

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

CONCRETE EXPRESS OF NY, LLC

And

Cases 02-CA-220381
02-CA-224789
02-RC-218783

TEAMSTERS & CHAUFFEURS LOCAL
UNION 456, IBT

Allen M. Rose, Esq., for the General Counsel.
Aaron T. Tulencik, Esq. (Mason Law Firm Co., L.P.A.), for the Respondent.
Bryan T. Arnault, Esq. (Blitman & King, LLP), for the Petitioner/Charging Party Union.

DECISION

STATEMENT OF THE CASE

BENJAMIN W. GREEN, Administrative Law Judge. This case was tried before me in New York, New York, on April 23 and July 30, 2019. In addition, the record of *RAV Truck & Trailer Repairs, Inc. & Concrete Express of NY, LLC*, 02-CA-220395, 2019 WL 3073998 (2019) (*RAV*) was admitted into evidence and incorporated into the record of this case.¹ (GC Exh. 7)

The matter in dispute arises in the context of a representation petition filed on April 19, 2018² by Teamsters & Chauffeurs Local Union 456, IBT (Union) to represent a unit of drivers and mechanics employed by the Respondent.³ On May 10, pursuant to a stipulated election agreement, an election was conducted and a tally of ballots prepared. The tally reflects that four employees voted in favor of representation and three employees opposed representation with one determinative challenged ballot. The sole challenge was to the ballot of Rafael Valencia,⁴ whose vote was challenged by the Union on the grounds that he is a yardman instead of a mechanic and, therefore, not eligible to vote as a bargaining unit employee. The Respondent contends that Rafael is a dual-function mechanic/yardman and eligible to vote on that basis. Both parties filed timely objections to the election. The Union also filed unfair labor

¹ The *RAV* record was introduced into evidence in its entirety as General Counsel Exhibit 7. Citations to *RAV*'s transcripts and exhibits are designated herein as (RAV Tr.), (RAV GC Exh.), and (RAV R Exh.). In that case, *RAV Truck & Trailer Repairs, Inc.* (*RAV*) and Respondent were found to be a single employer. The only employer in this case is the Respondent.

² All dates refer to 2018 unless indicated otherwise.

³ The Union filed separate petitions in May to represent *RAV* mechanics Jorge Valencia and Victor Gonzalez in a different unit than the drivers and mechanics employed by the Respondent.

⁴ Rafael Valencia and his nephew Jorge Valencia are referenced in this decision by their first names in order to avoid any confusion among them.

practice charges. On December 21, the Regional Director issued a consolidated complaint and decision on challenges and objections. On January 4, 2019, the Regional Director issued an order further consolidating Cases 02-CA-220381/02-CA-224789/02-RC-218783 and a corrected decision on challenges and objections. (GC Exh. 1)

The General Counsel alleges that the Respondent violated Section 8(a)(5), (3), and (1) of the Act by, within a few hours after the conclusion of the May 10 election, implementing a new dress code and revoking parking privileges of its drivers to park in the Respondent's garage.⁵ The General Counsel further alleges that, within the week prior to the election, the Respondent violated Section 8(a)(1) of the Act by threatening to close the company if employees elected the Union as their bargaining representative, threatening to discharge employees unless they vote "No" against the Union, interrogating employees regarding their union activities, and promising employees new trucks if they refrain from engaging in union activities.

The Regional Director's corrected decision on challenges and objections referred the sole determinative challenged ballot and certain Union objections for hearing. Those objections included the threat of discharge, threat of plant closure, and employee interrogation which were alleged in the complaint as violations of Section 8(a)(1).⁶ The Regional Director overruled the Respondent's objections. The Respondent filed a request for review of that decision. On December 10, 2019, the Board issued an order referring Respondent objections 4-8 for hearing.

For reasons discussed below, I will overrule the challenge to Rafael's ballot and direct the Regional Director to count that ballot toward the results of the May 10 election in Case 02-RC-218783. Regarding the alleged Section 8(a)(5), (3), and (1) violations, I find that the Respondent unilaterally changed the parking privileges of unit employees and did so because employees engaged in union activities. However, this Section 8(a)(5) violation is conditioned upon the Union demonstrating majority support by winning the May 10 election and being certified after Rafael's ballot is counted and the Respondent's objections are resolved. Once a union is certified, the employer's obligation to bargain attaches as of the date of the election. Accordingly, the employer acts at its peril by making unilateral changes after a union wins an election even though certification is still pending the results of challenges and/or objections. *Ozburn-Hessey Logistics, LLC*, 366 NLRB No. 177 (2018). However, if the Union is not ultimately certified as the bargaining representative of unit employees as a result of the May 10 election, the Respondent cannot be found to have violated Section 8(a)(5).⁷ I will dismiss the allegation that the Respondent changed its dress code on a unilateral and/or discriminatory basis. Regarding the alleged Section 8(a)(1) violations and corresponding Union objections, I find that the Respondent committed the violations and engaged in objectionable conduct.

Once Rafael's ballot is counted, if the Union does not have majority support, a rerun

⁵ The complaint also alleged that the Respondent violated Section 8(a)(3) and (1) of the Act by reducing the work hours and discharging employee John Torres because of his union activities. However, the parties settled those allegations before the record opened.

⁶ The discharge, threat of plant closure, and employee interrogation are Union objections 1, 3, and an unmentioned objection, respectively. The Regional Director also referred for hearing Union Objection 4, which alleges that the Respondent threatened futility in bargaining if the Union was elected. This objection was not alleged in the complaint as a violation of Section 8(a)(1) and no evidence was presented in support of it. Accordingly, I do not address it further herein.

⁷ Such a result will not alter my finding of a Section 8(a)(3) violation or the remedy thereof.

election will be ordered as I have found that the Respondent engaged in objectionable conduct which violates Section 8(a)(1) of the Act during the critical period between the filing of the petition and the election. See *NYES Corp.*, 343 NLRB 791, 791 fn. 2 (2004). However, if the amended tally reflects that the Union has won the election after Rafael's ballot is counted, the Region will schedule a hearing on Respondent objections 4-8 pursuant to the Board's December 10, 2019 order.⁸

On the entire record, including my observation of the demeanor of the witnesses, and after considering the posthearing briefs that were filed by the General Counsel, the Respondent, and the Union, I make these

FINDINGS OF FACT⁹

JURISDICTION AND UNION STATUS

The Respondent has been a limited liability corporation with an office and place of business in Bronx, New York, where it is engaged in the manufacture and sale of concrete. The Respondent has derived over \$500,000 in gross annual revenue from its business and purchases. The Respondent has also annually received goods, products, and materials valued in excess of \$5,000 directly from suppliers outside the State of New York. The Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union has been a labor organization within the meaning of Section 2(5) of the Act. Accordingly, I find that this dispute affects commerce and that the Board has jurisdiction over this case pursuant to Section 10(a) of the Act.

ALLEGED UNFAIR LABOR PRACTICES, CHALLENGE, AND UNION OBJECTIONS TO THE ELECTION

Background

Christopher Trentini¹⁰ is the sole member and officer of the Respondent. Since opening in 2006, the Respondent has been engaged in the manufacture and wholesale/retail sale of

⁸ On December 17, 2019, Region 2 requested that the Division of Judges reopen the record to take evidence on Respondent objections 4-8. However, as discussed below, I am overruling the Union's challenge of the determinative ballot and, once that ballot is counted, the Union may not have majority support. The Respondent's objections do not need to be heard if the Respondent won the election. If, nonetheless, the Union appeals my decision on the challenged ballot and my decision is overturned, a hearing on the Respondent's objections can be held at that time.

⁹ My factual findings are based in part on credibility determinations and, in this decision, I have credited some but not all of the testimony of certain witnesses. Credibility findings need not be all-or-nothing propositions and, indeed, it is common in judicial proceedings to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, 335 NLRB 622 (2001). A credibility determination may rely on a variety of factors, including the context of the testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enf'd. 56 Fed. Appx. 516 (D.C. Cir. 2003).

¹⁰ A number of people referred to in this decision have the last name Trentini. Other than Christopher Trentini, I refer to these individuals by their first names to avoid confusion.

concrete from its principal place of business at 2279 Hollers Avenue, Bronx, New York (Hollers Avenue). Trentini oversees the entire operation. (Tr. 24, 26)

5 The Respondent's drivers use square open-top mobile mixer cement trucks to deliver and mix concrete at remote customer locations. The trucks contain bins for concrete components (sand and gravel) and a water tank. The components move on conveyor belts to the truck's auger, which has blades that spin like a corkscrew and mix the materials into concrete.¹¹ The drivers can initiate this process with a remote control or with manual controls
10 on the truck. Trentini estimated that the Respondent performs about 10 percent of its work on construction sites. About 90 percent of the Respondent's work is for homeowners (e.g. sidewalks) and small contractors which is not performed on construction sites. (Tr. 12-13, 119, 259-260, 291, 295) (RAV Tr. 186-190)

15 The Respondent is a family business. Trentini's wife, Donna Trentini, is the financial manager. Trentini's sister-in-law, Diane Denti, is the Respondent's office manager and dispatcher. Diane works in the office at Hollers Avenue and is in regular contact with the drivers throughout the day by phone regarding their location, assignments, and any mechanical
20 problems they have. Diane's son, George Denti, works remotely on billing. Trentini's daughter, Alexis Trentini, performs managerial, financial, and bookkeeping functions. Trentini's other daughter, Victoria Trentini, has also worked for the Respondent in an unidentified capacity. (Tr. 13, 28-44, 25, 224-225, 240) (RAV Tr. 151)

25 Donna testified that, before coming to work for the Respondent, she was the sole owner of a trucking and concrete company called Trentini Mobile Concrete Corporation (Trentini Mobile). Trentini Mobile was in business from the early 1990s to about 2005. Trentini Mobile closed because it was unable to collect money from contractors in a timely manner and could not pay its bills. The employees of Trentini Mobile were represented by the Union. Donna testified that Trentini Mobile owed the Union \$250,000 when it closed. (Tr. 226-230)

30 The Respondent originally owned and operated 5-yard cement trucks.¹² The Respondent purchased six larger 12-yard cement trucks in 2016 and began operating those trucks as they were received and registered. Of the new trucks, the first was registered on
35 October 4, 2016 and the last two were registered on September 6, 2017. Currently, the Respondent only operates the new trucks. The old trucks are no longer registered or in use. (Tr. 17-18, 260) (RAV Tr. 186-187, 193-194) (RAV R Exh. 12)

40 During the period preceding early-May, the Respondent employed drivers Luis Fernandez, Channy Hernandez, Matthew Murray, Christian Reyes, Adman Robert, John Torres, and Winston Walker. Trentini also drove a truck sometimes himself. (RAV Tr. 194) (GC Exh. 12, 13)

45 Rafael drove a truck (truck number 9) until early-2017. In May 2017, the Respondent hired Christian Reyes to replace Rafael as the driver of truck number 9. Reyes testified that his truck was older and more prone to mechanical failure than the newer trucks driven by other drivers. Reyes estimated that his truck broke down about 10 times and required repairs that took anywhere from a day to a month to complete. Reyes asked Trentini for a different truck

¹¹ The entire unit (i.e., bins, conveyer belts, blades) that mixes concrete on top of the chassis is called the "mixer." (Tr. 295)

¹² The number of yards refers to the cement capacity of the truck in cubic yards. (RAV Tr. 241)

about three or four times. However, according to Reyes, Trentini just “brushed it off.” When asked what he meant by “brushed it off,” Reyes testified, “[b]est response I got was, why do you want a truck, anyways?” (Tr. 70-71) Reyes did not recall what he said in response to this question. Among the other drivers, Torres also drove one of the older trucks. Trentini testified that Torres was the only driver with a CDL license for manual transmissions and, therefore, drove a truck with a stick shift.¹³ (Tr. 53, 56-58, 70-71, 267-268, 286)

Until late-2017, the trucks were housed, loaded with materials, and departed for jobs from Hollers Avenue. The Respondent maintained a time clock at Hollers Avenue for employees to punch in and out for work. The drivers generally drove to work and parked on the street near the yard. (Tr. 68-69, 134, 139, 154)

In late-2017, the Respondent rented space in a garage at 3771 Merritt Avenue, Bronx, New York (3771 Merritt Avenue) and began housing the trucks at that location.¹⁴ This building was referred to on the record as the “garage” while the space at Hollers Avenue was referred to as the “yard.” Drivers picked up their trucks in the morning and dropped them off after work at 3771 Merritt Avenue. Before dropping off their trucks at the garage at the end of the day, drivers returned to Hollers Avenue to wash their trucks and sometimes preload them for jobs the following day. (Tr. 15-16, 68-69, 259)

As detailed in my RAV decision, RAV was a Trentini owned repair shop which performed mechanical repairs on third-party trucks and the Respondent’s trucks. The record in that case included RAV invoices for work performed on the Respondent’s trucks. RAV was originally located at 38 Edison Avenue, Mount Vernon, New York. However, the owner of that property terminated the lease in February. On March 23, RAV rented a 600 square foot space at 3773 Merritt Avenue, Bronx, New York (3773 Merritt Avenue).¹⁵ Although 3771 and 3773 Merritt Avenue have different postal addresses, they are one building with a single open internal space. RAV is no longer in business. However, in about May, the Respondent leased the entire garage (3771 and 3773 Merritt Avenue).¹⁶ The Respondent parks its new trucks in 3771 Merritt Avenue and its old trucks in 3773 Merritt Avenue. (RAV Tr. 194-195, 283-284) (RAV R Exh. 13)

After the Respondent rented the garage and before the election on May 10, drivers

¹³ Reyes and Torres separated from the Respondent in May. Apparently, the Respondent retired their trucks from service after they left the company. (Tr. 58, 152)

¹⁴ I take administrative notice that Hollers Avenue and 3771 Merritt Avenue are less than 0.5 miles apart based upon directions obtained from Google Maps. See *Bud Antle, Inc.*, 359 NLRB 1257, 1258 fn. 3 (2013) reaffd. 361 NLRB 873 (2014). Trentini estimated that it takes about 5-6 minutes to walk between Hollers Avenue and 3771 Merritt Avenue. (Tr. 16)

¹⁵ Although the record was not entirely clear, RAV apparently rented 600 square feet of a significantly larger space at 3773 Merritt Avenue. At the time, the remainder of 3773 Merritt Avenue was rented by a different tenant. (RAV Tr. 194-195, 283-284) (RAV R Exh. 6)

¹⁶ Presumably, the other tenant that rented part of 3773 Merritt Avenue vacated the property.

parked their personal cars in the garage along with the trucks.¹⁷ The garage had no painted lines for designated parking spots. Reyes and Fernandez testified that they were told to park in the garage, but did not recall by whom. The other driver witnesses testified that drivers started parking in the garage when the Respondent acquired the space, but did not testify that they were told to park there. Upon arriving at work, a driver would move his truck out of the garage and then move his car into the garage before returning to the truck. While out in the field, drivers left their keys in their cars so the vehicles could be moved if necessary. Initially, the Respondent's time clock remained at the yard even though drivers reported for work at the garage. However, drivers complained that the time clock should be located where they picked up and dropped off their trucks. Accordingly, the Respondent moved the time clock to the garage. Upon returning to the garage at the end of the day, drivers sometimes had to move a car out to get a truck inside. Fernandez testified that it could take 5 minutes to move trucks/cars around to get in/out of the garage. According to Fernandez, he had to do this about 2 times per week. (Tr. 59-60, 67-69, 77-79, 81, 99-102, 113-116, 120-121, 134-136, 139, 154-155)

Trentini and Diane denied they told drivers to park their personal vehicles in the garage at 3771 Merritt Avenue. According to Diane, she learned that drivers were parking in the garage when she received complaints from drivers who said it was difficult to move trucks in and out because cars were in the way. When asked to identify the drivers who raised such complaints, Diane only identified Walker. Diane did not recall when she received this complaint from Walker. Diane was asked on direct examination, "What if anything did you do as a result of having received those complaints?" Diane answered that she "[s]ent a text once again to everybody that they are not allowed to park in the garage." (Tr. 241) As discussed at greater length below, this referred to a text she sent the drivers on May 10. (GC Exh. 3, 5) Diane was subsequently asked by Respondent's counsel, "Was there ever a time prior to the text where you verbally told the men they were not to park there?" Diane answered, "Yes." (Tr. 242) However, Diane did not specifically identify who she told or when. (Tr. 238-243, 251-252, 261)

According to Trentini, he went to the garage "as little as possible." (Tr. 287) However, Trentini admitted it was "possible" that he saw drivers' personal cars parked in the garage before the election since he performed certain truck repairs at the garage and housed his cement truck there in the winter months. Trentini testified that he first learned cars were being parked in the garage when drivers complained to Diane about trucks being damaged. When asked for more details, Trentini testified that he found a truck emblem on the floor of the garage in front of the hood of a truck. According to Trentini, after finding the emblem, he instructed Denti to tell the drivers "they're not allowed to park in the garage." (Tr. 262) Trentini did not recall the date of this incident and did not identify other instances of trucks being damaged in the garage. (Tr. 261-263, 287-289)

Fernandez testified that, until May 10, nobody told him what he should wear to work. Fernandez generally wore shorts and sneakers during the warmer months and track pants in the winter months. Fernandez preferred this attire to work boots and work pants because he found it more comfortable. Fernandez testified that he believed his attire was safe for

¹⁷ Driver witnesses credibly testified that all the drives started parking in the garage when the Respondent acquired that space. RAV mechanic Gonzalez also testified that drivers parked their vehicles in the garage. Respondent's counsel asked Gonzalez, "are you saying there were vehicles of the drivers meaning their personal vehicles?" Gonzalez answered, "one or two, yes." However, the question concerned the type of vehicle and not the number of drivers who parked in the garage. Thereafter, Gonzalez continued to testify that the drivers (without distinguishing which or how many) parked in the garage. I credit the drivers and find that they all began parking in the garage when the Respondent acquired the space. (Tr. 203-205)

construction sites and asserted that at least two other employees (Murray and Walker) dressed the same way. According to Fernandez, drivers generally remained about five feet from the auger blades when the blades were spinning. (Tr. 96-97, 111-113, 119-120)

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Hernandez testified that he was not told what to wear to work when he was hired and generally wore sneakers, shorts or jeans, and a T-shirt. Hernandez preferred sneakers over boots because they were more comfortable. However, he ultimately bought boots to wear instead of sneakers because his sneakers were being damaged by the cement. Thereafter, Hernandez wore boots unless they were damaged, in which case he wore sneakers. According to Diane, Diane told him a couple of times he should not wear sneakers or shorts to work and, instead, should wear jeans/work pants, boots, and shirts. However, Hernandez did not take Diane's comments seriously and never received any formal discipline for violating the dress code.¹⁸ (Tr. 47, 132-134, 139-141, 147-150, 233-235)

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Torres and Reyes testified that they always wore work pants and boots on the job. (Tr. 74-75, 154, 156)

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The Respondent maintains no written dress code and has not formally disciplined drivers for dress code violations. However, Diane testified that she has always, including before the May 10 election, verbally informed drivers that the Respondent's dress code consisted of jeans/work pants, work shirts, and work boots with no sweatpants, shorts, sneakers, and tank tops permitted. Diane had a specific recollection that she talked to Hernandez and Reyes about wearing improper work attire. In particular, on one occasion, Diane spoke to Hernandez after a customer complained about him wearing sneakers and sweatpants on a construction site. According to Diane, she told drivers about the dress code when they were hired and as necessary on an ad hoc basis when she saw one of them wearing clothes that were not appropriate. Diane explained that the dress code serves to protect drivers at construction sites. Trentini testified that sweatpants are particularly hazardous because the draw string can get caught in the auger, which twists like a corkscrew. The risk of this occurring is particularly high, according to Trentini, when drivers lean over the rotating blades to wash cement off of them with a hose. (Tr. 29, 47, 166, 233-237, 269-270, 277-279)

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During the *RAV* trial,¹⁹ Rafael testified that he is employed by the Respondent as a mechanic and yardman at Hollers Avenue. On direct examination, Rafael was asked how many hours he spends (present tense) performing mechanic work, and testified as follows (*RAV* Tr. 134):

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Q Do you know how many hours per week you perform those jobs?

A Twenty-five – the mechanic, twenty-five?

On cross examination, Rafael was asked about his testimony regarding the mechanic hours he performed, and he testified as follows (*RAV* Tr. 137-138):

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Q You said you worked as a mechanic how many hours a week?

¹⁸ As discussed below, according to Hernandez, this did not change after Diane sent drivers a text on May 10 regarding what they should wear to work. He continued to wear sneakers if necessary when his boots were damaged.

¹⁹ Rafael was called by the Respondent to testify in the *RAV* trial on November 28. Rafael was not called as a witness by any party and did not testify in the instant hearing.

A Twenty-five hours a week.
 Q Twenty-Five
 A Yea

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Rafael testified that his mechanic work involved such tasks as replacing auger blades, changing breaks, and changing oil filters. Rafael only performed mechanic work on the new trucks that were in service. He did not work on the old trucks. Trentini trained Rafael to perform mechanic repairs when they first started working together.²⁰ (RAV Tr. 133-134, 137-140)

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Rafael described his yardman work as using a machine (loaders) to load trucks with sand and gravel, and doing whatever else needs to be done in the yard. Rafael testified that it takes him about 10 minutes to load a truck. Rafael loads all the trucks in the morning and loads the trucks again if/when they return to the yard to be dispatched for another job. According to Rafael, drivers perform one to three jobs per day. (RAV Tr. 133-134, 137-138)

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Trentini testified that drivers would call him if they had mechanical issues and he tried to fix those problems over the phone. However, if the issue could not be resolved over the phone, the driver would come back to the yard and "Rafael would take care of it." (Tr. 36) Trentini described Rafael as a "mechanic yardman." (Tr. 25) Trentini testified that he and Rafael have always performed repair work, often together. (Tr. 268-70)

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Trentini admits that RAV mechanics Victor Gonzalez and Jorge Valensia performed work on the Respondent's trucks and that the new trucks, which Rafael repaired, required less work than the old trucks. However, according to Trentini, RAV mechanics only worked on the Respondent's trucks when they had nothing else to do. Trentini claimed that he and Rafael did most of the work on the mixers while RAV mechanics were largely limited to work on the chassis. Trentini testified that work on the mixers took about a day. Gonzalez and Jorge both testified that they changed auger blades. Jorge testified that it took 2-3 hours to do so. Trentini indicated that the amount of repair work varied since it depended on whether and when trucks broke down. However, certain maintenance is performed every day, such as greasing the trucks and checking the oil. Trentini testified that he and Rafael sometimes performed repairs at the yard and sometimes at the garage. (Tr. 25, 35-36, 73, 99, 106, 113-114, 257-259, 269-270, 286-291, 295) (RAV Tr. 139, 258-259)

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Diane described Rafael as "the yardman" rather than the "yardman/mechanic." (Tr. 244) However, Diane testified that drivers call her regarding mechanical issues and she refers them to Rafael for repairs. Diane further testified that she has seen Rafael changing auger blades and performing other repairs. The yard is equipped with security cameras and the video feed can be viewed on screens in the office. Thus, although Diane works in the office, she can see Rafael working in the yard on those screens. Diane testified that she referred repair work to Rafael and saw him performing such work "during the time of the election." (Tr. 244-245) Diane was not aware that Gonzalez and Jorge performed mechanic work on the Respondent's trucks at the garage on Merritt Avenue. (Tr. 35-36, 244-245, 255-258, 271)

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Fernandez, Hernandez, Reyes, and Torres testified that they never saw Rafael perform mechanic work. Reyes testified that, when his truck broke down, he texted Gonzalez and Jorge, brought the truck to the yard, and Gonzalez or Jorge came to pick it up (presumably, to take it to the garage for repair). Fernandez and Torres testified that they saw Gonzalez working on their trucks when the vehicles required repairs. Hernandez testified that he has only seen Rafael load the trucks. (Tr. 65, 103-104, 143-144, 158-159)

²⁰ Rafael has worked for various Trentini owned businesses since 1984. (RAV Tr. 189)

Union Organizing Campaign

5 Beginning about April, the Union sought to organize a unit of drivers and mechanics employed by the Respondent. (Tr. 182) On April 19, the Union filed the petition in Case 02-RC-218783. (GC Exh. 1(a)) On May 2, the Regional Director approved a stipulated election agreement to hold an election on May 10, from 5:30 a.m. to 8:30 a.m., among employees in the following bargaining unit (GC Exh. 2):

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Included: All full-time and regular part-time drivers and mechanics employed by the [Respondent] at 2279 Hollers Avenue, Bronx. NY 10475.

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Excluded: All other employees, including clerical employees, guards and managers, and professional employees and supervisors as defined by the Act.

The stipulated election agreement defined eligible voters as “employees in the above unit who were employed during the **payroll period ending April 27, 2018 . . .**” (Emphasis in the original.) (GC Exh. 2)

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Union Vice President Dominick Cassanelli, Jr. testified that he understood the unit to consist of the drivers (Fernandez, Hernandez, Murray, Reyes, Robert, Torres, and Walker) and mechanics Gonzalez and Jorge. However, Cassanelli ultimately learned that Gonzalez and Jorge were employed by RAV and the Union filed petitions to represent them in a separate unit. (Tr. 181-183) (RAV GC Exh. 3, 9, 10)

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On May 4, at 5 p.m., Respondent attorney Ronald Mason emailed Union Attorney Bryan T. Arnault a voter list which contained the names of the seven drivers. That same day at 5:20 p.m., Mason sent Arnault another email which stated, “I sent you a[n] earlier draft that had an error.” This email contained a corrected voter list with Rafael added as a “Yardman/Mechanic.” (U Exh. 2-3)

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Prior to the election, Cassanelli and another Union organizer drove to the Respondent’s yard at Hollers Avenue about 3 days per week and generally spent about 5 hours there per day. If the gate to the facility was open, the Union representatives looked into and could see the entire yard. However, on rare occasions, the Respondent closed the gate. If the gate was closed, Cassanelli went to certain spots where he could see into the yard through gaps in the fence. On these occasions, he could not see the entire yard. Cassanelli sometimes followed trucks out into the field in an attempt to speak with drivers. Cassanelli testified that he never saw Rafael performing mechanic work at the yard. (Tr. 181-186, 192-193, 199-201)

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During the organizing campaign, the Respondent retained a consultant named Bill to hold a meeting to talk with employees about the Union and the upcoming election. When Trentini was asked whether he attended any other meetings about the Union or the election (other than the one held by Bill), he answered, “Not to my knowledge.” Likewise, when Trentini was asked whether he had any other conversations with drivers about the Union or the election, Trentini responded, “Not to my knowledge.” However, as addressed below, the General Counsel called witnesses who testified to the contrary. (Tr. 21-22, 110, 267, 297)

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About a week before the election, Trentini allegedly threatened Reyes and Hernandez with discharge if they did not vote “No.” Reyes testified that Diane was present at the time, but Hernandez testified that she was not. According to Reyes, Trentini said, “if you guys don’t want

to be fired, vote no.”²¹ (Tr. 58) According to Hernandez, Trentini said, “if we want to keep our job, we should vote no.” (Tr. 131) Reyes and Hernandez both testified that they did not respond to Trentini and left the office. Diane denied that Trentini instructed Reyes or Hernandez to vote “No” or otherwise threatened any of the employees regarding the union election. Trentini did not recall any conversation with Reyes, Hernandez, and Diane in which he told the employees they should vote “No” if they wanted to keep their jobs.²² (Tr. 21-22, 57-58, 131-132, 139, 243-244, 265)

Reyes testified that, within a week of the election, in the yard at the end of his shift, Trentini approached him and asked whether he “ever signed a small card for the union or anything like that.” Reyes denied he signed anything for the Union. Trentini then allegedly asked, “what is it that you want, a new truck?” Reyes responded, “I’m happy to be working.” (Tr. 54-55) As noted above, prior to this conversation, Reyes asked Trentini for a new truck about three or four times. Trentini did not recall asking Reyes if he wanted a new truck or otherwise offering Reyes a new truck. Trentini testified that Reyes drove a small 5-yard cement truck because Reyes was a young driver who had his license for less than a month when he was hired. Reyes had no prior experience driving a concrete truck before he was hired by the Respondent. Trentini claimed he told Reyes he would not be given a new truck because he (Reyes) was too inexperienced. (Tr. 54-55, 70, 260, 267-268)

Torres testified that, a few days before the election, in the late morning at the yard, Trentini “called me over and told me I hear there’s talk about the Union coming in.” Torres replied, “I hear the same.” Trentini then asked Torres how he felt about that. Torres said he “felt it was a good thing for the guys.” However, Torres indicated that he was not going to be working for the Respondent much longer because he received an offer for alternative employment with the Department of Sanitation. After discussing Torres’ anticipated departure date, Trentini said, “guys are making it seem like you’re the ringleader.” Torres asked Trentini why . . . he felt that.” Trentini said it was because Torres missed the two meetings they had. Torres told Trentini he could not attend the meetings because he was never told about them. (Tr. 152-154) Trentini did not recall having any conversation with Torres in the yard regarding the Union or the upcoming election. (Tr. 265)

Fernandez and Hernandez testified that, during the week of May 7, they attended a meeting which was held in the dispatch office by Donna and Trentini. Drivers Walker, Murray, and Robert were also present. Before the meeting began, Winston collected employees’ mobile

²¹ Respondent’s counsel asked Reyes certain questions about conversations he had with Trentini, including this alleged threat. Respondent’s counsel subsequently asked Reyes “why none of those conversations with Mr. Trentini are included in this affidavit.” After an objection, Respondent’s counsel asked, “Do you know any idea why you wouldn’t put those threats in this Board affidavit?” Reyes answered, “I don’t recall.” It was not necessarily my impression that Reyes actually recalled what was in his affidavit and intended to confirm that he did not describe certain conversations therein (a fact assumed by the question but not in evidence). Rather, it was not my impression that Reyes recalled what was in his affidavit. (Tr. 80)

²² Respondent’s counsel solicited certain denials from Trentini of alleged conversations by asking Trentini whether he “recalled” those conversations. (Tr. 265-267) When Trentini was asked more directly by the General Counsel whether these conversations occurred, he answered, “Not to my knowledge.” (Tr. 21-22) By contrast, Respondent’s counsel specifically asked Diane whether she ever witnessed Trentini threaten employees regarding the Union election, and Diane answered, “No.” (Tr. 243) There is a distinction between a witness’ testimony that he/she cannot recall an event and more definitive testimony that the event did not occur. The former suggests less certainty and leaves room to recant if more reliable evidence indicates that the event actually took place.

phones and took them outside. Fernandez recalled that Donna asked employees to turn over their phones and it was Winston who collected them and took them outside. According to Fernandez, Donna opened the meeting by saying that “she didn't want the union, and if the union comes in,
 5 all she has to do is, well, close down the company, and we'll be out of work. And then we'll have to go to a union hall and look for work.” (Tr. 93) According to Fernandez, Trentini was standing next to Donna nodding his head in agreement. Fernandez further testified that Trentini said “he used to be unionized. Then he had to close the company. He had to go bankrupt.” (Tr. 94) According to Fernandez, Winston said the drivers would be happy if they received a wage rate
 10 of \$26 per hour. Hernandez testified that Donna “said something about if the Union come in, she’s going to shut down the company.” (Tr. 130) Hernandez also recalled Winston saying “if Trentini give us like better rates, we like don’t take the Union – something like that.” (Tr. 130) Hernandez further testified that Trentini said “we’re going to be on the bottom of the list. Something about if the Union come in.” (Tr. 130) Both employees testified that Trentini said he
 15 was forbidden by law from negotiating about wages at that time. (Tr. 92-94, 129-130)

Donna and Trentini denied they threatened to close the business if the Union won the election. When Trentini was asked on direct examination whether he attended any meetings with the drivers and yardman/mechanic prior to the election, he admitted he had. However,
 20 Trentini denied he told the employees at any such meeting that he previously owned a company that went bankrupt or that the Respondent would close if the Union won the election. Further, Trentini did not recall one of the drivers stating that they would not need a union if they had better wages. Donna admitted that, on one occasion, she told certain drivers about her experience with Trentini Mobile (described above). However, Donna denied that this occurred
 25 in a formal meeting. Rather, she vaguely remembered a few employees (perhaps Walker, Hernandez, and Rafael) talking in the office and hearing someone say something which reminded her of her old business. (Tr. 226-230, 266-267) Donna testified as follows regarding the substance of the resulting conversation (Tr. 229-230):

30 [T]hey were just talking about things that were going on with the trucks and all of that and I had said I had a business we did trucking. And I had said that it was Union and I couldn't stay in the business because I couldn't pay my bills. I couldn't pay my -- I just couldn't pay the bills anymore because I was owed so
 35 much money. Actually, I was owed -- 456, I owe them \$250,000 at that time when Dominique Doil (phonetic) was the president.

. . . .
 I just said that I was Union . . . and I couldn't pay my bills. And I explained that I owed the Union 250,000 because I couldn't collect and that I had told Dominique that, you know, if I had to sell my house, I would sell my house to pay him. And I
 40 ended up collecting what money that -- most of the contract has owed me and I paid him back earlier than I was -- I told him I could pay him by March. I paid him in February.

45 Fernandez testified that, a couple of days before the election, in the afternoon as he was washing his truck, Trentini approached and said, “if I want to keep my job, I should vote no for the union.” Fernandez claims he did not respond and Trentini left. (Tr. 95) Trentini denied that this conversation occurred. (Tr. 265)

On May 10, as noted above, the election was conducted between 5:30 and 8:30 a.m. with a count of 4-3 in favor of the Union and one determinative challenged ballot.

Diane testified that, on May 10, Hernandez came to work in sneakers and she sent a text to all the drivers because “she did not want to point one person out.”²³ (Tr. 238) At 10:26 a.m., after the election was over, Diane sent a text to all the drivers which stated, “Good Morning. As mentioned many times The proper dress attire Jeans/work pants, boots and shirts. NO tank tops. NO sneakers. NO sweat pants. Thank you[.]” (GC Exh. 3, 5) (Tr. 234-236, 239)

Hernandez testified that Diane’s text was correct in that she had, previously, mentioned such a dress code and told him not to wear shorts or sneakers. However, according to Hernandez, he did not think Diane was serious. Further, Hernandez did not believe that Diane’s text changed the rules in that he continued to wear sneakers to work if his boots were damaged. The record contains no evidence that the Respondent disciplined employees for wearing the wrong attire to work before or after the election. (Tr. 140, 149-150)

Trentini testified that, on the day of the election, he went to the garage and saw cars parked there. Trentini did not recall why he went to the garage or what he was doing there. Trentini claims he once again told Diane to tell the drivers they are not allowed to park in the garage. When asked how he communicated this direction to Diane, Trentini testified that it was “[p]robably in person when I went back to the yard.” (Tr. 263-264, 274-275) Diane testified that Trentini called her on the day of the election and told her that drivers were parking in the garage.²⁴ (Tr. 241, 251)

On May 10, at 11:27 a.m., Diane sent a text to all the drivers which stated, “Hi Please be advised as of Friday May 11th cars are NOT to be parked in the garage. Thank you[.]” (GC Exh. 3, 5) Hernandez responded with a text that stated, “Uff thanks god im on foot.” Hernandez did not have a car at that time (for about two weeks) because he had an accident. (Tr. 138-139) Two other drivers responded with texts indicating that they would park outside. (GC Exh. 3, 5)

Drivers stopped parking their cars in the garage after they received this May 10 directive from Diane. Fernandez, Hernandez, and Torres differed slightly in their estimate as to how long it took to find parking on the street in the morning near Hollers Avenue. Fernandez estimated 10-15 minutes, Hernandez estimated 20-30 minutes, and Torres estimated 15-30 minutes. After parking in the morning, drivers walked to the garage to get their trucks. Fernandez testified that he preferred parking in the garage because he did not have to walk there. Reyes and Hernandez testified that they had to wake up earlier to find parking on the street.²⁵ (Tr. 59-61, 67-69, 77-79, 81, 99-102, 113-116, 120-121, 134-136, 139, 154-155)

Credibility

I address credibility throughout this decision, but, here, I include some additional observations regarding the credibility of Trentini and Hernandez. In my *RAV* decision, I found

²³ Diane’s explanation for sending a group text made little sense since she admittedly spoke to drivers about their attire on an individual basis. Although her explanation was not credible, my decision to dismiss the dress code allegations, as explained in the legal analysis below, is based on other evidence.

²⁴ I question whether, on May 10, Trentini went to the garage and talked to Diane about cars being parked there. However, I do not find that factual issue to be particularly significant.

²⁵ Reyes’ shift started at 7:30 a.m. Reyes testified that, after Diane sent the May 10 text, he woke up 10-15 minutes earlier to find parking on the street. (Tr. 61-62)

that Trentini altered testimony as necessary to support the employer's defense in that case. For example, in the *RAV* trial, when Trentini was asked whether he had authority to hire and fire employees of the Respondent, he answered, "No. I didn't get involved in that." (*RAV* Tr. 50-51).
 5 In this proceeding, when asked his role with the Respondent, Trentini testified that he "oversee[s] everything," including hiring and firing. (Tr. 26) The Respondent and *RAV* were alleged to be a single employer in the previous case while only the Respondent is alleged to be an employer in the instant case. Accordingly, Trentini appears to have changed his testimony based upon the needs of the particular case.

10 Although I found Trentini more credible in this case than in *RAV*, I still found him less than entirely credible. His demeanor and testimony appeared tentative with regard to certain denials of alleged unlawful conduct. Trentini also seemed given to exaggeration and willing to hedge testimony in a manner designed to support the Respondent's case. Regarding the
 15 allegation that the Respondent unilaterally changed employees' parking privileges, Trentini initially testified that drivers complained to Diane that some trucks were being damaged in the garage. On cross-examination, Trentini could only identify a single specific instance when a truck was damaged – i.e., the front emblem of a truck was found on the floor. Trentini did not know whether private vehicles were in the garage when the damage was caused or whether a
 20 private vehicle had anything to do with that damage. (Tr. 262-263, 273-274)

I found Hernandez to be a particularly credible witness. He is still employed by the Respondent and has no pecuniary interest in the outcome of the case. *Pacific Cost Sightseeing Tours & Charters, Inc.*, 365 NLRB No. 131 (2017) (current employees particularly credible since
 25 they are testifying against their employer's interest and their own pecuniary interest); *Rose Printing Co.*, 289 NLRB 252, 270 (1988) (employee credible where she had no monetary or job interest in the outcome of the proceeding). Hernandez also appeared fair and forthright in his answer to all questions, including those from Respondent's counsel. He did not attempt to exaggerate or shape his recollection in a manner most favorable to the General Counsel or the
 30 Union. Likewise, Hernandez did not attempt to deny facts helpful to the defense. For instance, Hernandez admitted on cross-examination that Diane told him before the election that he should not wear shorts and sneakers to work. Hernandez also refused, on redirect, to state whether he knew Rafael performed mechanic work on the Respondent's trucks. Rather, Hernandez stated, "I don't know," and continued, "I know he loads the trucks. That's what I know." (Tr. 43)
 35 As discussed below, I rely heavily in this decision on the testimony of Hernandez.

ANALYSIS

Challenged Ballot – Rafael Valencia

40 The Union challenged the ballot of Rafael Valencia in the election held on May 10 in representation Case 02-RC-218783. Rafael's ballot was determinative as the remainder of the ballots were counted 4-3 in favor of the Union. The Union contends that Rafael was ineligible to vote because he was a yardman and not a mechanic. The Respondent does not contend that
 45 the classification of yardman was included in the unit.²⁶ Rather, the Respondent contends that

²⁶ The Union asserts that Rafael must be excluded because the Respondent admits that it did not intend to include the classification of yardman in the stipulated unit. *Desert Palace, Inc.*, 337 NLRB 1096 (2002). However, the Respondent identified Rafael on its corrected voter list as a "yardman/mechanic" and has, since the petition was filed, taken the position that he is a hybrid dual-function employee. I do not find it strongly suggestive of a contrary intent that, just 20 minutes before the Respondent sent the Union a corrected voter list, Respondent's Counsel mistakenly emailed Union counsel an erroneous draft of the voter list that did not include Rafael.

Rafael was a dual-function yardman/mechanic who performed sufficient mechanic work to be included in the unit on that basis.

5 The Board has established a policy of including “dual-function employees” in a unit “if they regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have substantial interest in working conditions in the unit.” *Martin Enterprises, Inc.*, 325 NLRB 714, 715 (1998), and cases cited therein. In determining whether a dual-function employee will be included in the unit, the Board employs “no bright line rule as to the amount of time required to be spent performing unit work. Rather, the Board examines the facts in each particular case.” *Id.* Employees who spend less than half their time and as little as a quarter of their time performing unit work have been included in the bargaining unit. See *Avco Corp.*, 308 NLRB 1045 (1992); *Alpha School Bus Co.*, 287 NLRB 698 (1987); *Oxford Chemicals*, 286 NLRB 187 (1987); *Berea Publishing Co.*, 140 NLRB 516 (1963). The dual-function employee must be performing “bargaining unit work for a sufficiently substantial amount of time by the eligibility cutoff date to be eligible to vote in the ensuing election.” *Meadow Valley Contractors, Inc.*, 314 NLRB 217 (1994).

20 Rafael testified that he performs 25 hours of mechanic work and 20 hours of yardman work a week. However, Rafael did not specifically testify that he performed 25 hours of mechanic work during the payroll period ending April 27 (i.e., the period when eligibility to vote is determined pursuant to the stipulated election agreement).

25 The record also contains additional evidence which draws into significant question whether Rafael actually performed 25 hours of mechanic work per week during the period leading up to the election. It is undisputed that RAV mechanics performed repairs on the Respondent’s trucks from November 2017 to May 2018.²⁷ Trentini also testified that the new trucks which Rafael worked on were in better condition and required less work than the old trucks. The Respondent’s witnesses largely failed to provide specific testimony regarding the type of mechanic work Rafael performed, when he performed it, and the amount of time it took to perform. Four drivers testified that they never saw Rafael perform mechanic work. Rather, Reyes saw RAV mechanics pick up his truck when it required repairs and two other drivers (Fernandez, Torres) saw RAV mechanics performing repairs on their trucks. Cassanelli credibly testified that he never saw Rafael performing mechanic work even though Cassanelli spent as much as 15 hours per week at the yard during the period between the filing of the petition on April 19 and the election on May 10. If Rafael were spending over 50 percent of his time performing repairs in the yard, as he claims, it is likely that Cassanelli would have seen him.²⁸

40 Unlike Rafael himself, Diane and Trentini did testify that Rafael performed mechanic work during the time of the election. However, Diane and Trentini did not attempt to quantify how much mechanic work Rafael performed. Interestingly, Diane testified that Rafael performed all the Respondent’s mechanic work even though we know, through other testimony and documents, that RAV mechanics performed such work as well. Accordingly, I question to what extent Diane was knowledgeable of the process of truck repairs and in a position to explain Rafael’s role therein.

²⁷ Since RAV has closed and the RAV mechanics are no longer employed, it would not be surprising if Rafael were performing more mechanic work currently than he performed during the period leading up to the election.

²⁸ I find it noteworthy that the Respondent’s witnesses offered no explanation of where (within the yard) or when Rafael performed repairs such that Cassanelli may not have seen him doing it.

5 Despite these significant deficiencies in the Respondent's evidence, the Union was not in a position to entirely dispute testimony that Rafael performed some mechanic work during the period of the election. The drivers spent most of their time in the field away from the yard and it is not particularly surprising that they did not see Rafael performing repairs when they returned to the yard to be reloaded because it was Rafael who was responsible for reloading the trucks. And although Cassanelli spent more time than the drivers at the yard, he was not at the yard 40 hours per week. Ultimately, I do not find that Rafael performed 25 hours of mechanic work per week as of the eligibility cutoff date, but I do find that Rafael performed some unspecified amount of mechanic work during the relevant time period.

10 Accordingly, in my opinion, the issue – i.e., whether Rafael is a dual-function employee who performed duties similar to those performed by unit employees for sufficient periods of time to demonstrate that he has a substantial interest in working conditions in the unit – comes down to burden. In *Harold J. Becker Co.*, 343 NLRB 51, 52 (2004), the Board confirmed that “the challenging party typically has the burden of proving that an employee is ineligible to vote. . . .” However, the Board majority noted that challenged ballots were cast by employees who held “positions explicitly excluded from the parties’ stipulated unit[,]” and found that this was sufficient “to place the burden on the Employer to establish that the challenged employees are nevertheless eligible to vote [as dual-function employees.]” Id. In so ruling, the Board majority observed that “[i]t is the Employer, of course, who is in the best position to establish that status, because it has superior access to the relevant information.” Id. The Board majority then concluded that the employer did not meet its burden, in large part, because it admittedly failed to introduce worksheets and timecards which would have shown how many hours the employees in question spent performing unit work. Id. The failure of the employer to introduce such evidence served to distinguish the facts in *Harold J. Becker* from dual-function eligibility findings in *Air Liquide America Corp*, 324 NLRB 661, 662 (1997) and *Faulks Bros. Constructive*, 176 NLRB 324, 331 (1969). In the latter cases, “the Board relied on vague and otherwise questionable testimony regarding the breakdown of an alleged dual-function employee’s work.”²⁹ *Harold J. Becker Co.*, 343 NLRB at 52.

15 The instant case is distinguishable from *Harold J. Becker* in certain significant respects. The stipulated unit did not expressly exclude yardman and the Respondent does not admit that Rafael was a yardman. Although the Respondent admits that it did not intend to include the classification of yardman in the stipulated unit, Respondent’s counsel identified Rafael on a corrected voter list as a yardman/mechanic. Trentini also testified that he considered Rafael a “mechanic yardman.” Diane admittedly testified that Rafael was the “yardman,” but immediately stated that Rafael performed mechanical repairs among his duties.

20 Further, unlike in *Harold J. Becker*, the record contains no indication that the Respondent was in possession of and failed to introduce documents which would identify how much mechanic work Rafael performed. Rafael, Respondent’s witness, was certainly in the best position to testify regarding the amount of work he performed during the period leading up to the election. However, the availability of mechanic work varied at any given time depending upon the needs and condition of the trucks. Accordingly, it would not be particularly surprising

²⁹ In *Liquide America Corp*, 324 NLRB 661 (1997), the Board relied on the testimony of a dual-function employee to find him eligible even though the judge stated in his decision that he believed the employee was purposefully attempting to downplay the work he performed in a nonunit capacity. In *Faulks Bros. Constructive*, 176 NLRB 324, 331 (1969), the Judge conceded that the amount of time an alleged dual-function employee performed work equivalent to that of unit employees was “less than clear.” Among the ambiguities, one estimate of the employee’s work was arguably related to an earlier irrelevant period of his employment.

that, on November 28 when Rafael testified, he was unsure about the amount of work he was performing several months earlier prior to the election. It is possible, in my opinion, that the evidence we have in the record is the only available evidence.

5

On the other hand, this case does not fall squarely within the orbit of *Liquide America Corp*, 324 NLRB 661 (1997) and *Faulks Bros. Constructive*, 176 NLRB 324, 331 (1969). In those cases, the evidence included some estimate, even if not entirely reliable, of the amount of work the alleged dual-function employees performed during the relevant time periods. Here, Rafael was not asked by Respondent's counsel about the amount of work he performed during the period leading up to the election.

10

Although a difficult determination, I will overrule the Union's challenge to Rafael's ballot and order it to be counted. Rafael did not clearly hold the exclusive title of an excluded classification as he was largely described by the Respondent as holding the hybrid position of yardman/mechanic. Further, the record does not indicate that the Respondent was in possession of documents that would have established what type of work Rafael was performing and when. Although Respondent's counsel only asked Rafael how many hours per week he performs (present tense) mechanical jobs, Union counsel asked Rafael how many hours per week he worked (past tense) as a mechanic. In response to both questions, Rafael testified that he worked 25 hours per week as a mechanic. Arguably, Rafael's response on cross examination regarding the hours he "worked" encompasses the period leading up to the election. Trentini and Diane testified that Rafael has always performed mechanic work during that period. And although Rafael was not credible in his testimony that he performed as much mechanic work as he claimed, the Board generally imposes the burden of substantiating a challenge on the challenging party. Under these circumstances, although the Respondent produced the bare minimum of evidence in support of its case, with the ultimate burden on the challenging party, I find that Rafael regularly performed mechanic work for sufficient periods of time to demonstrate that he has a substantial interest in working conditions in the unit. Accordingly, I overrule the challenge to Rafael's ballot and find him eligible to vote.

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Section 8(a)(1) Violations

Trentini Threat to Discharge Hernandez and Reyes

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The General Counsel contends that, about a week before the election, the Respondent, by Trentini, violated Section 8(a)(1) of the Act by threatening Reyes and Hernandez with job loss if they did not vote "No" against the Union.

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Hernandez and Reyes provided testimony that was substantially consistent and supported the instant allegation. As indicated above, I found Hernandez to be particularly credible. Trentini did not recall any such conversation and Diane denied she heard Trentini instruct employees to vote "No" if they wanted to keep their jobs. However, Trentini was not entirely credible and Hernandez, who was entirely credible, testified that Diane was not present. Even if Diane were present in the office at the time, Trentini's comment was brief and did not elicit a response or extended conversation. Diane, who was presumably working, could have failed to hear it. Given the circumstances and the totality of the evidence, I credit Hernandez and Reyes. Accordingly, I find that the Respondent, by Trentini, about a week before the election, violated Section 8(a)(1) of the Act by threatening to discharge employees if they do not vote "No" against the Union. See *Guyan Valley Hospital, Inc.*, 198 NLRB 107, 109 (1972) (employer illegally threatened employee with discharge should he fail to vote "No" in the election).

Trentini Interrogation and Implied Promise of a New Truck

5 The General Counsel contends that, within a week of the election, the Respondent, by Trentini, violated Section 8(a)(1) of the Act by interrogating Reyes regarding his union activities and impliedly promising Reyes a new truck if he refrained from engaging in union activities.

10 I credit Reyes regarding the conversation in question. Reyes was clear, consistent, and detailed in his testimony. Trentini admits that Reyes previously asked him for a new truck on a number of occasions and it is certainly plausible that Trentini would suspect that Reyes was interested in union representation for the purpose of obtaining one. Conversely, as noted above, I found Trentini to be less than an entirely reliable witness.

15 In *Bristol Industrial Corp.*, 366 NLRB No. 101 (2018), citing *Rossmore House*, 269 NLRB 1176, 1178 (1984), the Board discussed, as follows, the analysis for determining whether an unlawful interrogation has occurred:

20 This inquiry involves a case-by-case analysis of various factors, including (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, (3) the identity of the interrogator, (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. See *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964).” The Board also considers whether or not the interrogated employee is an open and active union supporter. See, e.g., *Southern Bakeries, LLC*, 364 NLRB No. 64, slip op. at 7 (2016), enfd. in relevant part 871 F.3d 811 (8th Cir. 2017). These factors “are not to be mechanically applied”; they represent “some areas of inquiry” for consideration in evaluating an interrogation's legality. *Rossmore House*, 269 NLRB at 1178 fn. 20.

30 Here, all the *Rossmore* factors weigh in favor of finding that the Respondent violated Section 8(a)(1) of the Act when Trentini asked Reyes whether he signed a union card. As reflected in my *RAV* decision and throughout this decision, the Respondent has demonstrated hostility and a willingness to discriminate against employees based on their union activity. Just days before this conversation, Trentini threatened Reyes and Hernandez with discharge if they failed to vote “No” against the Union.

40 The decision of an employee whether to sign an authorization is the type of core union activity that the Board has long protected as confidential. *National Telephone Directory Corp.*, 319 NLRB 420, 421-422 (1994) (the confidentiality interests of employees have long been a concern to the Board and an employer who seeks to obtain the identities of employees who sign authorization cards generally violates the Act). Thus, the type of information sought suggests that Trentini unlawfully interrogated Reyes.

45 The identity and place of the interrogator were also likely to be intimidating to Reyes. Trentini is the sole owner and officer of the Respondent and he questioned Reyes on company property during working time. *Bristol Industrial Corp.*, 366 NLRB No. 101 (2018) (interrogation coercive where sole owner and highest company official, at the worksite, asked employee if he signed a union authorization card).

Finally, the method of the interrogation and Reyes’ response thereto suggest a violation. After Reyes denied he signed a union card, Trentini implied that Reyes was lying by continuing to question his (Reyes’) motives for doing so (i.e., whether Reyes signed a card because he wanted a new truck). Unsurprisingly, in light of Trentini’s previous threat that Reyes would lose

his job unless he voted “No,” Reyes responded that he was just “happy to be working.” Trentini’s implied accusation that Reyes was being dishonest and Reyes’ deflection of any suggestion that he might be interested in obtaining a new truck through a union bargaining representative are suggestive of a coercive exchange. *Cal Western Transport*, 316 NLRB 222, 231 (1995) (interrogation coercive where manager questioned employee about union activity and accused him of lying about it). Since the background, information sought, interrogator, place and manner of the interrogation, and response of the employee all favor the finding of a violation, I find that the Respondent, by Trentini, violated Section 8(a)(1) of the Act by interrogating Reyes regarding his union activities.

I also find that, during this conversation, Trentini unlawfully solicited employee grievances and promised to correct them. The Board has explained that “the solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances.” *Maple Grove Health Care Center*, 330 NLRB 775, 775 (2000), quoting *Capitol EMI Music*, 311 NLRB 997 (1993). See also *MEK Arden, LLC*, 356 NLRB No. 109 (2017). The Board has further explained that the absence of “a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved.” *Id.* A violation will be found if the totality of the circumstances demonstrate that an employer impliedly promised benefits in order to address employee dissatisfaction without the need for union representation. *Multi-Ad Service, Inc.*, 331 NLRB 1226, 1227, 1241 (2000). However, “[a]n employer may rebut the inference of an implied promise by, for example, establishing that it had a past practice of soliciting grievances in a like manner prior to the critical period, or by clearly establishing that the statements at issue were not promises.” *MEK Arden, LLC*, 356 NLRB No. 109 (2017), quoting *Mandalay Bay Resort & Casino*, 355 NLRB 529, 529 (2010).

Here, Trentini asked Reyes whether he wanted a new truck after unlawfully interrogating Reyes and, a few days earlier, unlawfully threatening to discharge him. If the threat of termination was the stick to compel Reyes to vote “No,” the prospect of a new truck was the carrot. Trentini did not deny Reyes previously asked him for a new truck. Rather, Trentini merely denied he was willing to give Reyes a new truck. However, this would not necessarily prevent Trentini from floating the implied promise of a new truck even if Trentini did not intend to follow through on that promise. Indeed, the fact that Trentini previously denied Reyes’ requests for a new truck would suggest that Trentini raised the issue again as an implied promise of benefit since he would have no reason to further address the issue if it were not to imply that he might change his mind. The Respondent also failed to establish that it routinely solicited grievances and corrected them. Rather, it was Reyes who previously requested a new truck, not Trentini, and those requests were denied. Accordingly, I find that the Respondent, by Trentini, violated section 8(a)(1) of the Act by soliciting the grievances of employees and impliedly promising to resolve them.

Trentini Interrogation of Torres

The General Counsel contends that, a few days before the election, the Respondent, by Trentini, violated Section 8(a)(1) of the Act by interrogating Torres regarding his union activities.

I found Torres credible in testifying to the conversation at issue. Torres demonstrated a clear and detailed recollection of his interaction with Trentini. Torres also appeared forthright in his demeanor regardless of the person who was examining him and not prone to exaggeration. For example, Torres admitted, on cross-examination, that he believed work attire such as boots provided more protection than sneakers and that he only wore such work attire on the job. (Tr. 165-166) I found Trentini to be a less reliable witness than Torres. Accordingly, I credit Torres’

testimony regarding his discussion with Trentini about the Union.

5 Considering the *Rossmore* factors outlined above, the record contains evidence which weighs both for and against the finding of a violation. Trentini's initial question regarding Torres' feelings about "the Union coming in" was not an accusation or query about past union activity. Further, Torres appears to have answered the question honestly and was probably less likely than most employees to be intimidated because he was planning to resign and start a new job. On the other hand, Trentini, as the Respondent's sole owner and officer, initiated the inquiry regarding Torres' union sentiments on working time and property. These facts favor the finding of a violation. See *ATC, LLC*, 348 NLRB 796, 805 (2006). More importantly, Trentini followed his initial question by indicating that he heard from other employees that Torres was the "ringleader." The term "ringleader" has a negative connotation in that it suggests that Torres was responsible for an undesirable result (i.e., union organizing). See *Baltz Bros. Packing Co.*, 153 NLRB 1114, 1119 (1965). Unlike Trentini's initial question, this comment did function as an accusation and coercive query regarding Torres' union activities. Accordingly, I find that the Respondent, by Trentini, violated Section 8(a)(1) of the Act by interrogating Torres regarding his union activities.

20 **Donna and Trentini Meeting with Employees – Threat to Close the Business**

The General Counsel contends that, the week before the election, the Respondent, by Donna Trentini, violated Section 8(a)(1) of the Act by threatening to close the business if employees elected the Union as their bargaining representative.

25 In determining the facts underlying this allegation, I find it significant that neither Donna nor Trentini denied they attended a meeting, at which, Winston collected and removed the phones of employees who attended. Donna offered fairly awkward and halting testimony about a comment she made in the office regarding Trentini Mobile going out of business and a large some of money she owed the Union at the time. However, Donna had only a vague recollection of who was present when she made these comments and what employees were talking about which led her to share this information. Ultimately, Donna indicated that she made these comments in response to employees who happened to be present in the office and not at a formal meeting called by the Respondent. Since the Respondent did not specifically deny that a formal meeting was held in which Winston collected employee phones, I conclude that such a meeting took place. And although Respondent's counsel elicited certain denials from Donna and Trentini, the Respondent's witnesses did not provide their own detailed and credible description of this meeting.

40 Other factors lead me to credit Hernandez and Fernandez over Trentini and Donna. As indicated above, Hernandez is currently employed by the Respondent (with nothing to gain from this proceeding) and he appeared particularly forthright in his testimony. The two employees offered testimony that was significantly consistent. The undisputed evidence also established that Winston collected employees' phones at Donna's direction. This type of precaution is one that tends to suggest the Respondent's managers intended to say something illegal and did not want it to be recorded. Further, Hernandez and Fernandez both testified that Trentini told Winston it would be unlawful for him to negotiate with the employees regarding wages before the election. If the employee witnesses were simply intent upon manufacturing fictitious testimony about a meeting that did not actually take place, it would be hard to understand why

they would include such a detail.³⁰ Based on the totality of the evidence, I find that Donna threatened employees with plant closure if they elected the Union as their bargaining representative. Accordingly, I find that the Respondent, by Donna, violated Section 8(a)(1) of the Act. See *A.S.V., Inc.*, 366 NLRB No. 162 (2018); *Gunderson Rail Services*, 364 NLRB No. 30 (2016).

Trentini Threat to Discharge Fernandez

The General Counsel contends that, a couple of days before the election, the Respondent, by Trentini, violated Section 8(a)(1) of the Act by threatening Fernandez with job loss if he did not vote “No” against the Union.

I credit Fernandez with regard to the conversation in question. Fernandez was clear and detailed in his testimony that Trentini approached him in the afternoon while he was washing his truck and said, “if I want to keep my job, I should vote no for the union.” Fernandez was corroborated by Hernandez and Reyes with respect to other events and I found Hernandez to be particularly credible. The Respondent has argued that Fernandez was discharged under circumstances that undermine his character for truthfulness and I am mindful of this argument. However, for various reasons explained herein and in the *RAV* decision, Trentini did not impress me as a particularly credible witness. Under the totality of the circumstances, I am inclined to credit Fernandez and find that Trentini threatened Fernandez with discharge unless he voted “No” against the Union. Accordingly, I find that the Respondent, by Trentini, violated Section 8(a)(1) of the Act. See *Guyan Valley Hospital, Inc.*, 198 NLRB 107, 109 (1972)

Section 8(a)(5), (3), and (1) – Dress Code and Parking Privileges

Change of Dress Code

The General Counsel contends that the Respondent violated Section 8(a)(5), (3), and (1) of the Act by unilaterally changing the dress code and doing so because employees engaged in union activities.

Section 8(a)(5) and (1) – Unilateral Change of Dress Code

The Board has long held that, “when a majority of the unit employees have selected the union as their representative in a Board-conducted election, the obligation to bargain . . . commences not on the date of certification, but as of the date of the election.” *San Miguel Hospital Corp.*, 357 NLRB 326, 327 (2011). Thus, an employer acts at its peril after a union election victory and risks committing a Section 8(a)(5) violation if it unilaterally changes terms and conditions of employment of unit employees while certification is pending the results of challenges and/or objections. *DHSC, LLC*, 362 NLRB 654, 665 fn. 27 (2015); *L & M Ambulance Corp.*, 312 NLRB 1153, 1156 (1993)

On May 10, between 5:30 and 8:30 a.m., the election was conducted and ballots were

³⁰ The Respondent asserts, among other arguments, that Donna and Trentini should be credited because they would not have violated the law by threatening to close the business while simultaneously making a point of obeying the law with regard to promises of increased wages. However, I disagree. If the Respondent wanted to compel employees to reject the Union and not promise/grant wage increases (for obvious financial reasons), it would be reasonable to threaten closure while rationalizing a refusal to increase wages as not within its current legal authority (arguably the fault of the Union for filing the petition).

cast 4-3 in favor of union representation with one determinative challenged ballot.

5 On May 10, at 10:26 a.m., Diane sent a text to all drivers which stated, “Good Morning. As mentioned many times The proper dress attire Jeans/work pants, boots and shirts. NO tank tops. NO sneakers. NO sweat pants. Thank you[.]” Drivers did not respond with texts contesting Diane’s representation that she mentioned this “many times.”

10 Hernandez testified that Diane had, before this text, told him not to wear shorts or sneakers. Nevertheless, the General Counsel contends that the Respondent violated Section 8(a)(5) because Diane, for the first time after the election, promulgated the dress code in writing to all drivers by text. I note initially that a text seems different and less formal (more conversational) than the promulgation of, for example, a memorandum, letter, or handbook. Regardless, the General Counsel cites no case for the proposition that reducing a policy to writing necessarily amounts to a change of that policy and I do not find such a theory
15 compelling. In *Post-Tribune Co.*, 337 NLRB 1279, 1279–1280 (2002), the Board stated:

20 An employer violates Section 8(a)(5) and (1) if it makes a unilateral change in wages, hours, or other terms and conditions of employment without first giving the Union notice and an opportunity to bargain. See *1280 *NLRB v. Katz*, 369 U.S. 736, 743 (1962). [Footnote omitted] “[T]he vice involved in [a unilateral change] is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge.” *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994), *enfd.*
25 73 F.3d 406 (D.C. Cir. 1996), *cert. denied* 519 U.S. 1090 (1997) (quoting *NLRB v. Dothan Eagle*, 434 F.2d 93, 98 (5th Cir. 1970)). Therefore, where an employer’s action does not change existing conditions—that is, where it does not alter the status quo—the employer does not violate Section 8(a)(5) and (1). See *House of the Good Samaritan*, 268 NLRB 236, 237 (1983). An established past practice can become part of the status quo. See *Katz*, 369 U.S. at 746. Accordingly, the Board has found no violation of Section 8(a)(5) and (1) where the employer simply
30 followed a well-established past practice. See, e.g., *Luther Manor Nursing Home*, 270 NLRB 949, 959 (1984), *affd.* 772 F.2d 421 (8th Cir. 1985); *A-V Corp.*, 209 NLRB 451, 452 (1974). (Emphasis in original.)

35 The Board recently observed that numerous decisions have “focused on whether there has been ‘a substantial departure from past practice’” in “evaluating whether particular actions constitute a ‘change.’” *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), quoting *NLRB v. Katz*, 369 U.S. 736, 746 (1962). I do not believe the absence or existence of a writing reflecting a change in the term and condition of employment is particularly significant. The
40 question is whether the Respondent has actually changed a term of employment, and I do not believe the evidence supports such a finding in this case.

45 Before the election, Diane admittedly told Hernandez what not to wear to work. Further, the record does not indicate that the Respondent actually disciplined employees for dress code infractions before or after May 10 (even though Hernandez admits he continued to wear sneakers to work when necessary after the election). Thus, Diane’s directions, be it verbal or by text, before or after the election, functioned more as guidance than a rule and have been substantively consistent over time. The evidence also fails to demonstrate that employees suffered any financial loss as a result of the alleged change. Under these circumstances, I do not find that the General Counsel established that the Respondent changed employees’ terms of employment. Even if it could be considered a change, it did not constitute the type of “material, substantial, and significant” change that amounts to a violation of Section 8(a)(5) and

(1) of the Act. *Crittenton Hospital*, 342 NLRB 686 (2004) (prohibition against using acrylic or artificial nails lawful where employer, previously, “strongly discouraged such nails and prohibited nails longer than 1/8 inch past fingertip”). See, contra, *Salem Hospital Corp.*, 360 NLRB 768 (2014) (new dress policy unlawful where it was shown to have a significant financial impact on employees and imposed a new disciplinary process for violations).

For the reasons stated above, I will dismiss the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by changing the dress code of employees.

Section 8(a)(3) and (1) – Discriminatory Change of Dress Code

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981) cert. denied 455 U.S. 989 (1982), in order to establish a violation of Section 8(a)(3) and (1) of the Act, the General Counsel must establish that an employee suffered an adverse employment action. See *Bellagio, LLC*, 362 NLRB 1426, 1427 (D.C. Cir. 2015) enf. denied 854 F.3d 703 (2017) (Board affirms that “adverse employment action” must be proved to establish a violation and Circuit Court denies enforcement on grounds that paid suspension was not adverse). More specifically, “the General Counsel must show by a preponderance of the evidence that, in response to protected activity, ‘the individual’s prospects for employment or continued employment have been diminished or that some legally cognizable term or condition of employment has changed for the worse.’” Id., quoting *Northeast Iowa Telephone Co.*, 346 NLRB 465, 476 (2006).

For reasons discussed above in my analysis of the Section 8(a)(5) allegation, I do not believe the General Counsel established a change in employees’ dress code and, therefore, I do not find that Diane’s text amounted to an adverse employment action. Since the Respondent has not established this element of a violation, I will dismiss the allegation that the Respondent violated Section 8(a)(3) and (1) of the Act by changing the dress code of employees.

Change of Parking Privileges

The General Counsel contends that the Respondent violated Section 8(a)(5), (3), and (1) of the Act by unilaterally changing the parking privileges of unit employees and doing so because employees elected the Union as their bargaining representative.

Section 8(a)(5) and (1) – Unilateral Change of Parking Privileges

The Board has long held that parking privileges is a mandatory subject of bargaining. *Latino Express, Inc.*, 360 NLRB 911, 920 (2014); *United Parcel Service*, 336 NLRB 1134 (2001).

Contrary to the Respondent’s assertion, I find that the Respondent changed drivers’ parking privileges when Diane announced that they were prohibited from parking in the garage. Diane specifically stated in her May 10 text, “as of Friday May 11th cars are NOT to be parked in the garage.” (GC Exh. 3, 5) (Emphasis added.) By indicated that the prohibition will go into effect as of May 11, Diane effectively admitted that drivers were allowed to park their cars in the garage before May 11. If Diane had previously directed employees not to park in the garage as she claims, it is likely that she would have said so in her text (as she did regarding the dress code). Indeed, Diane testified that she sent the May 10 parking text when she learned drivers were parking their cars in the garage. Although Respondent’s counsel attempted to resuscitate this testimony by asking Diane, in the form of a leading question, whether she told employees not to park in the garage prior to sending the text, her affirmative testimony without any details

as to who she told and when was not credible. And although Trentini claims he did not affirmatively tell drivers to park their cars in the garage, he was certainly aware that drivers were doing so. Meanwhile, driver witnesses testified that they were allowed to park in the garage until Diane sent her May 10 text. In my opinion, the credible evidence indicates that the Respondent, by Diane's May 10 text, changed employees' parking privileges by prohibiting drivers from parking in the garage.

I also find that this change in parking privileges was "material, substantial, and significant." See *United Parcel Service*, 336 NLRB 1134, 1136 fn. 5 (2001). The drivers spent between 10-30 minutes looking for parking on the street in the morning once they were no longer allowed to park in the garage. Although drivers sometimes had to jockey their cars and trucks in and out at the beginning and end of the day, this was not a daily exercise and did not take more than 5 minutes. Particularly for drivers who worked early shifts, the need to wake up earlier and allow for additional time to find parking on the street was a significant change in their terms of employment.

Based on the foregoing, I conditionally find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally prohibiting employees from parking in the garage. However, this finding is conditioned upon the Union demonstrating majority support after Rafael's ballot is opened and counted toward the results of the May 10 election. Once a union is certified, the employer's obligation to bargain is effective as of the date of the election. *Ozburn-Hessey Logistics, LLC*, 366 NLRB No. 177 (2018). However, if the Union did not win the election, the Respondent had no obligation to bargain and cannot be found to have violated Section 8(a)(5).

Section 8(a)(3) and (1) – Discriminatory Change of Parking Privileges

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), in order to establish a violation of Section 8(a)(3) and (1) of the Act, "the General Counsel must prove that antiunion animus was a substantial or motivating factor in the employment action. If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of employee union activity." *Baptista's Bakery, Inc.*, 352 NLRB 547, 549 fn. 6 (2008). The General Counsel's initial burden requires a showing of union activity, employer knowledge of that activity, and union animus on the part of the employer. *Auto Nation, Inc.*, 360 NLRB 1298, 1301 (2014).

Recently, the Board clarified that *Wright Line* is a causation test which requires the showing of a connection or nexus between protected activity and the adverse action. *Tschiggfrie Properties, LTD.*, 368 NLRB No. 120 (2019). In *Tschiggfrie Properties*, the Board expressly overruled cases "to the extent that they suggest that the General Counsel necessarily satisfies his burden of proof under *Wright Line* by simply producing any evidence of the employer's animus or hostility toward union . . . activity." *Id.* slip op. p. 7. (Emphasis in original.) However, the Board also "emphasize[d] that we do not hold today that the General Counsel must produce *direct* evidence of animus against an alleged discriminatee's union or other protected activity to satisfy his initial burden under *Wright Line*." (Emphasis in the original.) Thus, the General Counsel's case may be proved by circumstantial evidence such as timing of alleged discriminatory action, a failure to follow past practice, disparate treatment of discriminatees, shifting or irrational explanations for the treatment of discriminatees, and other contemporaneous unfair labor practices. *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 14 (May 31, 2018); *Novato Healthcare Center*, 365 NLRB No. 137 (Sep. 29, 2017); *Lucky Cab Co.*, 360 NLRB 271, 274 (2014).

Here, for reasons I previously discussed in finding an 8(a)(5) violation, I find that Diane's May 10 text announced a new parking restriction that adversely altered drivers' terms of employment.

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The first two elements of the *Wright Line* test are also satisfied as the Respondent was aware of the petition, the election, and the results of the election in which drivers voted 4-3 in favor of union representation.

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The record evidence is also sufficient to establish the Respondent's antiunion animus and a connection between that animus and drivers' union activity. The Respondent demonstrated animus by broadly directing coercive statements, including threats, toward all of the drivers. In particular, the Respondent held a meeting with five drivers and threatened to close the business if employees elected the Union as their bargaining representative.

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The timing of Diane's parking text, just 3 hours after the election polls closed, is also strong evidence that the action was a reaction to and retaliation against drivers for voting 4-3 in favor of the Union.

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Finally, I find it noteworthy that the change of parking privileges was directed at the drivers and did not, apparently, impact Rafael. Rafael's ballot was challenged and, therefore, his ballot could not have been one of the ballots that was counted in favor of union representation. The evidence does not indicate that Rafael parked in the garage and it stands to reason that he would not since he worked exclusively in the yard at Hollers Avenue (unlike drivers who picked up and dropped off their trucks at the garage). Like timing, this fact suggests animus and supports the finding of a nexus between the revocation of drivers' parking privileges and the union activity of those drivers.

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Based upon the foregoing, I find that the General Counsel established a prima facie case that the Respondent violated Section 8(a)(3) and (1) of the Act by prohibiting employees from parking in the garage. See *Treanor Moving & Storage Co.*, 311 NLRB 371, 382 (1993).

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The Respondent also failed to establish a *Wright Line* defense rebutting the General Counsel's prima facie case. Although not specifically argued as a *Wright Line* defense in the Respondent's brief, the record contains some evidence regarding truck damage and an employee complaint regarding the viability of the parking arrangements in the garage. However, Trentini recalled only one incident of a truck being damaged in the garage (i.e., a hood ornament was found on the ground) and did not recall when it occurred. Similarly, Diane only recalled a single driver (Walker) who complained about the parking arrangements in the garage and did not recall when that complaint occurred. If these incidents occurred prior to the election (perhaps months earlier), it hardly stands to reason that the Respondent was inclined to prohibit drivers from parking in the garage on that basis regardless of the intervening election which immediately proceeded Diane's text. Indeed, it is highly unlikely that the Respondent would have implemented the change when it did if the election had not been held just a few hours earlier. Accordingly, the Respondent failed to establish that it would have prohibited drivers from parking in the garage if they had not voted in the election the way they did.

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Based upon the foregoing, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by prohibiting employees from parking in the garage.

CONCLUSIONS OF LAW

5 1. The Respondent, Concrete Express of NY, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Teamsters & Chauffeurs Local Union 456, IBT, is a labor organization within the meaning of Section 2(5) of the Act.

10 3. The Union's challenge to the ballot of Rafael Valencia is overruled.

4. By the following acts and conduct, the Respondent violated Section 8(a)(1) of the Act:

15 (a) On about May 3 and 8, the Respondent, by Christopher Trentini, threatened employees with discharge if they did not vote "No" against the Union.

20 (b) On two occasions during the week prior to May 10, the Respondent, by Christopher Trentini, interrogated employees regarding their union activities.

(c) During the week prior to May 10, the Respondent, by Christopher Trentini, solicited employee grievances and impliedly promised to correct those grievances by impliedly offering Reyes a new truck.

25 (d) During the week prior to May 10, the Respondent, by Donna Trentini, threatened to close the business if employees elected the Union as their bargaining representative.

30 5. On May 10, the Respondent violated Section 8(a)(3) and (1) of the Act by changing employees' parking privileges because employees engaged in union activities.

35 6. If it is determined that the Union has received a majority of the valid ballots cast in the election on May 10 in Case 02-RC-218783 and is certified as the bargaining representative of the appropriate unit, the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the parking privileges of employees without providing the Union notice and opportunity to bargain over the subject. The appropriate unit is as follows:

Included: All full-time and regular part-time drivers and mechanics employed by the Respondent at 2279 Hollers Avenue, Bronx. NY 10475.

40 Excluded: All other employees, including clerical employees, guards and managers, and professional employees and supervisors as defined by the Act.

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

8. Other than the allegations listed above, the unfair labor practices alleged in the complaint are dismissed.

DIRECTION IN REPRESENTATION CASE 02-RC-218783

Case 02-RC-218783 is remanded to the Regional Director of Region 2 and it is DIRECTED that the Regional Director shall, within 10 dates from the date of this decision, open and count the ballot of Rafael Valencia and prepare and serve on the parties a revised tally of

ballots.

5 If the final revised tally reveals that the Union has received a majority of the valid ballots cast, the Regional Director will schedule a hearing on Respondent objections 4-8 pursuant to the Board's December 10, 2019 order.

10 If the final revised tally reveals that the Union has not received a majority of the valid ballots cast, the Regional director will set aside the election on the basis of the Union objections I have found meritorious and conduct a second election by secret ballot among employees in the unit found appropriate, whenever the Regional Director deems appropriate. During the critical period between the filing of the petition and the election, the Respondent engaged in objectionable conduct that violated Section 8(a)(1) of the Act. This conduct included threats to close the business and discharge employees if they voted in favor of union representation. "[I]t is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period since '[c]onduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammelled choice in an election.'" *Taylor Motors, Inc.*, 366 NLRB No. 69 (2018), quoting *Clark Equipment Co.*, 278 NLRB 498, 505 (1986) and *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). "The only exception to this policy is where the Board finds that it is 'virtually impossible' to conclude that the unfair labor practice could have affected the results of the election." *Id.*

25 The Respondent does not contend that the "virtually impossible" exception applies in this case and, in any event, I do not find that it does. The Respondent's Section 8(a)(1) violations were directed at all unit employees except Rafael and they included threats of plant closure and discharge. The "Supreme Court has held, employees are 'particularly sensitive' to threats of plant closure, and such threats are among the types of unfair labor practices that 'destroy election conditions for a longer period of time than others.'" *Mid-South Drywall Co., Inc.*, 339 NLRB 480, 481 (2003), quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 611 fn. 31 (1969). Threats of discharge are also considered "hallmark" violations under *Gissel*. Further, all but one of the violations were committed by the sole owner and officer of the Respondent, which is likely to be particularly intimidating for employees. In this case, it is not "virtually impossible" to conclude that the unfair labor practices could have affected the results of the election.

35 Should a second election be necessary, the Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations.

The ULP Remedy

40 Having found that the Respondent, Concrete Express of NY, LLC, 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.

45 Since the Respondent was found to have violated Section 8(a)(3) and (1) of the Act by changing its practice of allowing employees to park in the garage at 3771 and 3773 Merritt Avenue, Bronx, New York because of their union activities, the Respondent will rescind this change and restore the status quo ante.³¹ Accordingly, the Respondent will allow employees to

³¹ The Respondent will also be found to have violated Section 8(a)(5) if the Union is determined to have won the May 10, 2018 election in Case 02-RC-218783. However, such a finding will not affect the remedy.

park their personal vehicles in the garage.

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³²

ORDER

10 The Respondent, Concrete Express of NY, LLC, of Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

15 (a) Threatening to discharge employees unless they vote “No” against Teamsters & Chauffeurs Local Union 456, IBT (Union) or any other union.

(b) Threatening to close if employees elect the Union or any other union as their bargaining representative.

20 (c) Interrogating employees regarding their union activities.

(d) Soliciting employee grievances and impliedly promising to resolve those grievances if they refrain from supporting the Union or engage in other union activities.

25 (e) Changing the parking privileges of employees because they supported the Union and/or engaged in union activities.

30 (f) If the Union is determined to have majority support among unit employees as a result of the election conducted on May 10, 2018 and is certified as the bargaining representative of the appropriate unit, unilaterally changing the parking privileges of employees without notifying and giving the Union an opportunity to bargain over the subject.

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

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

40 (a) Within 14 days after service by the Region, post in its facilities located at 2279 Hollers Avenue, 3771 Merritt Avenue, and 3773 Merritt Avenue, Bronx New York, copies of one of the attached notices³³ marked “Appendix A” or “Appendix B.”³⁴ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent’s

45 ³² 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.

³³ If the Union is ultimately certified as the bargaining representative of the unit as a result of the May 10, 2018 election, the notice attached as Appendix B shall be posted. If the Union is not so certified, Appendix A shall be posted.

³⁴ 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."

5 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
10 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 facilities 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 May 3, 2018.

15 (b) Reinstate the parking privileges of employees by allowing them to park their personal
vehicles in the garage located at 3771 and 3773 Merritt Avenue, Bronx, New York.

(c) If the Union is determined to have majority support among unit employees as a result
of the May 10, 2018 election in Case 02-RC-218783 and is certified as the bargaining
representative of the appropriate unit, the Respondent shall bargain with Union as the
collective-bargaining representative of unit employees as to any changes in their terms and
20 conditions of employment, including its parking policy. The appropriate unit is as follows:

Included: All full-time and regular part-time drivers and mechanics employed by
the Respondent at 2279 Hollers Avenue, Bronx. NY 10475.

25 Excluded: All other employees, including clerical employees, guards and
managers, and professional employees and supervisors as defined by the Act.

(d) Within 21 days after service by the Region, file with the Regional Director for Region
2 a sworn certification of a responsible official on a form provided by the Region attesting to the
30 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.

35 Dated: Washington, D.C. December 27, 2019

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Benjamin W. Green
Administrative Law Judge

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APPENDIX A
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 UNDER SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT 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 change the parking privileges of employees or otherwise discriminate against employees for supporting the Teamsters & Chauffeurs Local Union 456, IBT (Union) or any other union.

WE WILL NOT threaten to close the company or discharge employees because they sought to be represented by the Union for purposes of collective bargaining or otherwise engaged in union activities.

We Will Not interrogate employees regarding their union support or activities.

We Will Not solicit employee grievances and impliedly promise to correct those grievances by impliedly promising to give employees a new truck or other benefits if they refuse to support the Union or otherwise refuse to engage in union activities.

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

WE WILL restore the parking privileges of employees as they existed prior to May 10, 2018 by allowing employees to park their personal vehicles in the garage located at 3771 and 3773 Merritt Avenue, Bronx, New York.

CONCRETE EXPRESS OF NY, LLC
(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

26 Federal Plaza, Room 3614, New York, NY 10278-0104
(212) 264-0300, Hours: 8:45 a.m. to 5:15 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/22-CA-220381 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 (212) 264-0300.

APPENDIX B

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 UNDER SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT 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 change the parking privileges of employees or otherwise discriminate against employees for supporting the Teamsters & Chauffeurs Local Union 456, IBT (Union) or any other union.

WE WILL NOT unilaterally change the parking privileges or other terms and conditions of employment of unit employees without notifying and offering to bargain with the Union as the bargaining representatives of employees in the following bargaining unit:

Included: All full-time and regular part-time drivers and mechanics employed by the Employer, Concrete Express of NY, LLC, at 2279 Hollers Avenue, Bronx. NY 10475.

Excluded: All other employees, including clerical employees, guards and managers, and professional employees and supervisors as defined by the Act.

WE WILL NOT threaten to close the company or discharge employees because they sought to be represented by the Union for purposes of collective bargaining or otherwise engaged in union activities.

We Will Not interrogate employees regarding their union support or activities.

We Will Not solicit employee grievances and impliedly promise to correct those grievances by impliedly promising to give employees a new truck or other benefits if they refuse to support the Union or otherwise engage in union activities.

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

WE WILL restore the parking privileges of employees as they existed prior to May 10, 2018 by allowing employees to park their personal vehicles in the garage located at 3771 and 3773 Merritt Avenue, Bronx, New York.

CONCRETE EXPRESS OF NY, LLC
(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

26 Federal Plaza, Room 3614, New York, NY 10278-0104
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The Administrative Law Judge's decision can be found at www.nlr.gov/case/22-CA-220381 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 (212) 264-0300.