* at 14. Here, the reasons for Respondents’ policy do not warrant the serious incursion on fundamental employee rights. There is no question that Respondents have a legitimate and substantial interest in keeping customer information secure. Respondents are mandated to do so by both Federal and State law. The need for a business to protect customers’ social security numbers, dates of birth, credit card information, and authentication credentials is obvious. Similarly, Respondents have a legitimate interest in protecting the privacy of certain employee information.

But the inquiry does not end there. The question in this case is whether Respondents have shown a legitimate justification for a single policy covering both customers and employees – distinct groups with unique interests to whom Respondents owe very different duties. There is no readily apparent reason for maintaining a single policy for customers and employees and Respondents did not present any evidence or offer any justification for doing so. Nor did Respondents offer any explanation, evidence or justification for maintaining a policy that solicits its employees to report “improper disclosure” of “employee information” without defining or limiting these terms. Surely, Respondents can more narrowly tailor their policies to meet their obligations to protect privacy without infringing on the most basic of its employees’ rights protected by the Act. In sum, the ALJ correctly found that the policy, as constituted, violates Section 8(a)(1).

V. CONCLUSION

For the reasons set forth above, the General Counsel respectfully urges the Board to affirm the Administrative Law Judge's findings and conclusions and issue the Judge's recommended remedial order.

Dated at Grand Rapids, Michigan, this 26th day of October, 2018.

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