



United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

October 8, 2019

David J. Smith
Clerk, United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, NW
Atlanta, GA 30303-3147

Re: *NLRB v. Sheet Metal Workers Local Union 85*
Board Case No. 10-CB-179895

Dear Mr. Smith:

I am enclosing a copy of the National Labor Relations Board's application for enforcement of its order in this case. Within 40 days of the Court's docketing of this application, I will file the agency record and a certified list of its contents.

Please serve a copy of this application on the Respondent, Sheet Metal Workers Local Union 85, whose address appears on the service list. I have served a copy of the application on each party admitted to participate in the Board proceedings, and their names and addresses also appear on the service list.

I am counsel of record for the Board, and all correspondence should be addressed to me. I would appreciate your furnishing the Board's Regional Director, whose name and address also appear on the service list, with a copy of any correspondence the Court sends to counsel in this case. The Board attorneys

directly responsible for this case are Elizabeth A. Heaney (202) 273-1743 and Barbara Sheehy (202) 273-0094.

/s/ David Habenstreit

David Habenstreit

Acting Deputy Associate General Counsel

NATIONAL LABOR RELATIONS BOARD

1015 Half Street, SE

Washington, DC 20570-0001

(202) 273-0979

Enclosures

SERVICE LIST

NLRB v. Sheet Metal Workers Local Union 85
Board Case No. 10-CB-179895

Robert M. Weaver Esq., Quinn, Connor, Weaver, Davies & Rouco LLP 3516 Covington Highway Decatur, GA 30032-1850 Email: rweaver@qcwdr.com	Respondent's Counsel
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David Norton, President Sheet Metal Workers Local Union 85 1838 Metropolitan Parkway Atlanta, GA 30315	Respondent
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John Allen Culpepper 58 Patterson Ave Lumpkin, GA 31815-5400 Email: john.culpepper1@gmail.com	Charging Party
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Russ Foster Esq. Carver Darden, Esq. Energy Center, Ste. 3100 1100 Poydras St New Orleans, LA 70163 Email: foster@carverdarden.com	Involved Party's Counsel
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Lisa Grim, Director of Human Resources The Logistics Company, Inc. 3400 Walsh Pkwy Fayetteville, NC 28311-1642 Email: www.tlc-inc.net	Involved Party
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John D. Doyle Jr. Harris Tower 233 Peachtree Street N.E. Suite 1000 Atlanta, GA 30303-1531	Regional Director
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**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner)	
)	
v.)	
)	
SHEET METAL WORKERS LOCAL UNION)	
85)	
)	
Respondent)	

**APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

The National Labor Relations Board hereby applies to the Court for enforcement of its Order issued against Sheet Metal Workers Local Union 85 on August 22, 2019, in Board Case No. 10-CB-179895, reported at 368 NLRB No. 50. The Board seeks enforcement of its Order in full.

The Court has jurisdiction over this application pursuant to Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. § 151, 160(e)). Venue is proper in this Circuit because the unfair labor practices occurred in Columbus, Georgia.

/s/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570-0001
(202) 273-0979

Dated at Washington, D.C.
this 8th day of October 2019

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD)
)
Petitioner)
)
v.)
)
SHEET METAL WORKERS LOCAL UNION)
85)
)
Respondent)

CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2019, I filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

/s/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570-0001
(202) 273-0979

Dated at Washington, D.C.
this 8th day of October 2019

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

Sheet Metal Workers Local Union 85 (The Logistics Company, Inc.) and John Allen Culpepper. Case 10-CB-179895

August 22, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND KAPLAN

On May 24, 2018, Administrative Law Judge Donna N. Dawson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. In addition, the General Counsel filed limited cross-exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order² as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sheet Metal Workers Local Union 85, its officers, agents, and representatives, shall take the action set forth in the order as modified.

1. Substitute the following paragraph for paragraph 2(f).

“(f) Within 14 days from the date of this Order, request in writing that The Logistics Company, Inc. expunge from its files any reference to the unlawful discharge of John Allen Culpepper, and within 3 days thereafter, notify him in writing that this has been done.”

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The Respondent contends on exception that the judge's recommended Order erroneously fails to reflect that the Respondent tolled its backpay obligation by stating, in written notices to The Logistics Company, Inc. (TLC) and John Allen Culpepper, that it did not object to TLC reinstating Culpepper. We find no merit in this contention. Where, as here, the employer has not been found culpable for any unlawful conduct, the respondent union must make the discriminatee whole for all loss of wages and benefits suffered as a result of its discrimination against him,

2. Delete paragraph 2(d) and reletter the subsequent paragraphs.

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

Dated, Washington, D.C. August 22, 2019

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

and it cannot toll its backpay obligation by such notices. See, e.g., *Teamsters Local 331*, 315 NLRB 10, 10 fn. 3 (1994) (holding backpay not tolled where union unlawfully causes an employer to discharge an employee and there is no culpability on the part of the employer) (citing *Sheet Metal Workers Local 355 (Zinsco Electrical)*, 254 NLRB 773 (1981), *enfd.* in relevant part 716 F.2d 1249 (9th Cir. 1983)).

³ We shall modify the judge's recommended Order to (a) conform to the expungement language in the remedy section of the judge's decision, and (b) delete the requirement that the Respondent file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters, as the Respondent was not Culpepper's employer. See, e.g., *Food & Commercial Workers (Awrey Bakeries, LLC)*, 360 NLRB 48, 48 (2013). We shall also substitute a new notice to conform to the Order as modified.

WE WILL NOT cause or attempt to cause The Logistics Company, Inc. (TLC) to discharge or otherwise discriminate against any of you for engaging in protected activity.

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

WE WILL, within 14 days from the date of the Board's Order, notify TLC in writing that we have no objection to the reinstatement of John Allen Culpepper with TLC and request in writing that TLC offer John Allen Culpepper full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. If TLC refuses to reinstate Culpepper, WE WILL show that we submitted written notification to TLC and to Culpepper that we did not object to Culpepper's reinstatement.

WE WILL make John Allen Culpepper whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate John Allen Culpepper for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

WE WILL, within 14 days from the date of the Board's order, remove from our files any references to our unlawful actions against John Allen Culpepper, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that his discharge by TLC will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's order, request that TLC remove from its files any reference to the unlawful discharge of John Allen Culpepper, and WE WILL, within 3 days thereafter, notify him in writing that this has been done.

SHEET METAL WORKERS LOCAL UNION
85

The Board's decision can be found at www.nlrb.gov/case/10-CB-179895 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Carla Wiley, Esq. and Laura Evins, Esq., for the General Counsel.

Robert M. Weaver, Esq. (Quinn, Conner, Weaver, Davies & Rouco, LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Atlanta, Georgia, on June 28 and 29, 2017. John Allen Culpepper, the Charging Party, filed the charge on July 12, 2016.¹ The complaint issued on November 3, alleging that Respondent, Sheet Metal Workers Local Union 85 (the Union), attempted to cause and caused the employer, The Logistics Company, Inc. (TLC) to discharge the Charging Party in violation of Section 8(b)(2) and 8(a)(3) of the Act.² The Union denies having violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Union and the General Counsel,³ I make the following

FINDINGS OF FACT

I. JURISDICTION

The Union admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act. At all material times, TLC has been engaged in the business of providing automated logistics, maintenance and support services at its Fort Benning Army Base facility in Columbus, Georgia. In conducting business operations during the 12-month period ending June 30, 2016, TLC purchased and received at its Columbus, Georgia facility goods valued in excess of \$50,000 directly from points outside the State of Georgia. Thus, I find that TLC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Factual Background and Findings*

Respondent Union represents four units of private sector employees at Fort Benning Army Base, Georgia. Relevant to this case is the unit of security guards II (guards) working for TLC at the Fort Benning weapons pool and access supply point (ASP).

brief's tables of contents and authorities filed on August 7, 2017. I grant this request, and will have the attached Exhibit 1 to the Errata substituted for the original tables of contents and authorities. On the same date, the General Counsel filed a motion to redact transcript GC Exh. 4(a) containing the Charging Party's full social security number. I also grant this motion, ordering that the original GC Exh. 4(a) be substituted with the amended, redacted GC Exh. 4(a) attached to the motion; I will instruct that this substitution be made, and the original be removed.

¹ All dates are in 2016 unless otherwise indicated.

² NLRB dismissed the Section 8(a)(3) and (1) charge against TLC, finding no evidence that it unlawfully discharged Culpepper because of protected activity. Rather, the Region found that TLC's decision was based on legitimate, documented performance "shortcomings." (R. Exhs. 13-15.)

³ On August 8, 2017, the General Counsel filed an Errata seeking to correct certain clerical errors in the General Counsel's posthearing

At all material times, Randall Beall (Beall) served as Respondent's business representative, and thus, an agent of Respondent's within the meaning of Section 2(13) of the Act.

On May 23, 2016, the Charging Party, John Culpepper (Culpepper) began working for TLC as a guard II on TLC's contract with Fort Benning.⁴ As such, he began a 90-day probationary period. Union Local 85 represented him in connection with discipline relevant to this case, but under the collective-bargaining agreement between the Union and TLC, he was not entitled access to the arbitration and grievance procedures. In his capacity as a guard II, he secured weapons, other property and personnel, and performed his duties in the ASP, part of which is also referred to as the guard shack. TLC supervisor Mitchell Bonnette (Bonnette) supervised Culpepper and several other guards, including Edward Johnson, Willie Williams and Charles Tyrone Jordan. TLC Human Resource Director Lisa Grim (Grim) was responsible for hiring, firing and overseeing discipline generally.

On or about June 9, Culpepper called Beall with concerns that Bonnette had been violating the collective-bargaining agreement's 48 hour notice rule for setting or changing schedules or shifts and assigning guards duties outside of their scope of work.⁵ It is undisputed that Beall subsequently met with him in the guard shack to further discuss the issue of changing schedules outside the 48 hour window.⁶ Culpepper left that meeting with the impression that a grievance on behalf of the guards would be filed. (Tr. 68–70, 72.) There is no dispute that Culpepper's fellow guards shared these concerns. Beall testified that he consulted with Bonnette and Grim about the 48 hour rule, and was satisfied with their response that they followed the rule unless there was an emergency call out or tardiness. Beall claimed he did not investigate further or file a grievance since TLC had followed the CBA's management rights clause in connection with scheduling and duties. (Tr. 154–159.)

There is also no dispute that Culpepper and other guards had communicated to TLC management that they should be armed while on duty protecting personnel and property and arms, pursuant to an army regulation AR 190-56. (Tr. Tr. 44–45; R. Exhs. 7–8.) Beall told Culpepper that although he believed the issue of arming the guards was outside the CBA and governed by the Army and TLC, he would look into it. (Tr. 154–155.)⁷ There is no evidence that Beall informed Culpepper of his findings on these various issues before they next met on July 8.

⁴ Previously, Culpepper worked for TLC as a warehouse specialist, and as such was represented by another union.

⁵ (GC Exh. 3-CBA, Art. 15, Sec. 4.)

⁶ Initially, Culpepper testified that this meeting took place on June 12. On cross-examination, Culpepper admitted that June 12 was on a Sunday when Beall would not have been working. However, no one disputed that such a meeting took place during that time frame. (Tr. 89–90.)

⁷ Culpepper indicated that he had not brought this issue of AR 190-56 to Beall's attention. However, I credit Beall's testimony that Culpepper mentioned it to him since the guards had brought up the issue with management, Beall knew that Culpepper was concerned about the guards' security, and on a subsequent date, Beall asked Culpepper if he was satisfied with management's response.

B. Culpepper's Prior Discipline

On June 9, TLC counseled Culpepper in writing for excessive tardiness on three occasions within a 5-day period—June 2, 3, and 7. (Jt. Exh. 4.) On June 13, Bonnette issued a memorandum detailing Culpepper's unacceptable conduct for failing to request time off at least 24 hours prior to the time requested in violation of the collective-bargaining agreement. His request was 7 minutes short of meeting the 24-hour notice requirement.⁸ (Jt. Exh. 5; R. Exhs. 5–6.) On about July 5, Bonnette issued a memorandum for the record stating that Culpepper failed to update the monthly fire extinguisher spreadsheet with his initials in a timely manner. Rather than properly completing it in June, he turned it in on July 5 after Bonnette had orally reminded him to do so. (R. Exhs. 1–4.)⁹ There is no evidence that Culpepper received, or was made aware of, Bonnette's memoranda concerning Culpepper's failure to timely request time off or failure to fulfill his fire extinguisher responsibilities.

It is undisputed that Beall at least represented Culpepper in connection with the tardiness discipline, and assisted in having one of the alleged days removed. Beall also testified that in response to Bonnette asking him if the prior employer had waived the 24-hour notice for requesting time off on non-work days, he advised that the prior employer had done so, but that TLC had not done so. (R. Exh. 6.) Beall asserted that in Culpepper's defense, he told Bonnette that Culpepper should not be punished for submitting his time off request 7 minutes late.

C. July 8 Verbal Altercation Between Beall and Culpepper

1. Testimony of Beall and Culpepper

The parties agree that Beall and Culpepper engaged in verbal altercation on July 8 shortly after Beall entered the guard shack office area where Culpepper worked. Beall visited the guards' office to say hello to the members and to see if Culpepper had seen an email from management regarding AR 190-56 and its inapplicability to the TLC guards. Although he testified that he specifically asked Culpepper about this matter because he knew it was of concern to him, the evidence shows that the other guards had also made inquiries to management about it, and had been copied on email responses from management. (Tr. 73–74, 76–77, 168–170; R. Exh. 8.) Not satisfied with management's assessment that AR 190-56 did not pertain to the guards II or permit them to carry weapons, Culpepper indicated that he might go straight to the army's Fort Benning commanding general.

⁸ Culpepper denied receiving any counseling for this incident. He testified that instead, Bonnette appeared to have accepted his explanation that due to a system issue, he had tried unsuccessfully to put in his time off request in a timely manner. (Tr. 103–104.)

⁹ Director of Human Resources Lisa Grim, testified and stated in her Board affidavit that Bonnette had talked to Culpepper regarding the fire extinguisher checks, and that she directed him to prepare a written counseling memorandum. Culpepper initially denied that Bonnette counseled or even discussed the matter with him, but subsequently admitted that Bonnette had asked him to correct or use the updated fire extinguisher check sheet. Given Culpepper's somewhat evasive testimony around this issue, I credit Grim's testimony, consistent with the memorandum, that Bonnette had at least discussed this issue with Culpepper. I note, however, that Culpepper's prior discipline is not in dispute. (Tr. 26, 27, 85–87; R. Exh. 3, p. 2; ALJ Exh. 1.)

Culpepper also criticized Beall and the Union for not representing the guards' concerns about unlawful schedule changes; called Beall's responses "BS;" accused him of allowing the company to "bend him over;" and asserted that another union or local should be representing the guards. Beall responded by telling Culpepper that he never had an issue with the CBA until he got there, and telling him about a rumor that trouble followed him (Culpepper) wherever he goes.¹⁰ (Tr. 76–77.) Culpepper insisted that he tell him where he heard the rumor, but Beall refused to do so. This provoked Culpepper into becoming more upset with Beall to the point where he raised his voice and called him a "chicken shit bastard" and "pussy," as he paced back and forth. In response, Beall warned Culpepper that he "was dancing dangerously close to violating [the Union's] constitution and ritual, and that charges may or could be filed, and he was doing it in front of a witness." In turn, Culpepper said that he would "prefer charges" on him (Beall). (Tr. 76–80, 170–172, 192–193.) Beall testified that he left the guard shack first, after asking Johnson and Jordan if they needed anything from him, and Culpepper testified that he walked away. It is undisputed that at some point, Beall asked Johnson and Jordan to provide statements, but never followed up with them.

Beall testified that he felt threatened by Culpepper's speech and demeanor—his raised voice and use of profanity as he paced back and forth, and at one point, walked within a foot of him with finger pointed.¹¹ Beall then testified that Culpepper was "about a foot or two away, and that "his behavior was very erratic," he became "a little more irate," and "said things like he would prefer charges on [him]." (Tr. 170–172.) He later stated that Culpepper had "raised his voice, and he was pacing around the room, and he came at [him] . . . [h]e would back up, but he would come toward me." (Tr. 192.) Grim testified that Beall told her that another guard, Johnson, had to get between Beall and Culpepper, but Beall confirmed that this was not the case.¹² (Tr. 56, 172.) He testified that instead, "Mr. Johnson was sitting down and to my left, and I positioned myself off of his right shoulder." (Tr. 172.)

Beall also explained that he did not care whether or not Culpepper took the AR 190-56 issue above TLC management to the base's commanding general, but that he told Culpepper about the rumor that he was a trouble maker because the employer might care or take action against him as a probationary employee if he complained to the commanding general. He later testified that he shared the rumor with Culpepper because "it was something that he needed to do self-evaluation on," and that it was then that "it was like a time bomb went off," and "that's what made his language get colorful . . . [t]hat's when he began to start using the vulgarity . . . [i]t never escalated to that point, but he was out of control in my opinion." (Tr. 185–186, 190–191.) It was then that he threatened Culpepper with potential internal union charges because he thought it would calm him down; he testified

that, "[He] was trying to diffuse the situation because it was getting out of hand. I was doing the best thing that I knew to do to try to bring him down a notch." He stated that "John [Culpepper] understands regulations. He's a former military person. So [he] believed that if [he] told him he was dancing near that territory that it would slow him down." (Tr. 193–195.)

According to Beall, immediately after the confrontation, he left the office in search of one of his other unit stewards to get the status of dues authorization and membership cards. Beall testified that while talking to that steward, "at the back of [his] mind" entered thoughts about an incident with two other TLC employees, Vasquez and Williams. He recalled that the Army had banned both of them from the facility for engaging in a physical altercation, even though only one of them had thrown a punch. He testified that this memory led to his decision that it would be in his best interest as a union official, as well as in that of Local 85, to report his altercation with Culpepper to TLC management. He said that he did so to make sure union access to the facility would not be compromised. He claimed that because people were coming in and out of the guard shack check point, he wanted to report the incident before management heard it from someone else. Beall admitted, however, that he had not seen anyone else enter the guard's office. Nor was he aware of any visitors who had observed or heard what had taken place. Nevertheless, he told Bonnette that he knew management did not care if someone cursed a union agent, but that Culpepper had spewed vulgarities towards him while people were coming in and out of the facility. He further testified that he told Bonnette that he was concerned with access to the post, and that Bonnette advised him to call Grim. Therefore, at some point after he exited the facility, he called Grim from his vehicle, and made the same report to her. He stated that he also told Grim that, "[he] didn't want [his] access or Local 85's access to be compromised in any way, fashion, shape or form over this incident." (Tr. 174–178, 196–197.)

Contrary to Grim's statements (discussed below), Beall denied that he told Grim that he was reporting the incident as a private citizen or visitor. Rather, he did so in his capacity as a union representative. He also insisted that he never asked for or recommended that TLC management take any adverse action against Culpepper. (Id.)

2. Testimony and statements of guards Johnson and Jordan

Witness and guard II Edward Johnson, who worked with Culpepper in the guard shack, provided a signed statement to Bonnette on July 8, in which he wrote that while sitting in a chair, he suddenly heard Culpepper call Beall "derogatory names. He had called him a "p*****" and other names which wasn't his very own." He stated that he had walked into a "conversation that was totally talking bad towards Mr. [Beall]." (GC Exh. 4(b)). Johnson testified at the hearing that he "just basically heard two gentlemen verbally going back and forth with each other on the

¹⁰ Beall did not rebut Culpepper's testimony that Beall told him that he had not had any issues with the CBA or anyone prior to Culpepper.

¹¹ Culpepper denied that he got that close to Beall, or that he posed any threat. However, he admitted calling him the names. It is undisputed that Culpepper never physically touched Beall or verbally threatened him.

¹² Grim stated in her Board affidavit that Beall told her that he "positioned himself away from Culpepper, and that security guard Edward Johnson was between them." I credit Beall's testimony, confirmed by Johnson, that Johnson did not stand or move to get between Beall and Culpepper. (ALJ Exh. 1, Tr. 172.)

disagreement and agreement of arming and disarming of the guards . . . heard Mr. Culpepper use some vulgar words at Mr. Beall.” He did not observe Culpepper touch or threaten to touch or harm Beall, nor did he see Culpepper make any threatening gestures toward him. (Tr. 136–137.) He explained that he was sitting about 1–2 feet behind Beall, and that Culpepper was about 5 feet from him (Johnson) on the other side of the room. He testified that at one point he did stand up, “[d]ue to the conversation . . . with the pitching in the voices.” He also agreed with his Board affidavit statements that he stood up because of Culpepper’s pacing, which made him nervous, and that Culpepper was the “aggressor” with the “louder voice” in that he did not want to hear what Beall had to say. He explained, however, that he did not have to get between the two as if “to break up a fight.” (Tr. 142–148.) In addition, he did not state whether or not he heard the charged statements that Beall made to Culpepper.

Witness and guard II Charles Jordan, who also worked with Culpepper in the guard shack, provided a sworn statement to management, in which he stated that he was present for a “portion” of the argument between Culpepper and Beall on July 8 in the guard shack. He wrote that he “heard both parties argue and get loud,” but due to his guard duties, “did not hear any details but it started with AR 190-56, and that it seemed like both parties were trying to get their points across with no success.” (GC Exh. (4c)). At hearing, he testified that he heard part of the argument regarding AR 190-56,¹³ Beall telling Culpepper that he heard he was a trouble maker in his former job and that trouble followed him, and Culpepper calling Beall a “pussy.” He also heard the word, “shit,” and talk about how the guards should join another union on post. He did not hear any threats of physical harm. Jordan recalled that after Culpepper left the office area, Bonnette came in, and he and Beall went outside to talk.¹⁴ Then Beall came back in, and asked him for a written statement of the incident. Beall did not return for a statement, but Bonnette asked for one later that afternoon. Jordan agreed with his Board affidavit statement that at one point during their encounter, Culpepper came within a foot of Beall and then backed up. On redirect, Jordan testified that they were only about a foot apart for “[m]aybe a minute at the most.” (Tr. 119–131.)

D. Culpepper’s Termination

Grim testified that after the July 8 incident, Beall called and told her he was calling as a private citizen or a visitor to the facility (and not as a union representative), to report his altercation with Culpepper, during which Culpepper had been abusive and loud.¹⁵ However, this testimony was discredited by Beall’s own testimony that he called on behalf of his position as a union agent. She further testified that Beall shared his concern about having his access to the facility compromised based on the prior incident with Vazquez and Williams, who were banned from the

base by Army personnel because they had engaged in a physical altercation. (Tr. 34–36.) According to Grim, Beall,

was a little bit - - he felt threatened and another guard had to get between them, and . . . he told me that Mr. Culpepper was shouting at him and called him the P word and other words that he would not want to repeat to me or anyone else. He said that he just wanted me to know that that occurred, that he was at fear of anything further happening when he came back because he knew that if he engaged in any kind of physical altercation, whether he was to blame or not, that he could be banned from post which would not allow him to do his work.

(Tr. 37–38.) In her Board affidavit, Grim stated that Beall told her that there was no physical altercation, but [somewhat contrary to her hearing testimony] that when “Culpepper got heated he [Beall] positioned himself away from Culpepper, and that security guard Edward Johnson was between them.” (ALJ Exh. 1, p. 4.) The latter is more consistent with testimony of Beall and Johnson that Johnson did not move to get “between” them.

Grim informed Beall, and later Bonnette, that she would look into the matter. She did so by reviewing the witness statements obtained by Bonnette. She testified that she also spoke to Booker Taylor, former vice president of operations, with whom she had previously discussed Culpepper’s performance and absenteeism.¹⁶ She further testified that when the July 8 incident occurred, “we just took it for what it was and we went ahead with what we believed we were already going to do, and we terminated.” (Tr. 29–30.) She never talked to Culpepper to get his version of events.

Grim testified that she alone made the determination to terminate Culpepper; she denied that Beall influenced or attempted to influence her to do so. In fact, she testified that her decision to discharge Culpepper had nothing to do with his altercation with Beall on July 8. (Tr. 31–33.) Instead, she insisted that her decision was based solely on his excessive tardiness, failure to request time off at least 24 hours prior to the time requested, and failure to perform the fire extinguisher duties as instructed. She also testified that “we were considering termination” before July 8 and after Culpepper’s failure to follow instructions regarding the fire extinguisher checks, and that she “likely would have fired Culpepper even if the incident between him and Beall had not happened.” (Id.)¹⁷ She adamantly denied that the July 8 disagreement was the last straw, and insisted that Culpepper’s “poor performance was the icing on the cake.” (Id.)

In stark contrast to her testimony that she never considered the July 8 incident at all in her decision to discharge Culpepper, Grim stated in her sworn Board affidavit that,

[i]mmediately after receiving the statements [from Bonnette on July 11] and without consulting or discussing the matter with

¹³ Jordan testified that Culpepper asked Beall how did the AR 190-56 issue go with the union side, and that Beall responded that it “went up the flagpole [on the employer’s side] and we were not under AR 190-56.” (Tr. 120.)

¹⁴ I credit Beall’s testimony over that of Jordan’s that he immediately left the guard office to seek out another unit’s steward before talking to Bonnette. (Tr. 120–121.)

¹⁵ Over much objection from TLC (non-party) and Respondent, I

denied TLC’s petition to revoke subpoenas regarding Grim’s appearance as a witness. Bonnette did not testify, nor was there a reason provided for why he did not do so.

¹⁶ Grim testified that Booker’s last day with TLC would be the Friday after the hearing, but that he had taken 2 weeks of vacation beforehand.

¹⁷ Grim also testified that she did not terminate Culpepper after the tardiness and time off violations because Bonnette had not recommended that she do so. (Tr. 24–26.)

any other employer representative, I decided to terminate Culpepper's employment. The July 8th incident made clear that Culpepper was not fit for the position coupled with [his] prior disciplines and counseling, and that because he was a probationary employee I am going to terminate his employment. Culpepper's abusive and foul language in the workplace on July 8th is unprofessional behavior, and his poor customer service is what I relied upon considering the July 8th incident between [Beall] and Culpepper to terminate him.

(Tr. 33; ALJ Ex. 1, p. 6.) Further, it was only after July 8 that she told Taylor that she "was going to fire [Culpepper] based on his poor attendance, poor job performance, and the incident between him and [Beall]." Moreover, neither Bonnette nor Taylor testified at the hearing in order to corroborate Grim's testimony that they were considering or about to discharge Culpepper prior to the July 8 incident, or that they would have likely discharged him had it not occurred. (ALJ Ex. 1, p. 7.)

On July 12, 2016, Grim notified Culpepper in writing that he was terminated as of that date for unsatisfactory performance. (Jt. Exh. 6.)

By email on July 18, Beall filed a first step in the grievance procedure on behalf of Culpepper, stating that TLC did not have just cause to terminate Culpepper as required by CBA, Article 29, Section 1. He also sought reinstatement of Culpepper with backpay. (R. Exh. 9.) On July 22, Grim denied the grievance because Culpepper was a probationary employee who was not entitled to have the Union grieve his termination pursuant to the CBA. She attached Culpepper's personnel action requests for hire and termination. (Id.) Then, on August 2, Beall advised Grim that he understood TLC's position, but that Local 85 still maintained that "reinstatement of Mr. Culpepper to his position of employment with TLC is appropriate, and the Local has no objection to the reinstatement." (Id.)

It was not until August 25 that the Union's attorney notified Culpepper by letter, with a copy of the email exchange between Beall and Grim, that Local 85 believed that his "reinstatement is appropriate, and that the Local has no objection to same." (R. Exh. 10.)

E. Remaining Credibility Determinations¹⁸

Although the witnesses' testimony may have varied to some degree, there are really only a few material facts in dispute. Based on fairly consistent testimony from Beall, Johnson and Jordan, and to a great extent, Culpepper, I find that during the July 8 encounter, Culpepper became loud and frustrated, paced back and forth, and briefly spewed a couple of expletives towards Beall. I also find, based on overall witness testimony, that it is more likely than not that Culpepper at some point came within a foot or two of Beall for a moment. Neither Jordan nor Johnson felt threatened by Culpepper, but Johnson credibly

testified that he felt the need to stand up "[d]ue to the conversation . . . with the pitching in the voices," and because Culpepper's pacing made him nervous. He even acknowledged that he was "concerned that the situation might go to another level." However, it did not, and he did not feel the need to move between them in order to break up the altercation. (Tr. 142–148.)

Nevertheless, I am convinced that Beall did not feel threatened by Culpepper, or fear that his access to the facility or base might be in jeopardy. First, he knew that the two guards, Vazquez and Williams, had been banned from the base by the Army because of a physical altercation, and not a verbal one. Further, Beall testified that he did not talk to Bonnette until after he sought out another union representative concerning another union matter. I find that such a delay is not indicative of one who felt threatened or in imminent danger of physical harm, or even shaken by his encounter with Culpepper. Nor does it demonstrate one's concern about a future altercation or access to the facility.

In addition, I find that Grim was not a forthcoming, credible witness.¹⁹ Her often contradictory testimony further supports a finding that Beall's alleged fear and concern about facility access was less than credible. I discredit Grim's testimony about what Beall reported to her and why he did so. Grim initially testified that Beall called her on July 8 to report the incident with Culpepper "in case things escalated." However, she admitted that he did not state that as a reason for his calling in her Board affidavit. When asked about the discrepancy, she testified that she stated that "he was shaken and he was concerned about workplace violence." After testifying that "she [stood] corrected," and that Beall had not said those exact words, she insisted that Beall "was concerned about being able to come back to that facility without physical altercation or he wouldn't have called me." However, Grim admitted that she had not used the term "physical altercation" in her affidavit description of what Beall told her, and testified that Beall had been "concerned that someone had to get between them. I think it was Mr. Johnson." Once more, Grim's testimony was inconsistent with what she wrote in her affidavit, which was that Beall told her that it was he who positioned himself away from Culpepper, "and that security guard [Johnson] was between them." Finally, Grim conceded that "it was insinuated when [Beall] stated . . . that he was concerned regarding the Vasquez and Williams case. . . that was a workplace violence issue and he was definitely concerned about coming back on base." (Tr. 54–57.) She insisted that she just "kind of . . . knew that he was calling me because of that." (Tr. 54–56.) In her affidavit, she stated that,

When [Beall] told me during this initial telephone conversation that he was concerned for his continued access to the facility, I knew what he was talking about even though he did not mention any specific policy. On any military installation, if two people enter into any physical altercation regardless of whose

¹⁸ A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd.* 56 Fed.

Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622. Such is the case here.

¹⁹ Beall also appeared to be somewhat annoyed when attempting to answer questions by the General Counsel.

fault it is, the government will ban them from the post. This is a workplace violence policy that is enforced at Fort Benning.

(ALJ Exh. 1.) She explained that she knew about this policy after the Army banned Vasquez and Williams from the facility due to their physical altercation; Grim terminated them because they were unable to report to work for an indefinite period of time. (Id.) It is evident that Grim's testimony was based on assumptions about what Beall said rather than what he actually told her, and that he did not tell her that he feared a future altercation during which Culpepper might get physical. Grim's testimony not only conflicted with her Board statement, but it also contradicted other parts of her testimony as she wavered back and forth in her variations of what Beall reported. Overall, I find that Grim fabricated her reasons for discharging Culpepper and what Beall reported to her. It appears that she intentionally did so in an attempt to bolster Respondent's theory that Beall only reported the incident because he was concerned about his future access to the base. In fact, she went as far as not telling the truth about Beall calling as a private citizen versus a union official.

Further, in finding Beall's stated reasons for reporting the incident to TLC management was not believable, I find it implausible that Beall repeated the rumor that Culpepper was a known trouble maker in order to make him "self-evaluate," or understand that as a probationary employee he might suffer repercussions from TLC management if he took his complaints to the base's commanding general. This explanation defies logic and belief that immediately after Culpepper became upset and complained about Beall's union representation or lack thereof, Beall would divulge such an inflammatory, provocative rumor. Instead, it appears that he did so due to his displeasure with Culpepper's criticism of him and the Union.

Beall was also disingenuous, and somewhat evasive, in his testimony regarding how and why he threatened Culpepper with internal union charges for disrespecting a union official in an effort to calm him down. He testified that he did so in the moment without thinking that Culpepper was a probationary employee or the fact that the Union would not bring such charges against a probationary employee. Yet, he testified that he had just told Culpepper about the trouble maker rumor out of his concern that TLC might react negatively towards him since he was a probationary employee. Beall further claimed that when he went to his car and read the Union's constitution, he realized that the Union would not bring charges against a probationary employee. He admitted, however, that he had already suspected that the Union would not do so for that very reason.

Regarding Culpepper, although at times during cross-examination, he did not answer questions in a straight forward manner,

or respond directly to questions asked, I find that regarding material disputed facts, his testimony was generally consistent with other witnesses regarding his interaction with Beall on July 8. As stated, he admitted calling him names and fervently disagreeing with how he represented the guards.

III. DISCUSSION AND ANALYSIS

A. Allegations and Legal Standards

The General Counsel alleges that the Union, by Beall, violated Section 8(a)(3) of the Act in violation of Section 8(b)(2) of the Act by causing or attempting to cause TLC to terminate Culpepper. Respondent argues that this matter should be dismissed because the Board determined that TLC had not discriminated or otherwise violated the Act in terminating Culpepper for poor performance. However, the fact that the Board dismissed the case against TLC does not automatically absolve Respondent from all liability under the Act, nor does it address Respondent's motive (through Beall) in reporting Culpepper's actions to TLC management.²⁰ It has been established that a Section 8(a)(3) violation is not a prerequisite to a Section (b)(2) violation. See *Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 53–54 (1954). Respondent also argues that the manner in which Culpepper expressed himself with Beall (the disrespectful rant and cursing), and not Culpepper's protected concerted activity or criticism of the Union, motivated Beall to report the encounter to Bonnette and Grim.

A union violates Section 8(b)(2) of the Act when it "cause[s], or attempt[s] to cause an employer" to discriminate against or discipline an employee, and its actions either violate the duty of fair representation or are discriminatory under the Board's *Wright Line* analysis.²¹ *Good Samaritan Medical Center*, 361 NLRB 1294, 1295–1296 (2014) enf. denied on the facts, 858 F.3d 617 (1st Cir. 2017);²² *United Paperworkers Int'l Union, Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB 1042, 1044 (1997). When a union violates Section 8(b)(2) by causing or attempting to cause the discipline of a unit member, a derivative violation of Section 8(b)(1)(A) (violation of the duty of fair representation) arises. *International Union, Security, Police and Fire Professionals of America*, 360 NLRB 430 (2014). Thus, the Board may find a Section 8(b)(1)(A) violation when it finds a Section 8(b)(2) violation even when the complaint, as here, does not allege the same. *Valley Cabinet & Mfg.*, 253 NLRB 98, 100 fn. 10 (1980).

The Board finds causation when a union demands, either directly or indirectly by implication, that the employer take disciplinary action against an employee. See *Laborers Local 1184 (Nicholson Rodio)*, 332 NLRB 1292, 1296 (2000) (a request to

²⁰ Respondent does not argue that Beall acted in his individual capacity, rather than as a union official, when he approached and engaged with Culpepper on July 8. By his own admission, Beall reported the incident with Culpepper as a union representative, and there is no doubt that Culpepper viewed him as one. I have also discredited Grim's testimony that Beall made his report to her as a private citizen visiting the facility. Therefore, Beall at all times material to this case acted as an agent of the Union. *Shen Automotive Dealership Group*, 321 NLRB 586, 593 (1996) (the Board generally applies common law principles and finds agency if the individual has either actual or apparent authority for the challenged actions).

²¹ *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The Board has applied the *Wright Line* framework in cases involving union activity. See *Int'l Union, SPFPA, Local 444*, 360 NLRB 430 (2014); *Int'l Ass'n of Bridge, Structural and Ornamental Ironworkers, Local 340*, 347 NLRB 578, 579 (2006); *United Paperworkers Int'l Union, Local 1048*, 323 NLRB 1042, 1044 (1997).

²² Also cited as 361 NLRB 1294, 1296–1297 (2014).

discipline may be direct or indirect); *Avon Roofing & Sheet Metal*, 312 NLRB 499, 499 (1993) (“direct evidence of an express demand by the Union is not necessary where the evidence supports a reasonable inference of a union request”). In addition, causation is also established when the union knew or should have known that reporting an employee’s conduct might result in discipline. *Good Samaritan Medical Center*, supra, at 1296.

In determining whether a union has violated Section 8(b)(2), the Board has applied both the analytical framework set forth in *Wright Line* and the duty of fair representation framework set forth in *Caravan Knight Facilities*, 362 NLRB No. 196 (2015), enf. denied on the facts, 844 F.3d 590 (6th Cir. 2016). Under the *Wright Line* analysis, the General Counsel must make a prima facie case that “the employee’s conduct protected by §7 was a substantial or a motivating factor in the discharge.” *NLRB v. Transportation Mgmt.*, 462 U.S. 393, 400 (1983). The General Counsel may do so by showing that: (1) the employee engaged in protected activity; (2) the union knew of the activity; and (3) the union had animus towards the activity sufficient to be a substantial or motivating factor in or causal link to the subsequent adverse action. See *Security, Police & Fire Professionals of America (SPFPA) Local 444*, 360 NLRB 430, 435–436 (2014); *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB 1042, 1044 (1997). If the initial burden is met, then the union may rebut it by showing that it would have taken the same action absent the employee’s protected activity. *Id.*

B. Respondent Union Attempted to Cause and Caused Culpepper’s Termination

I find that Culpepper was clearly engaging in protected concerted activity on July 8 during his encounter and disagreement with Beall over the Union’s representation (or lack thereof) of the guards in connection with several matters.²³ The record establishes that the issues discussed involved terms and conditions of employment (arming of the guards and scheduling of the guards) that had been raised by Culpepper on behalf of the guards, and raised by other guards. Next, Beall had knowledge of the activity as evidenced by his approaching Culpepper on that day to ask if he was satisfied with management’s response to the AR 150-96 matter and during his verbal discourse with Culpepper both before and during the July 8 incident.

In addition, the facts in this case support an inference that when Beall reported Culpepper’s conduct to management, he reasonably should have foreseen that Culpepper would be disciplined. Beall admitted that he knew that Culpepper was a probationary employee, not subject to internal union discipline, or to union grievance and arbitration procedures. He also knew that Culpepper had recently received discipline, and that Bonnette had questioned him about Culpepper’s submission of the untimely time off request. Moreover, Beall testified that during their July 8 discussion, he was (allegedly) concerned that Culpepper’s job would be in jeopardy if he took his complaints to the Army’s commanding general. Surely, he should have known that TLC would probably discipline Culpepper if he told them

about their encounter.

Remaining questions are whether or not the Union, by Beall, exhibited animus towards Culpepper’s protected activity and whether or not the animus, if it existed, was a substantial or motivating factor in Beall’s decision to report to TLC management. I find that Beall did so, and that it was a substantial and motivating factor in his decision to tell management about the altercation.

I find that Beall showed animus towards Culpepper’s criticism of how he had failed to represent the guards concerning several issues, including AR 190-56, and how Beall seemed to have sided with TLC on these matters. Culpepper disagreed with the opinion about the inapplicability of AR 190-56 to the guards and threatened to take the AR 190-56 arming the guards issue to Ft. Benning’s (the base’s) commanding general. Beall testified that he did not become concerned about Culpepper’s conduct until after he began calling him the vulgar names and pacing. However, prior to the name calling, Beall told Culpepper that he had not previously had problems with the CBA or with anyone else, and that he had heard that he (Culpepper) had been a troublemaker in the past and that trouble follows him wherever he goes. I have determined that Beall did not do so to get Culpepper to self-evaluate or out of his concern for Culpepper’s job as a probationary guard. It was only after Beall made these remarks and refused to tell Culpepper the source of them that the disagreement escalated to the point where Culpepper raised his voice, began pacing back and forth and called Beall a “chicken shit bastard” and “pussy.” (Tr. 77–79.)

Respondent cannot incite employee misconduct and then rely upon the provoked misconduct for an adverse employment action. However, the employee’s misconduct must be evaluated by comparing “‘the seriousness of respondent’s conduct with the extent of the employee’s reaction.’” *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 849 (2001), quoting *Caterpillar, Inc.*, 322 NLRB 674, 678 (1996).²⁴ See also, *Trus Joist Macmillan*, 341 NLRB 369 (2004). In this case, I find that Culpepper’s “rant” was provoked by Beall’s response to his protected activity. Therefore, Culpepper did not forfeit the protections of the Act and the Union cannot justifiably rely on his “rant” as his motivation for its unlawful actions.

As stated, Beall claimed that while Culpepper had every right to take his concerns to anyone, including the commanding general, he was “fearful” that as a “probationary employee with no grievance rights,” Culpepper might suffer repercussions from TLC if he went to the commanding general during “within 90 days.” (Tr. 169–170.) Beall further testified that this concern was the reason that he told Culpepper, only “as a matter of self-evaluation,” about the rumor that trouble followed him. I have found it inconceivable that Beall actually shared this provocative rumor with Culpepper out of any concern for him. Instead, I find that Beall knew or should have known that telling Culpepper that he is a known trouble maker under the circumstances described herein would provoke a negative response. Beall admitted that

²³ Culpepper engaged in his protected right to criticize the Union. *Radio Officers’ Union of Commercial Telegraphers Union v. NLRB*, supra at 40 (“8(b)(2) is designed to allow employees to freely exercise their

right to join unions, be good, bad or indifferent members...without imperiling their livelihood.”)

²⁴ *Caterpillar, Inc.*, 322 NLRB 674, 678 (1996), decision vacated pursuant to a settlement by unpublished order dated March 19, 1998.

his calling Culpepper a “troublemaker” caused Culpepper’s “colorful” and vulgar language. (Tr. 190–191.) However, he failed to mention this fact to either Grim or Bonnette.

Beall also testified that Culpepper’s rant towards him turned personal to the extent that it was no longer about the Union. Similarly, Respondent argues that the motivating factor for Beall reporting the incident to TLC management was Beall’s concern that Culpepper’s loud, profane, personal rant, which may have been overheard or seen by visitors outside the guards’ office, might result in his being banned from the base and precluded from carrying out his union duties. As I have determined, Culpepper’s reaction was provoked by Beall’s demonstrated animus towards his protected. It was not an isolated, personal verbal attack.

Therefore, I find that Culpepper’s emotional reaction was not only a direct result of Beall’s comments, but was inextricably interwoven with his protected activity.

Beall testified it was some time after the verbal altercation, during a discussion with a union steward about another unit, that it suddenly dawned on him that he should report his concerns to TLC before someone else did. He also claimed that at the same time, he recalled the situation where Vasquez and Williams had been banned for engaging in a physical altercation. However, he and Culpepper did not engage in any physical altercation, nor did Culpepper threaten him with physical harm. Moreover, I have found that Beall’s actions after he left the guard shack office belie his testimony that he had felt threatened by Culpepper. Surely, had he been so concerned about his safety and his access to the facility, that concern would have been at the forefront, and he would have immediately sought out Bonnette and Grim. I have also discounted Beall’s insistence that he threatened internal union charges against Culpepper in order to “diffuse the situation because it was getting out of hand.” (Tr. 193.) Therefore, I find that the General Counsel has established a *prima facie* case under the *Wright Line* analysis.

I also find that Respondent in this case has not rebutted the *prima facie* case by showing that Beall would have reported the incident to TLC management in the absence of any protected activity. Respondent makes the same argument discussed above to show that at the time Culpepper began to curse and pace and make Beall feel threatened, he was no longer engaged in protected activity. As stated above, I find that in this case, Culpepper’s use of profanity in response to Beall’s provocation was inextricably part of the protected activity,²⁵ and that Beall’s actions

were motivated by that protected activity. Moreover, there is no credited evidence that TLC management had decided to terminate, or would have done so, absent the July 8 incident.²⁶

Regarding the duty of fair representation, the Board maintains that when a union “causes the discharge of an employee, there is a rebuttable presumption that [it] acted unlawfully because by such conduct [it] demonstrates its power to affect the employees.” *Operating Engineers Local 478 (Stone & Webster)*, 271 NLRB 1382, 1382 fn. 2 (1984); see also *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB at 681, 681 (1973), *enf. denied* on other grounds 555 F.2d 552 (6th Cir. 1977). Once it is determined that a union has attempted to cause and/or caused an employee’s discharge, it may rebut the presumption that it acted unlawfully in doing so by demonstrating that its action “was necessary to the effective performance of its function of representing its constituency.” *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB at 681.²⁷

I find that Respondent also failed to rebut the presumption of unlawful conduct under this framework. Beall insisted that he reported the incident with Culpepper to TLC management in order to preserve his right to access the Army base facilities and represent the Union’s constituents. However, I have discounted his testimony, in that his reasons stated for his concern — that two TLC employees were denied base access due to a physical altercation—were invalid. I agree with the General Counsel that TLC terminated these employees because Fort Benning had indefinitely denied them access to the base, which precluded them from reporting to work. They were not discharged due to their conduct. He and Culpepper had not engaged in any physical altercation, nor did Culpepper threaten to physically harm him. He exaggerated what occurred, implying that Culpepper would have made physical contact had he not moved to stand next to or behind Johnson. Although Johnson indicated that he was “nervous” about what might happen, he also testified that he did not have to get between Beall and Culpepper as if to “break up a fight.”

Furthermore, there was no evidence that anyone would have reported the same to the base military police or command, or to management. Neither Johnson nor Jordan gave any indication that anyone else, including visitors to the facility, overheard the conversation. Nor was there any other evidence that they had. In fact, Beall admittedly went about his union business with another unit before even thinking about access or reporting his alleged concerns to management. As previously stated, had he

²⁵ The Board in *Good Samaritan Medical Center*, *supra*, found the employee’s misconduct did not forfeit the protection of the Act. The Board stated that it did not need to pass on whether *Atlantic Steel Co.*, 245 NLRB 814 (1979) was applicable to that case since it involved 8(b)(1)(A) and 8(b)(2) allegations. However, it is apparent that whether *Atlantic Steel* applies or not, the standard for when an employee forfeits the protection of the Act is the same whether the Respondent is an employer or labor organization. *Good Samaritan Medical Center*, *supra* at 294 fn. 4.

²⁶ Of note, even considering the 1st Circuit Court of Appeals’ denial of enforcement based on the facts in *Good Samaritan Medical Center*, this case is distinguishable. The Court found that the Board in *Good Samaritan* failed to rely on evidence showing the union’s motive for reporting the employee’s bad behavior— in other words, that the employee

mistreated a union official during a meeting. *Good Samaritan Medical Center Ctr. v. NLRB*, 858 F.3d 617, 631, 641–642. (1st Cir. 2017). Here, as stated, I have considered all of the evidence of record, including the reasons stated by Beall for notifying Bonnette and Grim, and decided that Beall’s motive was based on his demonstrated animus towards Culpepper’s protected activity. Nevertheless, Board judges are bound to apply Board precedent which neither the Board nor the Supreme Court has reversed (notwithstanding contrary Courts of Appeals decisions). *G4S Regulated Security Solutions*, 359 NLRB 947, 947 fn. 1 (2013); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984).

²⁷ A union may also rebut such presumption by showing that it acted pursuant to a valid union-security clause, but this case does not involve a security clause issue or allegation. *Id.*

been so concerned about what others heard or saw, he would have reported the incident immediately. Rather, the evidence indicates that Beall only reported the incident to TLC management after he allegedly remembered that he would not be able to fulfill his hollow threat to Culpepper about filing internal union charges against him. Based on Beall's discredited logic, it would not have mattered whether or not he reported the incident to TLC management since the decision to ban access to the facility resided with the Army and not with TLC. This is a fact of which he was aware.

Moreover, Grim contorted and exaggerated her testimony, basing it on her own assumptions about what Beall meant instead of what he actually told her. Therefore, I do not find that Respondent has shown that Beall's report "was necessary to the effective performance of its function of representing various unit members working at Fort Benning."²⁸

In addition, I discredit any argument that Beall's filing of a termination grievance supports a finding that his motive was not born out of Culpepper's protected activity. To the contrary, it appears to have been an afterthought as it was filed on July 18, 10 days after the incident and 6 days after the charge filed against the Union, without any credible reason provided for the delay. There was no evidence of any investigation on his part, or an attempt to interview or notify Culpepper prior to filing a grievance with Grim. In fact, the Union did not notify Culpepper of the grievance and Grim's denial until August 25. (R. Exhs. 9–10; GC Exh. 1(a).)

C. Respondent's Defenses

I have considered all of Respondent's defenses, including cases cited in support of them (and including those not specifically mentioned here), and find that they are inapplicable. For example, Respondent relies on *Laborers Int'l Union of N. America, Local 872*, 359 NLRB 1076, 1077–1078 (2013), in which the Board affirmed the administrative law judge's finding that respondent union did not violate the Act when it ejected and had the police remove the charging party from its hiring hall. The charging party had a "heated confrontation" with one of the union hall dispatchers. On a subsequently date, after a dispatcher informed her, she did not have the required certification documents, she yelled, screamed and cursed out the hiring hall dispatcher in the hiring hall. When the dispatcher told her to leave or he would call the police, the charging party refused to do so, and continued to yell. When the hiring hall manager was came, and told her she had to leave, she moved towards the door, but continued to yell and utter expletives. She left the building and went into the parking lot, but refused to leave the property and continued to scream and curse in the parking lot. The Board considered the fact that the charging party's outburst occurred in the public hiring hall, but found that the combination of her "tirade of continuous screaming, her repeated use of expletives, and her persistent refusal either to 'calm down' or to leave justified the Respondent's decision to remove her from the property. Id. In the instant case, Culpepper did not have a continuous outburst of

screaming and yelling expletives or repeatedly refuse to leave the premises after being told to do so by Beall or management. In fact, Beall never actually asked him to calm down or threaten to call the military policy. There was no evidence that any visitors heard or could hear or see the discourse between Beall and Culpepper, and Johnson and Jordan were coworkers who also had also taken issue with the decision not to arm the guards and scheduling.

Respondent also cited *Amsted Indus.*, 309 NLRB 860, 861 (1992), in which the Board reversed the administrative law judge's ruling the union president sought the employee's discharge because he threatened to join the union. This case is dissimilar from this one in that the employee not only became "angry, belligerent," and cursed another employee who had tried to get him to join the union on two occasions, but on the second occasion, "had [him] up against the wall shaking his finger in his face and cussin' him out." Moreover, the employee told the other that, "[i]f I want to get out of the Union, I'll get out of the Union...I've got a .38 and I'll get my .38 and I'll blow anybody's goddamn brains out who tries to stop me from coming through the gate." Here, Culpepper did not rant and curse at Beall on several occasions or physical touch him or threaten any bodily or other harm. Id.

In addition, these cases did not involve situations where the union directly and unnecessarily provoked the charging parties. Other cases relied upon by Respondent are not applicable as they involve employees engaging in profane outbursts and insubordination towards their supervisors otherwise insubordinate to their supervisors.

Based on the foregoing, I find that the Union attempted to cause and substantially aided in causing Culpepper's termination by reporting his protected conduct to Grim in violation of Section 8(b)(2) of the Act. The Union's conduct, by Beall, also constitutes a derivative violation of 8(b)(1)(A).

CONCLUSIONS OF LAW

1. By causing or attempting to cause the Employer to discharge Culpepper because of his concerted protected activity, the Respondent Union, Sheet Metal Workers Local Union 85, violated Section 8(b)(2) and 8(b)(1)(A) of the Act.

2. The aforesaid violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

Having found that Respondent Union is responsible for the unlawful discharge of John Allen Culpepper, it must promptly notify the employer, The Logistics Agency, Inc., that it has no objections to the reinstatement of John Allen Culpepper and request that he be fully reinstated to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges

²⁸ It appears here that Beall's and Grim's testimony appears to have been crafted to support Respondent's litigation theory, and as such it is

not credible. See *CNN America, Inc.*, 361 NLRB 439 (2014), citing *In re: Lexus of Concord, Inc.*, 330 NLRB 1409, 1412 fn. 9 (2000).

previously enjoyed. If The Logistics Company, Inc. refuses to reinstate Culpepper, Respondent Union must show that it submitted written notification to The Logistics Company, Inc. and to Culpepper that it did not object to Culpepper's reinstatement.

Having found that Respondent Union is responsible for the unlawful discharge of John Allen Culpepper, it must make him whole for any loss of earnings or other benefits suffered as a result of his unlawful discharge. See *Iron Workers, Local No. 111 (Northern States Steel Builders)*, 298 NLRB 930 (1990), enf. 946 F.2d 1264 (7th Cir. 1991) (backpay is an appropriate remedy against a labor union which has caused a discriminatory discharge, even absent complicity of the employer). Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent Union shall also be required to expunge from its respective files any and all references to the unlawful discharge and to notify Culpepper in writing that this has been done and that the unlawful discharge will not be used against him by Respondent Union in any way. The Respondent Union shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent Union shall also compensate Culpepper for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

Additionally, the Respondent Union will be required to request that The Logistics Company, Inc. expunge from their files all records of Culpepper's discharge from his personnel file and to refrain from using the discharge against him. The Respondent Union shall notify Culpepper in writing if and when this has been done. Further it shall request that The Logistics Company, Inc. provide, if requested, at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due to John Allen Culpepper under the terms of this Order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁹

ORDER

The Respondent Union, Sheet Metal Workers Local Union 85, Columbus, Georgia, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Attempting to cause and causing the Employer to discharge employees because of their protected concerted activity.

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

2. Take the following affirmative action necessary to

effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, notify the employer The Logistics Company, Inc. in writing that it has no objections to the reinstatement of John Allen Culpepper and request that The Logistics Company, Inc. offer John Allen Culpepper full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. If The Logistics Company, Inc. refuses to reinstate Culpepper, Respondent Union must show that it submitted written notification to The Logistics Company, Inc. and to Culpepper that it did not object to Culpepper's reinstatement.

(b) Make John Allen Culpepper whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Reimburse John Allen Culpepper an amount equal to the difference in taxes owed him upon receipt of a lump sum backpayment and taxes that would have been owed had there been no discrimination against him.

(d) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to John Allen Culpepper, it will be allocated to the appropriate periods.

(e) Within 14 days from the date of this Order, expunge from its union files any reference to the unlawful actions against John Allen Culpepper and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used in any way against him by the Union.

(f) Within 14 days from the date of this Order, request in writing that the employer TLC expunge from its files any reference to the unlawful actions against John Allen Culpepper and within 3 days thereafter, notify him in writing that this has been done.

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

(h) Within 14 days after service by the Region, post at its union office in Columbus, Georgia copies of the attached notice marked "Appendix."³⁰ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent Union's authorized representative, shall be posted by the Respondent Union and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent Union customarily communicates with its members by such means. Reasonable

²⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

steps shall be taken by the Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent's union office closes, or the Employer has gone out of business or closed the facility involved in these proceedings, the Respondent Union shall duplicate and mail, at its own expense, a copy of the notice to all current members and former employees employed by the Respondent at any time since July 8, 2016.

(i) Within 14 days after service by the Region, deliver to the Regional Director for Region 10 signed copies of the notice in sufficient number for physical and/or electronic posting by The Logistics Company, Inc. at its Columbus, Georgia Fort Benning facility, if the Company wishes, in all places or in the same manner as notices to employees are customarily posted.

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

Dated, Washington, D.C. May 24, 2018

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT cause or attempt to cause The Logistics Company, Inc. (TLC) to discharge employees because of their protected concerted activity.

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

WE WILL notify The Logistics Company, Inc. in writing that we have no objection to the reinstatement of John Allen Culpepper with The Logistics Company, Inc., and request in writing that The Logistics Company, Inc. offer John Allen Culpepper full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. If The Logistics Company, Inc. refuses to reinstate Culpepper, WE WILL show that we submitted written notification to The Logistics Company, Inc. and to Culpepper that we did not object to Culpepper's reinstatement.

WE WILL make John Allen Culpepper whole for any loss of earnings and other benefits suffered as a result of the

discrimination against him, plus interest.

WE WILL compensate John Allen Culpepper for any adverse tax consequences of receiving make-whole relief in one lump sum.

WE WILL remove from our files any reference to the unlawful actions against John Allen Culpepper and within 3 days thereafter, notify him in writing that this has been done and that his discharge by the Employer will not be used against him in any way.

WE WILL request in writing that The Logistics Company, Inc. remove from its files any reference to the unlawful discharge of John Allen Culpepper, and, WE WILL, within 3 days thereafter, notify him in writing that this request has been made.

SHEET METAL WORKERS LOCAL UNION 85

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/10-CB-179895> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

