

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

CONCRETE EXPRESS OF NY, LLC

and

**Case Nos. 02-CA-220381
02-CA-224789
02-RC-218783**

**TEAMSTERS & CHAUFFEURS LOCAL
UNION 456, IBT**

**COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

Allen M. Rose
Counsel for the General Counsel
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10278

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I. STATEMENT OF THE CASE

Pursuant to charges, and amendments thereto, in Case Nos. 02-CA-220381 and 02-CA-224789, filed by Teamsters Local 456, Brotherhood of Teamsters (the “Union”) against Concrete Express of NY, LLC (“Respondent” or “Concrete Express”), the Regional Director, Region 2, issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing against Respondent on December 21, 2018 (the “Complaint”). On January 4, 2019, the Regional Director issued an Order Further Consolidating Cases and Notice of Hearing that consolidated Case No. 02-RC-218783 with this matter. GC 1(g)-(r), (s), (x).¹

The Complaint alleges that, in about early May 2018, Respondent violated Section 8(a)(1) of the National Labor Relations Act (the “Act”), when its owner Chris Trentini: (a) interrogated employees about their union activities; (b) promised employees assignment of newer trucks and other improved working conditions if they refrained from engaging in union activity; and (c) threatened employees with discharge if they voted for the Union in an upcoming representation election. The Complaint also alleges that, about one or two weeks before May 10, 2018, the Respondent violated Section 8(a)(1) of the Act when Respondent supervisor and agent Donna Trentini threatened to close its operations if employees selected the Union as their bargaining representative. The Complaint further alleges that, on May 10, 2018, the Respondent

¹ References to the record exhibits herein shall be: “GC [exhibit number],” for General Counsel’s exhibits; “U [exhibit number]” for Union exhibits; and “R [exhibit number]” for Respondent exhibits. References to the transcript shall be “[Witness last name] [page number]” or “Tr. [page number].” (Chris Trentini’s testimony will be cited as “Trentini [page number]; Donna Trentini’s testimony will be cited as “D. Trentini [page number].) References to General Counsel Exhibit 7 shall be “GC 7 Tr. [page number].”

violated Section 8(a)(1) and (3) and (5), when it: (a) implemented a new dress code for its drivers; and (b) revoked the privilege of its drivers to park in Respondent's garage.²

Respondent filed an Answer to the Complaint on August 2, 2018 (the "Answer"), denying the material allegations therein, as well as the supervisory and agency status of Donna Trentini. GC 1(aa). At hearing, the Respondent amended its Answer to admit that Donna Trentini is a supervisor and agent pursuant to Sections 2(11) and 2(13), respectively, of the Act. Tr. 6-7.

The case was litigated before Administrative Law Judge Benjamin W. Green on April 23, and July 30, 2019.

² Before the hearing opened, based on a partial non-Board settlement of the current matter, the General Counsel withdrew the remaining allegations in the Complaint pertaining to the discharge of driver John Torres. Tr. 6.

II. ISSUES PRESENTED

1. Whether Respondent, in about early May 2018, by Chris Trentini, violated Section 8(a)(1) of the Act by:
 - (a) interrogating employees about their union activities;
 - (b) promising employees the assignment of newer trucks and other improved working conditions if they refrained from engaging in union activity; and
 - (c) threatening employees with discharge if they voted for the Union in an upcoming representation election.
2. Whether Respondent, about one or two weeks before May 10, 2018, by Donna Trentini, violated Section 8(a)(1) of the Act, by threatening to close its operation if employees selected the Union as their bargaining representative.
3. Whether Respondent, on May 10, 2018, violated Section 8(a)(1), (3) and (5) of the Act by:
 - (a) implementing a new dress code for its drivers; and
 - (b) revoking the parking privilege of its drivers to park at Respondent's garage located at 3771 Merritt Avenue, Bronx, NY.

III. FACTS

A. Respondent's Business Operations

At all times material to this case, Respondent Concrete Express has sold concrete to various customers. Christopher "Chris" Trentini ("Trentini") has been the admitted owner, supervisor and agent of Concrete Express; he is the sole member of the Respondent, which is a limited liability company. Answer ¶ 5; Trentini 12, 23-24, 259. His responsibilities include hiring and firing. Trentini 26.

At all material times, Respondent has employed drivers who deliver the concrete to customers in trucks owned by Respondent. Trentini 12-13. The record reflects that Respondent employed the following seven drivers in 2017 and 2018: Matthew Murray,³ Winston Walker;⁴ Adman Roberts;⁵ Channy Hernandez,⁶ Christian Reyes,⁷ Luis Fernandez,⁸ and John Torres.⁹ Trentini alone permanently assigned each driver a specific truck, and when he bought new trucks in 2016 and 2017, he alone decided which driver would be assigned one of the new trucks. Trentini 17-18, 28-29.

The trucks are loaded with concrete components at Respondent's yard located at 2279 Hollers Avenue, Bronx, New York, where those components are stored and where Respondent maintains its office. Trentini 13, 14.

³ Trentini 25, 27; Reyes 79, 84, 93. Hernandez 129.

⁴ Trentini 25, 27; Reyes 79, 84, 85, 88; Fernandez 92, 93; Hernandez 129, 130.

⁵ Trentini 25, 27 (spelled "Admond"); Reyes 79, 84, 85 (same); Fernandez 93 (same); Hernandez 129 (spelled "Adman").

⁶ Trentini 25, 27; Reyes 57; Hernandez 128.

⁷ Trentini 28; Reyes 53.

⁸ Trentini 28; Fernandez 90.

⁹ Trentini 28; Torres 152.

Starting near the end of 2017, Respondent has parked its trucks in “one large garage,” encompassing 5,600 square feet, located at 3771 and 3773 Merritt Avenue, Bronx, New York. Trentini 15, 30-31, 259; GC 7 Tr. 166-67.¹⁰ Prior to that time, Respondent kept its trucks at the Hollers Avenue yard. Trentini 259. Trentini did not know the exact date Respondent started parking the trucks there, but speculated that it was “towards the end of the winter because we wanted to put them inside for the cold weather.” Trentini 15-16.

After this switch to the Merritt Avenue garage, drivers started their routes by picking up their trucks at the garage. Trentini 16; Reyes 59, 65; Fernandez 100; Hernandez 134. The trucks have the concrete components either preloaded at the end of the day, or the drivers would drive the trucks to the Hollers Avenue yard to be loaded before their first delivery. Trentini 16-17. If the drivers have more than one delivery to make during the day, they may return to Hollers Avenue to reload the truck. Trentini 17. At the end of the work day, drivers would go to Hollers Avenue to wash their trucks and possibly have them preloaded. Trentini 17; Fernandez 122.

Since July 2017, Trentini has employed his wife’s sister, Diane Denti, as an office manager and dispatcher; she also attested to supervising workers, including drivers. Trentini 12, 13, 16, 31; Denti 38, 232, 233, 246. She works in the office at the Hollers Avenue yard, and her responsibilities include in large measure assigning delivery orders to drivers. In particular, Denti receives telephone orders from customers, and transmits the details of the orders to the drivers by text or in person. Trentini 12, 34; Denti 39, 44, 233.

Chris Trentini’s wife, Donna Trentini, has been the “financial manager” of Respondent since 2004. D. Trentini 224-25.

¹⁰ Page 15 of the transcript reveals an obvious error in that it identified one of the garage’s street addresses as 3373, rather than 3773. There is no dispute that 3771 and 3773 are the two street addresses for the Merritt Avenue garage. Trentini 30-31, GC 7 Tr. 166, 167.

The record disclosed that Respondent employed only three other individuals: Alexis Trentini, George Denti, and Raphael Valencia, all of whom worked in non-driver positions. Trentini 25, 27.

B. The Union’s Petition for Election, the Election, and Tally of Ballots

On April 19, 2018, the Union filed a petition for election in Case 02-RC-218783 (the “Petition”), seeking to represent “[a]ll full-time and regular part-time drivers and mechanics employed by the [Respondent].” GC 1(a). The Petition’s Certificate of Service certifies that it was emailed to the addresses shown on the Petition, and sent by overnight delivery to the Respondent on the date of filing, April 19. GC 1(b). Trentini testified that the Respondent’s email address is ConcreteExpressofNY@gmail.com, which is the same as one of the addresses on the Petition. He admitted that he became aware that the Union filed the Petition when the Respondent received a copy of it. Trentini 14, 19-20.

Pursuant to a stipulated election agreement, a representation election was held in Case 02-RC-218783 at the Hollers Avenue office, on May 10, 2018, between 5:30 a.m. to 8:30 a.m. GC 2. The tally of ballots showed four votes in favor of representation by the Union, three against representation, and one determinative challenged ballot. GC 1(v) at 1. It is not in dispute that challenged ballot was cast by Rafael Valencia, the only non-driver who had voted in the election. GC 1(v) at 2.

C. The Alleged Section 8(a)(1) Violations Committed by Chris and Donna Trentini

1. Chris Trentini’s Alleged Unlawful Threat to Driver Luis Fernandez

Driver Luis Fernandez was employed by Respondent as a driver from the summer of 2017 to June 7, 2018. Fernandez 90. Fernandez testified that, a few days before the representation election, he was washing out his truck in the yard in the afternoon. Fernandez 95.

Trentini approached Fernandez, and was brief and to the point before walking away: “He came up to me, and he said that if I want to keep my job, I should vote no for the union.” Fernandez 95.

When Chris Trentini was asked at hearing whether he had any conversations with any driver in which the Union or the election was discussed, he answered, “Not to my knowledge.” Trentini 21. When asked if he ever talked to a driver in a conversation that was not a meeting about the Union or the election, he answered, “No.” Trentini 22. He also answered “no” when asked he ever had an encounter with an employee where only one party talked about the Union or the election. Trentini 22-23. Trentini answered “no” when Respondent counsel asked him if he made the alleged unlawful statement to Fernandez. Trentini 265.

2. Chris Trentini’s Alleged Unlawful Interrogation of, and Promise of Benefit to, Driver Christian Reyes

Christian Reyes worked as a driver at the Respondent from May 2017 to May 2018. Reyes 52-53. He voted in the election on May 10, and left his employment after the election. Reyes 53.

On a day within a week before the May 10 election, Reyes was washing his truck in the Hollers yard at the end of his shift. Trentini approached Reyes and asked him if he “ever signed a small card for the union or anything like that.” Reyes 54-55. After Reyes said no, Trentini asked Reyes, “[W]hat is it that you want, a new truck?” Reyes replied only that he was “happy to be working.” Reyes 55.

Reyes testified that a new truck was important to him during his tenure at the Respondent because, compared to his coworkers’ trucks, Trentini assigned him to drive an older truck with frequent mechanical problems. Reyes 55-56, 62. When Trentini bought new trucks, he would not let Reyes drive them. Reyes 62. At one point, Reyes’s truck was in disrepair for about a

month, during which time he received no work from the Respondent. Reyes 56, 67. During that month of unemployment, and three or four other times during his tenure at the Respondent, Reyes asked Trentini to drive a different truck. Reyes 57. The response from Trentini each time was to “brush[] it off.” Reyes 57.

As stated above, Trentini denied any encounters with employees where the Union or the election were discussed. Trentini 21, 22, 22-23. Upon examination by Respondent, Trentini testified that he did not recall having a conversation with Christian Reyes “wherein [Trentini] told him you'd give him a new truck or asked if wanted to drive a new truck.” Tr. 267. However, Trentini corroborated that Reyes drove an older truck, which Trentini testified was smaller than the new trucks. Trentini 267, 268. Trentini further testified that he had assigned Reyes to the older truck because Reyes was inexperienced. Trentini 267, 268.

3. Chris Trentini’s Alleged Unlawful Threat to Drivers Christian Reyes and Channy Hernandez

Both Reyes and driver Channy Hernandez testified to a statement made by Chris Trentini at the Hollers Avenue office during the critical period before the election. Reyes 57 (“about a week before the election”); Hernandez 131 (“before the election”).¹¹ Hernandez and Reyes were in the office, in the morning, when Trentini said to them: “If we want to keep our job, we should vote no.” Hernandez 131, 137. Reyes recalled Trentini’s statement as “if you guys don’t want to be fired, vote no.” Reyes 57. Neither employee said anything in response. Hernandez 131; Reyes 57. Hernandez testified that he and Reyes then left the office, at which point Hernandez asked Reyes, “did he really say that?” and Reyes responded, “yeah, he said that.” Hernandez 132.

¹¹ Driver Hernandez began working for Respondent in July 2017, and at the time of the hearing was still employed. Hernandez 128.

As stated above, Trentini denied having any encounters with employees where the Union or the election were discussed, and he answered “no” when asked specifically by Respondent counsel if he made the unlawful statement to Reyes and Hernandez. Trentini 22, 22-23, 265.

4. Chris Trentini’s Alleged Unlawful Interrogation of Driver John Torres

Torres, who began his employment at Respondent in February 2018, testified to Trentini approaching him in the yard, in the morning, a few days prior to the election. Trentini said to Torres, “I hear there’s talk about the Union coming in.” Torres 153. After Torres confirmed he heard that as well, Trentini “asked [him] how [he] felt about that.” *Id.* Torres replied that it was “a good thing,” but then informed Trentini that he would be leaving Respondent in July or August for a job with the Department of Sanitation. Complimenting him on getting the job, Trentini revealed to Torres that the “guys are making it seem like [Torres was] the ringleader” because Torres did not attend the two staff meetings about the Union. Torres 153. In response, Torres reminded Trentini that he had never been invited to the meetings. Torres 153-54. Because Torres had to load his truck, he told Trentini that they would talk later. Torres 154.¹²

As stated above, Trentini denied the existence of any encounters with employees where the Union or the election were discussed. Trentini 21, 22, 22-23. Upon examination by Respondent counsel, Trentini testified to having no memory of a conversation with Torres in which the union and the election were discussed. Trentini 265.

¹² On cross examination, Torres testified that he learned about one of the two meetings while driving home with fellow drivers Fernandez and Hernandez, after Fernandez received a phone call. Fernandez told Torres that the call had been an invite to a meeting and he (Fernandez) had been instructed not to invite Torres. Torres 162-63. Although Torres admitted on cross examination that these details were not in his affidavit, the fact of whether Torres was invited to, or forbidden from, attending a meeting has no relevance to the inquiry of whether Trentini uttered the alleged statements to Torres in violation of Section 8(a)(1),

5. Donna Trentini's Alleged Unlawful Threat to Drivers Fernandez, Hernandez, Murray, Roberts and Walker

Fernandez and Hernandez testified to an employee meeting held in the Hollers Avenue office before the election in which Donna and Chris Trentini made their opinions about the Union known to the drivers. Both drivers placed the date of the meeting during the critical period. Fernandez 91-92 (“about one week after” signing a Union authorization card on April 18, 2018); Hernandez 129 (“[b]efore the election”); GC 4. Fernandez testified that driver Winston Walker had informed him of the meeting, which took place after work in the dispatch office. Fernandez 92.¹³ In addition to Donna and Chris Trentini, in attendance were drivers Matthew Murray, Adman Roberts, Channy Hernandez and Luis Fernandez. Fernandez 93, 110; Hernandez 129.

The meeting began with driver Winston Walker collecting each employee's personal cell phone and taking them outside of the room. Fernandez 93, 102-103; Hernandez 130. Fernandez recalled that Walker did this at Donna Trentini's direction. Fernandez 93.

Both Fernandez and Hernandez testified to what was said at the meeting, albeit recalling a different order to the participants' remarks. According to Fernandez, after Walker returned, “Donna started talking about the union.” Fernandez 93. He recalled her saying:

she didn't want the union, and if the union comes in, all she has to do is, well, close down the company, and we'll be out of work. And then we'll have to go to a union hall and look for work.

Fernandez 93. Hernandez recalled that Donna Trentini “said something about if the Union come in, she's going to shut down the company.” Hernandez 130. Fernandez saw Chris Trentini nod his head in agreement. Fernandez 94.

¹³ Fernandez also testified to the existence of another meeting, which was a captive-audience meeting with a labor relations consultant. Fernandez 110. *See* Trentini at 22 (admitting to attending to a meeting with labor consultant).

Fernandez further recalled that, after Donna Trentini's comment about the Union, he heard Chris Trentini remark that "he used to be unionized . . . then he had to close the company [and] [h]e had to go bankrupt." Fernandez 94. Hernandez recalled Trentini commenting that drivers "are going to be on the bottom of the list . . . if the Union come in." Hernandez 130. In addition to the Trentinis' respective statements, both driver witnesses recalled that fellow driver Winston Walker spoke about a raise for drivers, but the Trentinis declined to discuss the matter with employees during a union campaign. Fernandez 94; Hernandez 130.

In Donna Trentini's testimony, she corroborated that there were several employees present, including drivers, when she spoke to them; however, she denied that there was a meeting deliberately called by Respondent after working hours: "the guys were just talking and I was there." D. Trentini 228-229. First not remembering exactly where the employee gathering took place, "[p]robably by the yard, at the – like, around the office" – she later admitted that it was "in the office." D. Trentini 228, 229. She was not asked by either Respondent counsel nor any other party, and therefore she did not deny, that this seemingly casual gathering began with the confiscation of cell phones, a precaution which, according to Fernandez, she directed driver Winston Walker to take. Fernandez 93.

When asked on direct examination what she told the drivers, Ms. Trentini described that she "shared" an "experience" with the assembled employees of having previously owned a trucking company that closed in 2005, where employees were represented by the Charging Party Union. She also testified on direct examination that she told the drivers that the business closed for reasons having nothing to do with the Union:

[the company] kind of ran out of money, because we couldn't collect money from the contractors. And when we did collect it, it was never in full or it was extremely late. So we had to close.

D. Trentini 226.

However, only when she was questioned by the Administrative Law Judge did Ms. Trentini admit that she explained to the drivers the Union's role in the financial problems of her trucking company:

I had said that it was Union and I couldn't stay in the business because I couldn't pay my bills. I couldn't pay my -- I just couldn't pay the bills anymore because I was owed so much money. Actually, I was owed -- 456, I owe them \$250,000 at that time

D. Trentini 229. She then further revealed:

-- and I couldn't pay my bills. And I explained that I owed the Union 250,000 because I couldn't collect and that I had told [the Union president] that, you know, if I had to sell my house, I would sell my house to pay him. And I ended up collecting what money that -- most of the contract has owed me and I paid him back earlier than I was -- I told him I could pay him by March. I paid him in February. . . . I had to go out of -- I was out of business because I couldn't collect money, I couldn't pay bills. They actually took trucks back, they repossessed trucks.

D. Trentini 230.

Nevertheless, Ms. Trentini had no memory of what provoked her to talk about the Union with employees. On examination by Union counsel, she stated that the employees simply "were talking one day about the Union." D. Trentini 228. When questioned by the Administrative Law Judge, she described that employees "were just talking about things that were going on with the trucks and all of that and I had said I had a business we did trucking." D. Trentini 229. However, when asked again by the Administrative Law Judge, she confessed her utter lack of memory as to why she talked about her prior business: "To be honest, I don't remember exactly . . . I really don't remember. I just know that something with my other business came up." Trentini 231.

Even though his wife Donna had remembered the gathering of drivers at the Hollers office, Chris Trentini testified that “to [his] knowledge” there existed no other meeting with drivers about the Union other than the meeting with a labor consultant. Trentini 22. When questioned by the Administrative Law Judge, Trentini stated that he “was not there” when his wife spoke about her prior failed business. Trentini 294-95, 297-298. Trentini testified to not recalling being at a meeting where an employee stated that they would not need a Union if they received a raise. Trentini 266. He answered “no” when asked by Respondent counsel if Donna Trentini ever told employees that Respondent would close if they voted for the Union. Trentini 267.

D. The Alleged Unlawful Implementation of a Dress Code and Revocation of Parking Privileges

1. The Two Text Messages Sent After the Tally of Ballots

On May 10, 2018, the ballots in Case 02-RC-218783 were tallied after the close of polls at 8:30 a.m. About two hours later, at 10:26 a.m., Diane Denti sent the following text message to all drivers:

Good Morning. As mentioned many times The proper dress attire
Jeans/work pants, boots and shirts. NO tank tops. NO sneakers.
NO sweat pants. Thank you.

GC 3 at 2 (grammatical errors in original); GC 5; Denti 40-42, 235-36; Trentini 277. An hour later, at 11:26 a.m., Denti sent another group text to the drivers:

Hi Please be advised as of Friday May 11th cars are NOT to be
parked in the garage. Thank you

GC 3 at 1 (grammatical errors in original), GC 5; Denti 40-42. There is no dispute that all drivers received this text.¹⁴

¹⁴ In any event, Reyes confirmed that it was a group text to drivers. Reyes 83-86.

Dispatcher Denti testified that, apart from customer orders, she texts employees “[i]f there’s things that need to be said” to the drivers. Denti 39. Trentini testified that none of Respondent’s work rules are written down – they are only “verbal” and employees are “told what to do or not do” upon hiring. Trentini 29-30.¹⁵ Denti recalled that non-written work rules were communicated to drivers when they were hired and she would “reiterate” those rules “[i]f anything was not followed.” Denti 47.

However, she emphasized in her testimony that she never reiterated a rule to all drivers in a group:

I would, individually go up to each one of them, or they come to me. . . . There’s only a few people in that place, so I would go one-on-one with them. . . . I was very one-on-one.”

Denti 47, 48, 236.

2. What Drivers Wore to Work

Drivers Reyes and Fernandez testified that no one told them what to wear to work at Respondent when they were hired, and the first time someone told them what to wear was when they received the group text message from Denti. Reyes 60, 61; Fernandez 90, 95-96, 96-97, 111, 112-13. When Torres started at Respondent in February 2018, no one told him what to wear to work. Torres 154. Driver Hernandez did not recall if anyone told him about dress attire when he began his employment, but recalled that Denti “would mention it, but there wasn’t no consequences” Hernandez 132, 139-40.

¹⁵ Denti, who began working for the Respondent in July 2017 (Denti 38-39), testified vaguely to seeing “two or three pages of . . . what [employees] needed, but . . . that was an old one.” Denti 48. Denti also testified to there at one time being an employee handbook of one or two pages in length. Denti 247, 248. Although Denti claimed that this old document included “how to dress” and “timely fashion,” the Respondent never produced at hearing any documents (other than the text messages) that contain work rules. Tr. 248-49.

Each driver testified to what they wore to work before Denti sent the group text on May 10. Reyes testified to wearing work pants and work boots when working for Respondent; he testified that he preferred work boots in order not to dirty his sneakers. Reyes 74, 75. Torres, like Reyes, preferred to wear “boots, jeans and a shirt.” Torres 154, 166. In contrast to Reyes and Torres, Fernandez wore shorts and sneakers in the summer, and sometimes boots; however, he wore sneakers most of the time because they were more comfortable. Fernandez 96. In colder weather, Fernandez wore “joggers” (which are similar to track pants) or jeans, but he mostly wore joggers because they were more “comfortable” and “flexible.” Fernandez 96. Fernandez further recalled that two fellow drivers, at the time he was hired, were also in the habit of dressing in shorts and sneakers. Fernandez 112. Hernandez in warm weather wore “sneakers, shorts, jeans and a T-shirt.” Hernandez 132. He sometimes wore jeans when the weather too cold to wear shorts. Hernandez 133. Hernandez prefers sneakers because they are more comfortable; he only bought boots when his sneakers became damaged. Hernandez 96, 132, 147-48.

3. Denti’s and Trentini’s Testimony Regarding Work Attire

When examined by Respondent counsel, Denti testified to a “dress code” for drivers: “Work pants, jeans are acceptable. Work shirts, long sleeve, short sleeve. And boots, work boots.” However, “sweatbands” and “tennis shoes” are not permitted. Denti 233-34. Contrary to the testimony of Reyes, Fernandez and Torres, Denti claimed that drivers were made aware of this code on “date of hire” and she would “verbally tell them.” Denti 234. Denti explained that the purported dress code is in place to “protect” employees “[b]ecause the work in construction sites.” Denti 234.

She recalled only once, on an identified date in 2017, to receiving a complaint from a customer about the dress of driver Hernandez. Denti 236-37, 249-50. She testified to telling only one other driver – Christian Reyes -- about the dress code, but gave no details as the circumstances. Denti 237.

Denti further testified that she sent the May 10 text about attire to all drivers because one driver -- Channy Hernandez -- “came in with sneakers.” Denti 235. However, instead of following her usual practice of talking to drivers individually about dress, she chose, for the first time on May 10, 2018, to inform drivers of the purported dress code in a group text. Denti 235, 249. Her stated reason for sending the group text that day was that she “did not want to point one person out.” Denti 238.

Trentini testified that it was Denti’s decision alone to send the text to the drivers, and it was she alone would be the one that would receive any customer complaints about attire. Trentini 277, 278, 280.

4. Where Drivers Parked Their Cars

Two months after driver Christian Reyes began working at Respondent in May 2017, he stopped taking public transportation to Hollers Avenue and began driving his personal car there; he would either park in front of the yard if there was space, or, if there was no space, he would find a spot on Hollers Avenue. Reyes 58-59. When Fernandez began employment at Respondent in the summer 2017, he drove his car to Hollers Avenue, parking in front of the yard or wherever there was space. Fernandez 99. When Hernandez began at Respondent in July 2017, he would drive to work and park his car near the yard. Hernandez 128, 134, 137.

All drivers employed when Respondent began parking trucks at the Merritt garage testified to starting the practice, upon arriving to work, of parking their personal cars in the

garage instead of near the Hollers Avenue yard. Reyes 59-60; Fernandez 99, 116, 125; Hernandez 134. As stated above, Trentini described the Merritt location, which spanned two street addresses, as “one large garage,” totaling 5,600 square feet. Trentini 15, 30-31, 259; GC 7 Tr. 166-67. Driver Fernandez confirmed that “it was two garages in one.” Fernandez 116.

Reyes’s practice was to park his personal car as far back as possible. Reyes 60. Fernandez’s habit was to take his truck out first and then park his car inside the garage. Fernandez 99-100. Hernandez testified to parking the car inside the garage and then leaving with his assigned truck. Hernandez 134-35. Mechanic Victor Gonzalez observed drivers taking trucks out of the garage and then parking their personal cars, which remained in the garage during his entire working day. Gonzalez 203, 204. Reyes, Fernandez and Hernandez each corroborated the practice of leaving their keys inside their cards so they could be moved during the day if necessary. Reyes 60; Fernandez 100; Hernandez 134-35.

It remained unrebutted at hearing that the Hollers yard time clock was moved to the Merritt garage. Reyes testified that, initially after Respondent switched to the Merritt garage, drivers would clock in at Hollers Avenue, “before it became an issue;” the clock was then moved to Merritt because drivers felt that they should clock in there first before picking up the trucks. Reyes 68-69. Fernandez recalled that the request to move the clock was also employee-driven, and the presence of the clock was one of the reasons he preferred parking his car there. Fernandez 102, 113. Mechanic Victor Gonzalez, who worked full-time at the garage, confirmed that the time clock moved into the garage about month after he started working there in November 2017. Gonzalez 202, 205.

Each driver further described the personal inconvenience caused by Denti’s May 10 text forbidding them to park in the garage. After May 10, Reyes would have to leave home about

ten-to-fifteen minutes early to find parking around Hollers Avenue. Reyes 60-61. Fernandez had to park near the Hollers yard because Merritt was zoned for commercial parking, and it took him about ten-to-fifteen minutes to find a space at Hollers Avenue; Fernandez then had to walk back to Merritt to get his truck, which took an additional ten minutes. Fernandez 101-01, 126-27. Contrary to his coworkers, Hernandez parked near the Merritt Avenue garage, but he had to wake up earlier to look for a space on the street around the garage, which would take him twenty minutes to a half hour to find. Hernandez 135. Torres described that, after Denti's May 10 text he, like Hernandez, would try to find parking around the Merritt garage, which would take between fifteen minutes to a half hour. Torres 155.

5. Mechanic Gonzalez's Testimony Regarding Parking

From November 2017 to May 21, 2018, mechanic Victor Gonzalez worked under Chris Trentini,¹⁶ at the Merritt garage, five-to-six days a week, eight hours a day starting at 7 a.m. Gonzalez 202-03. He would see Trentini at the garage once or twice a week, where Trentini would stay for a half hour. Gonzalez 203. Gonzalez further testified that he never complained about the personal cars parked in the garage, and he knew of no one who ever complained about the practice. Gonzalez 204-05. He also never heard of any truck in the garage being damaged by one of the personal vehicles, nor of any damage to a truck by another truck moving in and out of the garage Gonzalez 219, 220.

¹⁶ Gonzalez worked for RAV Truck & Trailer Repairs, Inc. (Gonzalez 203), which Trentini owned and was found to be a joint employer with Respondent in *RAV Truck & Trailer Repairs, Inc.*, Case 02-CA-220395, JD(NY)-12-19, slip op. (July 15, 2019). GC 7 Tr. 41 (Trentini admission of ownership).

6. Denti's and Trentini's Testimony Regarding Parking

Trentini testified that, before using garage at Merritt Avenue, his drivers parked their personal cars “down the street” from the Hollers Avenue yard. Trentini 259. Both Trentini and Denti testified to having never instructed drivers to park at the garage. Trentini 261; Denti 239.

Trentini stated that he first learned of drivers parking in the garage when “the drivers complained to Diane” and “[a]ll the drivers talking in the garage” Trentini 262. These complaints were not made to him directly; rather, he only heard of them from Denti. Trentini 272. Trentini did not recall any specific dates of any complaints. Trentini 262.

Regarding the substance of the complaints, Trentini initially testified that “[d]rivers told Diane that their trucks were hitting the garage.” Trentini 262. However, Trentini later denied that drivers were hitting the garage, stating only that “[t]he trucks were getting damaged in the garage.” Trentini 263.

Trentini described only one incident of damage: he found a Freightliner emblem “on the floor of the garage.” Trentini 263. It appears from Trentini's testimony that he first saw drivers' cars in the garage when he “went to check out the damage” because “[t]hat's when I seen the cars over in the garage.” Trentini 263. He then instructed Denti to tell the drivers to stop the practice. Trentini 263. Trentini did not identify when this incident happened, stating only that it was “before the election.” Trentini 263. Trentini also could not provide details of how this damage occurred, did not know what other vehicles were in the garage at the time of the alleged accident, and did not know what time of day the alleged accident occurred. Trentini 272, 272-73. He testified: “drivers sometimes back into trucks . . . I see damage on the trucks but nobody knows how it got there, you know, so.” Trentini 272, 273.

Trentini admitted that it was after the election concluded on May 10 that he gave the directive to Denti to tell drivers to stop parking in the garage. Trentini 264, 275. Trentini described that, on the day of the election, he arrived at 4:30 a.m., then he “drove around” with his wife until the conclusion of the polling at 8:30 a.m., when he observed the tally of ballots at the Hollers Avenue office. Trentini 273-74; GC 2.¹⁷ After observing the tally, he “went to work” at “my yard, my garage, drove around, you know.” Trentini 274. When asked at hearing what he did “there at the garage,” he answered, “I don’t recall. I went to the garage.” Trentini 275. But, when asked what he did “after [he] went to the garage,” he then testified, “I recall seeing some cars in the garage and told Diane, these guys are parking in the garage again.” Trentini 275. Trentini “probably” told Denti in person upon returning to the yard. Trentini 275.

As she testified with respect to other work rules, Denti claimed to have previously told employees “one-on-one” not to park in the garage; however, she did not testify to whom she told this to or when. Denti 241-242. Regarding the reason for sending the text, Denti provided testimony about the receipt of “complaints” about drivers parking in the garage, but she gave that testimony under leading and suggestive examination by Respondent counsel:

Q . . . Now after Concrete Express secured the location at 3771 Merritt Avenue, did there come a time where you learned that employees were parking their trucks in the garage?

A Yes.

Q Okay. And are you able to recall whether those complaints were before or after the May 10th election?

A Before.

Tr. 240. Denti claimed that the complaints came from “[t]he drivers,” but admitted, on examination by Union counsel, that it was just one driver: Winston Walker. Denti 251-52. Furthermore, she described the nature of the complaints were that drivers “couldn’t get their

¹⁷ There is no dispute that the polling took place at the Hollers Avenue office, as set forth in the stipulated election agreement. GC 2.

trucks out. If the keys weren't in -- the cars shouldn't just be there. It was hard for them to go in and out." Denti 240.

Denti explained at hearing that she sent the May 10 group text forbidding parking in the garage "as a result of having received those complaints." However, she admitted that she sent the text on May 10 upon the direction of Chris Trentini. Denti 251. Trentini admitted that Denti had no knowledge of how any damage occurred. Trentini 273.

IV. ARGUMENT

A. Violations of Section 8(a)(1)

1. General Legal Principles

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights protected under the Act. Whether a statement is lawful depends on whether it tends to interfere with the free exercise of these rights when viewed from the perspective of a reasonable person.¹⁸ The circumstances surrounding a statement are properly considered in the inquiry as to whether it reasonably tends to restrain, coerce, or interfere with employees' rights.¹⁹ Thus, the Board also considers the context and timing of employer statements in evaluating their objective tendency to coerce.²⁰

¹⁸ *ITT Federal Services Corp.*, 335 NLRB 998, 1002 (2001) (citing *American Freightways Co.*, 124 NLRB 146, 147 (1959)).

¹⁹ *See, e.g., Sunnyside Home Care Project*, 308 NLRB 346, 346, n.1 (1992) ("the Board does not consider subjective reactions, but rather whether, under all the circumstances, a respondent's remarks reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed under the Act") (citing *American Freightways Co.*, *supra*).

²⁰ *See, generally, Rossmore House*, 269 NLRB 1176, 1177 (1984) ("[t]o fall within the ambit of Sec. 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference"), *affd. sub nom. HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *see also Jones Plumbing Co., Inc.*, 277 NLRB 437, 437 & 440 (1985) (the timing of employer owner's comment to principal union supporter that there was one man he would like to fire, made one day after representation election during which employee had served

Unlawful threats may be explicit or implicit,²¹ and ambiguities that could render a statement unlawful are construed against the speaker.²²

2. The Testimony of Employee Witnesses Were Credible and Mutually-Corroborative Whereas Chris Trentini's Testimony Fundamentally Lacked Credibility

General Counsel's witnesses showed respect and care when answering questions, responding in a straightforward manner to examination by General Counsel, Respondent counsel, Union counsel and judge alike. Their testimony was also consistent on both direct and cross examination. The drivers all credibly testified to both the material and ancillary details of the threats, interrogations and promise of benefits alleged in the Complaint, and corroborated each other where there was more than one witness to events.

By contrast, Chris Trentini was defensive and combative on the witness stand to the point where he engaged in an unprovoked outburst when asked a straight-forward question.

Q All right. Now, did Diane Denti ever tell you that a customer complained about how your employees were dressed?

A I heard, yeah.

Q You heard from her?

A Yes. Let me ask you a question, may I?

JUDGE GREEN: No.

THE WITNESS: Okay.

JUDGE GREEN: Sorry. That's not the way it works.

as union observer, was a clear violation of 8(a)(1)); *Wilker Bros. Co., Inc.*, 236 NLRB 1371, 1372 (1978) (employer vice president's comment to an employee that they were no longer friends, the day after the employer received a union telegram listing the employee as a member of the union's organizing committee, violated Section 8(a)(1)), *enfd.* in relevant part 652 F.2d 660 (6th Cir. 1981)).

²¹ *Pomona Valley Hospital Medical Center*, 355 NLRB 234, 235 (2010) (where words could reasonably be construed as coercive, they may violate the Act).

²² *Con-Way Freight*, 366 NLRB No. 183 (Aug. 27, 2018), slip op. at 5-6, n. 23 (unlawful threat found where employees could reasonably believe that labor consultant who made a statement about his propensity for violence, with accompanying gestures, was referencing employees' union sympathies, even if his remark might have been only a reference to his own general inclination toward self-defense) (citing *ITT Federal Services Corp.*, *supra.*)

THE WITNESS: I mean, come on, sweatpants. You don't go to work in sweatpants and sneakers. It's not the – it's not – it's not what you wear on a construction site. So let's – let's move on here.

MR. ARNAULT: Objection. Move to strike. There's not a question.

THE WITNESS: I mean, come on.

MR. ROSE: I'd – I'd like to leave it actually.

THE WITNESS: How many times you ask me the same question?

JUDGE GREEN: I'm not going to strike it but --

THE WITNESS: Enough already, yeah.

Tr. 278-79.

Trentini also revealed himself on the witness stand to be a man of few words. Thus, it is not surprising that his direct and laconic speaking style is evident when the drivers testified to what Trentini said to them: each witness recalled Trentini's threats, interrogations and promises as brief and to-the-point. The testimonies of the drivers are credible and mutually-corroborative in this respect, as well as with respect to the material and secondary details of their encounters with Trentini.

Furthermore, it is difficult to trust Trentini's testimony in this case based on the inconsistencies, contradictions and evasiveness of Trentini's testimony in the transcript in *RAV Truck & Trailer Repairs, Inc.*, Case 02-CA-220395, JD(NY)-12-19, slip op. (July 15, 2019) (GC 7 here), which in large part formed the basis of the Administrative Law Judge's multiple adverse credibility determinations against Trentini in that case. *E.g.*, compare GC 7 Tr. 309 (testimony regarding RAV/Concrete Express loan) with *RAV Truck*, JD(NY)-12-19 at 6 n.9 ("I not only discredit Trentini on this point, but find his overall credibility diminished by a willingness to reverse his testimony as the defense required"), 11; and compare GC 7 Tr. 293-294, 297 (Trentini testimony regarding conversation with mechanics concerning discharge based on immigration status) with *RAV Truck*, JD(NY)-12-19 at 15; and compare GC 7 Tr. 45, 170, 206-

07, 208, 214 (Trentini testimony regarding arrangements to close RAV) *with RAV Truck*, JD(NY)-12-19 at 21.²³

3. Respondent Violated Section 8(a)(1) of the Act When Chris Trentini Threatened to Discharge Luis Fernandez If He Voted for the Union

An employer's direct threat of job loss if employees select a union to represent them violates Section 8(a)(1) of the Act.²⁴ There was no ambiguity in Chris Trentini's threat to Luis Fernandez: "He came up to me, and he said that if I want to keep my job, I should vote no for the union." Fernandez 95. Fernandez remembered where he was at the time and what he was doing: washing his truck in the yard. *Id.* Without a response from Fernandez, Trentini, having quickly accomplished his goal in threatening his employee, "just left." *Id.*

Respondent's sole defense to this allegation is Chris Trentini's self-serving denials: he answered "not to my knowledge" and "no" on cross examination when asked whether he had ever spoke to or with employees about the Union or the election. Trentini 21, 22, 22-23. He merely answered "no" when asked by Respondent counsel if he made the threat to Fernandez. Trentini 265.

²³ Respondent suggested at hearing that Fernandez and Reyes were biased because Respondent had fired them. Tr. 107-08. However, such suggestion of bias is dispelled by the admitted fact that the Union had raised its objections to the election while Fernandez and Reyes were gainfully employed. Trentini 276. Furthermore, Respondent counsel suggested the argument at hearing that Reyes's testimony of Trentini's threats was not credible because they were not in affidavit form prior to the hearing. Reyes 79-80. Firstly, the threat of job loss made by Trentini in the Hollers Avenue office was fully corroborated by current employee Hernandez. Hernandez 131. Secondly, there is nothing in the record regarding the substance of the affidavit in question; however, the record does reflect that the Union filed a second amended charge in Case 02-CA-220381 allegedly the unlawful discharge of Reyes. GC 1(k).

²⁴ *E.g., Tellepsen Pipeline Services. Co.*, 335 NLRB 1232, 1233 (2001) (finding violation where employer told employees that "they would lose their jobs if the Union won the election") (italics omitted).

Thus, based on the credible testimony of Fernandez, Respondent violated Section 8(a)(1) of the Act when Trentini unambiguously threatened his employee that he would lose his job if he voted for the Union in the upcoming election.

4. Respondent Violated Section 8(a)(1) of the Act When Chris Trentini Interrogated Christian Reyes About His Union Activities and Promised Him a New Truck

As with all allegedly unlawful employer statements, an employer's interrogation of an employee's union sympathies or activities is evaluated under the totality-of-circumstances analysis.²⁵ This analysis includes a consideration of "the background and timing of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation," as well as whether the employee was given assurances "that their participation was voluntary or that the purpose of the interviews was something other than to discipline those who actively supported the [union]."²⁶

With regard to an unlawful promise of benefit, the Board has long held that:

an employer's promise or grant of benefits during an organizing campaign is presumed to influence employees to relinquish their support for the union, and a violation is made out unless the employer establishes a legitimate reason for the timing of its announcement. Such promises made in the course of urging employees to reject unionization are unlawful because they link improved conditions to defeat of the union.

²⁵ *Rossmore House Hotel*, 269 NLRB at 1177-1178.

²⁶ *Sunrise Senior Living, Inc.*, 344 NLRB 1246, 1254 (2005) (in finding violation, Board considered that questioner was a high-ranking employer official and employees were not given assurances). *See also Stoddy Co.*, 320 NLRB 18 (1995) (in finding violation, Board noting that "interrogation occurred against a background of numerous unfair labor practices committed by the Respondent in an attempt to prevent its employees from selecting the Union as their exclusive collective-bargaining representative," questioner was "a high level supervisor" who conducted interrogation in his office, "core of management authority") (internal quotation marks and citations omitted).

Dyncorp, 343 NLRB 1197, 1198 (2004). A promise can be implied in the form of a question: “the significant predicate is whether or not [the employer] also expressly or impliedly promised, or at least led employees to believe, that Respondent intended to remedy, or at least consider remedying, what employees perceived as deficiencies in their benefits.” *Bakersfield Memorial Hosp.*, 315 NLRB 596, 600 (1994).

a. The Interrogation

Trentini was characteristically to-the-point when he interrogated driver Christian Reyes about his Union activities. Knowing already that the Union had filed the Petition to represent his drivers, Trentini asked Reyes if he “ever signed a small card for the union or anything like that.” Reyes 54-55.

As stated above, Trentini provided no more than general self-serving denials regarding whether he ever had conversations with his employees about the Union or the election. Trentini 21, 22, 22-23. Moreover, Respondent counsel never posed the question to Trentini whether he had asked Reyes about his Union activities, and thus Trentini never provided a specific denial of interrogating Reyes. *See* Tr. 267.

Trentini’s interrogation was a straight-forward violation of Section 8(a)(1). Trentini was Respondent’s highest-ranking official, the timing of the interrogation was during the critical period before the election, the information sought by Trentini was directly whether Reyes engaged in the protected activity of signing a Union card, and Trentini gave Reyes no assurances that he did not intend to punish Reyes if Reyes chose to reveal his Union activities. *See Sunrise Senior Living*, 344 NLRB at 1254; *Rossmore House Hotel*, 269 NLRB 1176, 1177-1178 (1984), *affd.* 760 F.2d 1006 (9th Cir. 1985).

b. The Promise of Benefit

Although Reyes denied signing a Union card, Trentini had already established the context for the next sentence uttered to Reyes -- the question, “what is it that you want, a new truck?” Reyes 55. Under the circumstances of a Union campaign and Trentini’s interrogation about Reyes’s involvement in it, a reasonable employee would conclude that asking whether Reyes wanted new equipment was the dangle of a benefit if Reyes refrained from Union activity. However, the specific context of Trentini’s statement leads to the firm conclusion that he was ready to fulfill Reyes’s desire for a new truck if Reyes voted no in the upcoming election.

Reyes credibly described his history of asking Trentini to assign him a new truck because the older truck he drove deprived him of income when it was broken down. Reyes 55-56, 62. In fact, this aspect of Reyes’s testimony was unrebutted. Moreover, Trentini admitted that that he did not want Reyes to drive a new truck because of Reyes’s inexperience on the larger, more advanced trucks. Trentini 267, 268; Reyes 70. However, the reason *why* Trentini denied Reyes’s requests for a new truck, or the wisdom of doing so, is irrelevant. Reyes had operated a new truck once when driver Walker trained him on it (Reyes 88), and thus getting further experience on a new truck would have made Trentini’s offer even more enticing.²⁷ In any event, “[t]here is no requirement that the promise or grant of benefits involve matters with which the employees had “problems.” *Dyncorp*, 343 NLRB 1197, 1198 (2004). Furthermore, the force of Trentini’s promise was borne out by the fact that he was not offering a benefit applicable to all drivers, like an across-the-board raise. Only Reyes wanted to drive a new truck because he was the only driver not driving one.

²⁷ Trentini also claimed there were no new trucks available, suggesting that it was impossible to assign Reyes a new one. Trentini 268. However, it is clear from the record that drivers, including Reyes, knew that Trentini had the ability to buy additional new trucks.

Thus, the undisputed circumstances surrounding Trentini's promise supports a finding of a violation of Section 8(a)(1). The timing of Trentini's promise was during the critical period, and the Respondent has offered no legitimate reason why Trentini decided to ask Reyes about driving a new truck at that time. *See Dyncorp*, 343 NLRB at 1198. Furthermore, the context of the Union campaign, the petition, and the upcoming election would lead Reyes to reasonably believe that Trentini would at least consider finally fulfilling Reyes's clearly expressed desire to drive a new truck if the Reyes did not support the Union by signing a card. *Bakersfield Memorial Hosp.*, 315 NLRB at 600. *See also Genesee Family Restaurant*, 322 NLRB 219, 224 (1996) (finding Sec. 8(a)(1) violation where employer repeatedly asked employee to vote against the union while telling employee that "he would take care of him").

5. Respondent Violated Section 8(a)(1) of the Act When Chris Trentini Threatened Christian Reyes and Channy Hernandez With Discharge If They Voted for the Union

Trentini was again unambiguous and direct when he told Reyes and Hernandez that they would lose their jobs if they voted for the Union in the upcoming election. Hernandez 131, 137; Reyes 57. Hernandez's and Reyes's memories of what Trentini said to them were corroborative in both the words used and their meaning. Hernandez recalled Trentini saying, "If we want to keep our job, we should vote no" (Hernandez 131), and Reyes remembered, "if you guys don't want to be fired, vote no." Reyes 57. Both employees also corroborated that they were together when Trentini made the statement, that the statement was made in the office, and that both were silent after they heard Trentini. Reyes 57-58; Hernandez 131. The only difference in their testimony is that Reyes recalled the non-material detail that Diane Denti was in the office and Hernandez did not recall. Reyes 57; Hernandez 137. Furthermore, Hernandez testified to the significance of the remark in his memory: when he and Reyes left the office, he recalled asking

Reyes if Trentini “really [said] that?” and hearing Reyes respond “yeah, he said that.” Hernandez 132.²⁸

As stated above, Respondent’s sole defense to this allegation is Chris Trentini’s general denials of “not to my knowledge” and “no” when asked whether he had ever spoke to or with employees about the Union or the election. Trentini 21, 22, 22-23. Furthermore, in lieu of any specific denial that he ever threatened Reyes and Hernandez with job loss in the Hollers Avenue office, Trentini only answered “no” to the question, posed by Respondent counsel, if Trentini “ever *recalled* having a conversation in the office at 2279 Hollers Avenue with Christian Reyes, Channy Hernandez, and Diane Denti -- were you told -- both of those men, if they wanted to keep their jobs, they should vote, no.” Tr. 265 (emphasis added).

Thus, based on the corroborative testimony of Reyes and current employee Hernandez, the Respondent, by Trentini, violated Section 8(a)(1) of the Act by unequivocally threatening the two drivers with losing their jobs if they did not vote against the Union.

6. Respondent Violated Section 8(a)(1) of the Act When Chris Trentini Interrogated John Torres About His Union Activities

True to form, Trentini did not mince his words when he approached Torres in the yard and announced, “I hear there’s talk about the Union coming in.” Torres 153. After Torres acknowledged the fact, Trentini’s next sentence was the question, “how [Torres] felt about that.”

²⁸ Although Reyes did not testify to the conversation with Hernandez after they exited the office, testimony on that non-material fact does not detract from the corroborated testimony of Trentini’s threat inside the office. *See Precision Plating*, 243 NLRB 230, 236 (1979) (Board upheld the ALJ’s crediting of General Counsel witnesses, where ALJ credited witnesses who were consistent over matters of greater substance despite their minor inconsistencies over non-critical issues). Furthermore, Hernandez’s testimony should be considered particularly reliable because he is a current employee. *See Advocate South Suburban Hospital*, 346 NLRB 209, n. 1 (2006), quoting *Flexsteel Industries*, 316 NLRB 745 (1995) (citations omitted), aff’d mem. *NLRB v. Flexsteel Industries*, 83 F.3d 419 (5th Cir. 1996) (“the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests”).

Id. Torres’s testimony displayed a detailed memory of the back-and-forth of the remainder of the conversation, the substance of which followed naturally from Trentini’s stated purpose for having it: to talk to Torres about the Union. Torres recalled how Trentini thought he was the “ringleader” of the Union campaign, and how the two discussed Torres upcoming departure from Respondent to take a job with the City of New York.

Respondent’s sole defense to this allegation is Chris Trentini’s general denials. Trentini 21, 22, 22-23. However, instead of a specific denial, Trentini answered “no” to Respondent counsel’s question whether he “*recall[ed]* having any conversation with John Torres in the yard prior to the Union election regarding the Union itself and the upcoming election?” Tr. 265. Moreover, Trentini admitted to knowing that Torres left employment at Respondent to work for New York City (Trentini 266), which suggests that Trentini learned that fact from Torres when he had the conversation with Torres as recounted by Torres.

Trentini’s interrogation of Torres was as straight-forward as his interrogation of Reyes, and violated Section 8(a)(1) of the Act. Respondent’s highest official Trentini asked Torres directly to reveal his sympathies towards the Union during the critical period without offering any assurances to Torres that he would not suffer adverse consequences if he chose to reveal those sympathies. *See Sunrise Senior Living*, 344 NLRB at 1254; *Rossmore House Hotel*, 269 NLRB 1176, 1177-1178 (1984), *affd.* 760 F.2d 1006 (9th Cir. 1985).

7. Respondent Violated Section 8(a)(1) of the Act When Donna Trentini Threatened Employees With Closing Respondent If They Voted for the Union

An employer's direct threat to close its business if employees select a union to represent them violates Section 8(a)(1) of the Act.²⁹ Drivers Fernandez and Hernandez both testified that Donna Trentini made such a direct threat. They corroborated that the meeting occurred in the Hollers Avenue office during the critical period, and that all drivers were present except for Reyes and Torres. Fernandez 91-92, 93, 110; Hernandez 129. They both recalled that the meeting started with driver Winston Walker taking employee cells phones out of the room.³⁰ Fernandez 93, 102-103; Hernandez 130.

Although each driver testified to a different order of statements made at the meeting, they corroborated the substance of what was said, including Donna Trentini's threat to close Respondent if employees voted in the Union. Fernandez recalled that Donna Trentini made the threat following the confiscation of cell phones; Ms. Trentini said, "she didn't want the union, and if the union comes in, all she has to do is, well, close down the company, and we'll be out of work." Fernandez 93. Hernandez recalled that, later in the meeting, Ms. Trentini "said something about if the Union come, she's going to shut down the company." Hernandez 130.

In addition to the threat, both employees recalled remarks about the dangers of a union referral hall. In Fernandez's recollection, the remark came from Donna Trentini, who said, "then we'll have to go to a union hall and look for work" (Fernandez 93); Hernandez remembered it was Chris Trentini who said, "we're going to be on the bottom of the list." Hernandez 130.

²⁹ *Tellepsen Pipeline Services*, 335 NLRB at 1232 (employer owner violated Section 8(a)(1) when telling employees he "would shut the doors" before he would go union") (internal quotation marks omitted).

³⁰ The corroborated testimony about the confiscation of cell phones remained completely un rebutted in the record.

Both drivers also testified to driver Walker asking about a raise and Trentini demurring on discussing it. Fernandez 94; Hernandez 130.

In stark contrast to the mutually corroborative and detailed testimonies of the drivers, in her testimony Donna Trentini was vague, she testified inconsistently on direct examination and upon examination by the Administrative Law Judge, and she admitted to having a poor memory of events.

Firstly, on direct examination, Ms. Trentini would not fully acknowledge that there was a deliberately-called “meeting,” stating in sum and substance only that drivers happened to be assembled one day in the office and talking about the Union when she happened to be present. D. Trentini 228-229.³¹

Secondly, Ms. Trentini attempted, on direct examination by Respondent counsel, to portray her statements to employees in such a way that excluded the Union’s role in the closure of her prior company. When recounting, on direct examination, what she allegedly told the employees about her prior company, she mentioned only that the prior company had a bargaining relationship with the Union, and that her business had to close because customers were not paying her in full or at all. D. Trentini 226. However, when questioned by the Administrative Law Judge, she first repeated that she told employees about the shortfall in receivables, but then added new and essential information left out of her direct testimony: that she also told employees that the amount of money she owed to the Union made the deficit in receivables more

³¹ Both Hernandez and Fernandez also testified to Chris Trentini being present for the meeting, with Fernandez specially recalling that Trentini nodded his head in agreement after Donna Trentini made the threat to close. Fernandez 93, 94, 110; Hernandez 129. However, Trentini denied he was there when his wife allegedly told her story about the prior Unionized company, and he refused to concede the existence of any meeting of drivers in which the Union was mentioned, expect the meeting called to listen to a labor consultant. Trentini 22, 294-95, 297-298.

onerous. D. Trentini 229. In fact, she admitted to explaining to employees that a debt to the Union of \$250,000 was such that she risked losing her home: “I explained that I owed the Union 250,000 because I couldn't collect [from customers] and that I had told [the Union president] that, you know, if I had to sell my house, I would sell my house to pay him.” D. Trentini 230. Furthermore, she admitted to telling employees that, after she paid the Union in full, she “couldn't pay the bills,” the company's trucks were repossessed and she had to close. D. Trentini 230.

However, thirdly, after refusing to acknowledge a meeting and providing inconsistent testimony on the what she told employees, Ms. Trentini fully admitted to the faultiness of her memory of what transpired that day. At the end of her testimony, when the Administrative Law Judge asked why she told employees about her prior company, she confessed: “To be honest, I don't remember exactly . . . I really don't remember. I just know that something with my other business came up.” D. Trentini 231.

In sum, it is extremely hard to believe Donna Trentini's testimony that, at a random gathering of drivers, she told an innocuous story about her prior business for reasons she could not at all explain because her memory was so poor. However, even if one were to credit that she “shared” this “experience,” this does not preclude the fact that she made the additional statement to employees of closing Concrete Express if the Union represented employees at yet another business she was involved in. Fernandez and Hernandez both had a clear memory of what Ms. Trentini told them, and events recounted by these two employees stand in contrast to Donna Trentini's vague testimony.³²

³² Before Donna Trentini testified on the second day of hearing, Respondent asked Fernandez if he was “aware that Donna Trentini owned a Union company and had to shut it down due to lack of funds.” Tr. 119. Fernandez answered that he was not aware, which is consistent with the

Thus, the credible evidence establishes that the direct statement of closure by Donna Trentini violated the Section 8(a)(1) of the Act. *Genesee Family Restaurant*, 322 NLRB at 223 (1996) (finding Sec. 8(a)(1) violation where employer told employee, “Before the Union comes in here I will close this place down”).

B. Violations of Sections 8(a)(3) and (5)

1. General Legal Principles

An employer has a duty to bargain in good faith with the union representing its employees over mandatory subjects of bargaining, and the employer violates Section 8(a)(5) of the Act when it makes a unilateral change to a term and condition of employment that constitutes a mandatory subject. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

The Board has long held that, in a case where election objections are pending:

absent compelling circumstances, an employer that chooses unilaterally to change its employees’ terms and conditions of employment between the time of an election and the time of certification does so at its own peril, if the union is ultimately certified. . . . Thus, if the election objections prove to be fruitless and the union is certified as the employees’ collective-bargaining representative, an employer that has unilaterally changed terms and conditions of employment will be found to have violated the Act.

Overnite Transportation Co., 335 NLRB 372, 372-373 (2001) (citing *Mike O’Connor Chevrolet*, 209 NLRB 701 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975)).

circumstance that Donna Trentini never in fact spoke about her prior company at all. Fernandez 119. Furthermore, Hernandez’s testimony, as a current, should be given particular weight. *See Advocate South Suburban Hospital*, 346 NLRB at 209, n.1 (2006).

Parking privileges and dress codes are among the terms and conditions of employment that an employer may not change without giving a union notice and opportunity to bargain over them. *E.g.*, *United Parcel Service*, 336 NLRB 1134, 1135 (2001) (changing parking locations); *Dynatron/Bondo Corp.*, 324 NLRB 572, 578 (1997), *enf. denied* 176 F.3d 1310 (11th Cir. 1999) (assigning parking spaces); *Public Service Company of New Mexico*, 337 NLRB 193, 199-200 (2001) (requiring employee uniforms); *St. Luke's Hospital*, 314 NLRB 434, 434 n.1 (implementing revised dress code); *Transportation Enterprises, Inc.*, 240 NLRB 551, 560 (1979) (same).

Furthermore, an employer violates Section 8(a)(3) of the Act when antiunion animus is a motivating factor in making an adverse change in working conditions, and the Board analyzes such action pursuant to *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981). *Willamette Industries, Inc.*, 341 NLRB 560, 562 (2004).

In the precertification context, the Respondent's remedial obligation is to rescind unlawful unilateral changes under Section 8(a)(5) is contingent on the ultimate certification of representative. *See Overnite Transportation Co.*, 335 NLRB 372 (2001). However, when an adverse change in working conditions is a violation of Section 8(a)(3), the remedy is rescission regardless of the bargaining obligation. *See Hamilton Plastic Products, Inc.*, 235 NLRB 1178 (1978) (rescission of rule ordered where employer violated Section 8(a)(3) by changing work rule upon gaining knowledge of union campaign); *See Indiana Hospital*, 315 NLRB 647, 654 (1994) (where unilateral change found also to be a Section 8(a)(3) violation, recession of change ordered as well as bargaining with union over the change).

2. Respondent Violated Sections 8(a)(3) and 8(a)(5) When It Revoked the Drivers' Parking Privileges on the Day of the Election

On May 10, 2018, Chris Trentini attended the tally of ballots in the representation election after the polls closed on 8:30 a.m. Trentini 274. At that time, he learned that, of the eight votes counted, seven were cast by drivers and one unopened ballot was cast by non-driver Raphael Valencia. More particularly, he learned that four out of his seven drivers voted for the Union. GC 1(v).

Trentini then “[w]ent to work,” visiting both his yard and garage. Trentini 274. When asked at hearing what he did “at the garage,” he answered, “I don’t recall[,] I went to the garage,” but when asked what he did “after [he] went to the garage,” he testified, “I recall seeing some cars in the garage and told Diane, these guys are parking in the garage again.” Trentini 275. This instruction to Denti was “probably” given to her when Trentini returned to Hollers Avenue. Trentini 275.

Trentini therefore did not testify that, when he visited the garage after the election, he saw any truck damage. He also did not testify that, when he visited the garage, he heard any complaints about drivers’ personal cars.

However, he did testify to seeing the drivers’ cars parked in the garage, which, the record reflects, was far from the first time he had he noticed them. By May 10, he had been using the garage for at least a half a year, and, as full-time garage mechanic Gonzalez testified, Trentini would visit the garage for a half hour once or twice a week. Gonzalez 203. Furthermore, Trentini admitted that has walked between the Merritt garage and the Hollers yard “many times” (Trentini 16), and his description of what he did after the ballot count gives the distinct impression that it was a typical day for him: “[I] [w]ent to work” at “[m]y yard, my garage,

drove around, you know -- . . . whatever I had to do.” Trentini 274. Indeed, Trentini admitted that he already knew drivers were parking their cars in the garage. Trentini 263.

The testimonies of the drivers on the topic of parking their cars in the Merritt Avenue garage were consistent, mutually-corroborative and clear. Each driver, as well as mechanic Gonzalez, testified that the drivers parked their cars at the Merritt Avenue garage after Trentini began using it for his trucks. Reyes 59-60; Fernandez 99, 116; Hernandez 134; Torres 155; Gonzalez 203, 204. Although the drivers employed different techniques when parking their cars and taking out their trucks, the testimony was consistent that drivers left their keys in the cars in case they had to be moved while drivers were on their routes. Reyes 60; Fernandez 99-100; Hernandez 134-35.

Apart from the practical benefit of keeping their personal cars sheltered from the weather,³³ drivers were also mutually corroborative when describing the detrimental change to their working conditions after Denti’s text forbidding them to park in the garage. Reyes needed to leave for work ten to fifteen minutes earlier to find parking around Hollers Avenue before going to Merritt Avenue to pick up his truck. Reyes 60-61. Fernandez had to take an extra 20 to 25 minutes to find parking near Hollers Avenue, and then to walk from the Hollers yard to the Merritt garage. Fernandez 100-01, 126-27. Hernandez had to wake up earlier to spend about 20 minutes to one-half hour to look for a parking space near the garage. Hernandez 135. Torres spent an extra fifteen minutes to one-half hour looking for a space near the garage. Torres 155.

In contrast to the consistent, unambiguous testimony of the drivers, Trentini’s and Denti’s testimonies were contradictory and vague, inconsistent with each other, as well as inconsistent with the position statement that Respondent had submitted during the investigation of this matter.

³³ This benefit is revealed in Trentini’s testimony that he began parking his company’s trucks in the Merritt Avenue garage when the cold weather approached. Trentini 15-16.

According to the Respondent's position statement:

After third Company truck was damaged while being parked in the Company's garage it was unsafe for the drivers to park their cars in the garage. The Company did not want to be responsible for any cars being hit while trucks are being pulled in and out of the garage. This is not a regular parking garage with assigned parking spots. The employees' personal vehicles were in the way.

There is public parking on the streets and the drivers were never told they could park in the garage. Rather, they took it upon themselves to park in the garage in the mornings when they picked up their truck. Again, there is public parking by the yard where they normally parked, but for some reason they took it upon themselves to park their cars in the garage without asking. This was brought to the owner's attention when he had to go over to the garage to inspect a damaged truck that was damaged when hit by another truck having to maneuver in and around personal vehicles parked on inside the garage.

GC 6 at 1-2.

Thus, the position statement indicates that Trentini became aware that drivers were parking in the garage "when he had to go over to the garage to inspect a damaged truck that was damaged when hit by another truck having to maneuver in and around personal vehicles parked in the garage." GC 6 at 2. The position statement also asserts that Respondent gave the directive to forbid parking in the garage on May 10 "[a]fter [a] third Company truck was damaged while being parked in the Company's garage" GC 6 at 1, 2. Moreover, this damage was the only reason identified in the position statement for forbidding parking in the garage.

At hearing, Trentini and Denti gave conflicting testimony regarding the purported reason for Respondent's prohibition on employee parking in the garage. Although the position statement fails to mention any complaints about the parking, Trentini testified that he gained the knowledge that drivers were parking in the garage only when "[d]rivers told Diane that their trucks were hitting the garage," although Trentini subsequently testified that drivers were not

hitting the garage, stating only that “[t]he trucks were getting damaged in the garage.” Trentini 262, 263, 272.

However, that is not what Denti testified to be the nature of the complaints she transmitted to Trentini. According to Denti’s leading and suggestive examination by Respondent counsel,³⁴ Denti admitted that the complaints she received were not about truck damage at all. Rather, the complaints were that drivers “couldn’t get their trucks out. *If the keys weren’t in --* the cars shouldn’t just be there. It was hard for them to go in and out.” Denti 240 (emphasis added). Apparently, Denti here unsuccessfully stopped herself from admitting that the problem with the parking was that it may have been, at one point in time, impossible to move a locked personal car to give way to trucks; however, that problem was apparently solved because, as the drivers testified, their practice was to leave their keys in their car for the purpose of moving the cars if needed. Reyes 60; Fernandez 100; Hernandez 134-35.

Moreover, this assertion by Denti and Trentini of “complaints” was belied by the testimony of garage mechanic Gonzalez, an employee who spent his entire full-time work schedule in the garage. Gonzalez never heard anyone complain about the personal cars parked in the garage, and he knew of no one who ever complained about the practice. Gonzalez 204-05. Further casting doubt on Denti’s testimony that multiple “complaints” came from “[t]he drivers,” is her admission, on examination by Union counsel, that it was just one driver: Winston Walker. Denti 251-52.

³⁴ Q . . . Now after Concrete Express secured the location at 3771 Merritt Avenue, did there come a time where you learned that employees were parking their trucks in the garage?

A Yes.

Q Okay. And are you able to recall whether those complaints were before or after the May 10th election?

A Before.

When Trentini did testify to the existence of truck damage, Trentini could not corroborate the facts asserted in the position statement, which specified that a total of three trucks were “damaged when hit by another truck having to maneuver in and around personal vehicles parked on inside the garage.” GC 6 at 1. Trentini did not testify to three incidents of truck damage, but just one: when he found a truck emblem on the garage floor. Trentini 263. Furthermore, he could not explain the details of how this damage occurred, he did not know what other vehicles were in the garage at the time of the alleged accident, and he did not know what time of day the alleged accident occurred. Trentini 272, 272-73. He finally admitted that he had essentially no proof whatsoever that any trucks were damaged as a result of the personal cars: “drivers sometimes back into trucks . . . I see damage on the trucks but nobody knows how it got there, you know, so.” Trentini 272, 273.

Denti’s and Trentini’s testimonies were also inconsistent with each other regarding the motivation behind sending the election-day text that forbade parking. Denti testified to the following as the reason for sending the text under examination by Respondent counsel:

Q What if anything did you do as a result of having received those complaints?

A Sent out a text once again to everybody that they are not allowed to park in the garage.

Tr. 241. However, under examination by Union counsel, Denti revealed the true reason:

Q Okay. Now on May 10th, did you directly receive the complaint about the parking garage?

A Yes.

Q From who?

A Chris Trentini.

Denti 251. Therefore, Denti admitted that she sent the election-day text based on the complaint of one person, who was not a driver: Chris Trentini. Denti 251.

Consequently, on the morning of the election, the drivers received a text which clearly removed a benefit that they had enjoyed daily since the end of 2017. Indeed, the fact that the benefit was previously enjoyed is embedded in the wording of the text, which was prospective: “*as of Friday May 11th cars are NOT to be parked in the garage.*” GC 3 at 1 (emphasis added).

a. Section 8(a)(5) Violation

As stated above, parking privileges are a term and condition of employment and a mandatory subject of bargaining.³⁵ Respondent cannot defend the removal of the privilege by arguing that neither Trentini, Denti nor anyone else ever explicitly allowed drivers to park in the garage. The record establishes that Respondent clearly knew about the practice and made no meaningful effort to stop it until May 10, 2018. Trentini testified to only two times seeing the cars parked in the garage: once when he first learned of it, at an indeterminate time “before the election” upon finding a Freightliner emblem on the ground; and the second time in the morning of May 10 after the polls closed (when he found no damage). Trentini 263. But it is utterly implausible that Trentini had not noticed those cars every time he visited his own garage once or twice a week between the date he began parking his trucks there at the end of 2017 and May 10, 2018.³⁶ The driver witnesses consistently testified to their months-long, daily habit of parking their cars in the garage since the time that Respondent began using the garage for its trucks.³⁷

³⁵ *United Parcel Service*, 336 NLRB at 1135 (2001); *Dynatron/Bondo Corp.*, 324 NLRB at 578 (1997).

³⁶ See Gonzalez 203 (describing weekly visits by Trentini); Trentini 16 (admitting to walking between yard and garage “many times”); Trentini 274 (describing what appears to be a typical work day that included visiting his garage).

³⁷ That Respondent had clear knowledge of the parking practice is also inferred by the un rebutted evidence that drivers demanded that the time clock be moved to the garage, and that it was in fact moved. Reyes 68-69; Fernandez 113; Gonzalez 202, 205 (corroborating that the time clock was moved from the Hollers Avenue office to the garage); Reyes 68-69; Fernandez 102, 113 (corroborating that the clock was moved at the drivers’ request for the apparent purpose of allowing the drivers to punch in where they picked up their trucks).

See Indiana Hospital, 315 NLRB 647, 654 (1994) (ALJ finding unlawful unilateral change when employer banned employee use of a certain location for lunch because, *inter alia*, employer had longstanding knowledge of the use and never prevented employees from using the location).

Respondent also cannot argue that removal of the privilege was not a unilateral change because it was not a “material, substantial, and a significant change from prior practice.” *See Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327, 327 (1976) (internal quotation marks omitted); *see also Crittendon Hospital*, 342 NLRB 686, 686 (2004). The Board has addressed this issue specifically with respect to parking policy and the record evidence establishes that Respondent’s change here falls squarely within the line of cases finding a material, significant change in parking policy. In *Berkshire Nursing Home, LLC*, 345 NLRB 220 (2005), the Board found that the employer had no bargaining obligation when it removed the privilege of most employees from parking in its back lot and limited parking to its side lot. The Board considered the change not to be material because the only detriment to employees caused by the change was that it increased employee walking time between the lot and the facility from one minute to three to five minutes. *Berkshire Nursing Home*, 345 NLRB at 220. The Board specifically distinguished that case from *United Parcel Service*, 336 NLRB 1134 (2001) on the ground that, in *United Parcel Service*, the change found significant, and therefore unlawful, was relocating the employer’s parking to an offsite location that increased employee commute time by twenty minutes due to the need to wait for a shuttle bus. *Berkshire Nursing Home*, 345 NLRB at 220 n.8.

In this case, as in *United Parcel Service*, the consistent, and un rebutted, driver testimony established that, when the parking privilege was removed, the drivers needed to spend up to one-half hour in additional time finding a parking space before clocking in at the Merritt garage and

picking up their trucks. Fernandez 100-01, 126-27; Hernandez 135; Torres 155; Reyes 60-61.³⁸ However, the extra time is not the only detriment here, because it goes without saying that parking one's personal car inside a garage in New York City, especially in winter, is a prized benefit. See *Berkshire Nursing Home*, 345 NLRB at 220 (indicating that parking lot security concerns are a factor in analyzing whether the change would be significant, although not finding evidence of security issues in that particular case). This instant case is further distinguishable from *Advertiser's Mfg. Co.*, 280 NLRB 1185, 1193 (1986), cited in *Berkshire Nursing Home*, where there was no material change when the employer prevented employees from parking in the first row of the parking lot, resulting only in employees having to walk a few extra yards from their cars to the facility entrance. Rather, this case is analogous to *Frank Leto Honda*, 321 NLRB 482, 496 (1996), which, in the view of the Board in *Berkshire Nursing Home*, was properly decided in part because the change of requiring employees to park on a side road entailed detriments in addition to making employees walk further from their cars -- employees were also unable to see their cars while at work, and there was a risk that the cars would be blocked by delivery trucks. Here, the significant additional time to walk from car to work is coupled with the detriment of having to park in the street rather than within the shelter and security of a garage.³⁹

³⁸ Reyes testified to having to spend 10 to 15 minutes looking for parking at Hollers Avenue before walking to the Merritt garage. Although he not estimate at hearing the time it took to walk from the Hollers yard to the garage, Trentini himself estimated that it took five to six minutes. Trentini 16.

³⁹ The facts of the instant case are also distinguishable from *Success Village Apartments, Inc.*, 348 NLRB 579, 580 (2006), in which the Board found a change in parking policy not material because it only required employees to walk 200 additional yards. For Fernandez and Reyes, who parked near the Hollers Avenue yard, the distance between the Hollers office and the Merritt Garage, according to Google Maps, is 0.4 miles, which is over 700 yards. (The Administrative Law Judge is permitted to take judicial notice of this adjudicative fact. See *Bud Antle, Inc.*, 359

Finally, the Respondent cannot seriously raise the defense that it was privileged to make the pre-certification unilateral change because of “compelling circumstances” (*see Overnite Transportation Co.*, 335 NLRB at 372) or “compelling economic considerations” (*see Mike O'Connor Chevrolet*, 209 NLRB at 703). There is nothing “compelling” revealed in Trentini’s testimony about truck damage that would have necessitated removing the parking privilege on May 10. As stated above, he found no truck damage on May 10 to warrant an immediate stop to the parking practice, and he could not identify any truck damage other than finding the Freightliner emblem on the garage floor at an indeterminate time before May 10. The fact that Trentini knew about and allowed the parking practice to continue since late 2017 disproves any claim of economic exigency in eliminating the parking practice on May 10.

Therefore, the record evidence establishes that, when Respondent sent its May 10 text forbidding drivers from further parking in garage, Respondent made a change in the bargaining unit’s terms and conditions of employment in violation of Section 8(a)(5) of the Act.

b. Section 8(a)(3) Violation

As to the question of motive for removing the parking benefit, the evidence points in one, unlawful, direction. The record is clear that Trentini did not direct Denti to send the text on May 10 because he witnessed on that day any truck damage, or that he learned on that day of any further complaints from anyone about the cars parked in the garage. What is more, Denti and Trentini did not testify consistently as to the reason why the text message was sent on May 10, 2018, and their testimony did not comport with the position statement in that regard. Trentini 262, 263, 272; Denti 240; GC 6. Nevertheless, Denti and Trentini were consistent on the salient,

NLRB 1257 n.3 (2013) (Board properly taking judicial notice of distances between locations based on Google Maps.)

and undisputed, fact that Trentini told Denti to remove the benefit within a few hours after the election ballots were tallied. Trentini 275; Denti 251.

As stated above, after Trentini discovered from the tally of ballots that the majority of his drivers voted for the Union, Trentini visited the garage, where he saw, as he had on numerous prior visits, the personal cars of drivers who had voted. Given that Trentini had condoned this practice for months, the inference is strong, from the timing of the election-day text, that Trentini was closing his garage to employee cars in response to the drivers' Union activities. *See Willamette Industries*, 341 NLRB at 562 (in upholding violation, Board "found it significant that the [r]espondent announced the change shortly after the second election was held, when the initial tally of ballots favored the [u]nion, and implemented the schedule change just days after the hearing officer recommended certifying the [u]nion"); *U.S. Cosmetics Corp.*, 368 NLRB No. 21 slip op. at 2 n.6 (July 8, 2019) (Board "readily acknowledg[ing] that timing alone may be sufficient to infer unlawful motivation") (citing *Emery Air Freight Corp.*, 207 NLRB 572 (1973)); *see also NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982) ("[a]n inference of anti-union animus is proper when the timing of the employer's actions is 'stunningly obvious'"), cert. denied 461 U.S. 906 (1983).⁴⁰

Here, however, there is more than timing to support the conclusion that the removal of the parking privilege was unlawfully motivated. The parking privilege was removed in the

⁴⁰ *See, e.g., Gaetano & Associates, Inc.*, 344 NLRB 531, 531 (2005) (layoffs occurring on same day that employer received the union's representation petition warrant inference of unlawful motivation), *enfd.* 183 Fed. Appx. 17 (2d Cir. 2006); *Mesker Door Inc.*, 357 NLRB 591, 592 (2011) (employer's issuance of discipline to union supporter one day after he discussed the union, strong evidence of unlawful motive); *Case Farms of North Carolina, Inc.*, 353 NLRB 257, 260 (2008) (termination of two employees less than 48 hours after their protected concerted activity became known to their employer strong evidence of unlawful motivation); *Sawyer of Napa, Inc.*, 300 NLRB 131, 150 (1990) (inferring antiunion motivation from discharge of two employees only two working days after learning of their union sympathies).

context of numerous other unfair labor practices, *i.e.*, the threats, interrogations and promise of benefits made by the Trentinis after receiving the Petition. *See Electrolux Home Products, Inc.*, 368 NLRB No. 34, slip op. at 5 n.18 and cases cited therein (Board recognizing that unlawful motive can be inferred by evidence that includes contemporaneous Section 8(a)(1) violations and other unfair labor practices).

Furthermore, the inconsistencies between Denti's and Trentini's reasons for removing the parking privilege, as well as the testimony's inconsistency with the position statement, provides additional reasons to infer an unlawful motive. *See ATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) (“[w]here . . . an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive.”); *Black Entertainment Television*, 324 NLRB 1161 (1997) (relying in part on shifting explanations given in employer's position statement and its assertions at the hearing for reducing hours and laying off of employees in finding pretext); *see also Shamrock Foods Company*, 366 NLRB No. 117 n.11 (June 22, 2018) (employer's discharge of employee for protected concerted activity unlawful based in part in shifting reasons given in a respondent's position statement filed with the Board as compared with respondent witnesses' testimony during hearing).

Therefore, based on the credible testimony of the drivers compared to the inconsistent testimony of Denti and Trentini, as well as the timing of the change in policy relative to the election within the context of Respondent's other violations of the Act, Respondent violated Section 8(a)(3) when it removed the parking benefit from employees.

3. Respondent Violated Sections 8(a)(3) and 8(a)(5) When It Implemented a Dress Code on the Day of the Election

When, two hours after the polls closed on May 10, 2018, Respondent's drivers received the text from Denti about what they can and cannot wear to work, it was the first time that Respondent ever promulgated a dress code policy.

The record established, including through the testimony of Trentini, that Respondent had no employee handbook and, in particular, no written dress code policy. Trentini 29-30. Reyes, Fernandez and Torres each testified that no one ever told them what they could wear to work, either at the time of hire or any other time before receiving the election-day text message. Reyes 60, 61; Fernandez 90, 95-96, 96-97.

Dispatcher Diane Denti admitted that, prior to the election-day text messages, she would advise drivers of any work rule exclusively on an individual basis. Denti 47, 48, 236. Thus, the group text message sent to drivers two hours after they voted in the election was unique in that a work rule was imposed on all drivers as a group. In fact, Respondent provided no evidence whatsoever of any previous text messages sent by Denti to the drivers as group that informed them of any Respondent rule or policy.

Indeed, Denti's admitted reason for departing from her exclusively one-on-one communication practice in favor of a group text was, counterintuitively, based on the dress of one driver, Channy Hernandez, whom she allegedly saw wearing sneakers on May 10. Denti 235. Thus, on the day that all the drivers voted in the representation election, she decided, for the first time, that she "did not want to point one person out." Denti 238. Sending a group text might have made more sense if there were more than one employee whom Denti had to talk to previously about attire, but, other than Hernandez, Denti could only name one other employee whom she talked to about attire – Christian Reyes – but her recollection was bereft of any detail

other than his name. Denti 237.⁴¹ Significantly, Denti did not name Fernandez, who testified to his habit of wearing shorts, joggers and sneakers, thus casting doubt on Denti's claim that she imparted any dress code to drivers. Fernandez 96. Furthermore, when Denti testified to receiving the 2017 complaint from a customer about the dress of one of Respondent's driver, that driver was Channy Hernandez. Denti 236-37, 249-50.

Hernandez testified at hearing that Denti spoke to him about his attire in the past, but could not recall when or how many times. Hernandez 132, 139-40. However, his lack of memory is consistent with the reality at Respondent that there was, in fact, no promulgated policy regarding attire. Hernandez testified that Denti would only "mention" to him that he should dress in a particular way, "but there wasn't no consequences" Hernandez 139-40. Thus, without a policy announced to a group, Denti's statements to him about attire were akin to a suggestion, something not significant for Hernandez to remember. As Hernandez testified when questioned by the Administrative Law Judge, he thought that, when Denti would tell him what to wear, he "didn't think it was like serious . . . that serious" such that "even if [he] didn't wear boots and [he] go[es] to work in sneakers [he] would still work even if [he] didn't have boots on." Hernandez 149.⁴² Thus, when he received the group text on May 10, he considered that text -- as did Fernandez -- to be a formally promulgated rule that had to be followed. After

⁴¹ Denti testified that drivers were told about a dress code on "date of hire" (Denti 234), but Denti has only worked for Respondent since July 2017. Denti 38-39. Thus, if true, she could not have communicated this Reyes on his first day because he began employment in May 2017. Reyes 52-53.

⁴² Denti corroborated the lack of seriousness and consequences when she denied that she ever disciplined employees for failure to follow a policy. She merely "would tell them." Denti 47. *See also* Denti 238 ("I most probably told them that if they could please not, you know --").

receiving the text, both drivers stopped wearing their choice of clothes. Fernandez 99; Hernandez 148-49.⁴³

In effect, *all* drivers stopped wearing their choice of clothes. Each driver testified to their preferences regarding work clothes before May 10: some dressing in boots and others in sneakers; some in pants and others in shorts or joggers. What is essential to, and consistent among, each driver's testimony is that they had a *choice* of what to wear to work before May 10, and their choice was eliminated after Respondent's election-day text. Consequently, even for the drivers (like Reyes and Torres) who preferred jeans and boots, they were stuck: had either of them been thinking of wearing shorts or a tank top one day as the summer approached, that choice was taken away from them by the group text. Put differently, there is no evidence that drivers, other than Hernandez, had any clue, prior to May 10 text, that they could not wear more comfortable clothes if they wanted to.

Finally, Respondent's line of questioning to each driver, and to its own witnesses, about the relative safety merits of wearing boots and jeans is irrelevant. In fact, although the record suggests that the requirement of wearing boots and jeans is objectively debatable,⁴⁴ it is telling, in terms of motive that Respondent was not concerned enough about driver safety in attire that it promulgated a written rule about attire *before* a majority of them voted for the Union on May 10.

⁴³ Hernandez wore sneakers after May 10 only temporarily when his boots were damaged. Hernandez 149.

⁴⁴ *E.g.*, Trentini 291 (estimating that 10% of the work that Respondent he performs involves construction sites). As with the elimination of the parking privilege, the Respondent cannot successfully argue that "compelling circumstances" allowed it to implement the dress code. *See Overnite Transportation Co.*, 335 NLRB at 372. As the record established, Respondent had no desire to implement dress policy at any time before May 10, even after it allegedly received a customer complaint about Hernandez's attire in 2017.

In sum, not only is the implementation of the dress code a violation Section 8(a)(5),⁴⁵ it is also violation of Section 8(a)(3). The timing of the text raises a powerful inference of unlawful motive.⁴⁶ The text on attire cannot be isolated from Respondent's numerous other unfair labor practices, as set forth above.⁴⁷ The text also cannot be isolated from the second, unlawful, election-day group text that removed employee parking privileges. Based on the record evidence, both texts were apparently the only two that drivers had ever received, as a group, setting forth a work rule or policy. It was therefore not mere coincidence that the drivers received these group texts within hours of voting in the representation election. The group texts were as much Respondent's reaction to the election as Respondent's threats, interrogations and promise of benefits were its response to the Petition that spawned it.

^V. CONCLUSION AND REMEDY

In conclusion, the preponderance of the evidence clearly establishes that Respondent Concrete Express violated Section 8(a)(1) of the Act by threatening employees with job loss, by interrogating employees about their Union activities and by threatening to close Respondent if employees voted for the Union in the upcoming representation election. The preponderance of the evidence also establishes that Respondent Concrete Express violated Sections 8(a)(1), (3) and (5) of the Act when it revoked its employees' garage parking privileges, and when it unilaterally implemented a dress code.

⁴⁵ *Public Service Company of New Mexico*, 337 NLRB at 199-200 (2001); *St. Luke's Hospital*, 314 NLRB at 434 n.1; *Transportation Enterprises, Inc.*, 240 NLRB at 560.

⁴⁶ See *Willamette Industries*, 341 NLRB at 562; *U.S. Cosmetics Corp.*, 368 NLRB No. 21 slip op. at 2 n.6; *NLRB v. American Geri-Care*, 697 F.2d at 60; *Gaetano & Associates, Inc.*, 344 NLRB at 531; *Mesker Door Inc.*, 357 NLRB at 592; *Case Farms of North Carolina*, 353 NLRB at 260 (2008); *Sawyer of Napa, Inc.*, 300 NLRB at 150.

⁴⁷ See *Electrolux Home Products, Inc.*, 368 NLRB No. 34, slip op. at 5 n.18 and cases cited therein.

Therefore, an order should issue finding that Respondent violated the Act, as charged, and an appropriate remedial order should issue: (1) that Respondent rescind its dress code policy and revocation of parking privileges; (2) in the event that the Union is ultimately certified as the bargaining representative of the petitioned-for unit, that Respondent bargain with the Union as to the unit's terms and conditions of employment, including dress code policy and garage parking privileges;⁴⁸ (3) that Respondent post an appropriate notice to employees; and (4) that Respondent comply with any other just and proper remedy deemed appropriate.

Dated at New York, New York
This 1st day of November 2019



Allen M. Rose
Counsel for the General Counsel
National Labor Relations Board
Region 2
26 Federal Plaza, Suite 3614
New York, New York 10278

⁴⁸ Alternatively, the Administrative Law Judge may retain jurisdiction over Section 8(a)(5) portion of the instant the case until such time that the Regional Director certifies the Union in Case 02-RC-218783. *See NTA Graphics*, 303 NLRB 801 (1991) vacated on other grounds, 316 NLRB 25 (1995).

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CONCRETE EXPRESS OF NY, LLC

Respondent

and

Cases 02-CA-220318
02-CA-224789
02-RC-218783

TEAMSTERS & CHAUFFEURS LOCAL UNION 456, IBT

Charging Party

Date of Mailing: November 1, 2019

**AFFIDAVIT OF SERVICE OF: COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE
LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, state under oath that, on the date indicated above, I served the above-entitled document(s) by electronic mail (Email), as indicated below, upon the following persons, addressed to them at the following addresses:

By eFiling

Hon. Kenneth W. Chu
Associate Chief Administrative Law Judge
National Labor Relations Board
Division of Judges
26 Federal Plaza
New York, New York 10278

By Email

Aaron T. Tulencik
Mason Law Firm Co., L.P.A.
P.O. Box 398
Dublin, Ohio 43017
atulencik@maslawfirm.com

By Email

Bryan T. Arnault, Esq.
Blitman & King LLP
443 North Franklin Street
Syracuse, New York 13204
btarnault@bklawyers.com

November 1, 2019

Date

Allen M. Rose

Print Name

Board Agent

Title



Signature