

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AMERICAN FEDERATION OF TEACHERS,
AFL-CIO d/b/a WASHINGTON STATE
NURSES ORGANIZING PROJECT,
and/or AMERICAN FEDERATION OF
TEACHERS, AFL-CIO and WASHINGTON
STATE NURSES ORGANIZING PROJECT

and

Case 19-CA-190619

COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 7901

Kristen White, Esq.,
for the General Counsel.
Robert D. Fetter, Esq.,
for the Respondent.
William R. Reinken, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Portland, Oregon, on July 23, 2019. The Communication Workers of America, Local 7901 (CWA, Union, or Charging Party) filed the original charge on December 29, 2016, and an amended charge on April 6, 2017. The General Counsel issued the complaint currently before me on February 27, 2019, and the American Federation of Teachers, AFL-CIO (AFT) d/b/a Washington State Nurses Organizing Project (WSNOP or the Respondent), and/or American Federation of Teachers, AFL-CIO and Washington State Nurses Organizing Project, as a single employer, filed a timely answer denying all material allegations. The General Counsel subsequently withdrew its single/joint employer allegations and therefore the complaint before me concerns only Respondent WSNOP.¹

¹ AFT agreed to serve as guarantor for WSNOP. (ALJ Exh. 1.) Abbreviations used in this decision are as follows: “Tr.” for transcript; “GC Exh.” for the General Counsel’s exhibit; “R Exh.” for the

5 The complaint alleges the Respondent violated Section 8(a)(1) of the National Labor
 Relations Act (the Act) by: (1) suspending employee Joseph Crane (Crane) for engaging in
 concerted activities; and (2) informing the following employees they were being discharged and
 subsequently discharging the following employees, for engaging in protected concerted
 activities: Crane, Matthew Burdine (Burdine), Gabrielle Hanley (Hanley), Steven McAllister
 (McAllister), Cecile Reuge (Reuge), and Darnley Weekes (Weekes); (3) threatening employees
 during a staff meeting; (4) interrogating employees about whether they were resolute in
 10 supporting other employees and impliedly promising better working conditions for not engaging
 in protected concerted activities; and (5) telling employees they did not have the right to organize
 against the Respondent.

15 On May 11, 2017, the Regional Director for Region 19 issued a letter to the parties
 deferring to arbitration allegations essentially mirroring those in the complaint. An arbitration
 was held on June 4–6, 2018. On September 21, 2018, Arbitrator Jim Bailey issued an award
 finding, in pertinent part, the Respondent made unlawful statements as alleged in the complaint,
 and employee Crane was suspended and employees Crane, Burdine, Hanley, McAllister, Reuge,
 and Weekes were discharged for engaging in protected concerted activities. Arbitrator Bailey
 20 ordered the Respondent to change the employees’ discharges to layoffs, and to grant them 2
 weeks’ severance pay in accordance with their collective-bargaining agreement. WSNOP ceased
 operations as of August 31, 2018.

25 The Region subsequently revoked the deferral and reinstated the complaint, asserting the
 relief the arbitrator awarded was not reasonably permitted by the Act because it fell far short of a
 “make-whole” remedy.

30 On the entire record, including my observation of the demeanor of the witnesses, and
 after considering the briefs filed by the General Counsel, the Respondent, and the Charging
 Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

35 At all material times, AFT has been an unincorporated association with an office and
 place of business in Vancouver, Washington, where it operates as a multistate labor organization
 and an affiliate of the AFL–CIO, which maintains its national headquarters in Washington,
 District of Columbia. At all material times until August 31, 2018, WSNOP was an
 unincorporated association based out of AFT’s Vancouver office, where it engaged in organizing

Respondent’s exhibit; “Jt. Exh.” for joint exhibit; “ALJ Exh.” for administrative law judge exhibit; “GC
 Br.” for the General Counsel’s brief, “R Br.” for the Respondent’s brief; “CP Br.” for the Charging
 Party’s brief; “Arb. Tr” for arbitration transcript; “Arb U Exh.” for Union arbitration exhibit; “Arb. R
 Exh.” for Respondent arbitration exhibit; and “Arb. Jt. Exh.” for joint arbitration exhibit. Although I have
 included several citations to the record to highlight particular testimony or exhibits, I emphasize that my
 findings and conclusions are based not solely on the evidence specifically cited but rather are based on
 my review and consideration of the entire record.

activities on behalf of employees represented by AFT and in bargaining with employers on those employees behalf. In conducting its operations during the material time period, AFT collected and received dues and initiation fees in excess of \$250,000 including those from employees organized by WSNOP or whose contracts were bargained by WSNOP, and remitted from its offices in the State of Washington, including, its Vancouver office, to its Washington, District of Columbia national headquarters dues and initiation fees in excess of \$50,000. The parties do not dispute, and I find, that at all material times, the Respondent has been an employer engaged in commerce within the meaning of §§ 2(2), (6), and (7) of the Act.

II. FACTS FROM ARBITRATION PROCEEDING

I must first determine the threshold issue of deferral to Arbitrator Bailey's decision.² The following factual recitation is drawn from the arbitration proceeding.³

A. Background

WSNOP was created by a partnership between the AFT and its affiliate the Washington State Nurses Association to enable AFT to provide funding for projects, and became the vehicle for administering AFT's organizing work in the Vancouver, Washington area. Gerald Friesz was WSNOP's regional director for the western region. Linda Cushing was a national representative for the AFT until she passed away in March 2016. Charlie Ridgell replaced her. In August 2016, Angela Huesgen joined Ridgell as an AFT national representative. Darrin Nedrow was AFT's director of healthcare organizing.⁴ WSNOP maintained an office in Vancouver.

In March 2015, WSNOP voluntarily recognized the CWA as the exclusive bargaining representative for the following bargaining unit:

All full-time, permanent employees working in the following job classifications:

Organizer, Senior Organizer, and Lead Organizer, excluding any supervisors or managers as defined by the Act, any AFT member on release time working for the Project, and any AFT staff, affiliate staff and/or organizers from other projects assigned to the Project.

A collective-bargaining agreement was executed in December 2015, effective July 1, 2015–June 30, 2018.⁵ Joseph Crane, an organizer who had been hired as a temporary employee in January 2015, and a fulltime employee in March 2015, was the shop steward.

² See, e.g., *E.I. du Pont & Co.*, 293 NLRB 896 fn. 2 (1988); *Transport Service Co.*, 282 NLRB 111 fn. 4 (1986); *L. E. Myers Co.*, 270 NLRB 1010 fn. 2 (1984); and *Bio-Science Laboratories*, 209 NLRB 796 fn. 3 (1974).

³ Though the recitation of facts herein does not mirror the arbitrator's verbatim, I have not included any material facts the arbitrator did not rely upon in issuing his award. See *Louis G. Freeman Co.*, 270 NLRB 80, 81 (1984).

⁴ By the time of the hearing, Nedrow WAS AFT's director of organizing.

⁵ There is much dispute over how the CWA came to be recognized and how the contract came to be. I don't find it material and agree with the arbitrator that the recognition and bargaining history "tells a story of cooperation rather than one of confrontation." (Jt. Exh. 5, p. 9.)

Prior to the events at issue here, some of the organizers had raised collective concerns about their terms and conditions of employment, including a perceived lack of training, late direct deposit payments, healthcare benefits, 401K errors, and changes to a cell phone policy.⁶ In addition, some organizers had walked out of a staff meeting in October 2015 to protest their concerns, including the Respondent's delay in signing the collective-bargaining agreement. On October 29, 2015, Crane, Weekes, and Scott sent an email listing their concerns to Nedrow. Among the issues they raised was the lack of a database for system for tracking their organizing efforts. During a subsequent phone conference, Nedrow said he would try to address their concerns but also chastised the organizers for the walkout, stating such action would leave a "black mark" on their records.

On August 2, 2016, Nedrow conducted an in-person meeting with the WSNOP organizers.⁷ He expressed frustration with "bullshit complaints" from the WSNOP team and said he wanted to move forward on good footing. Nedrow banged the table and said they needed to hit the "reset" button. He advised the organizers to focus on the workers they were organizing.⁸

B. The PeaceHealth Southwest Campaign

WSNOP successfully organized the nurses and technical employees at PeaceHealth Southwest. At issue here is the organizing campaign for PeaceHealth Southwest's service and maintenance employees, which took place in 2015–2016. Organizers working on the PeaceHealth Southwest service and maintenance campaign (hereinafter referred to as "the campaign") were Crane, who served as the lead organizer;⁹ Weekes and McAllister,¹⁰ who served as senior organizers; and Hanley, Reuge, Burdine, and Roxanna McCloud-Lewis, who worked as organizers.¹¹ Rival union Service Employees International Union (SEIU) was simultaneously trying to organize these service workers.

For the campaign, organizers were each given a group of employees as their "turf" and ranked the employees on a four-point scale that gauged each's support of the Union.¹² This information was maintained in a database called KNACK, which the organizers updated regularly.¹³ Wall charts at WSNOP offices also reflected the employees' support but the KNACK database was the most extensive repository of information.

⁶ The only complaint that culminated in a formal grievance was the change to the cell phone policy. This was resolved when the Respondent withdrew its new policy of paying only the organizer's portion of a family plan and reverted to its previous policy.

⁷ All dates are in 2016 unless otherwise indicated. This was the second day of employment at WSNOP for both McAllister and Hanley.

⁸ McAllister perceived tension between Nedrow and Crane at this meeting.

⁹ Crane started as a temporary employee with WSNOP in January 2015 and became permanent in March 2015. He became lead organizer in December 2015.

¹⁰ At some point McAllister began working in Eugene, Oregon, and only came to the Vancouver facility for staff meetings.

¹¹ McCloud-Lewis' name was previously Roxanna Garcia.

¹² Crane oversaw the organizers and did not have his own separate turf.

¹³ As the arbitrator noted, "There was little disagreement that Mr. Crane was not a frequent user of KNACK." (Jt. Exh. 5, p. 6.)

In early June 2016, following his role in successfully organizing the technical unit at PeaceHealth Southwest, Crane complained to Ridgell that he was not getting paid what he should. He told Ridgell he and his wife were expecting a child, and he could get paid more at another union. Ridgell supported Crane's desire to make more money and advocated for him. The AFT, however, wanted to wait until a new contract was negotiated because Crane was at the top of the current contract's pay scale. In September 2016, Ridgell told Crane he could not get a raise under the current contract. In response, Crane said he may need to go work for the SEIU. Ridgell expressed concern about Crane working for the rival union given the intelligence and information he had about the campaign. Crane responded that he didn't sign a non-compete agreement. Ridgell told Huesgen that Crane was thinking of going to the SEIU.

Crane recalled his discussions about leaving for the SEIU were specific to the SEIU Local 503, where he had previously worked. The SEIU Local 503 is not one of the locals that organizes healthcare. When Crane had previously worked for the SEIU Local 503 about 5 years earlier, however, he had been pulled to work for one of SEIU's healthcare locals at PeaceHealth Southwest. Prior to Crane's termination, SEIU Local 49 had been involved with the campaign.¹⁴

Ridgell believed the campaign was moving slowly, so he asked Crane for updates multiple times. On September 29, 2016, Huesgen sent an email to the organizers entitled "Numbers report out and procedural changes." The email started out stating, "As we have been talking about for the last few weeks we need to capture our numbers." She specifically asked the organizers to report to Crane: number of conversations, number of group meetings including unit and number of attendees, new assessments using the four-point system, SEIU peel offs, and AFT defections. (Arb. R Exh. 3.)

On October 3, Huesgen requested suspension of Crane's KNACK database access based on her concerns he would share the information contained in it with the SEIU. Neither she nor anyone at WSNOP reminded Crane of his obligations under the CBA Article 6, prior to locking him out of the KNACK database. That provision states:

Article 6- General Employment Practices

Confidential information and trade secrets that are learned while in the employment of the Project are not to be disclosed to other parties and are the property of the Project. Information that must be kept confidential includes but is not limited to: data in any form concerning potential and actual members, unit lists and contact information, research, potential and actual organizing targets, employer and unit research, contacts that have to produced such target information, strategic plans and assessments, as well as the techniques and strategies used by the Project to develop and operate an organizing campaign. The duty to preserve confidentiality of this information extends during and after termination of employment.

¹⁴ The parties dispute whether or not Crane referenced a specific local when he said he may go work for the SEIU. Particularly in light of this history, it doesn't matter whether a specific local was mentioned.

(Arb. Jt. Exh. 1.)

5 The WSNOP organizers received a new employee directory of the entire hospital around Monday October 10. It identified about 300 additional employees in the service unit. The organizers thought they could sort through it by the following Tuesday, October 18. (Arb. Tr. 299, 520-522.)

10 On October 11, 2016, Ridgell texted Crane, "Got some numbers for the service unit?" Crane responded, "Around 800 total numbers, 39 cards from 50 percent." Ridgell replied, "OK. Looking forward to seeing the details." (Arb. U Exh. 2.)

15 At some point in early October, Crane discovered he was locked out of the KNACK database, so on October 12 he asked Huesgen about it. Huesgen told Crane she locked him out because he had threatened to go work for the SEIU. Huesgen told Crane he would restore his access. Later that day, Huesgen sent Crane an email entitled "5 pm meeting today" which stated:

20 Just to clarify the 5pm meeting today with you, myself, and Charlie is a continuation of our morning meeting as we all agreed upon, that was cut short, for you to respond to the needs of a worker which of course is a priority for all of us. The subject of this meeting is to prepare for the staff meeting tomorrow.

I do not anticipate a continuation of our discussion regarding your access to the data base. If you would like to have another discussion/meeting regarding that issue let us know and we can talk.

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(Arb. R Exh. 4.)

C. The October Meeting and Terminations

30 Management held staff meetings with the organizers on a roughly weekly basis to keep abreast of the campaigns. One such meeting was held on Thursday October 13, 2016, at around 5:30 p.m. at the Vancouver office.

35 Shortly before the October 13 meeting, at 4:56 p.m., Ridgell sent Crane the following email¹⁵:

Joe,

40 Since either Angie or I have verbally asked for a numbers report numerous times since September 29, and you have found reasons and excuses for why it cannot be done, I am now reducing my request to writing.

Please consider this an instruction.

45 Please provide the following by 2p tomorrow (Friday, October 14):

¹⁵ The email states the time as 7:56 but this was East Coast time.

A numbers report on the Southwest service unit broken out by organizer showing for each organizer:

5 Total# of workers and which departments;

of workers assessed showing 1s, 2s, 3s and 4s, unassessed as of today; SEIU peel offs, defections to SEIU.

10 Once we have this baseline report, it will be your responsibility to debrief organizers on a daily basis and provide Angie a daily summary as well as a weekly report that will be forwarded to Darrin.

Please provide the following by 5p Monday, October 17:

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A draft campaign plan for the service unit indicating weekly goals, approximate timeline for filing, literature outline and calendar, meetings/events, etc.

Thank you for your anticipated cooperation.

20

CR

(Arb. R Exh. 1.) Crane received the email right as the meeting was about to start. He did not believe it was feasible to provide the requested information by 2 p.m. the following day.

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At the October 13 staff meeting, organizers Crane, McAllister, Burdine, Hanley, Reuge, Weekes, and McCloud-Lewis were present. Ridgell and Huesgen were present for management. The organizers gave updates on various campaigns without incident. The PeaceHealth update was the final agenda item. Crane was asked for an update, and said he could not give a full answer because he had been locked out of the database. Huesgen told Crane that the database issue was a personal conversation not appropriate for the staff meeting. Weekes asked how Crane, the lead organizer, could be locked out of the KNACK database. Ridgell said Crane had been locked out of the database because he had threatened to go work for the SEIU, so WSNOP wanted to protect the integrity of the campaign. Weekes and some of the other organizers disputed this, saying Crane had expressed a commitment to stay through the campaign.

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The meeting became contentious, with voices raised all around. Crane's work ethic was questioned, and other employees stood up for him in response. Ridgell kept asking why Crane could not produce the numbers. Crane asked if he needed a union representative. Ridgell responded, "I don't know. You tell me." After some more back and forth, Ridgell said maybe Crane needed a representative, and asked when the union representative would be available. Crane responded the following Tuesday. Huesgen and Ridgell stepped out and discussed what to do about Crane.¹⁶ Ridgell came back in and told Crane he was suspended until they could meet with him and his union representative the following Tuesday. Crane then asked if that was

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¹⁶ The organizers agree that Huesgen and Ridgell stepped out, but there are discrepancies about what exactly they overheard.

necessary and suggested they could just finish the meeting and meet later when he had a union representation. He was rebuffed by Mr. Ridgell saying, “Let me rephrase the question. Why can't you do your job?” (Arb. Tr. 653; Jt. Exh. 5, p. 13.)

5 More yelling took place. Crane stood up and asked who was with him. Ridgell instructed the organizers to stay in the meeting and said they could be terminated if they left. (Arb. Tr. 100.) All of the organizers except McLeod-Lewis stood with Crane and left the meeting. McAllister recalled as he was getting ready to leave the meeting with his coworkers, “Charlie pulled me aside and he said, is this really what you want to do? Do you really want to hitch your wagon to this guy? And he pointed to Joe.” (Arb. Tr. 484.)

10 The organizers walked back to their work area. Ridgell followed and said anyone who left with Crane should hand over AFT property, keys, and laptops. The organizers said they needed to delete personal information from the computers. Ridgell heard somebody say “wipe them clean.” (Arb. Tr. 102.) Crane told the other organizers to wipe their passwords off their computers. (Arb. Tr. 306.) Ridgell again asked McAllister, “[A]re you sure you want to do this? You shouldn't end your career for this guy.” (Arb. Tr. 485.) Crane, Burdine, Hanley, McAllister, Reuge, and Weekes left the building together. Ridgell took their keys and said he was changing the locks the following day.

20 Ridgell left a voice message for McAllister the evening of October 13 instructing him not to talk to workers on behalf of AFT, and to refer any workers who called to him (Ridgell). (Arb. U Exh. 5.)

25 On October 14, 2016, Friesz sent emails to Crane and Weekes notifying them they were terminated effective immediately for gross insubordination.¹⁷ He sent probationary employees Hanley, Reuge, Burdine, and McAllister emails notifying them their probationary employment was terminated. The emails instructed all the recipients to return any AFT property and files to the project office and to mail any outstanding expense claims. Friesz reminded the former employees of their obligation to maintain confidentiality of proprietary information and records. The organizers grieved their terminations and each grievance was denied. (Arb. R Exhs. 2, 3.)

30 On October 15, Ridgell called McAllister, who recalled the salient points of their conversation as follows:

35 In the course of that conversation[,] though[,] he asked me, are you resolute in your decision? Is this really what you want to do? And I was, I was taken aback by that. I think I asked him, Charlie, I've been fired. Like, what is there for me to reconsider? Like, no, I don't think there's anything I can do at this point. And he said, well, that's, that's a shame. You could have been promoted to lead in a couple of months.

40 (Arb. Tr. 490; Arb. U Exh. 5). McAllister told Ridgell to talk to his union representative and ended the conversation.

¹⁷ The emails were sent from Emma Cullen on behalf of Friesz.

Following a runoff between WSNOP and the SEIU, WSNOP eventually won the campaign to represent PeaceHealth's service and maintenance workers.¹⁸

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III. DECISION AND ANALYSIS

A. Deferral to Arbitration

The parties correctly agree that the deferral issue this case presents falls under *Babcock & Wilcox Construction Co., Inc.*, 361 NLRB 1127 (2014), review denied sub. nom. *Beneli v. NLRB*, 873 F.3d 1094 (9th Cir. 2017). Under the standards the Board established in *Babcock & Wilcox*, deferral to an arbitrator's decision is appropriate where: (1) The arbitrator was explicitly authorized to decide the statutory issue; (2) The arbitrator was presented with and considered the statutory issue; and (3) Board law reasonably permits the award. The parties do not dispute the first and second criteria have been met, and I agree as to the unfair labor practices allegations.¹⁹ As such, deferral turns on whether Board law reasonably permits the arbitrator's award.

As to whether Board law reasonably permits the arbitral award, the arbitrator's decision must constitute a "reasonable application of the statutory principles that would govern the Board's decision, if the case were presented to it, to the facts of the case." *Id.* at 1133. The arbitrator "need not reach the same result the Board would reach, only a result that a decision maker reasonably applying the Act could reach." *Id.* The Board does not engage in a de novo review when determining if Board law reasonably permits an arbitrator's award.

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The party urging deferral has the burden to prove the requirements for deferral have been met. *Id.* The General Counsel argues that I should not defer to the arbitrator's award because the remedy falls short of the Board's make-whole standards. The General Counsel argues, however, that I should follow the arbitrator's reasoned credibility determinations and factual findings that the Respondent violated the Act as alleged. The Respondent argues that I should not defer to the arbitrator's decision, but if I do, I should defer to the entire decision, including the remedy.

As discussed fully below, I find the arbitrator's determinations regarding the unfair labor practices are "a reasonable application of the statutory principles that would govern the Board's decision, if the case were presented to it, to the facts of the case." *Id.* I find, however, that the remedy, specifically the backpay award, is not reasonably permitted under Board law.

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1. Alleged threats, interrogation, and implied promise of benefits

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor

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¹⁸ The timing of this is not clear from the transcript, but an AFT press release from December 16, 2016, announces the result. <https://www.aft.org/press-release/service-and-maintenance-workers-peacehealth-southwest-affiliate-aft>.

¹⁹ As discussed below, he did not consider the statutory criteria when fashioning the remedy.

organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .”

5 The Board's longstanding test to determine if there has been a violation of Section 8(a)(1) of the Act is whether the employer engaged in conduct which might reasonably tend to interfere with the free exercise of employee rights under Section 7 of the Act. *American Freightways Co.*, 124 NLRB 146 (1959). Further, “It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer’s motive or on whether
10 the coercion succeeded or failed.” *American Tissue Corp.*, 336 NLRB 435, 441 (2001) (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946)). It is the General Counsel’s burden to prove that a statement or conduct constitutes an unlawful threat, interrogation or act of surveillance, or an unlawful promise or grant of benefits.

15 a. Alleged threats

 The complaint alleges Ridgell threatened employees during the October 13, 2016 meeting by telling them: (a) that anyone who left the meeting would be terminated for insubordination;
20 (b) to think about the decision to leave the meeting carefully and to not pick the wrong side; (c) to reconsider their position to stand and support other employees; (d) that their decision to leave the meeting would end their careers; (e) that their bargaining unit did not count as a labor movement; and (f) to pick what side they were on.

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

 Considering these same allegations, Arbitrator Bailey, after making detailed factual findings, determined that “[t]he organizers were threatened with possible termination if they did
35 not remain in the meeting. In addition, Mr. McAllister was questioned about the threat to his career and to pick which side he was on.” (Jt. Exh. 5, pp. 8–15.)²⁰ He was “unable to confirm or disprove” any of the other claims. Under the applicable burdens of proof, this means the General Counsel did not meet his burden for the remaining claims.

²⁰ The cited pages of the arbitration award cover his factual findings regarding all of the alleged 8(a)(1) violations in the complaint. In making his findings, the arbitrator reviewed 34 court and/or NLRB cases submitted by the employer and 21 cases submitted by the union.

Arbitrator Bailey’s credibility determinations are contained in his findings and I defer to them. See *Aramark, Inc.*, 344 NLRB 549 fn. 1 (2005). He observed the witnesses firsthand, and there is nothing about his credibility findings inconsistent with Board law.

Without conducting a de novo review, I have duly considered the parties' respective arguments. I find, however, that the arbitrator's determination is a reasonable application of the statutory principles that would govern the Board's decision if the case were presented to it. Based on the foregoing, I find deferral to the arbitrator's award regarding the threats at issue in the complaint comports with Board law.

In the alternative, if the inadequacy of the remedy requires full relitigation of the substantive allegations, I find, giving significant weight to the arbitrator's detailed factual findings and analysis, the General Counsel proved the employees were threatened with termination if they left the October 13 meeting, and McAllister was threatened about his career and told to pick which side he was on in violation of Section 8(a)(1) of the Act.²¹ I find there is insufficient evidence to prove the remaining threat allegations.

b. Alleged interrogation and implied promise of benefits

The complaint alleges that on about October 15, 2016, Respondent, by Ridgell, telephonically interrogated its employees by asking if they were resolute in their decision to support other employees; and impliedly promised better working conditions by telling its employees that they could have been promoted to lead had they not engaged in concerted activities.

In assessing the lawfulness of an interrogation, the Board applies the totality of circumstances test adopted in *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom. *Hotel Employees Union v. NLRB*, 760 F.2d 1006, 1009 (1985) (9th Cir. 1985). This test involves a case-by-case analysis of various factors, including those set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964): (1) the background, i.e., whether the employer has a history of hostility toward or discrimination against union activity; (2) the nature of the information sought, i.e., whether the interrogator appears to have been seeking information on which to base taking action against individual employees; (3) the identity of the interrogator, i.e., his or her placement in the Respondent's hierarchy; (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. The Board also considers whether the interrogated employees are open and active union supporters. See, e.g., *Gardner Engineering*, 313 NLRB 755, 755 (1994), enfd. as modified on other grounds 115 F.3d 636 (9th Cir. 1997). These factors "are not to be mechanically applied"; they represent "some areas of inquiry" for consideration in evaluating an interrogation's legality. *Rossmore House*, supra, 269 NLRB at 1178 fn. 20. Implied promises of benefits in connection with an employee's protected concerted activities likewise violates the Act. See *Telecom, Inc.*, 153 NLRB 830 (1965).

Again, after making factual findings, Arbitrator Bailey determined that "the essence of these points occurred in a post-termination call between Charlie Ridgell and Steve McAllister." (Jt. Exh. 5, p. 17.)

Without conducting a de novo review, I have duly considered the parties' respective arguments. I find the arbitrator's determination is a reasonable application of the statutory

²¹ See *Babcock & Wilcox*, supra at fn. 35 (Board will give an arbitrator's findings "whatever weight is appropriate.").

principles that would govern the Board's decision, if the case were presented to it, to the facts of the case. I therefore find deferral to the arbitrator's determination regarding the interrogation and implied promise of benefits in the complaint comports with Board law.

5 In the alternative, if the inadequacy of the remedy requires full relitigation of the substantive allegations, I find, giving significant weight to the arbitrator's detailed factual findings and analysis, the General Counsel proved Ridgell telephonically interrogated McAllister by asking if he was resolute in his decision to support other employees and told him it was a shame he had engaged in the actions that led to his termination because he could have been promoted to lead. The credited and detailed testimony from McAllister regarding this incident is corroborated by a contemporaneous text and more persuasive than Ridgell's blanket denial.²² 10 (Arb. Tr. pp. 113, 490; Arb. U Exh. 5.) Ridgell's call to McAllister, directly on the heels of the contentious meeting and his and his coworkers' terminations, with the implications that he could change his course by breaking from his colleagues, was, under the present factual circumstances, 15 coercive. Accordingly, I find the Respondent violated the Act as alleged.

2. The suspension and terminations

20 The complaint alleges that Crane was suspended and then terminated, and that Burdine, Hanley, McAllister, Reuge, and Weekes were terminated for engaging in protected concerted activity.

25 An employee's discipline independently violates Section 8(a)(1), regardless of the employer's motive or a showing of animus, where "the very conduct for which employees are disciplined is itself protected concerted activity." *Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981). Furthermore, when an employee is disciplined for conduct that is part of the *res gestae* of his protected concerted activities, "the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act." *Stanford NY, LLC*, 344 NLRB 558 (2005); *Aluminum Co. of America*, 338 NLRB 20 (2002).

30 An employee's leeway for impulsive behavior when engaging in protected activity is not without limit and is subject to the employer's right to maintain order and respect in the workplace. See *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994); *NLRB v. Ben Pekin Co.*, 452 F.2d 205, 207 (7th Cir. 1991); *NLRB v. Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965). The 35 standard for determining whether specified conduct is removed from the protections of the Act is whether the conduct is "so violent or of such serious character as to render the employee unfit for further service." *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204-205 (2007), quoting *NLRB v. Illinois Tool Works*, 153 F.2d 811, 815 (7th Cir. 1946); See also *Hawthorne Mazda*, 251 NLRB 313, 316 (1980), and cases cited therein.

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²² Though the test is objective, McAllister testified at the arbitration hearing that there were some "implications there that made me really uncomfortable, that I was being contacted by the employer the day after being fired to ask, you know, hey, you know, the implication was that maybe this could be fixed if I did something. And I was sufficiently uncomfortable at that point. . ." (Arb. Tr. 490.)

Under *Atlantic Steel*, the Board considers the following factors to determine whether an employee loses the Act's protection: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

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With detailed factual findings, Arbitrator Bailey determined that Crane's "opposition to his lockout of the database and in support of similar positions taken by other employees on his behalf at a staff meeting on October 13, 2016 led to his suspension for actively engaging in legal, non-economic, workplace advocacy of his protected activity." (Jt. Exh. 5, pp. 15- 16.) He further concluded that Crane and the other employees were engaged in protected activities and protesting unfair labor practices when they left the October 13 meeting, which led to their terminations. Specific salient findings included:

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The supervisors had to know that Mr. Crane's history as an assertive shop steward made it extremely likely that the last-minute demand for a quick turnaround of information . . . and the ongoing dispute over the database, made for a toxic meeting. Instead of seeking a productive meeting on the campaign, supervisors continued to seek to isolate Mr. Crane from the other members of the bargaining unit. A second chance to avoid the building ULP was lost.

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. . .

Leaving an evening staff meeting, to support a co-worker unfairly suspended, when the meeting had descended into chaos, and contained several ULP incidents,²³ cannot I believe be fairly determined to be the equivalent of leaving the shop floor in the middle of a shift. None of the Organizers would have had organizing duties scheduled for the meeting time.

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. . .

The campaign directors set the stage for chaos by not reinstating Mr. Crane's database use when he believed there was an agreement to do so and emailed him with quick turnaround duties just minutes before the staff meeting allowing for no prior discussion with him. The Project Director also terminated the employees without any investigation beyond the Campaign Director's assertions.

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. . .

The Employer was not blameless in allowing the meeting to descend into chaos. Leaving the meeting, even under threat, would support, if anything, a penalty short of discharge. As previously demonstrated the actions of the organizers was not aimed at banning the core mission of organizing workers. Also, nothing in the record indicated any prior discipline, at any level against either permanent employee. Even if one were to find

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²³ The Respondent disputes that any ULP incidents occurred at the meeting. As discussed above, however, I agree with the arbitrator that the threats violated the Act. With regard to other ULPs the arbitrator cited, I find it is unnecessary to determine whether or not they rise to the level of violating the Act. The employees' actions were protected regardless.

insubordination at the meeting it would not rise to an egregious level to support discharge.

(Jt. Exh. 5, pp. 11–18.)²⁴

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Arbitrator Bailey also determined that having their keys and computers taken from them, and having been informed that Ridgell told McAllister he was not to contact workers, there was “little the organizers could do until contacted by someone in management.” (Jt. Exh. 5. P. 14.) There is no dispute the next contact was the termination letters.²⁵ Accordingly, Arbitrator Bailey found the suspension and terminations violated the Act.

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The Respondent argues at length that I should come to different conclusions regarding whether Crane and the other organizers engaged in protected concerted activity resulting in Crane’s suspension and his and the other organizers’ terminations. (R Br. Pp. 28–40.) Without conducting a de novo review, I have duly considered these arguments.²⁶ I find the arbitrator’s determination is reasonably permitted by Board law and easily meets the standards for deferral.

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In the alternative, if the inadequacy of the remedy requires full relitigation of the substantive allegations, I find, giving significant weight to the arbitrator’s detailed factual findings and analysis, the General Counsel proved Crane was suspended and terminated and the other employees were terminated for engaging in protected concerted activity in violation of the Act. I specifically find that the employees left the meeting to protest the employer locking Crane, their lead, out of the KNACK database, unfairly berating him about his inability to do his job, and ultimately suspending Crane after heated arguments over these issues. I further find that at no time did Crane or any of the other organizers lose the Act’s protection. On an independent review of both the arbitration record and the hearing record, I agree with the arbitrator that the employees’ actions of removing themselves from an escalating confrontational situation at the end of the workday under the factual circumstances present here did not warrant their terminations.

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The employer’s act of taking the employees’ keys and computers and changing the locks at the Vancouver facility would lead any prudent person to conclude he or she had been terminated. See, e.g., *Benesight, Inc.*, 337 NLRB 283 fn. 6 (2001). Moreover, Ridgell told McAllister on the evening on October 13 that he was not to talk to workers as a representative of AFT. Any notion that the employee were terminated for failing to show up to work on October 14 is belied by these facts, as well as the fact that the stated reasons for each of their terminations was “gross insubordination” rather than failure to report to work.²⁷ Accordingly, I find the suspension and terminations violated the Act as alleged.

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²⁴ The arbitration award contains numerous other findings which have also been considered.

²⁵ In McAllister’s case, there was also the call from Ridgell comprising the interrogation/implied promise of benefit allegation.

²⁶ I decline herein to engage in a detailed analysis about the nuances of the applicable law, how the arbitrator applied it, as this would defeat the purpose of deferral.

²⁷ For the probationary employees, no reason was given in their termination letters, but insubordination was the reason given at their respective unemployment compensation hearings.

3. Remedy for terminations

5 Arbitrator Bailey limited his consideration of the remedy for the terminations at issue to the collective-bargaining agreement. Specifically, he limited the remedial issues to whether the terminations violated the CBA as follows:

10 (8) Whether the Employer's decision to terminate Joseph Crane and Darnley Weekes violated Article 2, 5, and/or 9 of the parties' collective bargaining agreement and, if [so], what shall be the remedy

...

15 (9) Whether the Employer's decision to terminate Matthew Burdine, Gabrielle Hanley, Steven McAllister and Cecile Reuge violated Articles 2, 5, and 9 of the parties' collective bargaining agreement and, if so, what shall be the remedy.

(Jt. Exh. 5, p. 18.)

20 He then, citing to the CBA's provisions governing reductions in staff and converted the terminations to layoffs against the backdrop of WSNOP having recently ceased operations. The arbitration award ordered the following remedy:

25 The discharge of the six employees: Joe Crane, Darnley Weekes, Gabrielle Hanley, Cecile Reuge, Matthew Burdine, and Steve McAllister shall be removed from personnel records and changed to layoffs.

...

30 In accordance with Article 10 Section 3 of the collective bargaining agreement, in effect on October 14, 2016, the above named employees shall receive severance pay equal to two (2) weeks of their base salary as of October 13, 2016.

...

35 Should a layoff list exist for any employees subject to layoff with the ceasing of operations of Washington State Nurses Organizing Project on August 31, 2018, then and only then shall these six employees be entitled to recall rights as called for in Article 10 Section 4 of the collective bargaining agreement in effect on October 14, 2016. Their six month recall time starts with the date of issue of this decision., and shall be consistent
40 with their seniority rights in Article 10 Section 1 as of October 13, 2016.

(Jt. Exh. 5, p. 22.) As noted above, the employees were terminated on October 14, 2016, and WSNOP ceased operations on August 31, 2018.

McAllister worked remotely from Eugene, so any failure to report to work rationale makes even less sense applied to him.

The Respondent asserts that the arbitration award is “within a reasonable application of the statutory principles that would govern the Board’s decision” and argues that “[s]ince the Board is not performing a de novo review of the Arbitrator’s decision, his decision as to the appropriate remedy should stand, if dismissal is not otherwise appropriate.”²⁸ (R Br. 47.) The General Counsel argues that “two weeks’ backpay, conversion to a layoff, and preferential hiring rights are nowhere near the level of a standard Board remedy for discriminatory discharges by an employer . . . that continued to operate until . . . more than 22 months after the employees were unlawfully discharged” and therefore the award is not reasonably permitted by Board law. (GC Br. 33.)

The Board need not “automatically refuse to defer in all situations involving arbitration awards that provide incomplete make-whole remedies, or remedies not otherwise totally consistent with Board precedent.” *Cone Mills Corp.*, 298 NLRB 661 fn. 19 (1990). Likewise, the Board will defer to an award which is “not a model of clarity.” *Smurfit-Stone Container Corp.*, 344 NLRB 658, 660 (2005). To be sure, the Board has repeatedly found deferral appropriate despite an arbitrator’s denial or curtailment of backpay. See *Specialized Distribution Management*, 318 NLRB 158 (1995); *Crown Zellerbach Corp.*, 215 NLRB 385, 387 (1974); *American Commercial Lines*, 291 NLRB 1066 (1988); *Fikse Bros. Inc.*, 220 NLRB 1301 (1975). In these cases, decided under the Board’s previous standard upholding deferral unless the arbitrator’s award is repugnant to the Act, the arbitrator offered some justification for curtailing backpay, such as misconduct, warranting the reduction.

Here, Arbitrator Baily made no factual findings to justify such a severe curtailment of make-whole relief required by the Act.²⁹ With no factual findings, it is no surprise the arbitration award is devoid of legal analysis to support the remedy. See *Cone Mills Corp.*, supra at 666 (refusal to award backpay without finding misconduct that would justify withholding it is contrary to the Act). As such, I find the arbitrator’s award is not a “reasonable application of the statutory principles that would govern the Board’s decision, if the case were presented to it, to the facts of the case.” *Babcock & Wilcox*, supra at 1133.³⁰ I therefore will, in accordance with the Act, determine the appropriate remedy based on the relevant facts.

Before doing so, however, I will address the issue of whether, in a post-arbitral proceeding governed by *Babcock & Wilcox*, I must refuse to defer to the arbitrator’s findings on the substantive underlying unfair labor practices allegations, and issue a new decision on those allegations, when the only part of the decision not meeting the standards for deferral is an inadequate remedy.

²⁸ The Respondent cites to *Aramark, Inc.*, 344 NLRB 549 (2005), for the proposition that a lack of backpay does not necessarily render an arbitration award inconsistent with the Act. Reliance on *Aramark* is misplaced, however, because in that case the arbitrator had determined there was just cause for the employee’s termination based on her abusive behavior. There was no such determination here.

²⁹ The closest he comes is his statement, “Even if one were to find insubordination at the meeting it would not rise to an egregious level to support discharge.” (Jt. Exh. 5, p. 18.) This hypothetical consideration cannot under any reasonable reading serve as a factual justification for denying almost 2 years of backpay.

³⁰ Under the previous standard set forth in *Olin Corp.*, 268 NLRB 573, 574 (1984), the very limited backpay itself likely would not have rendered the award “repugnant to the Act.”

Piecemeal deferral runs counter to the Board's policy to resolve an entire dispute in a single proceeding. See *15th Avenue Iron Works*, 301 NLRB 878, 879 (1991), enf. 964 F.2d 1336 (2d Cir. 1992). Such concerns, however, are not present in the instant case where arbitration has already occurred. In *15th Ave. Ironworks*, at fn. 11, the Board explained:

We reject the General Counsel's contention that deferral is inappropriate because of Board policy to resolve an entire dispute in a single proceeding. . . . In the instant case, the arbitration proceedings, to which deferral has been requested, have been completed and deferral to these proceedings would not preclude the Board from now resolving all remaining issues presented to the Board. Cf. *Toyota of San Francisco*, 280 NLRB 784 (1986). The fundamental distinction underlying the Board's willingness to consider partial deferral under *Spielberg*³¹ criteria is that no further delay in resolving the proceeding before the Board is thereby necessary, whereas were the Board to consider deferral under *Collyer*³² to prospective arbitration for some of the intertwined issues in a proceeding before the Board, the result would necessarily entail further delay in reaching a final decision on those issues.

The specific efficiency concerns outlined in *15th Ave. Ironworks* differ from those present here, but the broad underlying concern is the same, i.e., how best to implement a national labor policy that strongly favors voluntary arbitration of disputes and deferral to arbitral awards yet ensures employees retain the Act's protections.

Liability and damages are distinct concepts. Liability contemplates whether there is a violation. Only if the question of liability is answered in the affirmative can we even proceed to the issue of damages. The latter simply does not exist without the former. Though the two concepts obviously relate to each other, the legal paradigms for determining each are entirely different. It goes without saying that a properly litigated liability determination need not be relitigated to determine the appropriate remedy.³³ To do so would be a waste of time and resources.

Here, following a 3-day arbitration, which produced a 752-page transcript and multiple exhibits, Arbitrator Bailey made extensive factual findings and engaged in analysis regarding the substantive statutory issues before me, as discussed above. He did not, however, lay out the facts or engage in analysis to support an extreme deviation from the statutory remedy for the employees' terminations. Under these circumstances, I find it is appropriate to defer to his findings and determinations regarding liability but to reject the remedy.³⁴

³¹ *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

³² *Collyer Insulated Wire*, 192 NLRB 837 (1971)

³³ This is underscored by the prevalence of bifurcated proceedings, where liability is tried separately from and prior to damages. Because the concepts of liability and damages are so distinct, I do not think permitting deferral regarding liability but not damages opens the door to permitting factfinders to "cherry pick" portions of an arbitrator's award they don't like and defer to others.

³⁴ For this reason, I find it improper to consider the complaint allegation at paragraph 6, which alleges that on or about October 12, 2016, Ridgell told employees they did not have the right to organize against the Respondent. This allegation was withdrawn before the arbitrator. The fact that the arbitrator failed to adequately remedy a different allegation should not revive this withdrawn allegation. To decide otherwise

B. The Remedy

1. Make-whole relief

The General Counsel argues that a make-whole remedy would include ongoing accrued backpay and interest for the 22 months WSNOP continued to operate following the terminations, plus any reasonable expenses, as well as reinstatement and/or preferential rehire rights. The Respondent argues that the employees' post-termination misconduct bars any remedy.³⁵

a. Post-termination events—facts

After the employees left on the evening of October 13, Ridgell noticed the signed authorization cards for one of the PeaceHealth lab units was missing. He contacted Jeannette Turner, the Local CWA President. Weekes had taken authorization cards that were in an envelope with some of his personal things when he left WSNOP's offices on October 13. When Turner informed him the cards were missing, Weekes returned them.

Ridgell had trouble opening up some of the computers after the employees left. He also testified about hearing reports from the hospital that Crane was talking to people there. Two unnamed workers left angry messages, and Ridgell was directed to have conversations with them.

SEIU put out a flyer which stated at the bottom: "Don't be a scab organizer. You don't have to work for SEIU but don't sell out the illegally fired aft project staff" and "If you want to know more about why six AFT organizers are gone go to: <https://www.nlr.gov/case/19-CA-187437>." (Arb. R Exh. 2.) The flyer covered the windows of the WSNOP Vancouver office.

makes a mockery of judicial economy and flouts the longstanding doctrine of res judicata. I understand the General Counsel was not a party to the arbitration. Citing to *Field Bridge Associates*, 306 NLRB 322, 322 (1992), enfd. 982 F.2d 845 (2d Cir. 1993), cert. denied 509 U.S. 904 (1993), the Board in *Babcock & Wilcox*, supra at 1138 stated, "It is well settled that the Board does not give collateral estoppel effect to the resolution of private claims asserted by private parties, where the Board was not a party to the prior proceedings." *Field Bridge Associates*, in turn, however, states, "The Board adheres to the general rule that if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully." Of course had the Union presented this claim to the arbitrator and lost, and it was later determined deferral to the arbitrator's decision was improper under extant Board law, it would be properly before the Board. But consider a case with 8 unfair labor practice allegations that is deferred to arbitration. The union subsequently withdraws 7 of the allegations and presents only one to the arbitrator. If deferral is later deemed improper, do all 8 allegations come back to the Board? This would be an absurd result which would invite gamesmanship of the process.

As detailed above, I have offered alternative analyses of the unfair labor practice allegations that gives significant weight to the arbitrator's findings but do not fully defer to them on the likelihood that a reviewing authority will adhere to the principle that a faulty remedy negates the entire award.

³⁵ No party offers specific argument regarding the other aspects of the arbitrator's remedy.

b. Post-termination events—analysis

5 When alleged misconduct occurs post-discharge, the only question is whether the employee's can be denied reinstatement and backpay as a result. The Board applies the standard set forth in *O'Daniel Oldsmobile, Inc.*, 179 NLRB 398 (1969), which holds:

10 When seeking to be excused from his obligation to reinstate or to pay backpay to a discriminatee because of misconduct which was not a factor in the discriminatory action, an employer has a heavier burden than when he is merely seeking to justify the original discrimination. In the former case, he has the burden of proving misconduct so flagrant as to render the employee unfit for further service, or a threat to efficiency in the plant. (internal quotations and citations omitted).

15 See *Hawaii Tribune Herald*, 356 NLRB 661 (2011).

20 In the instant case, the Respondent has not specifically asserted post-termination misconduct as to employees McAllister, Hanley, Burdine, and Reuge. With regard to Weekes taking home some authorization cards, the Respondent has not refuted Weekes' assertion that this was inadvertently done in the chaos of the events of the evening of October 13. It is undisputed the cards were returned.

25 As to Crane, the only evidence of any potential misconduct is Ridgell's testimony that he heard reports that Crane was talking to people at PeaceHealth. Though he claimed to know two such people, he did not identify them or shed any light whatsoever on what Crane allegedly said to them. Ridgell clearly suspects Crane and perhaps some other of the former employees bore some responsibility for the SEIU flyer, but there is no record evidence any former WSNOP employees were behind its creation or distribution. The bitter rivalry between the two unions is
30 apparent from the record, so without evidence, I cannot find that the former WSNOP employees had a hand in the SEIU flyer.

35 Finally, Ridgell's testimony about problems with the former employees' computers is too vague to serve as the basis for attributing post-termination misconduct to any employee. He did not specify any specific files or programs he was unable to access, and he was completely unable to link the actions of any employee to any particular computer problem.

Accordingly, I find the Respondent has not met the burden to prove post-employment misconduct cuts off the employees' backpay.³⁶

³⁶ Although I have found the employees are entitled to full backpay, I strongly encourage both parties to consider a reasonable settlement. Lacking clairvoyant powers allowing me to know what will take place during a compliance phase of this litigation, I can say with certainty that there is much uncertainty. Factually, the PeaceHealth campaign ended in December 2016. How many other campaigns were ongoing? How many organizers were required to staff them? As with any compliance proceeding, the issue of mitigation will also come into play. Legally, *Babcock and Wilcox* is on shaky ground, and a

CONCLUSIONS OF LAW

5 By threatening employees that their careers will end if they engage in protected, concerted activities with their coworkers, implying that employees would have received a promotion if they had refused to engage in protected, concerted activities with their coworkers, and asking if employees are resolute in their decision to support their coworkers by engaging in protected, concerted activities, the Respondent has violated Section 8(a)(1) of the Act.

10 By suspending and terminating employee Joseph Crane, and by terminating employees Matthew Burdine, Gabrielle Hanley, Steven McAllister, Cecile Reuge, and Darnley Weekes, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

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

REMEDY

20 Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.³⁷

25 Having found the Respondent threatened employees that their careers will end if they engage in protected, concerted activities with their coworkers, implied that employees would have received a promotion if they had refused to engage in protected, concerted activities with their coworkers, and asked if employees were resolute in their decision to support their coworkers by engaging in protected, concerted activities, the Respondent shall be ordered to cease and desist from these actions.

30 Having discriminatorily suspended Joseph Crane, the Respondent shall be ordered to rescind the suspension and remove from its files any reference to the suspension, and to notify him in writing this has been done and that the suspension will not be used against him in any way.

more deferential posture seems likely in the near future. On March 15, 2019, the Board issued a notice an invitation to file briefs on the following questions:

1. Should the Board adhere to, modify, or abandon its existing standard for postarbitral deferral under *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014)?
 2. If the Board decides to abandon the Babcock standard, should the Board return to the holdings of *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984), or would some other modification of the Board's standard for postarbitral deferral be more appropriate?
 3. If the Board decides to abandon the *Babcock* standard in favor of either the *Spielberg/Olin* standard or some other standard for postarbitral deferral, should it apply the newly adopted standard retroactively in this case and other pending cases or prospectively only?
- 2019 WL 1242711.

³⁷ Because WSNOP had ceased operations at the time of this decision, when I refer to the Respondent in the remedy and order section of this decision, I incorporate by reference the Respondent's guarantor, American Federation of Teachers, AFL-CIO.

5 Having discriminatorily terminated Joseph Crane, Matthew Burdine, Gabrielle Hanley, Steven McAllister, Cecile Reuge, and Darnley Weekes, the Respondent, if it has resumed operations shall be ordered offer them full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their respective seniority or any other rights or privileges previously enjoyed. If the Respondent has not resumed operations, it shall offer them preferential hiring should the Respondent resume operations.

10 The Respondent shall make Joseph Crane, Matthew Burdine, Gabrielle Hanley, Steven McAllister, Cecile Reuge, and Darnley Weekes whole for any loss of earnings or other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), 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).

15 The Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc.*, 358 NLRB 823 (2012), reaffid. 361 NLRB 1171 (2014); In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall compensate Nicholas Miller for search-for-work and interim employment expenses regardless of whether those expenses exceed their 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 *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 19 a report allocating backpay to the appropriate calendar year for the discriminatees.

30 The Respondent shall also be required to remove from its files any references to the discriminatory terminations of Joseph Crane, Matthew Burdine, Gabrielle Hanley, Steven McAllister, Cecile Reuge, and Darnley Weekes, and to notify them in writing that this has been done and that the terminations will not be used against him in any way.

35 The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Respondent's 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 the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 13, 2016. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 19 of the Board what action it will take with respect to this decision.

The Respondent shall further be ordered to refrain from in any like or related manner abridging any of the rights guaranteed to employees by Section 7 of the Act.

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁸

ORDER

10 The Respondent, Washington State Nurses Organizing Project, its officers, agents, successors, and assigns, shall

1. Cease and desist from

15 (a) Telling employees to choose which side they are on in order to dissuade them from engaging in protected, concerted activities with their coworkers.

(b) Threatening employees that they will be considered insubordinate and/or their careers will end if they engage in protected, concerted activities with their coworkers.

20 (c) Implying that employees would have received a promotion if they had refused to engage in protected, concerted activities with their coworkers.

25 (d) Asking if employees are resolute in their decision to support their coworkers by engaging in protected, concerted activities.

(e) Suspending, discharging, or otherwise discriminating against any employee for engaging in protected, concerted activity.

30 (f) 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.

35 (a) Within 14 days from the date of this Order, if the Washington State Nurses Organizing Project has resumed operations, offer Joseph Crane, Matthew Burdine, Cecile Reuge, Gabrielle Hanley, Steve McAllister, and Darnley Weekes full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their respective seniority or any other rights or privileges previously enjoyed. If the Washington State
40 Nurses Organizing Project has not resumed operations, it shall offer them preferential hiring should the Respondent resume operations.

³⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

5 (b) Make Joseph Crane, Matthew Burdine, Cecile Reuge, Gabrielle Hanley, Steve McAllister, and Darnley Weekes whole for any loss of earnings and other benefits suffered as a result of their unlawful suspension and discharge, including search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings, as well as consequential damages.

10 (c) Compensate Joseph Crane, Matthew Burdine, Cecile Reuge, Gabrielle Hanley, Steve McAllister, and Darnley Weekes for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 19, 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 years.

15 (d) Within 14 days from the date of this Order, remove from its files any reference to their unlawful suspensions and discharges, and within 3 days thereafter, notify Joseph Crane, Matthew Burdine, Cecile Reuge, Gabrielle Hanley, Steve McAllister, and Darnley Weekes in writing that this has been done and that the suspension and discharges will not be used against them in any way.

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

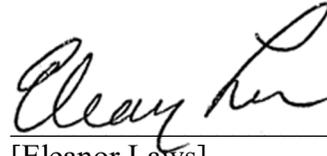
25 (f) Within 14 days after service by the Region, post at its Vancouver, Washington facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted 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 October 13, 2016.

30 (g) Within 21 days after service by the Region, file with the Regional Director for Region 19 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.

5 Dated, Washington, D.C. December 23, 2019

10



[Eleanor Laws]
Administrative Law Judge

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 interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT threaten you by telling you that you will be considered insubordinate and/or you will be terminated if you engage in protected, concerted activities with your coworkers.

WE WILL NOT imply that you would have received a promotion if you had not engaged in protected concerted activities with your coworkers.

WE WILL NOT ask you if you are resolute in your decision to support your coworkers by engaging in protected concerted activities.

WE WILL NOT suspend you because you solicit your coworkers to engage in a walkout in protest of issues related to your wages, hours, or working conditions.

WE WILL NOT fire you because you engage in a walkout with your coworkers in protest of issues related to your wages, hours, or working conditions.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

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

WE WILL remove from our files all references to the discharges of Joseph Crane, Darnley Weekes, Gabrielle Hanley, Steven McAllister, Matthew Burdine, and Cecile Reuge, and **WE WILL** notify them in writing that this has been done and that their discharges will not be used against them in any way.

WE WILL, through our guarantor American Federation of Teachers, AFL–CIO, make whole Joseph Crane, Darnley Weekes, Gabrielle Hanley, Steven McAllister, Matthew Burdine, and Cecile Reuge for the wages and other benefits they lost, including consequential damages, because we fired them.

WE WILL offer Joseph Crane, Darnley Weekes, Gabrielle Hanley, Steven McAllister, Matthew Burdine, and Cecile Reuge immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions in the event that we are reconstituted, and/or **WE WILL** place them on a preferential hire or re-hire list in the event a full complement of positions are not available for the named employees, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WASHINGTON STATE
NURSES ORGANIZING PROJECT

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret–ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board’s Regional Office set forth below. You may also obtain information from the Board’s website: www.nlr.gov.

915 Second Avenue, Room 2948; Seattle, WA 98174–1078
(206) 220–6300; Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge’s decision can be found at www.nlr.gov/case/19-CA-190619 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.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE’S COMPLIANCE OFFICER (206) 220-6340.