UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD Petitioner	)	19-2356
v.	)	Board Case Nos. 08-CA-188055, et al.
ROEMER INDUSTRIES, INC. Respondent	)	

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

The National Labor Relations Board hereby applies to the Court for enforcement of its Order issued against Roemer Industries, Inc. on May 23, 2019, in Board Case Nos. 08-CA-18055, 08-CA-192702 and 08-CA-204521, reported at 367 NLRB No. 133. The Board seeks enforcement of its Order in full.

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

/s/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, D.C. 20570
(202) 273-2960

Dated at Washington, D.C.
this 21st day of November 2019

SERVICE LIST

NLRB v. Roemer Industries, Inc.
Board Case Nos. 08-CA-188055, 08-CA-192702 and 08-CA-204521

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UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that the foregoing document will be served today by first-class mail upon the following counsel:

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/s/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, D.C. 20570

Dated at Washington, D.C.
this 21st day of November 2019

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

Roemer Industries, Inc. *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC.[1] Cases 08–CA–188055, 08–CA–192702, and 08–CA–204521

May 23, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On September 24, 2018, Administrative Law Judge Sharon Levinson Steckler issued the attached decision. The Respondent Roemer Industries, Inc., filed exceptions and a supporting brief, the General Counsel filed exceptions and an answering brief to the Respondent's exceptions, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings,[3] and conclusions[4] and to adopt the judge's recommended Order as modified and set forth in full below.[5]

[1] We have corrected inadvertent errors in the judge's case caption.

[2] The record in this case suggests that the Respondent's attorney, Matthew D. Austin, has not conformed to the standards of ethical and professional conduct required of practitioners appearing before the Agency under Sec. 102.177(a) of the Board's Rules and Regulations. To begin with, Judge Steckler granted the General Counsel's motion to strike six portions of Counsel Austin's posthearing brief because the brief "misrepresented portions of the transcript and/or included facts . . . that were not in the transcript." The judge noted that this was not the first instance of similar conduct, citing *Roemer Industries*, 362 NLRB 828, 831 fn. 7 (2015), enfd. 688 Fed.Appx. 340 (6th Cir. 2017). There, a different administrative law judge criticized a posthearing brief filed by Counsel Austin as "contain[ing] many assertions not based on any record evidence," and a purported offer of proof that that judge characterized as "entirely improper." Id. Other documents filed with the Board in this matter by Counsel Austin maintain apparently frivolous positions, repeat claims previously found unsupported by Judge Steckler, and otherwise make statements that appear to be knowingly false. For example, the Respondent's briefs misrepresent the timing of several bargaining proposals related to the Respondent's unilateral wage increase. And the briefs maintain, without record support, that the Respondent asked the Union to limit the scope of its request for information about the Respondent's security surveillance cameras before the Respondent failed and refused to provide the requested information. In light of what appears to be a persistent pattern of misrepresentation by Counsel Austin, we have concluded that it is appropriate under Sec. 102.177(d) and (e)(1) of the Board's Rules and Regulations to refer allegations concerning Austin's conduct to the attention of the Investigating Officer for investigation and such disciplinary action as may be appropriate. We shall therefore modify the judge's recommended Order to include the referral. See *Deep Distributors of Greater NY d/b/a Imperial Sales, Inc.*, 365 NLRB No. 95, slip op. at 3–4 & fn. 15, 5 (2017) (Board modified judge's recommended Order to refer apparent hearing misconduct for investigation), enfd. 740 Fed.Appx. 216 (2d Cir. 2018); see also *Earthgrains Co.*, 351 NLRB 733, 733 fn. 3, 741 (2007) (Board adopted judge's recommended Order provision including Sec. 102.117(e) referral, while noting better practice is for judges to submit misconduct allegations directly to the Investigating Officer); *Bethlehem Temple Learning Center*, 330 NLRB 1177, 1177 fn. 3, 1178 (2000) (Board referred alleged attorney misconduct to the Investigating Officer for appropriate disciplinary action); *McAllister Towing & Transportation Co.*, 341 NLRB 394, 398 fn. 7 (2004) (same), enfd. 156 Fed.Appx. 386 (2d Cir. 2005).

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

We adopt the judge's findings that statements made to employees by the Respondent's owner Joe O'Toole on January 3, 2017, had a reasonable tendency, under all the circumstances, to interfere with, restrain, or coerce employees in the exercise of their Sec. 7 rights in violation of Sec. 8(a)(1). See, e.g., *El Paso Electric Co.*, 350 NLRB 151, 152 (2007) (stating standard), enfd. 272 Fed.Appx. 381 (5th Cir. 2008). In doing so, we note that to the extent O'Toole might have intended to imply, when he asked employees whether they wanted to keep working for the Respondent, that the Union's bargaining positions imperiled the survival of the company, O'Toole presented no objective basis for such an implication as would be required for his question to fall within the protection of Sec. 8(c). See, e.g., *Reeves Bros., Inc.*, 320 NLRB 1082, 1083 (1996) (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969)). We further agree with the judge that in the context of O'Toole's unlawful implied threat to employees' continued employment, combined with his unlawful attempt to undercut the Union by dealing directly with employees, employees would reasonably understand O'Toole's statement that he had hired a union-busting lawyer as a coercive threat to interfere with their right to act collectively through their selected bargaining representative.

In adopting the judge's finding that the Respondent unlawfully suspended and discharged employee Bruce Haas because of his protected union activity, we note that the judge inadvertently misstated certain aspects of Haas' disciplinary record. Specifically, the judge stated that Haas received a 5-day suspension pending discharge in 2008 (he received a 3-day suspension) and that Haas received a 1-day suspension on November 4, 2015 (he received a written warning). The judge also incorrectly stated that Haas was disciplined in the summer of 2016—and that the Union grieved the discipline—after O'Toole observed Haas by camera talking to a UPS driver. Haas testified that O'Toole "chewed him out" for the UPS driver incident, but he was not disciplined. However, O'Toole disciplined Haas for conduct observed by camera in 2013 (which discipline the Union grieved). Finally, the judge correctly found that Haas had previously reached the 5-day suspension level without being discharged, but incorrectly stated that this happened in 2008 (it happened in 2002 and 2003). No party filed exceptions to these inadvertent misstatements by the judge, which do not, in any case, affect our analysis. Additionally, in adopting the judge's finding that the Respondent offered pretextual reasons for disciplining and discharging Haas, we find it unnecessary to rely on the judge's finding that the discipline imposed was not in proportion to Haas' work infraction.

[4] In affirming the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally increasing employees' wages, we

ORDER

The National Labor Relations Board orders that the Respondent, Roemer Industries, Inc., Masury, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees' continued employment because of their support for the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC (the Union) or the Union's bargaining positions.

(b) Threatening to interfere with employees' right to act collectively through their selected collective-bargaining representative.

(c) Threatening to change employees' wage structure because of the Union's bargaining positions.

(d) Telling employees it had to take back wage increases because the Union had filed an unfair labor practice charge with the Board.

(e) Suspending, discharging, or otherwise discriminating against employees because of their support for and activities on behalf of the Union or any other labor organization.

(f) Changing the terms and conditions of employment of its unit employees because the Union filed an unfair labor practice charge with the Board on their behalf.

(g) Changing the terms and conditions of employment of its unit employees, including by raising and lowering their wages, without first notifying the Union and giving it an opportunity to bargain.

(h) Bypassing the Union and dealing directly with its employees regarding wages, hours, and terms and conditions of employment.

(i) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

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

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

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

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

(c) Compensate Bruce Haas for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 8, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Bruce Haas, and within 3 days thereafter, notify Haas in writing that this has been done and that the suspension and discharge will not be used against him in any way.

(e) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All production and maintenance employees of the Company except those individuals occupying watchman, confidential clerical, salaried or supervisory positions of assistant foreman level or above.

(f) On request by the Union, rescind the changes in terms and conditions of employment for its unit employees that were unilaterally implemented in May and July 2017.

(g) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes in the manner set forth in the remedy section of the decision.

(h) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 8, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

(i) Furnish to the Union in a timely manner the information requested by the Union on May 8, 2017.

(j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for

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note that, while the judge's conclusions of law give the date of the wage increase as May 19, 2017, the record shows (and the judge correctly found elsewhere) that O'Toole authorized the wage increase on May 10, 2017. Further, in affirming the judge's conclusions that the Respondent's July 2017 reduction of employee wages violated Sec. 8(a)(5), (4), and (1) of the Act, we do not affirm the judge's apparently inadvertent conclusion that the same conduct also violated Sec. 8(a)(3). No such 8(a)(3) violation was alleged, litigated, or discussed in the analysis section of the judge's decision.

[5] We shall modify the judge's recommended Order to conform to the violations found and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(k) Within 14 days after service by the Region, post at its Masury, Ohio facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 30, 2016.

(l) Within 21 days after service by the Region, file with the Regional Director for Region 8 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the alleged misconduct by the Respondent's counsel, Matthew D. Austin, as set forth above, is referred to the Investigating Officer, the Associate General Counsel, Division of Operations Management, pursuant to Section 102.177(e) of the Board's Rules and Regulations.

Dated, Washington, D.C. May 23, 2019

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten your continued employment because of your support for the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC (the Union) or the Union's bargaining positions.

WE WILL NOT threaten to interfere with your right to act collectively through your selected collective-bargaining representative.

WE WILL NOT threaten to change your wage structure because of the Union's bargaining positions.

WE WILL NOT tell you that we have to take back wage increases because the Union filed an unfair labor practice charge with the Board.

WE WILL NOT suspend, discharge, or otherwise discriminate against you because of your support for the Union or your activities on behalf of the Union or any other labor organization.

WE WILL NOT change your terms or conditions of employment because the Union filed an unfair labor practice charge with the Board on your behalf.

WE WILL NOT unilaterally change the terms and conditions of your employment, including by raising or lowering your wages, without first notifying the Union and giving it an opportunity to bargain.

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

WE WILL NOT bypass the Union and deal directly with you regarding your wages, hours, or terms and conditions of employment.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as your collective-bargaining representative.

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

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

WE WILL make Bruce Haas whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Bruce Haas for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 8, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

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

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All production and maintenance employees of the Company except those individuals occupying watchman, confidential clerical, salaried or supervisory positions of assistant foreman level or above.

WE WILL, on request by the Union, rescind the changes in terms and conditions of employment for our unit employees that were unilaterally implemented in May and July 2017.

WE WILL make unit employees whole for any loss of earnings and other benefits suffered as a result of our unlawful unilateral changes in terms and conditions of employment, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 8, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL furnish to the Union in a timely manner the information requested by the Union on May 8, 2017.

ROEMER INDUSTRIES, INC.

The Board's decision can be found at www.nlrb.gov/case/08-CA-188055 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Kelly Freeman, Esq., for the General Counsel.
Keith L. Pryatel and *Matthew D. Austin, Esqs.*, for the Respondent.
Anthony Resnick, Esq., for Charging Party Union.

DECISION

STATEMENT OF THE CASE

SHARON LEVINSON STECKLER, Administrative Law Judge. This case was tried in Cleveland, Ohio, on April 24–26, 2018. Charging Party United Steel, Paper, & Forestry, Rubber Manufacturing, Energy Allied Industries and Services Workers International Union, AFL–CIO, CLC (Union) filed the charge in Case 08–CA–188055 on November 14, 2016, and amended the charge on December 1, 2016; the Union filed the charge in Case 08–CA–192702 on February 8, 2017, and amended it on March 29, 2017; the Union filed the charge in Case 08–CA–

204521 on August 17, 2017. General Counsel issued the order consolidating cases, consolidated complaint on April 27, 2017, and issued an order further consolidating cases, second consolidated complaint and notice of haring (complaint) on November 30, 2017. Respondent filed timely answers.

General Counsel, Charging Party and Respondent filed timely briefs. On June 7, 2018, General Counsel filed a motion to strike 6 portions of Respondent's brief. I ordered Respondent to show cause why I should not grant General Counsel's motion. Respondent provided a timely response to the Order to show cause but responded to only three of the six areas General Counsel proposed to strike. I grant the motion as Respondent misrepresented portions of the transcript and/or included facts in its brief that were not in the transcript. Nor is this the first time that Respondent and its attorney have claimed information in its brief not supported by the hearing record. See *Roemer Industries, Inc.*, 362 NLRB 828, 831 fn. 7 (2015), enfd. 688 Fed.Appx. 340 (6th Cir. 2017). Some of these are discussed in more detail below in the appropriate section of the decision.[1]

On the entire record, including my observation of the demeanor of the witnesses,[2] and after carefully considering the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Ohio corporation, is engaged in the manufacture and nonretail sale of custom graphic industrial identification products at its facility in Masury, Ohio, where it annually sells and ship products, goods, and materials valued in excess of $50,000 directly from points outside the State of Ohio. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[3]

II. RESPONDENT ROEMER'S MANAGEMENT AND OPERATIONS

Respondent's owner is Joe O'Toole. His management team consists of: AnnFraley, the production manager; Connie Bistarkey, administrative services and custodian of records; Amanda Shinkovich, the quality manager; Jill Palumbo, engineer; and Mike Farmer, general manager.

Fraley is a long-time employee. She initially worked in the bargaining unit before eventually being promoted to production manager. She reports directly to O'Toole.

Bistarkey works in administrative services. She maintains records, including disciplinary records and employee appraisals. She apparently has a role in making sure pay is correct.

Shinkovich, a 3-year employee at the time of hearing, maintains the quality management system, handles customer complaints and driver questions, and assists Fraley with her duties, particularly when related to the parts manufactured. She can discipline employees at the lower levels of discipline, but cannot suspend or terminate them. However, if Fraley is on vacation, she can issue a suspension.

The facility, including the parking lot, is equipped with cameras that have been in place for 10 years. O'Toole and Fraley have access to the camera feed through their computers. However, the collective bargaining agreement precludes using the information from the cameras for certain types of discipline.

III. HISTORY OF UNIONIZATION AND RECENT BARGAINING

The facility has been unionized since 1973. The Union currently represents Respondent's 17 to 21 production and maintenance employees.[4] The facility has only one maintenance employee, Harold Hrabowy. The parties' last collective-bargaining agreement was in effect from February 22, 2013 until its expiration date of April 22, 2016. (GC Exh. 2.)

The parties' collective-bargaining agreement was in effect from February 22, 2013, through April 22, 2016. In March 2016, before the collective-bargaining agreement expired, the parties began negotiating for the successor collective-bargaining agreement. Throughout the negotiations, the parties

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[1] Unsupported in the record is whether O'Toole had a foot injury and where he had to park or access the stairs. Also unsupported is whether the Union has filed a surface bargaining or bad faith bargaining charge against Respondent, and furthermore the information is irrelevant to the allegations in this case. Nor was there any evidence that O'Toole was "frustrated" with the Union for cancelling and refusing to schedule bargaining dates. These references in the brief are struck.

[2] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather upon my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony, evidence presented, and logical inferences. The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 303–305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.

When a witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Testimony from current employees tend to be particularly reliable because it goes against their pecuniary interests when testifying against their employer. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961).

[3] The Union local representing the employees has changed its number due to mergers in the area. Respondent does not challenge that the Union remains the bargaining representative.

[4] Respondent's answer denies that the longstanding bargaining unit is inappropriate. Because Respondent adduced no evidence to support its answer and the collective-bargaining agreement contains the bargaining unit description, I find that Respondent failed to demonstrate that the longstanding unit is appropriate.

exchanged versions of proposals and revisions utilizing the redline method. As the parties continued, they marked certain proposals with "TA"—tentative agreement. However, those portions were tentative only and subject to further negotiations In the negotiations, Respondent was represented throughout negotiations by attorney Matthew Austin; sometimes O'Toole attended. The Union was represented by Jose Arroyo and Ron Merrick. Arroyo is the current Union staff representative, a position he held for three years. Merrick[5] is the Unit chairperson.[6]

Throughout negotiations, Respondent maintained that the union shop and dues checkoff provisions could no longer be included in the collective-bargaining agreement. O'Toole stated that he believed it would be an impediment to selling the company.

On November 21, 2016, the Union offered proposal #14 to strike the term "successor" from the portion ofthe agreement that bound any one or entity should O'Toole sell the company. However, this offer was limited to Respondent withdrawing its proposals on union security and checkoff. (GC Exh. 11.) By this time, the Union was clear that it rejected Respondent's wage proposals and countered with its own. It also discussed withdrawing its proposal on overtime should Respondent withdraw a proposal on overtime.

On November 28, the Union offered its proposal #15. The Union revised its proposal regarding use of the cameras, including limiting the number of cameras in each production area to a single camera. (GC Exh. 12.)

By this hearing, the parties had not concluded negotiations. Outstanding issues included wages and union security and dues checkoff. Despite the prior collective-bargaining agreements maintaining union security and dues checkoff, Respondent insisted that it could not include those provisions because it believed it could damage prospects for selling the operation.

IV. ON JANUARY 3, 2017, O'TOOLE, SHIMKOVICH AND FRALEY MEET WITH THREE EMPLOYEES

A. Facts

On January 3, 2017, after their first break, employee Hrabowy and two operators were called to a meeting with O'Toole, Shimkovich and Fraley. None of these employees were on the bargaining team.

O'Toole asked the employees for ideas to propel contract negotiations and that he wanted to discuss these ideas with his attorney, Matt Austin. O'Toole stated that Arroyo probably lost his bargaining notes and talked of Austin's notes. O'Toole told the employees that Austin was a "union busting attorney."[7] Hrabowy asked O'Toole if he really thought he needed "one of those." (Tr. 101.)

Hrabowy told O'Toole he should take the open shop proposal off the table. O'Toole said no to that idea. O'Toole then asked Fraley and Shimkovich whether they wanted to continue to work there. Both said yes. He then asked the employees whether they wanted to continue to works there. One employee stated he wanted a contract so that they could continue working. The other employee was quiet.

B. Analysis

General Counsel alleges that, within this conversation, O'Toole coercively stated that he hired a union busting attorney and threatened the employees' jobs in violation of Section 8(a)(1) and additionally violated Section 8(a)(5) by directly dealing with the employees. Respondent contends that the "union busting attorney" statement is protected by Section 8(c) of the Act.

Hrabowy's testimony was clear, straightforward, detailed, and uncontroverted. Respondent did not ask Fraley any questions regarding this meeting and did not call O'Toole or Shimkovich in its case in chief. I take an adverse inference because these Respondent witnesses would have had knowledge of this meeting and "reasonably be assumed to be favorably disposed to the party." *Grimmway Farms,* 314 NLRB at 73, fn. 2, citing *Property Resources Corp.*, 285 NLRB 1105 fn.2 (1987), enfd. 863 F.2d 964 (D.C. Cir. 1988).

Statements that have a reasonable tendency to interfere, restrain or coerce employees in the exercise of their Section 7 rights, when taken in context, violate Section 8(a)(1). *Erickson Trucking Service, Inc. d/b/a Erickson's Inc.*, 366 NLRB No. 171, slip op. at 2 fn. 6 (2018) (Pearce, dissenting). The statement is assessed in the context in which it is made and whether it tends to coerce a reasonable employee. *Westwood Health Care Center*, 330 NLRB 935, 940 fn. 17 (2000). The standard for assessing alleged 8(a)(1) threats is objective, not subjective. *Multi-Add Services*, 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). Any subjective interpretation from an employee is not of any value to this analysis. *Miami Systems Corp.*, 320 NLRB 71, 71 fn. 4 (1995), affd. in relevant part 111 F.3d 1284 (6th Cir. 1997).

I find the threatening question about whether the employees wanted to continue to work at Respondent's facility violates Section 8(a)(1). O'Toole, Respondent's owner, had called in three employees, who faced three managers. O'Toole disparaged the Union during the conversation. The implication is the wrong answer will get the employees fired—the labor equivalent of capital punishment.

Regarding O'Toole stating that he hired a "union busting attorney," Respondent is not protected by Section 8(c). The con-

[5] General Counsel called Merrick in her case-in-chief. Respondent declined to cross-examine Merrick and, after General Counsel closed her case, called Merrick in its case-in-chief. Only then did Respondent request Merrick's affidavits from General Counsel. General Counsel objected and I sustained the objection based upon Sec. 102.118(b) of the Board's Rules and Regulations. That rule restricts release of the affidavit only when the witness has testified and the statement will be used to cross-examine the witness. The Board finds that the plain language of the rule is specific to the limitation for purposes of cross-examination. *Wal-Mart Stores, Inc.*, 339 NLRB 64 (2003). Despite Merrick's status as an adverse witness who already testified, the purpose of Respondent's examination was a direct examination, not cross-examination. *Film Inspection Service*, 144 NLRB 1040, 1041 fn. 1 (1963).

[6] Merrick was a discriminatee in a previous Board case involving Respondent. *Roemer Industries*, 362 NLRB 828 fn. 7 (2015), enfd. 688 Fed.Appx 340 (6th Cir. 2017).

[7] Despite Respondent's assertions in brief, no record evidence supports Respondent's contention that employees were using that term.

versation included Respondent's highest ranking official questioning whether the employees wished to continue their employment while bragging he hired a "union busting attorney." Calling someone "union busting" is not unlike putting together two different words to create a specific meaning, like "Hulk" and "smash." Put together, the words mean that Hulk, a well-known hero in the Marvel Comic Universe, is about to smash something to bits. In context, O'Toole, the highest ranking officer, threatened to get rid of the Union while impliedly threatening the employees' livelihoods. See generally *Treanor Moving & Storage Co.*, 311 NLRB 371, 373 (1993). Also see *NLRB v. Thill, Inc.*, 980 F.2d 1137, 1142 (7th Cir. 1992) (the Act is concerned with, inter alia, unwarranted union busting).[8]

In distinguishing the statement from *Springfield Hospital*, 281 NLRB 643, 681 (1986), General Counsel differentiates whether the statement is hyperbole or telling employees he wants to get rid of the Union. General Counsel cites *Pratt (Corrugated Logistics), LLC*, 360 NLRB 304, 312 (2014), in which the consultant agent who was noted as a "union buster" also violated the Act by soliciting grievances. Similarly here, O'Toole bragged intent of union busting with a threat about continued employment.

This situation is also differentiated from *Erickson Trucking*, supra. In *Erickson*, the company president called the union business manager "the most arrogant son-of-a bitch I've ever met" and said the business manager ran the union like Hitler. While "flip and intemperate," the Board found the statement contained no threats or otherwise interfered with employees' Section 7 rights; it was a lawful expression of opinion under Section 8(c). *Erickson*, 366 NLRB No. 171, slip op. at 2. In contrast, O'Toole's statement conveyed a threat to interfere with employees' rights to act collectively through their selected bargaining representative.

For direct dealing, the long-held three-part test is:

(1) Respondent communicated directly with employees represented by a Union, for the purpose of

(2) Setting or changing wages, hours, and conditions of employment or undercutting the Union; and,

(3) The communication excluded the Union.

Southern California Gas Co., 316 NLRB 979 (1995).

O'Toole specifically asked the employees for collective-bargaining proposals, without the Union present. Bargaining for a successor collective-bargaining agreement was still in process. Thus, elements 1 and 3 are met. Regarding whether O'Toole undermines the Union, General Counsel notes, and I agree, that O'Toole's statement about Arroyo and his notes were disparaging per *Thill, Inc.*, 298 NLRB 669, 670–671 (1990), enfd. in relevant part 980 F.2d 1137 (7th Cir. 1992). O'Toole, who made comments about Arroyo's bargaining notes, had no intent except to undermine the Union. O'Toole's requests for bargaining proposals indeed was unlawful direct dealing. *El Paso Electric Co.*, 355 NLRB 544 (2010).[9]

V. THE UNION MAKES AN INFORMATION REQUEST REGARDING THE CAMERAS (COMPLAINT ¶¶12–13)

A. Facts

In the letters of understanding attached to the expired collective-bargaining agreement, the parties include Item 5, which addresses the use of electronic video at the facility:

> The use of electronic video (video, electronic data collection, et al), may be collected, without audio equipment, within the operation. This will continue and not be limited by number or technology in the future. In the use of this technology, no disciplinary action will be taken, except for material theft, sexual or physical harassment, or fraud, safety violations or insubordination.
>
> For all other disciplinary procedures, the Company and the Union agree not to use or refer to the cameras or use of cameras throughout the grievance procedure including arbitration. The use of or reference to cameras in the grievance procedure or arbitration will grant the grievance as requested by the Union or withdraw the grievance as requested by the Company.

[GC Exh. 2.]

The Union made several proposals to eliminate or reduce the scope of the surveillance cameras. Union Proposal # 2, dated June 28 or 29, 2016, proposed elimination of the cameras entirely. On November 28, the Union offered its proposal #15. The Union revised its proposal regarding use of the cameras, including limiting the number of cameras in each production area to a single camera. (GC Exh. 12.) Nonetheless the cameras continued to be at issue in negotiations.

On May 8, 2017, during a caucus, Arroyo emailed Austin that he had an information request for him. (GC Exh. 13.) They met and Arroyo handed him the information request, which was a pattern inquiry about cameras. (GC Exh. 14.) Arroyo testified, without controversy, that when he handed the information request to Austin, Austin stated Arroyo would have to file a charge to obtain the information. (Tr. 317). Arroyo said he would do it.

The information requested was:

> 1. What is the total number of cameras currently in the plant?
> 2. Does the company have further plans to install additional cameras?
> 3. Are the cameras operational as yet?
> 4. Who has access to these cameras?
> 5. Where are these cameras monitored from? What are the make and model numbers of the monitors?
> 6. Are these cameras able to record? If so, who has access to the recording?
> 7. Do the cameras have remote access?
> 8. Why were these cameras installed? For security? For discipline? For strike possibilities?

[8] I pass no judgment on O'Toole's claim that Austin is a union busting attorney.

[9] Respondent implies that the Union refused to continue to bargain and interact with Respondent. (R. Br. at 41.) He cites no record evidence to support this conclusion and I find no record evidence shows such. In addition, Respondent claims the statements do not violate Sec. 8(a)(3). (R. Br. at 40–42). However, General Counsel did not allege the statements violate that section of the Act.

9. Please provide information on any and all security breaches [sic] we have had in the last 5 years.

10. Why are the cameras pointed in the direction they are?

11. Who decided on the locations?

12. What field of view does each camera have?

13. What is the resolution of each camera?

14. Do the cameras pan.or zoom? if the cameras pan or zoom, list which ones do.

15. If they pan or zoom, how is it controlled? By who? And where is this accomplished?

16. Do we have the access to do this in case we possibly think that someone shouldn't be in the plant?

17. Will the local have access to view these cameras to verify the information provided from this request?

18. What is the cost of this surveillance project and is there any annual upkeep associated with this service? If so, who is doing it?

19. Has the company done a study on the need for such a project? If so, please provide the study results in whole.

20. Are the video feeds being sent elsewhere?

[GC Exh. 14.]

On June 14 and 16, 2017, Arroyo emailed Attorney Austin about dates for upcoming negotiations and asked that Respondent fulfill the outstanding information request regarding the surveillance cameras. Arroyo testified that he wanted the information to assist with negotiations. (Tr. 318). Respondent never requested to limit the scope of the information request and the Union never withdrew the information request.

The Union never received the information. None of Respondent's witnesses for Respondent testified otherwise, and no documents reflect any response from Respondent. For the hearing, General Counsel subpoenaed, "Any and all documents reflecting communications between Roemer and the Union regarding the Union's May 8, 2017 information request related to Roemer's use of surveillance cameras" and bargaining notes. (GC Exh. 33.) Respondent produced no documents in response to these subpoena requests.

B. Analysis

1. Applicable law for information requests

When the certified bargaining agent of the employees requests information, an employer can fulfill its "bargaining obligation under Section 8(a)(5) of the Act" by providing relevant information. *Diponio Construction Co.*, 357 NLRB 1206, 1217 (2011), citing *United Aircraft Corp.*, 192 NLRB 382, 389 (1971). The rationale for Section 8(a)(5)'s requirement is:

> Employees' certified representative is entitled to information that "will enable[ ] the union to negotiate effectively and to perform properly its other duties as bargaining representative." *Oil, Chemical & Atomic Workers Local Union No.6–418 v. NLRB*, 711 F.2d 348, 358 (D.C. Cir. 1983) (internal quotes omitted). The information requested must be relevant to the union's representation, but the threshold for relevance is low. See *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437–38 (1967). Information related to the wages, benefits, hours, working conditions, etc. of represented employees is presumptively relevant to collective bargaining. See *Oil, Chemical & Atomic Workers*, 711 F.2d at 359.

Country Ford Truck, Inc. v. NLRB, 229 F.3d 1184, 1191–1192 (D.C. Cir. 2000), enfg. 330 NLRB 328 (1999).

Once an initial showing of relevance is made, an employer has a burden of proof to demonstrate the lack of relevance or give sufficient reason(s) "'as to why he cannot, in good faith, supply such information.'" *ATV/Vancom of Nevada Ltd. Partnership*, 326 NLRB 1432, 1434 (1998), citing *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863 (9th Cir. 1997). When information is clearly relevant, the Board is not required to determine whether all of it is relevant. *Hughes Tool Co.*, 100 NLRB 208, 210 (1952). The requesting party is not required to demonstrate a"[a] ll possible ways in which the requested information may be useful" because all potential uses "may not be foreseen." *Bacardi Corp.*, 296 NLRB 1220, 1222–1223 (1989), citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). Respondent is required to make a reasonable effort to provide the information or otherwise explain why it did not present it. See generally *Hanson Aggregates BMC, Inc.*, 353 NLRB 287 (2008).

2. Respondent failed to provide necessary and relevant information

An employer might be required to provide information requested by the Union when the information has a probability of relevance and it will be of use to the union as it executes its statutory duties. *National Steel Corp. v. NLRB*, 324 F.3d 928, 934 (7th Cir. 2003), enfg. 335 NLRB 747 (2001). An employer has an obligation to provide relevant information to a union for contract negotiations. *ATC/Vancom*, 326 NLRB at 1434.

Surveillance cameras are a mandatory subject of bargaining. *Colgate-Palmolive Co.*, 323 NLRB 515 (1997). A mandatory subject is one that is "plainly germane to the 'working environment'" and "not among those 'managerial decision, which lie at the core of entrepreneurial control . . . ." *Brewers and Maltsters Local No. 6 v. NLRB*, 414 F.3d 36, 41 (D.C. Cir. 2005), quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979) (additional quotation marks deleted).

The expired collective-bargaining agreement contains provisions regarding cameras and their usage regarding discipline. Because the collective-bargaining agreement contains provisions regarding the cameras, Respondent recognizes the relevance of this topic. *Detroit Newspaper Agency*, 317 NLRB 1071, 1071 (1995). Respondent may have hidden cameras that are not apparent to the employees. The Union has an interest in determining not only the placement of the cameras, but the technical requirements. The information is germane to the union's statutory duties and should be provided. *National Steel Corp. v. NLRB*, 324 F.3d at 934–935. That one mechanic may have some knowledge of the cameras does not relieve Respondent of its duty to provide the requested information. *Detroit Newspaper Agency*, 317 NLRB at 1072 (having an alternative source of information does not excuse employer from providing information).

Attorney Austin immediately told Arroyo that he would have to file a charge to obtain the information. (Tr. 317). However, Respondent's brief, citing this transcript page, contends that:

> During discussion at the table and in the hallway, the undersigned [Austin] informed Arroyo that the request was too broad, sought information that the union already knew or can easily ascertain, sought information that the Union is not entitled to receive, and unless USW restricts the scope of the letter, the Company is not going to give the Union all this information. From that, Arroyo deduced, he "would have to file a charge to get this information." HT 317.

Respondent's version of the facts is not supported on that page or anywhere else in the record. Austin, who wrote the brief and was present throughout the hearing, never testified. Respondent provided no record evidence to show it objected to the information request in the detail Respondent's brief claims.[10]

Respondent further shoots itself in the foot when it argues no testimony demonstrated that the cameras changed, that there are too many cameras, that the video was used for unlawful purposes, or that Respondent could not afford them. (R. Br. at 47.) Indeed, some of the information requested asked for the same information. For example, whether Respondent intends to install more cameras remains relevant and per *Hughes Tool*, supra, the Board is therefore not required to determine the entire relevance here. Because Respondent failed to answer the information request regarding the cameras at all, Respondent violated Section 8(a)(5) of the Act.[11]

VI. RESPONDENT GIVES UNILATERAL PAY INCREASES, THEN TAKES THEM AWAY BECAUSE THE UNION PURSUED A BOARD CHARGE (COMPLAINT ¶¶ 8(D), 14(A), 14(B), 14(E), 14(F))

A. Facts

On May 10, 2017, O'Toole gave all employees, including the bargaining unit employees, a pay increase of 6 percent. He also ordered the certification and advancement program pay (CAP) to be increased by 15 cents. Employees advised Union Chair Merrick that they saw pay increases in their checks. Merrick went to HR Manager Bistarkey and asked her about it. Bistarkey said O'Toole told her to give everyone (not just bargaining unit) a 6 percent raise; those with certification and advancement program (CAP) pay received a 15-cent raise. Respondent never gave a previous mid-year raise.

On May 16, 2017, Arroyo wrote to O'Toole about the wage increases and proposed an additional 6 percent increase in the collective-bargaining negotiations. He demanded that Respondent bargain in good faith immediately over these issues; otherwise the Union "will seek relief under any and all available legal options." (GC Exh. 20.) At this time, the parties had not reached any interim agreement on wages. (Tr. 372, 379.) On June 22, 2017, Arroyo, on behalf of the Union, filed a charge that Respondent violated Section 8(a)(5) by circumventing the Union, failing to provide information and "refusing to bargain over mandatory subjects." (GC Exh. 22.)

On July 7, 2017, O'Toole ordered Bistarkey to rescind the bargaining unit's pay increase. O'Toole also conducted an employee meeting about the rescission. Fraley also instructed employees to meet in the break area during break time. Approximately 19 to 20 people, including managers, were in attendance. O'Toole was the only manager that spoke. O'Toole first discussed some of his health issues and then moved to the recent pay raise. He announced he was rescinding the pay raise, and, citing Arroyo and Merrick by name, the reason was because the Union was pursuing Board charges. Hrabowy testified that O'Toole said that he did not know whether the employees would have to pay back the money from their raises. (Tr. 104.)

The employees' next paychecks proved O'Toole meant what he said: The 6 percent increase was gone. On August 17, 2017, the Union filed charge 08–CA–204521 regarding the unilateral implementation of the wage increases and the unilateral and retaliatory rescission of the wage increases in July. Respondent restored the bargaining unit employees' pay increases.

B. Analysis

General Counsel alleges Respondent violated Section 8(a)(1) by O'Toole telling employees the Union caused Respondent to take away the pay increases. General Counsel also alleges that the pay decrease violated Section 8(a)(4), and the pay increase and decrease violated Section 8(a)(5). None of Respondent's managers testified about this meeting, so the General Counsel witness testimony is unchallenged. Respondent also provides no evidence that it notified the Union of its plans for the pay increase or decrease. I find Respondent violated the Act as alleged.

The relevant inquiry under Section 8(a)(1) is an objective one: Whether the employer's statements or actions would tend to coerce a reasonable employee and chill the exercise of that employee's Section 7 rights. See *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981); *Idaho Pacific Steel Warehouse Co.*, 227 NLRB 326, 331 (1976). I find that O'Toole's statement to the employees that he was rescinding the wage increase because the Union is pursuing charges is a threat. O'Toole's statement reflects getting even with the employees as a threat of reprisal for the Union acting to protect its bargaining role. The statement violates Section 8(a)(1) of the Act. *Anheuser-Busch, Inc.*, 337 NLRB 3, 15 (2001), enfd. 338 F.3d 267 (4th Cir. 2003), cert. denied 541 U.S. 973 (2004). Also see *Erickson Trucking*, supra, 366 NLRB No. 171, slip op. at 2 fn. 5 (per Member Emanuel, statement expressly identifying the Union as the cause for respondent's adverse action is unlawful on its face). The Board recently reminded that a statement is not an action. *Green Apple Supermarket of Jamaica, Inc.*, 366 NLRB No. 124, slip op. at 1, fn. 2 (2018). Here, O'Toole made good on his threat, and in doing so, violated Section 8(a)(4) and (5).

Section 8(a)(5) and (d) define the duty to bargain collectively, which requires an employer "to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment." *NLRB v. Katz*, 369 U.S. 736, 742-743 (1962). A violation of Section 8(a)(5) does not require a finding

[10] I grant General Counsel's motion to strike this portion of Respondent's brief.

[11] Respondent also argues that the Union was bargaining in bad faith and cancelling sessions. As the Union made the request during a meeting and continued to ask for the information, Respondent has no evidence of bad-faith bargaining that would excuse it from providing the requested information.

of bad faith. Id. at 743 and 747. The Act prohibits an employer from unilaterally changing wages and pay, which are mandatory subjects of bargaining.

A unilateral change acts no differently than a "flat refusal" to bargain by skipping the union's input when the union has so requested to do so. Id. at 743. An unlawful unilateral change "frustrates the objectives of Section 8(a)(5)," because such a change "'minimizes the influence of organized bargaining' and emphasizes to the employees 'that there is no necessity for a collective bargaining agent.'" *Pleasantview Nursing Home v. NLRB*, 351 F.3d 747, 755 (6th Cir. 2003) (quoting *Katz*, supra at 744, and *Loral Defense Systems-Akron v. NLRB*, 200 F.3d 436, 449 (6th Cir. 1999)); *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993).

Respondent had a duty to notify the Union and, upon request, meet and confer before granting or rescinding pay raises or pay decreases. Instead it made changes without notification to or entering into bargaining discussions with the Union, which is textbook "fait accompli." *Tesoro Refining & Marketing Co.*, 360 NLRB 293, 295 fn. 10 (2014). The wage increase and decrease both are unlawful unilateral changes, violating Section 8(a)(5).

The July pay decrease violates Section 8(a)(4) of the Act. Section 8(a)(4) prohibits discrimination against employees because of access to the Board processes. I find no need to rely on the *Wright Line* analysis, which is reserved for mixed motive cases. O'Toole made crystal clear he had a single, straightforward motive: He rescinded the pay increase because the Union, the employees' exclusive bargaining representative, filed a Board charge to redress Respondent's unlawful unilateral change of the May pay increase. Although Respondent later restored the pay increase, doing so did not resolve the unfair labor practice under the conditions set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). See *Mohawk Liqueur Co.*, 300 NLRB 1075 fn. 1 (1990). To be an effective repudiation, notice would be timely, unambiguous, specific in nature to the coercive conduct and free from other proscribed illegal conduct. *Boch Imports Inc. v. NLRB*, 826 F.3d 558, 566 (1st Cir. 2016), citing, inter alia, *Passavant*, supra. Respondent provides no evidence that reinstatement of the pay increases was accompanied by repudiation or disavowal of coercive conduct that Respondent would not interfere with employees' Section 7 right, much less any publication of a repudiation of unlawful conduct. *Sequoyah Spinning Mills, Inc.*, 194 NLRB 1175, 1192 (1972); *Passavant*, 237 NLRB at 138–139.

VII. IN MID-JUNE 2017, OWNER O'TOOLE THREATENS AN EMPLOYEE (COMPLAINT ¶8(C))

A. Facts

In about mid-June 2017, a few days after a union meeting, Production Manager Fraley directed employee and Unit chair Ron Merrick to meet with O'Toole and Bistarkey. Throughout the meeting, O'Toole repeated that there would be a "closed shop" over his dead body.

In the meeting, O'Toole asked Merrick whether the union had taken a strike vote at the recent meeting. Merrick said yes. O'Toole demanded to know the results. Merrick told him that the ballots were locked in an office. O'Toole then said to Merrick that the employees were gullible, that no one trusted him [Merrick] and nobody liked him. O'Toole, as before, said that over his dead body would there be a "closed shop."[12]

O'Toole said that if Arroyo pursued more than a 15 cent raise for the CAP program, he would eliminate the program. O'Toole then asked Merrick if he believed him and again made his comments about having the "closed shop" over his dead body. Merrick just shrugged his shoulders. O'Toole, referring to elimination of the union shop provision, demanded to know what it would cost to get "that."

B. Analysis

General Counsel alleges that O'Toole's statement to Merrick regarding elimination of the certification bonus violates Section 8(a)(1). Merrick's testimony is uncontroverted and was open. Merrick also is a prior discriminatee in a Board proceeding. *Roemer*, 362 NLRB No. 96. He testified in the face of the same respondent: His employer, the entity controlling his paycheck, previously suspended him for union activity. Respondent's failure to call witnesses under its control, Bistarkey and O'Toole, demonstrates that they likely would have testified adversely to Respondent. *Ryder Student Transportation Services, Inc.*, 333 NLRB 9, 13 (2001); *Champion Rivet Co.*, 314 NLRB 1097, 1105 (1994). Here, I fully credit Merrick.

The statement, taken in context, is a threat to remove part of the wage structure in response to the Union's bargaining demands. The circumstances were coercive: two managers, one of whom was the company owner, were talking to one employee. O'Toole's repeated statements about keeping a "closed shop" over his dead body, indicated O'Toole was "dead serious" about his threat. O'Toole's diatribe berated and personally attacked Merrick. I find that this statement violates Section 8(a)(1) of the Act.

VIII. RESPONDENT UNLAWFULLY SUSPENDED AND DISCHARGED HAAS

A. Facts

1. Respondent's claimed desire for efficiency

"Theory of Constraints," which outlines certain concepts and practices to promote efficiency. Fraley testified that she became acquainted with the "Theory of Constraints" when she joined the management team and left the bargaining unit. O'Toole gave her a book describing the theory. The collective-bargaining agreement has no reference to the "Theory of Constraints" but requires employees to work efficiently. Direction on a job comes through training and supervision, but Respondent never trained the bargaining unit employees about the "Theory of Constraints."

To assist employees with processing jobs, Respondent's engineering department determines the most efficient way to move from one job process to another. Employees receive training and are supervised to promote efficiency. Work instructions are available on the computers. In addition, the employees have job travelers, which are written router instructions

[12] Although O'Toole testified that the provision was a "closed shop," the collective-bargaining agreement contains lawful union shop and dues-checkoff provisions.

for each job. The job travelers go with each order in employee envelopes, moving with the work to the next phase in the production process. The job traveler includes, for example, the part to be made, what size and/or paint. The name of the customer is on the front page of the envelope and the job traveler itself. The work envelopes also include whether the job is a rush job. The envelopes are kept for at least 7 years after the work is performed, sometimes longer.

2. The collective-bargaining agreement mandates progressive discipline

Disciplinary records are kept on forms entitled "employee warning notice." The employee warning notice classifies disciplinary offenses in at least one of three areas: attendance; quality of work; and intolerable offense. Quality of work offenses include, but are not limited to, "carelessness, unsatisfactory work performance and failure to follow work instructions, etc." Intolerable offenses include, but are not limited to, "theft, violence, insubordination, inappropriate behavior, damage/destruction of company property, violation of safety policies or rules, violation of company procedures, Union business on company time, vacating work area/not working."

The collective-bargaining agreement contains a provision requiring Respondent to notify the Union and the employee during the suspension if Respondent decides to terminate the employee. (GC Exh. 2, art. IV, at p. 6.)

3. Respondent's disciplinary system

Bistarkey keeps the employee warning notices. Any manager wishing to discipline an employee pursuant to progressive discipline must call Bistarkey to determine what level of disciplinary action would be appropriate based upon prior discipline. The disciplinary records are kept in the employee's personnel file for one year as long as the employee does not receive a write-up for the same offense. (Tr. 156.)

O'Toole testified differently about how long the discipline remained in the file. O'Toole testified he retains discretion over terminations. He also testified that he has the authority to throw out the disciplinary system. (Tr. 63–64.) He also testified that he disciplines employees immediately if he sees a violation.

Regarding writing any other records of discipline or incidents that might require discipline, Production Manager Fraley rarely keeps any anecdotal notes for employee discipline.

For insubordination offenses, Fraley testified that employees are usually sent home immediately. (Tr. 580.) Indeed, in 2015, O'Toole changed a one–day suspension for employee Mike Robertson to a 3-day suspension for a first instance of insubordination. (Tr. 580–583; GC Exhs. 50–52.) On May 12, 2015, O'Toole decreed that anyone with a first incident of insubordination must be sent home immediately.

4. Haas's history at work and union activities

Haas had been an employee with Respondent for 42 years. He worked in the fabrication, where he ran machines such as dies, grinders, punch presses and shears. Since 2006, Fraley supervised him. On October 11, 2016, Respondent terminated him.

During the summer of 2016, Haas displayed the "Fair Contract Now" sign in his car and continued to do so. Haas had a special parking spot in the front of the south lot, near the entrance, for having over 25 years of service. Others, including Hrabowy, displayed the sign as well.

In August 2016, Haas asked Shinkovich whether the stress levels in the office were as high as in the shop due to the extended contract negotiations. Shinkovich said she thought the office was okay. (Tr. 193.) The next day, Bistarkey retrieved Haas and made him repeat the question he asked of Shinkovich. Owner O'Toole then directed Haas to repeat the question in front of Bistarkey, Attorney Austin, and Manager Farmer. O'Toole also ordered Haas, with Bistakrey's escort, to go to each and every employee in the office area and asked if they were stressed over the contract negotiations, which of course they did.

Haas took it upon himself to procure and distribute a special sticker about the negotiations, addressing in particular the union shop issue. He contacted his niece to make "No Open Shop" stickers. Once he received them, Haas passed them out to employees in the south parking lot before work and left them in his car for others to take between mid-September to late into the month. He had about 24 made and about half were left in the car. He displayed the "No Open Shop" sticker in his car's rear window, with the "Fair Contract Now" sign. Hrabowy also displayed the "No Open Shop" sticker on his motorcycle.

When Haas distributed the sticker is controverted. Merrick thought the distribution took place about two months before Haas's termination. Haas testified that he received and distributed the "No Open Shop" stickers about mid-September 2016. Hrabowy testified that Haas distributed the stickers about two weeks before the termination. Hrabowy stated he was still riding his motorcycle at the time instead of driving a vehicle, and although he sometimes rode his motorcycle in January, it did not occur in January.

Fraley denied seeing the "No Open Shop" stickers before October 11, 2016. The employees park in the south parking lot. In addition, O'Toole and Fraley park in the same lot and enter through the same entrance as the employees. However, Fraley and O'Toole both park in that lot and apparently must pass Haas's car, parked in its special spot, to enter or exit. In addition, Fraley usually arrives before anyone else at the facility. Both she and O'Toole have live camera feed from the parking lot. Shinkovich had seen the stickers in employee cars; she had no recollection of when she saw them.

5. Respondent suspends, then terminates Haas

a. Haas twice carries sheared parts from the machine to a rack

On September 14, 2016, Haas was shearing metal pieces and hand-carried some of his completed work from the machine to a shelf. The parts were flat aluminum rectangles. O'Toole noticed Haas carrying the parts and chided him for not using a cart to transport the parts.

Later that day, Fraley heard O'Toole telling Haas to use a cart to transport the parts. Fraley testified that she came out of her office and into the shop area, where Haas was carrying "several" parts, which she later said was "20" to the rack. Fraley said Haas was bent over about 30 degrees, with his hands down around his knees, carrying the parts. Fraley testified that

the unsheared parts were aluminum, flimsy and weighed about one pound each. She never testified to the weight or size of the products Haas sheared, which Haas testified were significantly smaller. Haas testified no cart was nearby, that the order was a rush and he was trying to get the parts to the racks so that the next person could begin the next phase of processing. Fraley testified she was able to grab a nearby cart and directed Haas to follow O'Toole's instructions. Fraley denied that the order was a rush. Haas received no discipline that day.

Fraley testified that at the end of the day, she told O'Toole that Haas should be written up and mentioned nothing about insubordination. Fraley agreed that Haas was not sent home immediately for insubordination, as O'Toole previously decided and she could not recall that O'Toole previously directed the management team to send home immediately any insubordinate employee with a 3-day suspension. (Tr. 580–583.)

b. Respondent suspends Haas

On September 30, 2016, Haas was presented with an employee warning notice from Shinkovich, who was acting supervisor in Fraley's absence. The notice, which had been written by O'Toole himself, marked that Haas's quality of work was at issue on September 14, 2016, between 10:38 a.m. and 12:48 p.m. It cites an order and parts number and described Haas's conduct as:

Not utilizing "Theory of Constraints" methodology. Specifically, hand carrying, in a piecemeal manner, work to a shelf near next work station instead of using an available cart, one trip and using said cart as an in-processing storage device.

Haas testified that he responded that the disciplinary action was harassment and wrote his disagreement on the form: "It would have taken me longer to find empty carts than to move parts in two handfuls." The 5-day suspension was scheduled to begin after Haas' vacation, on October 10, 2016 through October 14, 2016.[13] Haas did not sign, but Merrick did. (GC Exh. 5.) The disciplinary record contains nothing about insubordination or that Haas was to be terminated.[14] The first step grievance was handled at the same time, from Shinkovich's notes.

On October 4, 2016, Fraley returned from vacation and noticed Haas was not present. Fraley asked Shinkovich about Haas' whereabouts. Shinkovich informed her that Haas was on vacation and then serving a suspension. (Tr. 557.)

c. Respondent terminates Haas

At some unknown point between October 4 and October 11, Respondent decided to terminate Haas. Respondent's witnesses gave inconsistent versions of how that decision was made. O'Toole testified that he conducted a meeting with his management team, but did not know which members of the team were present for the meeting. He claimed he listened to what the team had to say and "Everybody wanted him terminated." (Tr. 69.) When asked why, O'Toole testified:

> Because he's a pain in the ass. He didn't follow orders, he did things his way, he was not a well-liked employee as far as his output and work. And the reason I get the group together is because I do not spend that much time on the shop floor, and I learn a lot of things that I didn't know.

[Tr. 69–70.]

Neither Fraley nor any other management team member corroborates O'Toole's version about a management meeting. Fraley testified that, upon her return from vacation, O'Toole asked her what to do about Haas and she said he should not be brought back. Then Fraley admitted that she first testified in an affidavit that she "did not remember" having a role in deciding to terminate Haas and did not testify anywhere in the affidavit she told O'Toole not to bring Haas back. (Tr. 593.) In an ironic tone of voice Fraley testified, "If you know my owner, he makes his own decisions." (Tr. 597.)

On October 13, 2016, Haas went to the plant for a free flu shot. Upon seeing him, Bistarkey told him he could not be present at the plant. When asked why, Bistarkey told Haas he was terminated by letter two days before. The termination letter, dated October 11, 2016 and signed by Bistarkey, contained no reasons for Haas's termination. (GC Exh. 24.)

The Union filed a timely grievance regarding the termination and processed it through the third step. The Union offered to arbitrate the matter, but could not force the matter because the collective-bargaining agreement expired and O'Toole declined the offer.

O'Toole also testified that Haas was insubordinate in a subsequent incident by failing to make a timely entry into a maintenance request log. Upon further questioning, O'Toole admitted that he did not learn about that incident until months later and the incident played no role in determining to terminate Haas. (Tr. 70–71.) As no further disciplinary records were presented for Haas after the September 14, 2016 incident, Respondent apparently failed to suspend Haas immediately for his alleged insubordination.

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[13] This incident was not the only time Respondent scheduled suspensions in advance.

[14] Respondent's brief states, "O'Toole had left town again prior to September 30, 2016." Respondent further contends, "Fraley testified that Company President Joe O'Toole was in fact, not at the facility." Fraley's last day to work was September 27, 2016, and left for Las Vegas the following day. The testimony that Respondent cites to support its factual statement is as follows:

> Q. And then, we know you go on your—
> you take off work on September 27th to depart for Vegas on the 28th, correct?
> A. Yes.
> Q. Now—so, you were in the following week of the 14th, right? Or whatever week that would have
> been. That would have been the week of September 19th?
> A. Yes.
> Q. Okay. Was Mr. O'Toole in that week?
> A. I don't believe so. I didn't see him.
> Q. Do you know where he was?
> A. No, I do not.

[Tr. 558.]

Fraley's testimony conveys she was unsure of where O'Toole was and that she returned to work on October 4. This portion of Respondent's brief unsupported in the record, that O'Toole was out of town. I therefore grant General Counsel's motion to strike this portion of the brief.

6. Haas' disciplinary record and performance appraisals

a. Haas's disciplinary record

Haas has a long disciplinary history. Respondent presented his disciplinary actions from 1990 to his 2016 termination and O'Toole mentioned the claimed additional incident of insubordination for which Haas received no discipline. Haas did not agree with all the disciplinary actions, but he admitted to some. Some of the disciplines were for incorrectly following instructions; others were for failing to correctly process orders and insubordination.

Merrick told Respondent that Haas was not going to change; it is not clear whether Merrick made this statement on September 30, 2016 or at another time. I highlight only a few of the more recent disciplinary actions.

In 2008, Haas received a 5-day suspension pending discharge for allegedly letting a job continue when he knew the job was set up incorrectly. Haas returned to the job.

On about September 4, 2009, Haas received discipline for an alleged safety violation. About October 25, 2009, Haas received a verbal warning for allegedly failing to follow instructions to wash hands when he entered the building the previous day.

In September 2010, Haas received a written warning for questioning why he had to work on an order when he thought other people were available. Less than a month later, about October 12, 2010, he received another written warning for making a part that had to be scrapped and reprinted. On about October 22, 2010, O'Toole gave Hass a verbal warning for taking too long at lunch and break.

About 7 months later, about May 5, 2011, Respondent gave Haas a 3-day suspension for insubordination and disruptive behavior. According to Respondent's documentation, Haas slammed down product and began to sand it incorrectly, when he was corrected. He yelled and said he would go home, which he did. Respondent's records show no response from Haas.

About August 22, 2011, Respondent gave Haas a one-day suspension for failing to verify a set-up, which caused incorrect product.

About May 23, 2013, Respondent gave Haas a verbal warning for "wasting time" and taking more steps than Respondent expected, plus not having carts around him to minimize the steps. Haas disagreed with Respondent's assessment. A little over a month later, about June 24, 2013, Respondent gave Haas a written warning for causing waste by incorrectly shearing product. A week later, about June 28, 2013, Respondent assessed that Haas was "wasting time & motion" walking around a cart that could have been moved instead and gave him a 1-day suspension. Haas disagreed, saying he needed to stretch his back and legs instead of standing in 1 place for 8 hours. On about September 4, 2013, Haas received a 3-day suspension for alleged variance on shear strips.

In July 2015, Respondent gave Haas a verbal warning for making parts that did not conform to customer needs, resulting in customer rejection of the order. Haas agreed. Less than 4 months later, about November 4, 2015, Haas received a 1-day suspension for creating 90 percent scrap. Haas again agreed.

In April 2016, about 5 months after the previous discipline, Haas agreed to a 1-day suspension for bad parts. On the same day, he received a 3-day suspension for another set of badly made parts. Haas again agreed.

During the summer of 2016, O'Toole observed Haas by camera for allegedly talking to a UPS driver too long and gave him discipline. The Union grieved the discipline, ostensibly as the discipline assessed violated the collective-bargaining agreement.

b. Haas's performance appraisals

Haas' last three performance appraisals were presented. Fraley documents her perceptions of the employee's performance on Respondent's forms, then gives them to Bistarkey to give to O'Toole. O'Toole then changes to what he believes the ultimate performance appraisal should be and adds his own comments. The forms show various items that rated on a scale of 1 to 4. A rating of 4 is excellent and 3 is "as expected, good."

The performance appraisals reflect that Fraley routinely rated Haas higher than O'Toole; ironically at one point O'Toole complained that Haas should have all 4s because of his seniority, instead of 3s. In 2015, O'Toole included negative comments, such as "Get the lead out" and complained of Haas's lack of efficiency. Yet in 2014 and 2015, Haas had no rating lower than 3, and most of his ratings in efficiency were at 4. (GC Exhs. 53, 55).

Shenkovich, the quality manager, testified consistently with performance appraisals about Haas's work. She stated he could be relied upon to show up when scheduled. He had his own way of performing work, but was knowledgeable about his work and "he would let you know if he wanted to do it a different way." (Tr. 84.)

7. Discipline of others

On November 28, 2016, employee Richard Ellison received documentation of a partial day suspension on November 23, 2016, after he questioned O'Toole, apparently on his own time. O'Toole, who signed the disciplinary action, labeled the question an "intolerable offense" of insubordination. (GC Exh. 7.) This partial suspension occurred after O'Toole required immediate suspension for any instance of insubordination.

Consistent with O'Toole's claim that he would throw out the disciplinary system if he desired, employee Shane Merchant received a written warning for Quality of Work, yet less than a year later, gave him a verbal warning for the same type of discipline. Had the progressive disciplinary system been followed, the punishment would have been more severe, not less severe.

Otherwise Respondent's response to the subpoena presented no additional evidence to demonstrate it consistently applied the disciplinary system for such an offense.

B. Analysis

1. Credibility

I partially credit Haas's testimony.[15] Haas admitted that he

[15] Haas testified that O'Toole told him that he knew about his role with the "No Open Shop" stickers about the third week in September 2016. General Counsel suggests that I credit this testimony because O'Toole never controverted it; in the alternative, the statement is not

sheared the parts and carried them to the rack. He also admitted that he stated it would make no sense to look for a cart. He made mistakes in testimony, such as no having discipline for creating scrap. He also sometimes was inconsistent on details on who was present during events.

I also credit Hrabowy, particularly regarding the timing of when Haas distributed the "No Open Shop" stickers. Despite Respondent trying to insist that it could have been at any time, Hrabowy stuck to his guns, that it was about 2 weeks before Haas's termination. Thus, the timing corroborates Haas's claim that the distribution took place in mid to late September.

The weight of the parts and whether the order was a rush job are controverted. Respondent presented the unfinished aluminum plate, but did not present an exemplar of the unfinished plate. Assuming that Fraley was correct that the unfinished plate was about 1 pound, she never testified how much the sheared product weighed.

Fraley testified contradictorily when she stated she came out to see Haas carrying parts "down to his knees" and then stated she did not observe him. She first said he was carrying several parts, yet then estimated 20. Several usually does not reach 20. She talked about the unfinished parts but never stated how large the sheared parts were. Given how small the sheared parts were and how light the aluminum pieces are, I find it improbable that Haas was hunched over carrying the parts, much less that it was a heavy load.

Regarding these questions about the order and whether the order was a rush job, Respondent could have presented the job traveler and its work envelope to contradict Haas did not do so. Respondent maintained these records but did not present them. I take an adverse inference that the job was as heavy as Fraley testified, much less a regular order. I credit Haas's testimony over Respondent's version.

Fraley also contradicted herself about being able to suspend someone immediately for insubordination, but did not immediately suspend Haas for insubordination. Fraley also was discredited whether she made a recommendation about terminating Haas. When confronted with her affidavit testimony, Fraley admitted she never testified that she told O'Toole not to bring back Haas. (Tr. 593, 597–598.) O'Toole, Fraley and Shinkovich were externally inconsistent about how they ultimately discussed Haas' termination. O'Toole maintains he conducted a management meeting. Fraley testified O'Toole "approached her" after she returned from vacation and asked what to do with Haas; she testified she said to terminate him, which was inconsistent with her affidavit. Shinkovich was very tentative about attending a meeting with O'Toole and could not recall who else attended such a meeting or when it occurred. She took no notes and had no recollection of what was discussed. Shenkovich also previously testified that she had no role in Haas's termination. I therefore discredit Fraley and Shinkovich about recommending Haas's termination or participating in a management meeting.

O'Toole's performance appraisal statement, that he knows better than an employee how things should be done, further undermines his claim that he knows little of events on the shop floor and relies upon his management team: He changed ratings and added a number of negative comments to Haas's appraisals. Fraley's statement, with her ironic tone of voice, about her boss making his own decisions, was quite credible and telling. *NLRB v. So-White Freight Lines, Inc.*, 969 F.2d 401, 407 (7th Cir. 1992), enfg. 301 NLRB 223 (1991) (credibility is not only what witness says, but how said). Due to these inconsistencies and Fraley's statement, I find it inherently likely that Fraley had nothing to do with the decision and O'Toole made his own decision to terminate Haas.

O'Toole's statement that he has full authority to change the disciplinary system at his whim is credited only to the extent he believes it and acts upon it, which does not change the language of the collective-bargaining agreement. The inconsistent applications of discipline, such as with Merchant, support O'Toole's belief he can do what he pleases with discipline.

O'Toole's application of the "Theory of Constraints" and complaints about efficiency are also questionable. He complained about the method Haas used to carry parts, yet when it suited his purposes, instead of having Haas work, in August 2016, he instructed Bistarkey to drag Haas around the office to ask 12 office staff about whether they too were stressed, in front of a manager no less. Obviously, this incident does not promote efficient use of an employee's time on production. The unrefuted testimony of this incident, O'Toole's imperious demeanor at hearing, the 8(a)(1) violations and personal attacks described above, and O'Toole's description of his personal authority to change the disciplinary system as he pleases, all convince me that O'Toole brooks no challenge to his authority.

I also consider that O'Toole raised a new, undocumented incident of Haas's alleged insubordination while testifying. This incident allegedly occurred after the September 14 incident but before termination. O'Toole testified later that he did not rely upon this discipline as he had no knowledge of it at the time. Such testimony is an effort to pack on irrelevant information and I discredit any import Respondent claims with it.

2. Applicable law

Section 8(a)(3) prohibits employers from discriminating in regard to an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." An employer violates Section 8(a)(3) by disciplining employees for

necessary to establish knowledge. Haas never raised the statement in his affidavit or during his direct testimony, and I therefore cannot credit it. It plays no role in my analysis. *Toll Manufacturing Co.*, 341 NLRB 832, 835 (2004) (public interest in vindicating Act outweighed evil of insignificant trespass on the trust when administrative law judge found the false testimony was a small part of otherwise credible testimony and plays no part in outcome of the case). Also see *Sunrise Senior Living, Inc. v. NLRB*, 183 Fed.Appx. 326, 333–334 (4th Cir. 2006), enfg. 344 NLRB 1246 (2005).

Regarding this statement, Respondent suggests that I find Haas perjured himself. At hearing, Respondent demanded that, based upon the Casehandling Manual, I order General Counsel to pursue proceedings against Haas for perjury. The Casehandling Manual is not binding upon the Board. As I pointed out at hearing, even the preface to the Casehandling Manual makes that statement. If I found Haas perjured himself, then I would also have to find the same of Respondent's witnesses who testified contradictorily or were discredited on the stand. I decline to do find perjury on any witness and limit the scope of my determinations to credibility.

antiunion motives. *Equitable Resources*, 307 NLRB 730, 731 (1992). To establish a violation of Section 8(a)(3) and (1) in cases where a discipline and discharge is alleged, General Counsel has the burden to prove that the disciplinary action or discharge was motivated by employer antiunion animus.

In determining whether adverse employment actions are attributable to unlawful discrimination, the Board applies the analysis set forth in *Wright Line*, 251 NLRB 108 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The *Wright Line* framework requires proof that an employee's union or other protected activity was a motivating factor in the employer's action against the employee. 251 NLRB at 1089. The elements required to support such a showing are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer. *Fremont-Rideout Health Group*, 357 NLRB 1899, 1902 (2011); *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 67 (2d Cir. 2009).

Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428–1429 (11th Cir. 1985). Because direct evidence of unlawful motivation is seldom available, the General Counsel may rely upon circumstantial evidence to meet the burden. See *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Circumstantial evidence is used frequently to establish knowledge and animus because an employer is unlikely to acknowledge improper motives in discipline and termination. *NLRB v. Health Care Logistics*, 784 F.2d 232, 236 (6th Cir. 1986), enfg. in part 273 NLRB 822 (1984). A showing of animus need not be specific towards an employee's union or protected concerted activities. *Colonial Parking*, 363 NLRB No. 90, slip op. at 1, fn. 3 (2016).

An employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996); *T & J Trucking Co.*, 316 NLRB 771 (1995).

3. Applying *Wright Line*

a. Haas' union activities and Respondent's knowledge of the union activities

Haas engaged in a number of union activities. He invoked the collective-bargaining agreement by filing grievances. One of his grievances was the underlying issue in *Roemer*, supra, so it would be difficult for Respondent to deny knowledge of the grievances.

O'Toole testified that Haas was terminated because he was a pain in the ass. Haas often "complained," according to Fraley's testimony and O'Toole's statements on Haas' performance appraisals. When asked what complaints Haas made, Fraley's testimony was general and never specified what the complaints were about. O'Toole did not testify to what the statements on the appraisals referred. Some of Haas's complaints, however, were about working conditions and O'Toole himself.

Haas also engaged in union activities regarding the "Fair Contract" signs, which Merrick distributed as well as his own "No Closed Shop" stickers. Similar to circulating a list of concerns, Haas reached out to fellow employees regarding Respondent's bargaining proposal of the open shop when he offered the stickers, which some employees accepted. Haas' conduct was concerted and protected. *NLRB v. So-White Freight*, 969 F.2d at 406.

Beyond the events of No Closed Shop" stickers, O'Toole and the management staff knew of Haas's union sympathies and views. In August 2016, O'Toole also took great offense when Haas asked Shinkovich about any stress level in the office staff due to the negotiations. O'Toole made him repeat the question to him and the management staff, and then directed Bistarkey to take Haas to each and every member of the office staff to ask the same question. It is this event that demonstrates both Respondent's knowledge of Haas's union sympathies and, as seen below, its antipathy to his position.

To demonstrate Respondent's knowledge of Haas last union activities—distribution of the "no open shop" stickers—General Counsel uses small plant doctrine. Small plant doctrine is an inference from the size of the plant[16] and its usage has been debated for some time. The implication of the doctrine is not a presumption. *NLRB v. Health Care Logistics, Inc.*, 784 F.2d at 236–237. The application of small plant doctrine "rests on the view that an employer at a small facility is likely to notice union activities at the plant because of the closer working environment between management and labor." *Health Care Logistics*, 734 F.2d at 236 (internal quotes and cites omitted). The appropriate application is that the size of the plant is only one factor to give rise to an inference of knowledge of union activity. *Almet, Inc.*, 305 NLRB 626 fn. 5 (1991). The doctrine should not be used as the "sole basis for finding knowledge." *Basin Frozen Foods, Inc.*, 307 NLRB 1406, 1408 (1992).

Small plant doctrine applies when the facility is small and open, the work force is small, the employees make no great effort to conceal their union activities, and management personnel are located in the immediate vicinity of the protected activity, which increases likelihood of knowledge. *NLRB v. Mid State Sportswear, Inc.*, 412 F.2d 537, 540 (5th Cir. 1969). I concur with General Counsel, in light of other evidence of knowledge, that Respondent knew of Haas' union activities, including distributing the "no open shop" stickers. I do not rely upon small plant doctrine alone, as Haas testified without contradiction about O'Toole questioning him about the statement of stress due to negotiations and then directing Bistarkey to drag him from office employee to office employee to ask the same question.

b. Evidence of animus in general and towards Haas

Determining the employer's motivation for termination is a

[16] Size may vary. See, e.g.: *Custom Wood Interiors, Inc.*, 248 NLRB 187, 189 (18 persons); *Famet, Inc.*, 202 NLRB 409 (1973), enfd. 490 F.2d 293 (9th Cir. 1973) (nine employees with supervisors or managers almost working continuously around the employees); *Wiese Plow Welding Co.*, 123 NLRB 616, 619 (13 employees). Small plant size has its limitations. *Springfield Garment Mfg. Co.*, 152 NLRB, 1054 (1965) (400 employees, noting Board also refused to apply in 275-employee plant in a small community).

fact-based inquiry and evidence may be direct or circumstantial. *SCA Tissue North America LLC*, 371 F.3d 983, 988-989 (7th Cir. 2004), enfg. 338 NLRB 1130 (2003). Factors which may support an inference of antiunion motivation include employer hostility toward unionization, other unfair labor practices committed by the employer contemporaneous with the adverse action, the timing of the adverse action in relation to union activity, the employer's reliance on pretextual reasons to justify the adverse action, disparate treatment of employees based on union affiliation, and an employer's deviation from past practice. *Purolator*, 764 F.2d at 1429; *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995), denying rev. 311 NLRB 1118 (1993). Respondent's conduct demonstrates animus towards union activities not only a general level, but also specifically to Haas.

(1) Evidence of general animus

General animus is seen through Respondent's conduct in the prior Board decision and the findings above after Haas' termination. In *Roemer*, 362 NLRB No. 92, the Board findings show Respondent's history of animus, which is considered background evidence of animus for this case. *Grand Rapids Press of Booth Newspapers, Inc.*, 327 NLRB 393, 395 (1998), enfd. 215 F.3d 1327 (6th Cir. 2000). The prior case, after the Sixth Circuit affirmed the Board's decision in 2017, was not closed on compliance until August 20, 2018, months after this hearing. Respondent's certification of posting in the prior case was not received until June 1, 2018.[17] Thus, the prior unfair labor practices were not resolved until after the hearing. I do not give "independent and controlling weight" to events occurring before the 10(b) period, but such evidence may be considered to give background on a "respondent's motivation for conduct within the 10(b) period." *Grimmway Farms*, 314 NLRB 73, 74 (1994), enfd. in part 85 F.3d 637 (9th Cir. 1996). In addition, the the Board may rely upon events "long passed" to identify the motivation behind a termination. *SCA Tissue,* 371 F.3d at 989

Respondent, without citing any case law, contends that I cannot take administrative notice of that case because the charge was filed 4 years ago, the case was "resolved" and is irrelevant to the case at hand. Respondent is incorrect for two reasons. First, the decision was enforced by the Sixth Circuit in 2017 and the case therefore remained open during events at hand. The case was not "resolved" until about June 1, 2018, when Respondent supplied its certification of notice posting. Secondly, the Board is entitled to take administrative notice of its own proceedings. *Metro Demolition Co.*, 348 NLRB 272 fn. 3 (2006).[18] The evidence here is not used to prove a time-barred unfair labor practice but instead provides information about the "true character" of events within the time period here. *Machinists Lodge 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 416 (1960). This information is not the only basis for making this determination and therefore is permissible. Id. at 417–418.

After Haas' termination, Respondent's statements and conduct in 2017 demonstrated additional animus. In January 2017, Respondent directly dealt with employees and made coercive statements. When O'Toole told employees he hired a union busting attorney, he told employees how much he disliked the Union. *Aliante Gaming, LLC d/b/a Aliante Casino & Hotel*, 364 NLRB No. 78 fn. 5 (2016) (even if statement was a lawful expression of opinion against a union, it could support a finding of animus). Since March 2016, Respondent's so-called "union busting" attorney was negotiating for a successor agreement, months before Haas's termination.

Respondent also made fait accompli unilateral changes regarding pay and coercively told employees that the removal of a pay raise was because the Union sought to exercise its right to file charges before the Board. These events also provide significant evidence of motivation. *SCA Tissue*, 371 F.3d at 990.

(2) Evidence of animus towards Haas

O'Toole testified that a reason for terminating Haas was that Haas was a pain in the ass. O'Toole statement "provide[s] a nexus for evaluating the true causation of [the] discharge." *Boston Mutual Life Insurance Co.*, 259 NLRB 1270, 1281 (1982), enfd. 692 F.2d 169 (1st Cir. 1982) (pain in the ass). The term "pain in the ass,"[19] taken with other anti-union statements from an employer, demonstrates animus towards an alleged discriminatee. *USF Dugan, Inc.*, 332 NLRB 409, 413 (2000) (pain in the butt). Also see *United States Steel Corp.*, 279 NLRB 16 fn. 1 (1986) (in context, use of term "troublemaker" showed animus). The statement also reflects O'Toole's "subjective evaluation of the merits of the complaints," that Haas made throughout his employment, which are not controlling. *Arrow Electric Co., Inc.*, 323 NLRB 968, 970-971 (1997), enfd. 155 F.3d 762 (6th Cir. 1998). Haas's employment history is pocked with O'Toole complaining about Haas's complaints about management (usually O'Toole) and working conditions.

Animus can be inferred from the relatively close timing between an employee's protected concerted activity and his disci-

[17] This information is available through the NLRB's public website at www.nlrb.gov/case/08-CA-124110. Fed.R.Evid. 201(b) permits judicial notice of a fact that is not subject to reasonable dispute when it is either: (1) generally known within the court's jurisdiction; or, (2) can be readily determined from an indisputably accurate source. Fed, R, Evid. 201(c) permits a court to take judicial notice on its own. Federal government websites are a frequent source of information for judicial notice. *U.S. v. Garcia*, 855 F.3d 615, 621–622 (4th Cir. 2017). Here, the source is the Agency's website.

[18] Respondent's brief restates its version of the events in the earlier case, but without any case cites to show where these findings are supported in *Roemer*, 362 NLRB 828. (R. Br. at 47–48.) Respondent's version was neither credited by the judge nor relied upon by the Board or Sixth Circuit. Respondent did not present these facts to this tribunal and, in any event, would have been precluded from doing so as a waste of resources. *Voith Industrial Services*, 363 NLRB No. 109, slip op. at 1 fn. 2 (2016). I therefore disregard Respondent's self-serving and inaccurate rehash of *Roemer*, 362 NLRB No. 96.

[19] "In informal English, if you call someone or something a pain or a pain in the neck, you mean that they are very annoying or irritating. Expressions such as a pain in the arse and a pain in the backside in British English, or a pain in the ass and a pain in the butt in American English, are also used, but most people consider them offensive." Collins English Dictionary. at www.collinsdictionary.com /us/dictionary/english/a-pain-in-the-arse (August 16, 2018).

pline. *Corn Brothers, Inc.*, 262 NLRB 320, 325 (1982) (timing of discharge within a week of union organizing meeting evidence of antiunion animus); *Sears Roebuck & Co.*, 337 NLRB 443, 451 (2002) (timing of discharge, several weeks after employer learned of protected concerted activities, indicative of retaliatory motive); *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002) (timing of discipline imposed 4 months after service on bargaining team and ULP hearing appearance suspect). Even without the "No Open Shop" stickers, Respondent displayed significant animus towards Haas in August 2016, within 2 months of such activity.

Respondent's failure to claim "an asserted reason for adverse action at the time the action is taken can indicate a discriminatory motive." *Royal Development Co. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983). Shifting reasons for Respondent's action also support finding unlawful motivation. *Scientific Ecology Group, Inc.*, 317 NLRB 1259, 1259 (1995). Also see *NLRB v. Aquatech, Inc.*, 926 F.2d 538, 547 (6th Cir. 1991), enfg. 297 NLRB 711 (1990) (inconsistencies in proffered reason and employer's actions lead to inference of antiunion animus). Respondent inconsistently claimed that Haas was insubordinate, yet the disciplinary action taken on September 30 made no such claim. Fraley was discredited regarding her claim that she recommended action for insubordination, particularly because O'Toole required insubordinate employees to be sent home immediately: That did not happen here.

Animus also can be inferred by previously terminating an employee and taking him back. *Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 825 (D.C. Cir. 2001), enfg. 328 NLRB 991 (1999). A final conclusion that an employer is ultimately exhausted by an employee's bad behavior is not persuasive. Id. at 825–826. Haas was taken back before, and eight years later Respondent wants to impress that Haas's actions now warrant termination.

4. Pretext

Respondent is required to show it would have taken the same action for legitimate reasons even in the absence of the protected activity. *Monroe Mfg.*, 323 NLRB 24, 27 (1997); *T & J Trucking Co.*, 316 NLRB 771, 771 (1995), enfd. mem.86 F.3d 1146 (1st Cir. 1996). ". . . [A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). A number of factors point out that Respondent's defenses are pretextual, and Respondent therefore failed to meet its responsive burden.

Shifting explanations for Respondent's disciplinary actions constitute strong evidence that Respondent's asserted reasons are pretextual. See, e.g., *Lucky Cab Co.*, 360 NLRB 271, 274 (2014). According to O'Toole's May 2015 edict, any employee who is insubordinate must be immediately suspended, even if it is a first instance of discipline. Respondent was not consistent in applying his own rules. With Haas, the timeline demonstrates O'Toole waited over two weeks to suspend Haas and allowed him to continue to work. In other cases, Respondent failed to enforce its own edicts on insubordination. O'Toole's belated understanding that Haas was insubordinate after his September 14 cart incident and before termination reinforces that Respondent did not consistently require insubordinate employees to be sent home immediately. Respondent's after-the-fact claim that Haas was insubordinate again reflects a shifting defense as well, and shows Respondent's claims are pretextual. *Kingman Regional Medical Center*, 363 NLRB No. 145 (2016) (respondent's shifting defenses implies grasping for reasons to justify unlawful conduct) (cite omitted).

Also unsupported is O'Toole's claim of Haas's insufficiencies and poor work quality. His performance appraisals reflect ratings in good or excellent and Shinkovich, the quality manager, did not present any complaints at hearing about his performance. Haas admitted mistakes when he made them and took the discipline. However, Respondent tolerated Haas's performance and rated his as good or excellent on most items. Thus, Respondent's complaints regarding his performance are pretextual.

The level of discipline Respondent gave to Haas was not in proportion to the offense:

> It has been held that a trier of fact is not permitted to substitute his or her judgment for that of the employer with regard to discipline imposed. *Super Tire Stores*, 236 NLRB 877 fn. 1 (1978); *Liberty House Nursing Home*, 245 NLRB 1194 fn. 2 (1979). However, "if the employee is a good worker and his breach of the work rules trivial, the more rational explanation for discharge may be invidious motivation." *Neptune Water Meter Co. v. NLRB*, 551 F.2d 568, 570 (4th Cir. 1977). See also *Flowers Baking Co.*, 240 NLRB 870, 870-872 (1970). And "overreaction to a violation of a rule or accepted standard may itself be an indication of pretext." *Sea-Land Service*, 240 NLRB 1146, 1147 (1979).

Bell Halter, Inc., 276 NLRB 1208, 1222 (1985).

Respondent applied the "Theory of Constraints" when it suited its purposes. First, Respondent never instructed employees in the bargaining unit about the "Theory of Constraints." Secondly, Respondent makes much of the need for efficiency, including working in the most efficient manner. However, O'Toole required Haas, with a manager present, ask each and every person in the office about whether they were stressed about collective-bargaining agreement negotiations. This canard not only cost Haas's production time, but it also cost the manager's time and caused interruptions to each and every person in the office. Such action is not consistent with the efficiency O'Toole claims he requires in his operations. As suggested above, the rule violation for carrying parts is trivial compared to O'Toole's reaction to Haas's question about stress in the office. It also demonstrates that O'Toole's vindictiveness when it came to the Union and pending negotiations.

O'Toole stated a reason for terminating Haas was that he was not changing. Respondent presented a lengthy history of Haas's discipline, dating back to the 1990s, to show how bad of an employee Haas was. Given Haas's frequent flier status for discipline, surely O'Toole and Respondent knew years ago that Haas was not going to change. No doubt, Haas had a significant disciplinary history. He had been up and down the progressive disciplinary ladder numerous times, including a 5-day

suspension pending termination in 2008, and he had not been terminated. O'Toole, who stated he could change the disciplinary system at his whim, decided this time to terminate Haas. Respondent tolerated Haas for many years before this time. Similarly, Respondent's documentation noted that it believed Haas was a chronic complainer and to take action after years of complaining smacks of pretext. Because Respondent tolerated for Haas' alleged poor performance and complaining for years, Respondent's reasons are pretextual. *Andronaco, Inc. d/b/a Andronaco Industries*, 364 NLRB No. 142, slip op. at 13 (2016), citing *Phillips Petroleum Co.*, 339 NLRB 916, 919 (2003).

Nor did Respondent consistently apply the progressive disciplinary system. As O'Toole noted he could do what he wanted when he wanted, the suspension and termination also point to pretext.

5. Completion of the *Wright Line* test

General Counsel established a prima facie case for Haas' suspension and termination. Respondent was well aware of Haas's union sympathies and views in August 2016 and O'Toole clearly was angered by Haas's question. The "no open shop" stickers, by timing, also infer that Respondent took action because of Haas's union views.

Many of Respondent's reasons for its actions contradictory and unsupported, further demonstrating animus and pretext. Respondent failed to satisfy its burden under *Wright Line* to show that it would have suspended and terminated Haas even in the absence of his protected concerted and union activities.

CONCLUSIONS OF LAW

1. Respondent Roemer Industries, Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The following are Respondent's supervisors within the meaning of Section 2(11) and/or agents within the meaning of Section 2(13) of the Act:

Joe O'Toole	owner/president
Mike Farmer	general manager
Anna Fraley	production manager
Amanda Shinkovich	quality manager
Connie Bistarkey	administrative services and custodian of records

3. The United Steel, Paper & Forestry, Rubber Manufacturing, Energy Allied Industries and Service Workers International Union, AFL–CIO, CLC (Union) is a labor organization within the meaning of Section 2(5) of the Act, representing:

> All production and maintenance employees of the Company except those individuals occupying watchman, confidential clerical, salaried or supervisory positions of assistant foreman level or above.

4. Respondent, by Joe O'Toole, violated Section 8(a)(1) of the Act, by:

> a. On January 3, 2017, impliedly threatening the employees' continued employment.
> b. On January 3, 2017, telling employees that he hired a union busting attorney.
> c. About June 15, 2017, threatening employees with eliminate the CAP if the Union pursued increased wages in bargaining.

About July 2017, told employees that the Union was the reason it was rescinding a wage increase.

5. Respondent violated Section 8(a)(3) and (1) of the Act by suspending Bruce Haas on September 30, 2016 and terminating him on October 11, 2016.

6. Respondent violated Section 8(a)(4), (3) and (1) of the Act in July 2017 by rescinding wage increases after the Union sought relief before the National Labor Relations Board.

7. Respondent violated Section 8(a)(5) of the Act by:

> a. By O'Toole, on January 3, 2017, directly dealing with employees.
> b. Since May 8, 2017, failing and refusing to provide information regarding surveillance cameras, which is necessary and relevant to the Union's role as the exclusive collective-bargaining representative of the Unit.
> c. On May 19, 2017, unilaterally implementing wages increases without first notifying or giving the Union an opportunity to bargain.
> d. On about July 14, 2017, unilaterally implementing wage decreases without first notifying or giving the Union an opportunity to bargain.

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

REMEDY

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

Respondent, having unlawfully discharged Bruce Haas, must offer him reinstatement to his former job or if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed. The Respondent shall make Bruce Haas whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. The make whole remedy shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate Bruce Haas for search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate Bruce Haas for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey,*

Inc., 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 8 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. The Respondent shall also be required to remove from its files any references to the unlawful discharge of Bruce Haas and to notify him in writing that this has been done and that the discharge will not be used against him in any way

Respondent, having unlawfully changed the terms and condition of employment, shall rescind the changes that was/were unilaterally implemented in mid-July 2017, and make all affected employees whole for any loss of earnings and other benefits suffered as a result of the unilateral changes. The make-whole remedy shall be computed in accordance with *Ogle Protective Service*, 183 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate any employees adversely affected by the unlawfully changed policies for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), Respondent shall, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, file with the Regional Director for Region 8 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Respondent's Masury, Ohio facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 30, 2016. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 8 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

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

ORDER

Respondent Roemer Industries, Inc., located in Masury, Ohio, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Threatening employees with termination because of the union support.

(b) Terminating employees for union and/or protected union activity.

(c) Threatening employees because unfair labor practices charges were filed on their behalf.

(d) Unlawfully suspending and terminating employees for union and/or protected concerted activity.

(e) Unilaterally changing wages, hours and terms and conditions of employment.

(f) Bypassing the Union and directly dealing with employees regarding wages, hours and terms and conditions of employment.

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

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

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

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

(c) Compensate Bruce Haas for the adverse tax consequences, if any, of receiving a lump-sum backpay award and file with the Regional Director for Region 8 within 21 days of the date the amount of backpay is fixed, either by agreement or board order, a report allocating the backpay award to the appropriate calendar year for Haas.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter, notify Bruce Haas in writing that this has been done and that the discharge will not be used against him in any way.

(e) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees of the Company except those individuals occupying watchman, confidential clerical, salaried or supervisory positions of assistant foreman level or above.

(f) Upon request of the Union, rescind the charges in the terms and conditions of employment for its unit employees that were unilaterally implemented on mid-July 2017 and May

2017.

(g) Furnish to the Union in a timely manner the information requested on May 8, 2017.

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

(i) Within 14 days after service by the Region, post at its Masury, Ohio facility copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 30, 2016.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 8 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

Washington, DC, September 24, 2018

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT impliedly threaten you about your continued employment with us.

WE WILL NOT by telling you we have hired a "union busting" attorney.

WE WILL NOT threaten to change wages, hours and terms and conditions of employment due to the Union's position in collective-bargaining agreement negotiations.

WE WILL NOT coerce you by telling you we changed terms and conditions of employment because the Union sought assistance from the National Labor Relations Board.

WE WILL NOT threaten you with changes in wages, hours and terms and conditions of employment because of your union and/or other protected concerted activities.

WE WILL NOT suspend or discharge you because you engaged in Union and/or protected concerted activities.

WE WILL NOT changes wages, hours and other terms and conditions of employment because charges have been filed with the Board on your behalf.

WE WILL NOT refuse to bargain in good faith with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and service Workers International Union, AFL–CIO in the following appropriate unit by unilaterally changing your terms and conditions of employment, including but not limited to changes in your wages, without first providing the Union with notice and an opportunity to bargain. The bargaining unit is:

> All production and maintenance employees of the Company except those individuals occupying watchman, confidential clerical, salaried or supervisory positions of assistant foreman level or above.

WE WILL NOT withhold from the Union that is necessary and relevant to its responsibilities as exclusive-bargaining representative of the above bargaining unit.

WE WILL NOT bypass the Union and deal directly with our employees in the above-described bargaining unit concerning your wages, benefits, or other terms and conditions of employment.

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

WE WILL offer Bruce Haas immediate and full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges she previously enjoyed.

WE WILL remove from our files all references to the suspension and discharge of Bruce Haas and WE WILL notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

WE WILL pay Bruce Haas for the wages and other benefits he lost, with interest, because of our unlawful suspension and ter-

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

mination of him.

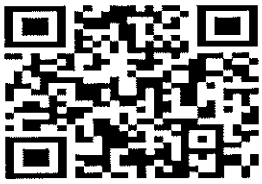
WE WILL, before implementing any changes in wages, hours or other terms and conditions of your employment, notify and on request, bargain with the Union as your exclusive collective-bargaining representative.

WE WILL, to the extent we have not already done so, upon request by the Union, rescind any changes in terms and conditions of employment for the unit employees that we unilaterally unilaterally implemented beginning May 2017 and mid-July 2017, including changes to our unit employees' rates of pay.

WE WILL make our unit employees whole for any losses they sustained due to the unlawfully imposed changes to their terms and conditions of employment, with interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 8, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL provide the Union with the information requested on May 8, 2017 regarding the camera system.

ROEMER INDUSTRIES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/08-CA-8055 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.