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Watco Transloading, LLC and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, USW Local 10-1 and Dennis Roscoe. Cases 04-CA-136562, 04-CA-137372, 04-CA-138060, 04-CA-141264, 04-CA-141614, and 04-CA-138265

May 29, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On April 5, 2017, Administrative Law Judge Susan A. Flynn issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party Union filed answering briefs, and the Respondent filed a reply brief. The General Counsel also filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

¹ No party has excepted to the judge's finding that, on August 25, 2014, the Respondent did not unlawfully interrogate employees, give the impression of surveillance, or threaten employees with cessation of operations at the Philadelphia facility. Nor were there exceptions to the judge's finding that the Respondent did not engage in the unlawful conduct alleged in the complaint to have occurred on August 28, including unlawful interrogation, giving the impression of surveillance, urging employees to throw away union cards, and engaging in other unlawful solicitation and promises. There were also no exceptions to the judge's failure to find that the Respondent threatened employees, at an early September meeting, by telling them that it would lose its contract with the Philadelphia facility refinery if a union were selected. However, there were additional allegations of promises of benefits and solicitation occurring in September 2014, which, as noted herein, we have found to have merit.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that any such contentions are without merit.

³ We shall modify the judge's conclusions of law and recommended Order to conform to the violations found and in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). The judge recommended a broad order requiring the Respondent to cease and desist from violating the Act "in any other manner." We find that a broad order is not warranted to remedy the unfair labor

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions,¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions only to the extent consistent with this Decision and Order.³

I. INTRODUCTION

We agree with the judge's findings, for the reasons she stated, that the Respondent violated Section 8(a)(1) of the National Labor Relations Act prior to a Board representation election by promising that it would try to secure a raise for employees and that it would provide them seasonal weather gear,⁴ and by purchasing lunch more frequently for employees. We find that the Respondent did not interrogate employees concerning their union support.⁵ However, we find that she erred by neglecting to find that the Respondent violated Section 8(a)(1) of the Act by soliciting grievances during the organizing campaign.⁶

The judge also found that the Respondent violated Section 8(a)(3) and (1) of the Act when it discharged employee John D. Peters, and when, on separate occasions, it issued written warnings to Dennis Roscoe, suspended him, and discharged him. For the reasons discussed below, we reverse these findings and dismiss all the

practices in this case, and we substitute a narrow order requiring the Respondent to cease and desist from violating the Act "in any like or related manner." See *Hickmott Foods*, 242 NLRB 1357 (1979). We shall also substitute a new notice to conform to the Order as modified.

⁴ The judge, in her conclusions of law and recommended Order, found that the Respondent unlawfully promised rain gear and boot slips. However, the record made clear that winter gear and gloves were also promised.

⁵ The judge did not address this allegation, which we dismiss as follows. At a meeting with employees in September 2014, Manager Spiller asked, "What are employee gripes and why would they want to bring the union in?" This was followed by a freewheeling discussion of improvements that employees sought to obtain through unionization. In context, we find that Spiller's inquiry was more in the nature of a "casual" discussion of employees' interest in the union, see *Rossmore House*, 269 NLRB 1176, 1177 (1984), *affd.* sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), rather than a coercive interrogation "calculated to elicit a response from employees concerning their union sympathies," *Beverly California Corp.*, 326 NLRB 153, 155 (1998), *enfd.* in relevant part 227 F.3d 817 (7th Cir. 2000), *cert. denied* 533 U.S. 950 (2001).

⁶ The credited testimony of employee Matthew Horne established that the Respondent unlawfully solicited grievances as alleged in the complaint. He testified that, at a September 16, 2014 meeting, Terminal Manager Brian Spiller asked employees "about the gripes that the [e]mployees had with the Company and what he could do to resolve them." Taken in the context of an organizing campaign along with the unlawful promises of weather gear at the same meeting and of a wage raise at an earlier September meeting, Spiller's inquiry would reasonably lead employees to believe that the Respondent was implicitly promising to remedy their grievances, thus suggesting that union representation was unnecessary. Under these circumstances, the solicitation was unlawful.

complaint allegations pertaining to the discipline and discharge of Peters and Roscoe.

Lastly, the judge dismissed the allegation that the Respondent violated Section 8(a)(1) when Human Resources Representative Brooke Beasley told Peters in a telephone conversation that she was conducting a confidential internal investigation of his misconduct and that he was “forbidden to discuss any of this conversation with anyone.” For the reasons discussed below, we affirm the judge’s dismissal.

II.

A. *The Discharge of Employee Peters*

The Respondent is a rail-switching company that facilitates the transfer of railborne petroleum products at a Philadelphia refinery. At the time of the relevant events here, the Respondent employed approximately 21 employees at its Philadelphia operations. The Respondent hired Peters as a locomotive engineer when it commenced its Philadelphia operations in November 2013. He possessed a valuable skillset, as it was somewhat difficult to recruit engineers.

In July 2014,⁷ Terminal Manager Brian Spiller warned Shift Supervisor David Gordon that employees might seek to form a union and said that Gordon should express to employees his opposition to a union. Spiller noted that Peters was pro-union and that Gordon should keep an eye on Peters. Nonetheless, Spiller and Peters had a good relationship, and Spiller valued Peters’ work. Notably, on August 4, the Respondent hired Peters’ grandson, largely on Peters’ recommendation.

Also on August 4, employee Curtis Pettiford emailed an incident report to the Respondent’s corporate human resources department⁸ in Pittsburg, Kansas, and to Operations Director Nathan Henderson⁹ (who was based in Houston), in which Pettiford complained, in detail, that, since November 2013, Peters had “repeatedly” referred to Pettiford, falsely, “as a homosexual.” Further, Pettiford claimed that Peters had frequently called him a “faggot”—including on one occasion interrupting conversations among a group of coworkers to declare, “That guy is a faggot”—and had continued falsely telling coworkers that Pettiford was gay in spite of Pettiford’s strong objections.

In response to Pettiford’s complaint, he and Peters were immediately placed on different shifts,¹⁰ and, on August 4

and 5, Human Resources Representative Beasley interviewed both employees by phone, along with four of their coworkers. Two of the four coworkers corroborated Pettiford’s claims that Peters had said Pettiford was gay. Although one coworker suggested Peters may have said so jokingly to Pettiford, the other stated that Peters had said Pettiford was gay outside Pettiford’s presence.

In Pettiford’s interview with Beasley, he reiterated that Peters had persisted in falsely calling him gay, both to him and his coworkers, in spite of his protests. Pettiford also claimed that when he and Peters were riding in a train cab together, Peters often joked that Pettiford was rubbing or “humping” against Peters’ leg deliberately.

In Peters’ interview with Beasley, he admitted solely to mild joking with coworkers, other than Pettiford, about a gay bar, and completely denied any comments to Pettiford regarding his sexual orientation. According to Peters’ credited testimony, Beasley advised him that she was conducting an interview about allegations against him and told him that he was prohibited from discussing their conversation with anyone. Beasley reported the results of her investigation directly to Operations Director Nathan Henderson, as Terminal Manager Spiller was on vacation that week. Spiller returned to work the next week, but Henderson then went on vacation.

Two weeks after Beasley concluded her interviews, on August 19, Beasley, Nathan Henderson, Spiller, and Human Resources Director Sofrana Howard held a conference call to discuss the Peters investigation. Two days later, on the morning of August 21, Beasley booked a flight from Kansas City to Philadelphia for August 25, which she said was for the purpose of participating in Peters’ discharge. Also, on August 21, in the evening, a shift supervisor observed Peters and Dennis Roscoe distributing union authorization cards in the parking lot.¹¹

On August 25, Beasley flew to Philadelphia as planned, arriving in the evening. While en route, she heard from Spiller and Nathan Henderson about the union activity on August 21. The following afternoon, Beasley participated in a meeting, along with Terminal Manager Spiller, at which Peters was discharged. Spiller gave Peters a discharge memo stating that the reason for the discharge was his violation of the Respondent’s sexual harassment policy, including unwelcome verbal or physical conduct of a sexual nature creating an intimidating or hostile work

⁷ Unless otherwise noted, all dates stated hereafter are in 2014.

⁸ The Respondent also refers to its human resources department as People Services.

⁹ To avoid confusion with Leroy Henderson, an employee (unrelated to Nathan Henderson) at the Respondent’s Philadelphia facility, these individuals will be referred to by their full names.

¹⁰ Beasley testified that Pettiford was advised of and satisfied with the placement on different shifts as a short-term solution, but in his

complaint he insisted on being transferred to a different facility as a long-term solution. Beasley also testified that there were no transfer openings for Pettiford at the time.

¹¹ Despite some lack of clarity in her decision, the judge essentially found that the Respondent’s suspicions, expressed in July, that Peters was pro-union did not constitute knowledge of actual union activity by him and that such knowledge was gained on the evening of August 21.

environment. As planned, Beasley flew back to Kansas City early the next morning. Peters filed an internal appeal of the discharge, after which Beasley conducted additional interviews with other employees, some of whom corroborated aspects of Pettiford's allegations (specifically that Peters had called Pettiford gay and "a faggot"). The appeal was denied.

The judge found that the General Counsel met his initial *Wright Line*¹² burden of proving that Peters' discharge was motivated by union animus. She further found that the Respondent failed to meet its defense burden of proving that it would have discharged him even in the absence of his protected union activity. Her reasoning in support of her findings was as follows.

The judge found that all of the evidence the Respondent relied on to discharge Peters was available to it by August 5. She found the explanation for why the Respondent did not actually discharge him until August 26 based on this evidence to be "unpersuasive." In particular, she concluded that even though the Respondent took the immediate action of ensuring that Peters and Pettiford worked different shifts, it would not have delayed disciplining Peters, or at least removing him from the workplace pending its final determination, for an offense it deemed serious. The judge also questioned the need to wait for Terminal Manager Spiller to return from his vacation and to participate in discussing the matter when Nathan Henderson, Spiller's boss, was apprised of the evidence and had the authority to discharge Peters without consulting Spiller. Further, while acknowledging that there was evidence of a phone conference among the Respondent's officials on August 19, the judge noted that there was no documentary corroboration of the matters discussed, and she discredited the "self-serving" testimony of Spiller, Beasley, and Howard that the decision to discharge Peters was made then.¹³ She further questioned why Peters was not discharged in the week following this discussion and why it would be necessary to wait for Beasley, a human resources representative, to be present at the discharge meeting when no representative was present for Roscoe's subsequent discharge, discussed below. Further, even though, on the

morning of August 21, before the Respondent learned of Peters' union activity later that day, Beasley made airline reservations for a one-business-day trip from Kansas City to Philadelphia and back, the judge noted the absence of any testimony that Beasley discussed the Peters discharge issue while waiting for her flight or at any time from her arrival in Philadelphia until the meeting with Spiller and Peters the next afternoon. Finally, the judge also questioned why Beasley conducted a follow-up investigation of other witnesses in response to Peters' appeal of his discharge if the Respondent's officials found the evidence from her August 4-5 investigation sufficient to warrant the discharge.

Without deciding the issue, we assume that the General Counsel met his initial *Wright Line* burden of proving that Peters' union activity was a factor motivating his discharge. Contrary to the judge, however, we find that the Respondent did meet its defense burden of proving that it would have discharged Peters even absent his union activity.¹⁴ In reaching this conclusion, we acknowledge that the timing of Peters' actual discharge soon after his card distribution for the Union warrants close scrutiny and that not every piece of evidence necessarily weighs entirely in the Respondent's favor. Nevertheless, "it is to be remembered that Respondent is required to establish its *Wright Line* defense only by a preponderance of the evidence. The Respondent's defense does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it." *Merillat Industries*, 307 NLRB 1301, 1303 (1992) (footnote omitted).

Here, the Respondent provided a coherent and rational account of its investigation, internal discussions, and decision to discharge Peters based on his homophobic sexual harassment of Pettiford. Notably, the judge did not credit Peters' denial that he engaged in this misconduct. Instead, she found the Respondent's defense to be "unpersuasive." She based this finding on unfounded speculation and unwarranted inferences, lacking any support in record evidence, that each of the Respondent's actions leading to the discharge was somehow not what it was purported to be. She essentially surmised that Peters should have been

¹² See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

¹³ The judge specifically referenced Respondent's Exhibit 5, a printout of an Outlook Calendar entry, as evidence that a teleconference took place, but she failed to note the subject heading of this entry was "JP Investigation discussion." Beasley testified that "JP" was John Peters.

¹⁴ The General Counsel and the Union contend in answering briefs that the Respondent's harassment misconduct defense was pretextual, and they further contend that Peters' discharge constituted disparate treatment when compared to the Respondent's failure to take any disciplinary action against Leroy Henderson for sending a series of angry,

vulgar text messages to Peters on August 1. We note, however, that the judge did not find that the Respondent's defense of Peters' discharge was pretextual or that it involved disparate treatment, and neither the General Counsel nor the Union excepted to the judge's failure to so find. Even if there were exceptions, we would find the argument to be without merit. In particular, Leroy Henderson's opprobrious statements were sent in a single evening's sequence of text messages from off-site and amounted to a largely incoherent ramble. They were not comparable to what Pettiford described as Peters' sustained and repeated in-person remarks in the workplace concerning Pettiford's sexual orientation, over his strong protests, along with homophobic slurs in the presence of co-workers.

discharged soon after Beasley completed her early August investigation, or not at all; that the August 19 teleconference was of no consequence in the determination of how to deal with Peters' misconduct; that a decision was made to discharge Peters only after the Respondent became aware of his union card solicitation activity on August 21; that Beasley's presence in Philadelphia on August 26 was mere happenstance that permitted Spiller to use it as a procedural gloss at the discharge meeting; and that Beasley engaged in her renewed investigatory effort to secure post hoc justification for the discharge.

We find the judge impermissibly imposed her own judgment as to how and when the Respondent should have conducted the investigation and discharge of Peters. The possibility that the Respondent's officials could have done certain things differently at different times does not vitiate the legitimacy of the actions taken. There is no evidence whatsoever that the Respondent deviated from a past practice with respect to the investigation and discharge of an employee accused of engaging in prohibited sexual harassment. Although inherent improbabilities in a respondent's account can cast doubt on it, here (and in Roscoe's suspension and discharge as well, as we will discuss) the Respondent's actions were triggered by independent employee reports of serious misconduct, which the Respondent investigated with reasonable diligence, and its handling of the discipline did not manifest any irregularities improbable and compelling enough to cast doubt on this straightforward narrative of events. On the contrary, the judge's alternative analysis is rife with improbabilities, not the least of which are that there was no need to wait for Terminal Manager Spiller to join in addressing this misconduct *at his facility*, that Beasley's scheduling of an otherwise-unexplained one-business-day round trip from Kansas City to Philadelphia had nothing to do with Peters' situation, and that her subsequent investigation of additional witnesses was something other than a routine procedural response to Peters' internal appeal of his discharge.

In sum, we find, contrary to the judge, that the Respondent proved that its actions here were consistent with a bona fide effort to determine the validity of serious allegations against Peters, an otherwise valued employee, and to discipline him for misconduct.¹⁵ As a result, the Respondent has met its *Wright Line* defense burden to establish that it would have discharged Peters for his misconduct notwithstanding the coincidence of his union activity. Accordingly, we will dismiss the complaint allegation that the discharge was unlawful.

B. *The Discipline and Discharge of Employee Roscoe*

1. The August 21 written warnings

The Respondent hired Roscoe as a car man, a job inspecting and repairing rail cars, in April 2014. On July 29, Roscoe gave Terminal Manager Spiller a letter in which he complained that African American car men were not being given promotion opportunities. Specifically, he pointed to the noncompetitive promotion of Mike Onuskanych, a white employee; and to the hiring of Joe and Kevin Onuskanych, Mike's sons, at the same rate of pay as experienced African American employees, despite the Onuskanych brothers' lack of experience. The following day, Spiller had a conversation with Roscoe and two other African American car men in which he sought to explain the Onuskanych promotion and promised future opportunities. There were no further complaints to Spiller on this matter.

On August 6, after witnessing Shift Supervisor Joe Ryder and Mike Onuskanych smoking in a no-smoking area where flammable material was present, Roscoe made a safety complaint to Shift Supervisor Gary Plotts. Roscoe subsequently made the same report to the refinery safety coordinator and to Terminal Manager Spiller. He would later email Human Resources Representative Beasley about the matter, indicating that Mike Onuskanych and his two sons were smoking in a no-smoking area, and also that Ryder was harassing Roscoe for reporting the violation. Beasley spoke to Spiller, who in turn spoke to the involved parties and posted a notice concerning smoking areas.

Spiller testified that on August 15, he observed that Roscoe remained in the work crew trailer even though a train was ready for inspection, which Roscoe was required to do promptly. Spiller further testified that he told Shift Supervisor Ryder to make sure Roscoe did not get any overtime since he had caused a delay in completing his work on the train. Finally, Spiller testified that Ryder later reported that Roscoe worked beyond his shift, failed to respond to initial attempts to contact him, resisted Ryder's directions to stop work, and stayed on site even after finishing work despite Ryder's directions to go home.

On August 21, on Spiller's instructions, Ryder issued Roscoe two written warnings: one for insubordination for failing to timely conclude his work and thereby avoid an alleged 2½-hour overtime charge and a second for failing to properly perform his work duties. However, the judge found the reasons asserted for the discipline were false, based on Roscoe's credited testimony that he followed normal practice by awaiting the usual notification that the train was ready for inspection before he went to work on

disclosed substantial evidence [of misconduct]" met respondent's affirmative defense burden).

¹⁵ See *Park N Fly, Inc.*, 349 NLRB 132, 136 (2007) (reasonably "thorough[]" investigat[ion] [of sexual harassment] complaint . . . [t]hat . . .

it, and that, with Ryder's permission, he only worked and claimed one overtime hour to complete his work, although he remained on site for another unpaid hour or so.

The judge found that the written warnings issued to Roscoe on August 21 violated Section 8(a)(1).¹⁶ She summarily stated, without explanation, that both his complaint about race discrimination and his antismoking activity constituted protected concerted activity. She further found that the Respondent was aware of these complaints and, based on Roscoe's credited version of events, that the facts asserted in the warnings were false. Then, without further explanation, she concluded that the General Counsel had met his burden of proof, and the Respondent did not meet its burden of proving that it would have warned Roscoe in the absence of his protected concerted activity.

Even accepting the judge's credibility finding with respect to what happened on August 15, we disagree with her that the General Counsel met his initial *Wright Line* burden of proving that the warnings were motivated by animus against protected concerted activity. First, we find that the judge erred in finding that Roscoe's smoking safety complaints were concerted. The General Counsel did not allege that they were concerted, and there is no evidence that Roscoe discussed the matter with co-workers or that he was attempting to initiate group action. Consequently, even if the written warnings were motivated by animus against this activity, there would be no violation of the Act. Second, while we agree that Roscoe's July 29 complaint concerning the treatment and promotion of African-American employees involved protected concerted activity, and that the Respondent recognized it as such, there is no evidence of any hostility or any negative reaction by Spiller or any of the Respondent's other officials to this complaint. Spiller promptly discussed the discrimination complaint with Roscoe and his co-workers, there is no evidence that he expressed any animosity about the complaint during this discussion, and that was apparently the end of the matter. Under these circumstances, we find that the General Counsel has failed to meet his initial *Wright Line* burden to show that Roscoe's August 21 warnings were based on protected conduct, and we will dismiss the complaint allegation based on this discipline.

2. Roscoe's September 23 suspension

As noted previously, on the evening of August 21, Respondent's officials observed Roscoe and Peters in the parking lot distributing authorization cards. The Union

subsequently filed a Board election petition, and the parties agreed on an October 3 election date.

During the morning shift start on September 23, Roscoe confronted Joe Onuskanych, who was not scheduled for duty but had been called in to work overtime. As described below, subsequent witness accounts vary as to the details of what took place. However, it is undisputed that Roscoe told Onuskanych that his presence was unnecessary as there was no work for him to do, and he threatened to call human resources to advise them that Onuskanych was needlessly being allowed to work. This encounter led to another involving Roscoe and Shift Supervisor Brandon Lockley, who attempted to get Roscoe to return to work.

Lockley later spoke to Terminal Manager Spiller concerning what Lockley viewed as Roscoe's disruptive and insubordinate behavior. Spiller in turn spoke by phone with both Director of Operations Nathan Henderson and Human Resources Director Howard. Later that day, Spiller suspended Roscoe pending an investigation of his alleged misconduct. At Howard's request, Spiller also took written statements regarding the incident that were forwarded to human resources.

Howard traveled to the facility to conduct additional investigative interviews. The statements taken by Spiller and Howard did not provide any consensus version of the exchange between Roscoe and Joe Onuskanych. The latter, corroborated by his father Mike, stated that Roscoe told him that Joe only got his job because his father "sucked management's dick" and that Roscoe made a corresponding obscene gesture. John C. Peters Jr. (Peters' grandson) did not mention that he heard the graphic sexual insult or observed the gesture, but he did state that Roscoe started a loud and heated argument. Other employees heard nothing objectionable in the exchange between Roscoe and Joe Onuskanych. Matthew Horne stated that Roscoe asked Joe Onuskanych why he was there, adding that Onuskanych "took it wrong," although he did confirm that Roscoe told Joe Onuskanych that he had a job at the Respondent only because of his dad. Another employee said Onuskanych was hostile.

With respect to the second confrontation on September 23, Shift Supervisor Lockley stated that Roscoe refused multiple times to go to his assigned duties despite Lockley's instructions to do so. When Lockley said he would have to send Roscoe home and call someone else in to do the job, Roscoe asked if Lockley was threatening him. Roscoe then told Lockley that he didn't "have the balls"

¹⁶ As noted in the General Counsel's cross-exceptions, the judge erred in finding that the warnings also violated Sec. 8(a)(3). We agree, inasmuch as the credited evidence shows that the Respondent did not know of any union activity by Roscoe until his distribution of union cards later on August 21. We also note, however, that the General Counsel

confusingly contended in his post-hearing brief to the judge that the warnings were issued in retaliation against union activity in violation of Sec. 8(a)(3), rather than in retaliation against any other protected concerted activity in violation of Sec. 8(a)(1).

to send him home, while clapping his hands and speaking in a raised voice. Peters Junior, in his witness statement, observed that Lockley intervened to “calm Roscoe down” when the “shouting” between Roscoe and Onuskanych got “a little out of control,” but Lockley’s effort only “added fuel to the fire” and led to “another minute or two of shouting.”¹⁷

Howard telephoned Roscoe on September 25 for his version of the events. According to her, she first asked Roscoe what happened on September 23. Roscoe replied that nothing happened, only that he was waiting to give a paper to Brian Spiller. When Howard asked a follow-up question about this, Roscoe said he did not feel comfortable answering her questions and was referring her to his lawyer, whom he did not identify. Then Roscoe hung up.

After reviewing the investigative findings, in which Howard found that Roscoe had acted inappropriately toward Joe Onuskanych and insubordinately toward Lockley, Director of Operations Henderson and Terminal Manager Spiller confirmed Roscoe’s suspension. On October 2, the day before the election, the Respondent gave Roscoe a letter, dated October 1 and signed by Spiller, confirming that he was officially suspended for 14 days, dating from September 23. Roscoe was also given a final warning and placed on a performance improvement plan. The letter cited the confrontation with Joe Onuskanych, wherein witnesses stated he made inappropriate gestures of a sexual nature, and the insubordination toward Lockley. The letter also noted that during the investigation of these incidents Roscoe was “uncooperative and refused to provide any statement, stating ‘nothing happened.’” Finally, the letter stated that in determining the level of discipline to be imposed, Roscoe’s prior written warnings issued on August 21, including one for insubordination, were taken into account.

The judge found that the General Counsel carried his initial *Wright Line* burden of proving that Roscoe’s suspension was motivated by his union activity. She further found that the Respondent’s reliance on alleged misconduct for the suspension was pretextual. Accordingly, she concluded that the suspension was unlawful. We again assume, without deciding, that the General Counsel met the initial *Wright Line* burden of proof. However, we disagree that the Respondent’s defense was pretextual. Instead, we find that the Respondent has established that it would have suspended Roscoe even in the absence of his protected union conduct.

Roscoe’s 14-day suspension for the events of September 23 was based on varying witness accounts of misconduct by Roscoe involving confrontational behavior, vulgarity, and insubordination. The judge, however, reasoned that the suspension and the determination of its length were based in part on a finding that Roscoe made an obscene sexual gesture in his confrontation with Joe Onuskanych. She found that the Respondent did not have a good-faith belief that this occurred because Joe’s father Mike was the only other witness interviewed who specifically corroborated Joe’s allegation that the gesture was made, and she found it was not clear whether Mike was an actual witness to this incident.¹⁸ The judge further opined that the Respondent failed to explain why its officials credited what she then characterized as an uncorroborated witness statement over Roscoe’s denial. She found it relevant that Roscoe denied under oath at the hearing that he made an obscene gesture and that the Respondent relied only on contrary hearsay evidence, failing to call Joe Onuskanych to testify. Consequently, the judge concluded that the Respondent relied on the September 23 incidents as a pretext to ensure that Roscoe was on suspension at the time of the representation election.

The judge’s analysis misleadingly focuses on only one aspect of the September 23 incidents and is based on a mistaken view of how the Respondent’s good-faith reliance on contemporaneous witness statements should be evaluated. At a minimum, the Respondent’s investigation produced evidence that Roscoe, who had no authority over Joe Onuskanych, initiated an officious confrontation with him about his presence at the job site and that the confrontation was both loud and angry. The investigation also produced evidence that Roscoe subsequently engaged in insubordinate conduct with Supervisor Lockley, refusing to obey Lockley’s directions to return to work, challenging Lockley’s authority to send him home by asking Lockley if he was threatening him, and saying that Lockley “didn’t have the balls” to send him home if he did not return to work. The judge barely discussed the latter encounter and gave the evidence of Roscoe’s insubordination no consideration in her analysis of whether the Respondent had a good-faith basis for imposing the 14-day suspension and related discipline.

Furthermore, the judge erred in relying on the fact that Roscoe testified at the hearing in this case but none of the other witnesses testified.¹⁹ Her analysis completely misses the point. The issue of the Respondent’s good-faith belief must be determined by whether it had a

¹⁷ Peters Junior further corroborated Lockley’s account in his trial testimony, agreeing that Roscoe told Lockley he didn’t “have the balls” to send him home.

¹⁸ The judge did not explain her reasons for this finding.

¹⁹ We note that the judge was also mistaken that no other witness testified. She failed to acknowledge that Peters Junior did testify and confirmed that Roscoe told Supervisor Lockley that he didn’t “have the balls” to send him home.

reasonable basis to impose discipline when it did, not months later when Roscoe testified about the events of September 23 at the hearing. In fact, the judge's reasoning for crediting Roscoe—that he testified at the hearing when other witnesses did not—fails to acknowledge that at the critical time of the Respondent's investigation and imposition of discipline, the opposite was true. While the other witnesses provided specific statements about what happened on September 23, Roscoe declined to cooperate in the investigation, stating only that “nothing happened” and terminating his conversation with Howard before she could ask for any details that could be weighed against other witness accounts. Simply put, there is no apparent reason why the Respondent, at that earlier time, should have found Roscoe to be inherently credible and all other witness versions of what transpired to be untrustworthy.

We also note that the discipline imposed, including the length of the suspension, is consistent with the Respondent's handbook provisions for the misconduct substantiated by the investigation. In addition, we find that the Respondent legitimately relied on Roscoe's August 21 warnings in determining the level of discipline. As previously discussed, we have reversed the judge and found these warnings were lawful. Thus, although Roscoe was a visible union supporter and the timing of his suspension closely coincided with the representation election, we find that the Respondent legitimately relied on evidence of Roscoe's serious misconduct to discipline him and that it would have imposed this discipline even in the absence of his union activity. Accordingly, we will dismiss the complaint allegation based on this discipline.

3. Roscoe's October 10 discharge

The Board election was conducted on October 3 and 4. The Union did not receive a majority of votes, there were no objections to the conduct of the election, and a certification of results issued. Roscoe voted in the election while still on suspension, which ended on October 6. He returned to work on October 7 or 8.

On October 9, Leroy Henderson called Director of Operations Nathan Henderson and Human Resources Director Howard to report that Roscoe had earlier that day pulled his car alongside Leroy Henderson's car near the refinery entrance gate and began cursing and threatening him. As requested, Leroy Henderson provided a written statement about the incident, as did his passenger, Sabrina Harris, a security officer for the refinery. Those statements asserted that Roscoe called Leroy Henderson a “punk mother fucking bitch” (or, according to Harris, “a

Punk Ass Pussy”). Both witnesses generally stated that Roscoe told Leroy Henderson he knew where Henderson lived and that Henderson had better watch out for his two little girls, since they had a drug addict for a father. On October 10, Spiller and Nathan Henderson decided to discharge Roscoe without asking him for his version of events. A discharge notice was emailed to him, stating that he had “engaged in a verbal altercation with a fellow Team Member, wherein witnesses provided testimony that you made threatening comments” that warranted discharge under the Respondent's rules of conduct. The letter further stated that the determination to discharge Roscoe took into account his prior disciplinary history, specifically including the August 21 warnings and the September 23 final warning.

The judge implicitly found, without so stating, that the General Counsel met his initial *Wright Line* burden of proving that Roscoe's union activity motivated the discharge. She also found that the Respondent failed to prove that it would have relied on the alleged October 9 incident to discharge him in the absence of animus towards his union activities.²⁰ The judge acknowledged that Leroy Henderson and Harris gave almost identical statements about the incident, but noted that neither of them contacted the police about it. Noting that neither Henderson nor Harris testified at the hearing in this case, the judge found that Roscoe credibly testified under oath that there was no confrontation with Leroy Henderson. The judge therefore observed that there was no explanation why the Respondent's officials took Leroy Henderson's accusation at face value. She also noted that Harris had failed to identify Roscoe as the protagonist. The judge concluded that the Respondent did not have a good-faith belief that Roscoe had cursed at and threatened Leroy Henderson when it discharged him and, moreover, that the discharge was tainted by what she had found to be his prior unlawful suspension.

Once again, we find numerous shortcomings in the judge's analysis. First, her passing attempts to undercut the weight of consistent statements by Leroy Henderson and Harris about the encounter with Roscoe are, to use the judge's own term, unpersuasive. There is nothing suspect about the fact that Harris, who was not employed by the Respondent, did not identify Leroy Henderson by name. Her description of what happened in an encounter with “other Watco personnel” substantially corroborated the serious misconduct that Leroy Henderson attributed by name to Roscoe. It is clear from the record that the two employees worked together in the same small work force and would readily recognize each other. Further, while

²⁰ Unlike her analysis of Roscoe's suspension, the judge did not expressly find the Respondent's defense to be pretextual. It is unclear whether that was her intent.

neither Leroy Henderson nor Harris contacted police, Leroy Henderson did immediately contact Respondent's senior management to express his concern about the incident. Finally, it is difficult to reconcile the judge's nit-picking the reliability of those two witnesses when she found it only "curious" in her decision that Roscoe denied any encounter with Henderson on October 9, even though he acknowledged in his testimony that he stated in a Board investigatory affidavit that there *was* a confrontation, but Henderson did all the yelling and cursing.

We also find no significance in the fact that the Respondent's officials did not attempt to get Roscoe's version of events prior to discharging him. The judge failed to recognize that when the Respondent attempted to get Roscoe's account of the September 23 incidents, Roscoe had simply denied that anything happened and hung up on the investigator. After that, it would not be unreasonable for the Respondent's officials to believe they had little to gain by interviewing him about the alleged October 9 incident before taking action based on the statements provided by Leroy Henderson and Harris. Moreover, we note that Roscoe's termination letter provided Roscoe with a post-discharge right to appeal the decision and provide his version of events. There is no evidence that he did so.

In sum, on October 9, Leroy Henderson immediately reported to the Respondent's officials that there had been a disturbing incident earlier that day in which Roscoe drove up next to Henderson's car and, *sua sponte*, began cursing at him and making threats, including a threat involving the welfare of Henderson's children. Within a day, the Respondent's officials had mutually corroborative accounts from two witnesses describing Roscoe's serious misconduct, occurring only a day or two after his return from suspension for serious misconduct in prior encounters with a co-worker and a supervisor. At bottom, we simply disagree with the judge that the preponderance of evidence shows the Respondent did not have a sufficient good-faith belief that Roscoe had committed a dischargeable offense. We find that the Respondent legitimately relied on that good-faith belief to discharge Roscoe and that it would have taken the same action even in the absence of his union activity. Accordingly, we will dismiss the complaint allegation that the discharge was unlawful.

III. THE INSTRUCTION THAT PETERS NOT DISCUSS HIS INTERVIEW

As discussed above, during Human Resources Representative Beasley's telephone interview with Peters on August 5 about the Pettiford allegations, Beasley told Peters that the Respondent "was conducting a confidential internal investigation" and that Peters "was absolutely forbidden to discuss any of this conversation with anyone." The judge found that this confidentiality instruction did not violate Section 8(a)(1) of the Act because the Respondent's legitimate justification for requiring confidentiality was "patently obvious." We adopt the judge's recommendation to dismiss this allegation, but we do so on the basis of *Apogee Retail LLC d/b/a Unique Thrift Store*,²¹ which was decided after the judge issued her decision in this case.

In *Apogee*, the Board overruled precedent holding that an employer could lawfully restrict discussion of ongoing confidentiality investigations only where it made a particularized showing of a substantial and legitimate business justification outweighing employees' Section 7 rights.²² Instead, the Board held that investigative confidentiality rules that by their terms apply only for the duration of any investigation are categorically lawful under the analytical framework set forth in *Boeing Company*, 365 NLRB No. 154 (2017). Specifically, the Board found that "justifications associated with investigative confidentiality rules applicable to open investigations will predictably outweigh the comparatively slight potential of such rules to interfere with the exercise of Section 7 rights." 368 NLRB No. 144, slip op. at 8. Accordingly, the Board held that investigative confidentiality rules limited to open investigations fall into *Boeing* Category 1(b).²³ The Board further stated in *Apogee* that its holding "does not extend to rules that would apply to nonparticipants [in an investigation], or that would prohibit employees—participants and nonparticipants alike—from discussing the *event or events* giving rise to an investigation (provided that participants do not disclose information they either learned or provided in the course of the investigation)." *Id.*, slip op. at 2 fn. 3.

Applying *Apogee*, we find that Beasley's confidentiality instruction to Peters did not violate the Act.²⁴ Beasley orally instructed Peters not to discuss their interview conversation with anyone. There is no record evidence that

²¹ 368 NLRB No. 144 (2019).

²² *Banner Estrella Medical Center*, 362 NLRB 1108, 1109–1110 (2015).

²³ *Boeing* Category 1(b) includes the types of rules that the Board has designated as lawful to maintain because the justifications associated with such rules predictably outweigh their potential adverse impact on employees' exercise of their protected rights under the NLRA. See, e.g., *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 & fn. 2 (2019).

²⁴ We recognize that the evidence about Beasley's direction to Peters does not show that it was a "rule" under Board precedent. See, e.g., *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. 2 fn.10 (2018) (finding that an oral direction to one employee did not constitute the promulgation of a rule). However, the analysis set forth in *Apogee* is applicable to an employer's one-on-one confidentiality instruction to an employee in all respects except one. We address that one respect in fn. 25, below.

this instruction was not limited to the term of the investigation of the Pettiford allegations, which concluded with the denial of Peters' appeal of his discharge. Moreover, the reason given by the Respondent and relied on by the judge for not finding a violation—that there was a risk of employees' coordinating their stories or suggesting helpful interview answers to others—naturally would apply only while the investigation remained active, and we believe this reason and the corresponding durational limit of the instruction would have been apparent to Peters under the circumstances.²⁵ There is also no evidence or allegation that the confidentiality ban extended beyond discussion of the interview and what was said there. Peters' credited testimony about what Beasley said did not suggest that her statement applied to anyone but Peters or that it prohibited even him from discussing the incidents that gave rise to the investigation. Accordingly, for the reasons stated, we will affirm the judge's dismissal of this complaint allegation.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's conclusions of law.

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

2. The Respondent, by Brian Spiller, violated Section 8(a)(1) in early September 2014 by promising benefits to employees, including a pay raise, rain gear and boot slips, and winter gear and gloves, during the critical period between the filing of an election petition and the holding of an election.

3. The Respondent violated Section 8(a)(1) in September 2014 by buying lunch for employees on a more frequent basis during the critical period between the filing of an election petition and the holding of an election.

4. The Respondent, by Brian Spiller, violated Section 8(a)(1) on September 16, 2014 by soliciting employee grievances during a union organizing campaign.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Watco Transloading, LLC, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising higher wages, weather gear, or other benefits to employees to dissuade them from supporting a union.

(b) Purchasing lunches for employees more frequently or otherwise granting benefits to employees to dissuade them from supporting a union.

(c) Soliciting grievances from employees and impliedly promising to remedy them to dissuade employees from supporting a union.

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

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

(a) Post at its Philadelphia, Pennsylvania facility copies of the attached notice marked "Appendix."²⁶ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former

²⁵ In *Apogee*, we found that employees would reasonably interpret an investigative confidentiality policy that is silent with regard to the duration of the confidentiality requirement not to be limited to open investigations. 368 NLRB No. 144, slip op. at 9. There, however, we were articulating a standard for evaluating the lawfulness of written investigative confidentiality policies on their face—not, as here, with an oral confidentiality instruction issued in, and limited to, a single, specific investigation. Peters was presented with an instruction embedded in a particular set of circumstances, which reasonably would have informed him that Beasley's concern was to prevent Peters from attempting to persuade other employees to corroborate his story—a concern that would cease to apply once the investigation had ended. In this context, therefore, we find it reasonable to take these circumstances into consideration in determining what Peters would have reasonably understood concerning the duration of required confidentiality.

²⁶ If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. 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."

employees employed by the Respondent at any time since September 1, 2014.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

Dated, Washington, D.C. May 29, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT promise higher wages, weather gear, or other benefits to you to dissuade you from supporting a union.

WE WILL NOT purchase lunches for you more frequently or otherwise grant benefits to you to dissuade you from supporting a union.

WE WILL NOT solicit grievances from you and impliedly promise to remedy them to dissuade you from supporting a union.

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

WATCO TRANSLOADING, LLC

The Board's decision can be found at <http://www.nlr.gov/case/04-CA-136562> 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.



David Faye, Esq., for the General Counsel.
Anthony B. Byergo and Julie A. Donahue, Esqs. (Ogletree Deakins, Nash, Smoak & Stewart, P.C.), for the Respondent.
Michael W. McGurrian, Esq. (Galfand & Berger, LLP), for the Charging Party Local 10-1.
Richard J. Albanese, Esq. (Karpf, Karpf & Cerutti, P.C.), for the Charging Party Dennis Roscoe.

DECISION

STATEMENT OF THE CASE

SUSAN A. FLYNN, ADMINISTRATIVE LAW JUDGE. This case was tried in Philadelphia, Pennsylvania, on October 20-22 and December 2, 2015. Local 10-1 filed five charges between September 11, and November 25, 2014. Dennis Roscoe filed his charge on October 7, 2014. The General Counsel issued the consolidated complaint on December 18, 2014. The Respondent filed an answer on January 2, 2015, denying all material allegations. An amended complaint was issued on February 11, 2015. At the beginning of the trial, I granted the General Counsel's motion to amend the complaint to correct typographical errors. The General Counsel alleges that Respondent committed numerous violations of Section 8(a)(1) of the Act as follows: Human Resource Manager Brooke Beasley prohibited an employee from discussing her interview with him; Watco Terminal Manager Brian Spiller violated the Act on several different occasions by: threatening employees if they selected union representation, soliciting grievances and granting benefits to discourage support for the Charging Party Union; promising employees improved wages and working conditions to discourage support for the Union and interrogating employees about their union sympathies.

The General Counsel also alleges that Respondent violated Section 8(a)(3) and (1) of the Act by terminating John D. Peters

on August 26, 2014, and by disciplining Dennis Roscoe on several occasions and then terminating Roscoe on October 10, 2014.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, provides rail switching services for industrial customers at 21 locations throughout the United States, including the facility at issue in this case in Philadelphia, Pennsylvania, where it employs 21 people. In Philadelphia, the Respondent services a petroleum refinery operated by Philadelphia Energy Solutions (PES). In 2014, the Respondent purchased and received goods valued in excess of \$50,000 at the PES facility directly from points outside of Pennsylvania. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Steelworkers Local 10-1, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

The Respondent began its operations at the PES Philadelphia refinery on October 17, 2013. Watco is a contractor at this facility, transferring petroleum products. CSX trains, consisting of 100–120 cars loaded with crude oil, arrive at the facility. Once the trains are on PES property, Watco employees take over, operating the train locomotives and inspecting the rail cars. The Watco engineer, conductor, and switchman (or brakeman) brings the train to the appropriate track location. The oil cars are disconnected from the locomotive (that is driven elsewhere); the tracks are locked out and “blue flagged” by a supervisor, indicating that it is safe to work on those tracks. This process usually takes 3–3½ hours. Once completed, that crew brings the paperwork to a Watco supervisor, who posts it in the employee trailer, notifying the carmen (maintenance) that the train has been “spotted.” The carmen go out and begin inspecting the cars and conducting maintenance and repairs. Concurrently, PES employees unload the crude oil; that may take 6–7 hours. When the carmen notice minor problems, they make the repairs. When the problem is significant, they mark the car and note the problem on the paperwork. Those cars are later separated from the train and moved to another track on the facility. After a number of those cars accumulate, CSX takes possession and makes those major repairs.

When Watco began its operations in October 2013, all employees were new hires, who underwent orientation from October 1 to October 17, 2013. Some additional employees were hired on various dates thereafter. John D. Peters, a locomotive

engineer, was one of those original hires.¹ In April 2014, Watco hired Dennis Roscoe as a carman.

Webb is the owner of the company, headquartered in Pittsburg, Kansas. Brooke Beasley is one of seven People Service managers (human resources) for Watco Companies, located in corporate headquarters in Pittsburg. She had primary responsibility for five facilities including Watco Transloading. Beasley reported to Sofrona Howard and Matt Lions, directors of People Services, who reported to Chris Speers, vice president of People Services.

At the Watco facility at issue, Brian Spiller was the terminal manager beginning in October 2013. He reported to Nathan Henderson, director of operations/assistant vice president for operations for that region, who was located in Houston, Texas.² Subordinate to the terminal manager were four shift supervisors.

The trains are operated by three-man crews: a conductor, an engineer, and a brakeman. There are also two-man teams of mechanics, called carmen, who inspect and perform general maintenance and repairs on the railcars.

All employees normally work 12-hour shifts, though they may perform overtime work when necessary. It is not unusual for employees to have free time during their shifts, if no train is entering or departing the facility.

There are two trailers on the site. One is the supervisors’ trailer, where supervisors work. The other is the employees’ trailer. Employees spend their free time during their shifts in that trailer, where they have lockers and a break room. The trailers are connected by a wooden deck. Outside, perhaps 50’ behind those trailers, is an area designated for smoking. For safety reasons, smoking is not permitted at the facility other than in the designated area, which is called the “smoking hut.” It is in a gravel area and is covered on the top but open on all sides. (R. Exh 1.) There are also porta-johns in back, maybe 50–75’ from the smoking hut.

Employees Contact the Union

In June and July 2014, Peters and Roscoe each independently, and without the other’s knowledge, contacted the United Transportation Union. Each one spoke to James White, the union organizer. They both discussed the union with other employees, but neither had any knowledge that the other had contacted any union. Tr. 455–56.

Spiller’s Comments About Union Activity

In July 2014, shortly after David Gordon was promoted to shift supervisor, Terminal Manager Spiller told Gordon to “keep his ear to the ground” regarding unionizing efforts, and that Peters was the leader of unionization efforts at the facility. (Tr. 111–12.)³ Gordon was anti-union himself, and Spiller asked him to tell employees about his negative experiences with unions. Spiller made these comments to Gordon on two or three occasions. In early August, Peters asked Gordon his opinion about unionizing, Gordon expressed his anti-union sentiments and

president of Houston operations in August 2015; Spiller succeeded him as vice president of operations.

³ Respondent fired Gordon in November 2014. However, his testimony on this point was not contradicted by Spiller; thus, I credit it.

¹ John D. Peters is the grandfather of John C. Peters, Jr., also a witness in this case. When I refer to Peters or John Peters, I am referring to the grandfather, John D. Peters, unless I indicate otherwise.

² Spiller was promoted to regional director of operations in January 2015, succeeding Nathan Henderson. Henderson became senior vice

explained his reasons. Peters had been vocal in his support for the union, so Gordon was aware of Peters' opinion. There is no evidence that the Respondent was aware of Roscoe's union activity until August 21 at the earliest.

Roscoe's Complaint to Spiller about Discrimination

Mike Onuskanych had been hired in October 2013 and had extensive experience prior to that. Spiller felt Onuskanych went well above and beyond the requirements of the position on a daily basis and was helpful and supportive to operations. Tr. 657–658. He discussed the matter with Nathan Henderson, who agreed it was important to reward such team members. Spiller then promoted Onuskanych to lead carman, with no supervisory responsibilities, but making him responsible for ensuring that all necessary parts and materials were on site, and that all necessary paperwork was properly completed by himself and all carmen. The promotion was noncompetitive; no vacancy was advertised. This occurred around mid-May 2014.

On July 29, Roscoe handed Spiller a letter in which he complained about nonpromotion of black carmen. (GC Exh. 21.) Specifically, he was concerned that the lead carman position had not been advertised, so the black carmen (he, Carl Pinder, Jr., and Kim Bronson) did not have the opportunity to apply, and the position was filled noncompetitively by Onuskanych, who was white. Further, two of Onuskanych's sons were hired to do the same work as the black employees, at the same pay rate, despite having less, or no, prior experience. (Tr. 272, 273, 395, 396, 397, 399–400, 403, 404, 405, 412; GC Exh. 7, 21, 41.) There had not previously been a lead carman; the position was newly created for Onuskanych. The following day, June 30, Spiller called Roscoe, Pinder, and Bronson to the supervisors' trailer to discuss the matter. Roscoe recalled that they met at 3 p.p. for over 2 hours. (Tr. 273–74, 405, 407, 410.) Spiller recalled the meeting taking 15–20 minutes. (Tr. 660.) Spiller explained that it was his decision and that he did not have to post jobs. He testified that he advised them that he wanted to reward hard work and exemplary performance, and that there would be other opportunities in the future. Spiller called Beasley a few days after that meeting and told her of the employees' concerns. Roscoe emailed Beasley a copy of his letter to Spiller, but she did not respond. It is unclear whether Beasley actually received that email. None of those employees again complained to Spiller about race discrimination.

Peters' Complaints About Offensive Text Messages from Coworker

On August 1, 2014, Peters was asked to stay on overtime, as engineer Leroy Henderson (no relation to Nathan Henderson) called out sick. Peters called Henderson and told him to come in, because he (Peters) could not stay. Less than 2 hours later, Henderson sent Peters a series of text messages that Peters found disturbing. (GC Exh. 19.) Peters went to Shift Supervisor Plotts and showed him the messages. Plotts requested to meet with Henderson but Henderson refused. Henderson did report to work later in that shift, albeit in an intoxicated state, and Peters went home.

Since Plotts had not dealt with the offensive texts, Peters raised the issue with Spiller the following day, via email.⁴ Peters complained to Spiller that Henderson had sent a series of threatening, harassing, and disparaging text messages to his cell phone beginning on August 1, 2014, at 6:15 p.m., because he did not support the hiring of Henderson's friend, who had applied for a job with Watco. Peters advised Spiller that he had asked Plotts to discuss the texts with Henderson, but Henderson refused to participate, so he now requests that Spiller speak to Henderson about his behavior. Spiller did not reply to Peters. He testified that when he returned to work after his vacation, he discussed the matter with each man separately. He understood that they had known each other from prior employment, thought the issue had been defused, and considered it resolved. (Tr. 653.) However, Peters did not tell him that he was satisfied and did not wish to pursue the matter.

Peters also sent the text messages to Beasley, who did not respond. (GC Exh. 19.) She testified that she did not receive the email and that she was unaware that any complaint was received by her office. Beasley was, however, advised by Spiller that there had been a conversation regarding problematic text messages. Beasley notified Howard generally of the problem but did not provide her any details. No action was taken against Henderson for his conduct.

Spiller testified that he did not consider Henderson's language to be inappropriate or threatening although he agreed that the language might warrant further investigation. (Tr. 688, 691–92.) While the employees may use crude language, he drew the line as to acceptability when an employee found it necessary to complain to a supervisor, manager, or HR. He felt it significant in this instance that the two employees seemed to have resolved the dispute and that no action was required by him. (Tr. 688.)

Beasley Investigation of Peters

On August 4, 2014, employee Curtis Pettiford sent an email to Beasley and Director of Operations Nathan Henderson (Spiller's superior). Pettiford complained that Peters repeatedly called Pettiford a "faggot" and other offensive terms, suggesting that Pettiford was homosexual.

Beasley advised Howard of the complaint and immediately initiated an investigation of Pettiford's accusation against Peters, conducted by telephone. She interviewed Pettiford on August 4. Pettiford said the harassment began in November 2013 and had been witnessed by several employees: Kim Bronson, Dennis Roscoe, Greg Baranyay, Leroy Henderson, Carl Pinder, and David Shertel. Pettiford told Beasley that he was offended in part because he is not gay and is married and has a child. He requested that he be transferred to another Watco facility because assignment to a different crew would not solve the problem. Pettiford stated that he would still have to interact with Peters on any crew at PES. He also said that he had no other issues with Peters.

On August 4, 2014, the Respondent took steps to ensure that Pettiford and Peters were never assigned to the same shift. The same day, Beasley interviewed Leroy Henderson, a locomotive

⁴ Spiller was on vacation at the time and did not see the email until his return.

engineer.⁵ Henderson told Beasley that he heard Peters say that Pettiford was gay on one or more occasions when Pettiford was not present.

On August 5, Beasley interviewed Kim Bronson, a carman. Bronson said he had never witnessed offensive or derogatory name calling amongst employees at PES.

Beasley also interviewed Roscoe, a carman, on August 5. Roscoe said he had no knowledge regarding this situation and would like to decline comment.

On August 5, Beasley interviewed Greg Baranyay, a conductor. Baranyay reported that he heard Peters call Pettiford gay, but not in Pettiford's presence. This occurred 2 months prior to the interview. Baranyay told Beasley he thought Peters said this in a joking manner in part because Peters joked with him about hanging out in gay bars.

Beasley called Peters on August 5 and advised him that she was conducting an investigation into allegations against him. He testified that she told him that he was prohibited from discussing the conversation with anyone, including Spiller (Tr. 167). Beasley testified that she "requested" that each of the employees that she interviewed keep her interview with them as confidential as possible. (Tr. 602.) I credit Peters. It is highly unlikely that one in a position of authority would "request" rather than order confidentiality if they were concerned that a lack of confidentiality would compromise the investigation.

Peters denied calling Pettiford gay or "faggot." He admitted to joking around with Pettiford, but not about sexual orientation. Peters admitted to joking around with other employees about frequenting gay bars, but not with Pettiford nor about him. Beasley testified that she suspended her investigation on August 5 because Spiller was on vacation. However, she shared the information with Nathan Henderson, Spiller's boss, on August 5. Henderson could have fired Peters without Spiller's input, but did not do so.

Decision to Terminate Peters

The information acquired on August 4 and 5 constitutes all the information on which the Respondent relied upon in terminating Peters' employment on August 26, 2014. However, Beasley interviewed other employees about this matter after Peters' termination.

On the morning of August 19, 2014, Beasley, Terminal Manager Brian Spiller, Director of Operations Nathan Henderson, and Human Resources Director Sofrana Howard participated in a conference call to discuss Beasley's investigation. (R. Exh. 5.) During the call Spiller was in Ohio on company business. Henderson, who did not testify in this proceeding, was apparently in his office in Houston, Texas. Beasley and Howard were in their offices in Pittsburg, Kansas.

There is no documentation regarding what was said during this conference call in the record. However, Beasley, Howard, and Spiller testified that the Respondent decided to terminate Peters during this conversation. For reasons discussed below I do not credit this testimony.

⁵ None of the employees interviewed by Beasley testified in the instant hearing other than Peters and Roscoe. Pettiford did not testify. As

Roscoe's Complaints About Smoking

In early August, Roscoe saw Shift Supervisor Ryder smoking outside, in front of the trailers where work vehicles are parked. Roscoe told Ryder that he should not smoke there, and Ryder replied that he was the boss and Roscoe could not tell him what to do. Roscoe had observed Ryder and employee Mike Onuskanych smoking there on other occasions as well, and Mike smoking near the tracks where oil was being pumped into a tanker. On August 6, Roscoe advised Shift Supervisor Plotts that he had seen two employees smoking in areas other than the designated hut on several occasions, and that it constituted a safety hazard. He suggested that Plotts issue a memorandum to the employees reminding them to smoke only in the hut. (R. Exh. 1.)

Roscoe also contacted the PES Safety Coordinator about his observations, and he indicated he would contact Spiller about it. Subsequently, Roscoe reported on the Respondent's website that employees were smoking in unauthorized areas. He then sent Spiller an email on August 13, advising him that he had made Plotts and the PES Safety Coordinator "aware of the life-threatening and hazardous situation" caused by employees smoking in non-designated areas, and that employees were ignoring posted memos and bulletins stating the smoking policy. (GC Exh. 22.) On August 17, Roscoe forwarded that email to Beasley, advising her that he had reported to Spiller that Ryder and Mike Onuskanych as well as his sons, Kevin and Joseph, were smoking in non-designated areas in violation of PES policy. (GC Exh. 23, 44.) He also told Beasley that he felt Ryder was harassing him for reporting his smoking violation.

Beasley replied to Roscoe's email, that she would look into it. She also asked about the alleged retaliation. (GC Exh. 44.) She contacted Spiller about the situation and, on August 20, emailed Roscoe that Spiller would handle the situation including posting a notice. (GC Exh. 45.)

A notice was posted in the employee trailer and on the bulletin board reminding employees that they were required to use the designated smoking hut. Spiller testified that he also spoke with the individuals identified by Roscoe as having violated the policy.

August 15 Overtime Incident with Roscoe and Ryder

On August 15, Roscoe worked past his shift end time at 6 p.m., making a repair to a train car and briefing his relief on the next shift about other needed repairs. SS Ryder sent Roscoe some text messages, but Roscoe did not receive them since his phone was in the trailer, not on his person. He then called him on his walkie-talkie and ordered him to come to the supervisors' trailer. When he arrived, Ryder told him to go home, since Bronson, his relief carman, had arrived, and he didn't want him working overtime. Roscoe replied that he needed to fix the pin, show Bronson the pin, and complete his paperwork. Ryder agreed, and Roscoe stayed approximately another hour.

On August 17, Roscoe e-mailed Beasley and Spiller about the incident with Ryder on August 15, 2014. (Tr. 286, 286-87, 289, 442, 445, 561; see Tr. 444; GCX 40; GC Exh. 45.)

Beasley had spoken with supervisors on August 15, so she was to the results of Beasley's investigation, I rely on her written report of August 29, 2014. R. Exh. 4.

aware of the situation from their perspective.

Employee Interaction with Union

On August 21, Peters, Roscoe, Home, and Salmond were on break in the employee trailer. Peters and Roscoe began discussing the merits of unionizing. Peters went on a computer in the trailer and representation of another facility in the area, and that he knew the Union represented PES employees. He said he was interested in organizing the Respondent's workforce and he believed most employees were in favor of unionizing. He suggested that Savage come to the facility to talk to employees in the parking lot when the shifts changed, and half the employees were available. He added that Savage could meet at least 12 employees in the parking lot, and that he would contact all employees coming on shift and ask them to come in early to hear Savage. Savage agreed to meet with employees in the parking lot at the PES facility later that day, about 5:15 p.m.

On the evening of Thursday, August 21, 2014, Savage came to the Watco employee parking lot at the PES facility. He met with about 12 employees including Peters and Roscoe. Both Peters and Roscoe signed authorization cards. The gathering was observed by one or more shift supervisors, who reported to Terminal Manager Brian Spiller that Peters and Roscoe were circulating union authorization cards. (Tr. 655.)⁶

On Monday, August 25, Brooke Beasley flew from Kansas City, Missouri to Philadelphia, arriving at 9:25 p.m. Beasley testified that while she was en route to Philadelphia, Nathan Henderson and Spiller informed her of the union activity at the PES facility. The next day, Spiller picked her up and drove her to the PES site. There is no evidence as to what Beasley did until 3:30 p.m. on the 25th. Peters reported to work at 2 p.m. At about 3:30 Spiller and Beasley summoned Peters to Spiller's office and terminated his employment.

Peters appealed his termination to the Director of Operations Nathan Henderson. As a result, Beasley conducted more interviews on August 28⁷ and apparently, for the first time, authored a written report of her investigation on August 29. Henderson denied Peters' appeal.

Legal Analysis Regarding John Peters' Discharge

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must show that union activity or other protected activity has been a substantial factor in the employer's adverse personnel decision. To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus and

discriminatory motivation may be drawn from circumstantial evidence as well from direct evidence.⁸ Once the General Counsel has made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity, *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981).

One thing that is perfectly clear is that Respondent was aware that John Peters had been passing out union authorization cards when it fired him on August 26. The timing of his discharge in conjunction with Watco's animus toward unionization is sufficient to meet the General Counsel's initial showing of discrimination. Aside from the timing of the discharge, Respondent's illegal grant of benefits to employees during the subsequent organizing campaign, which I discuss later, demonstrates its animus towards employees' efforts to organize Watco employees at PES.⁹ The fact that other Watco facilities are unionized is irrelevant with regard to the company's actions in this case. Thus, the burden of persuasion shifted to Respondent to prove that it would have fired Peters even in the absence of his union activity. I find that it did not satisfy its burden.

The timing of Peters' discharge is suspicious for a number of reasons. First, all of the evidence upon which the company relied in discharging Peters was in its possession on August 5. The company's explanation for why he was not discharged until August 26 on the basis of this evidence is unpersuasive. Brooke Beasley testified that Brian Spiller was on vacation the week of August 3–9, 2014, and that his boss, Nathan Henderson, was on vacation during the week of August 10–16. However, Beasley consulted with Henderson and Human Resources Manager Sofrana Howard the week of August 3–9. They decided to take action, even in Spiller's absence, by ensuring that Peters and Curtis Pettiford never worked on the same shift. Assuming the only reason for Peters discharge was Pettiford's complaint, there is no satisfactory explanation as to why Watco did not discharge Peters on or about August 5. Respondent has not explained why it was necessary to wait for Spiller's return. Henderson, who did not testify in this proceeding, appears to have had the authority to discharge Peters immediately and there is no explanation as to why he did not do so.

Respondent's witnesses testified that the decision to terminate Peters was made during a conference call on Tuesday, August 19, a week before it actually fired Peters. However, there is nothing to support this assertion other than the self-serving testimony of its witnesses, Spiller, Beasley, and Howard. While there is documentary evidence that they participated in a conference call on August 19 (R. Exh. 5), there is no documentary evidence as to what was discussed during this call - no emails, no notes, no

unable to contact Spiller on Thursday, August 21, Friday, August 22, or over the weekend.

⁷ This suggests that Respondent did not have sufficient information to justify the termination prior to August 28.

⁸ *Flowers Baking Co., Inc.*, 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.*, 321 NLRB 366, 375 (1966); *W. F. Bolin Co. v. NLRB*, 70 F. 3d 863 (6th Cir. 1995).

⁹ Respondent's post termination conduct may be considered in determining anti-union animus, *2 Sisters Food Group*, 357 NLRB 1816, 1836–37 (2011).

⁶ Spiller testified that he first learned of this union activity on Monday, August 25, his first day back at the PES terminal after being away for reasons not fully explored in this record. I do not credit this testimony. Shift Supervisors observed the union meeting in the parking lot on August 21 and I infer that if one thought that it was important enough to report this, they would not have waited 4 days. Spiller was not on vacation between August 21 and 25. His vacation ended the week of August 4–8. On August 19, he was on company business in Ohio. He testified that on August 21 he was at home in Pittsburg. In any event, there is no evidence that supervisors at the PES facility would have been

memoranda. Respondent has a progressive discipline policy, (GC Exh. 43), which does not mandate Peters' termination. There is no evidence that this policy was considered with regard to Peters on August 19, or at any other time. Prior to August 26, Respondent had never disciplined Peters. (Tr. 169.)

Moreover, if the decision to terminate was made on Tuesday, August 19, there is no satisfactory explanation as to why it was not effectuated for a week, or why Spiller could not have discharged Peters without a human resources representative being present. In contrast, when Respondent presented Dennis Roscoe with his 14-day suspension on October 2, Henderson and Spiller met him without a representative from human resources (Tr. 347–49.) When Respondent discharged Roscoe, it sent him an email; nobody met with him (Tr. 363–64.)¹⁰

While the record shows that on August 21, Brooke Beasley made airplane reservations to fly from Kansas to Philadelphia on August 25, this by itself does not satisfy Respondent's burden of persuasion that Watco decided to fire Peters before it knew of his union activities. Moreover, Spiller picked Beasley up and drove her to the PES facility on the morning of August 26, after they both knew of Peters' union activities.¹¹ There is no evidence in this record as to what Beasley did until 3:30 when Peters was called into the office to be fired. There is also no evidence as to what Beasley discussed with Henderson and Spiller on the afternoon of August 25, while she was waiting for her flight at Chicago Midway (Tr. 578)—other than there had been union activity at the PES site. One would think that Peters' involvement would have been a subject of discussion since according to Beasley she was going to Philadelphia for the express purpose of firing Peters.

Alleged 8(a)(1) Violations

Complaint paragraph 4(a): Brooke Beasley prohibits Peters from discussing his interview with her

I find that Respondent, by Brooke Beasley, did not violate the Act in giving this “confidentiality” instruction.

In *Caesar's Palace*, 336 NLRB 271, 272 (2001) the Board held that the employer did not violate Section 8(a)(1) by instructing employees not to discuss an ongoing drug investigation. It observed that employees have a Section 7 right to discuss discipline or disciplinary investigations. However, it found that Caesar's established a substantial and legitimate business justification which outweighed its infringement on employees' rights. The Board in footnote 5 made it clear that it is the Respondent's burden to establish a legitimate and substantial business justification.

In *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860 (2011) the Board found the employer violated Section 8(a)(1) by promulgating, maintaining, and enforcing an oral rule prohibiting employees from discussing with other persons any matters

¹⁰ When Roscoe reported for work on October 10, he was escorted off the PES premises by Shift Supervisor Gary Plotts. No representative of Watco ever met with him regarding the circumstances of his termination.

¹¹ While both Spiller and Peters testified that they became aware of Peters' union activities on August 25, I do not credit their self-serving testimony that they were not aware of it earlier—given that Peters'

under investigation by its human resources department. This rule was a blanket prohibition, applying to all matters regardless of the circumstances. The employer's rule in *Boeing Co.*, 362 NLRB 1789 (2015), was similarly broad.

In *Caesar's Palace*, an employer witness testified that it never explained the purpose of the confidentiality instruction to the employees during the investigation, 336 NLRB at 273. The Board appears to have inferred from the circumstances of the investigation that the employer had a legitimate and substantial justification for its confidentiality instructions. I believe this could be inferred in many investigations in which the dangers of evidence being destroyed or fabricated, and witness intimidation are obvious. In this vein I would note the Rule 615 of the Federal Rules of Evidence, in requiring a judge to order the sequestration of witnesses upon the request of any party, is a tacit recognition of this danger.

In this case, I find that Respondent's legitimate reasons for instructing employees not to discuss its investigation are patently obvious. There was an obviously danger of the employees coordinating their stories or suggesting “helpful” interview answers to others. Thus, I find that Respondent's burden of establishing that these interests outweigh its infringement on employees' rights has been met.

Complaint paragraph 4(b): Statements by Brian Spiller in the breakroom on August 25, 2014

John Peters testified that on August 25, Terminal Manager Brian Spiller met with a group of employees in the employees' trailer. Peters testified that witnesses Matthew Horne, a current Watco employee at the time of this trial, and Dennis Roscoe, who was terminated on October 10 were present. Peters testified that Spiller looked directly at him and asked what was going on with the union campaign and then told the employees that Rick Webb, the owner of Watco, would shut the facility down if employees voted to have a union (Tr. 140).

However, when testifying, Horne said nothing about attending a meeting with Spiller and Peters in August and he testified that he never heard Spiller say anything akin to Watco tearing up its contract or losing the contract with PES (Tr. 89).¹² In light of this I credit Spiller's denial at Tr. 677–78 that he made any statements suggesting that unionization would lead to termination of Respondent's work at PES, or that he made any of the other statements testified to by Peters. I dismiss complaint paragraph 4(b).

Meeting on August 28 (complaint para. 4(c))

Dennis Roscoe testified that he attended a meeting with Brian Spiller and Shift Supervisor Brian Lockley in the management trailer on August 28, 2014. According to Roscoe, Spiller asked Roscoe to tell him about the union campaign. Then Roscoe testified that Spiller told him that he knew Roscoe was passing out

activities were open and notorious in the employee parking lot and there is persuasive evidence that shift supervisors were aware of these activities as early as August 21.

¹² Horne, who worked for Watco at the time of the trial, had the least reason of any witness to fabricate testimony. I rely on his testimony heavily and where it does not corroborate other GC witnesses, I am disinclined to credit their testimony.

authorization cards and that Spiller would pay him \$7 more than any other Watco employee on the site if he threw away any signed authorization cards he had received. Then, according to Roscoe, Spiller asked what employees wanted and that he and Nathan Henderson had already discussed giving employees a \$2–\$3 per hour raise (Tr. 332–334).

Spiller denied ever promising an employee a raise if he threw away authorization cards (Tr. 678). He also denied in a rather generalized way the other statements attributed to him by Roscoe without specifically mentioning Roscoe (Tr. 677–78)6. I find Spiller’s denials at least as credible as Roscoe’s accusations and therefore dismiss complaint paragraph 4(c).

Meetings in early September 2014 (complaint paras. (d), (e), and (f))

The Union filed a petition to represent Respondent’s full-time and regular part-time engineers, conductors, and car persons at the PES site on September 2, 2014. The Union and Watco entered into a stipulated election agreement on September 11, 2014, for an election to be held October 3 and 4, 2014.

Matthew Horne, a current Watco employee at the time of trial, testified to the following regarding meetings conducted by Brian Spiller in September 2014 (Tr. 75). Given the fact that Horne was an employee in good standing at the time of his testimony, appeared to have no ulterior or self-serving motive and was taking a risk of subtle retaliation, I credit his testimony.¹³

Horne testified that Spiller asked employees what their gripes or issues were and why they would think about selecting unionization. In response, employees raised improved health benefits, vacation time, a seniority system, and wages. Spiller replied by saying that he would try to obtain a \$2–3 an hour raise. At another meeting, he asked employees to fill out a sheet for rain gear and boot slips so that he could order them. In response to the employee requests, Spiller promised to attempt to obtain winter hats and gloves.

Spiller testified in a very general way that his conversations with employees after the union campaign started was consistent with those prior to the union campaign (Tr. 677–678). He did not specifically contradict Horne’s testimony that he told employees in September that he would try to obtain a \$2–3 per hour raise.

Section 8(a)(1) prohibits employers from soliciting employee grievances in a manner that interferes with, restrains, or coerces employees in the exercise of Section 7 activities. Solicitation of grievances in not unlawful but raises an inference that the employer is promising to remedy the grievances. Additionally, an employer who has a past policy of soliciting employees’ grievances may continue such a practice during an organizing campaign. However, an employer cannot rely on past practice to justify solicitation of grievances where the employer significantly alters its past manner and methods of solicitation, *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB 347, 351 (2006); *Carbonneau Industries*, 228 NLRB 597, 598 (1977).

I conclude that the Respondent, by Spiller, violated Section 8(a)(1) in telling employees that it would try to get them a raise

and in indicating that they would be receiving rain gear and boot slips. Although there is evidence that that Spiller had told employees that he was working on getting such items for employees, it was not until after the campaign started that Respondent indicated that employees *would* receive them.

The Board will infer that an announcement or grant of benefits during the critical period between the filing of a representation petition and a representation election is objectionable and violative of Section 8(a)(1). However, an employer may rebut this inference by showing there was a legitimate business reason for the time of the announcement or grant of the benefit, *Caterpillar Logistics, Inc.*, 362 NLRB 395, 395 fn. 4, 9–10, (2005), enf. 835 F. 3d 536 (6th Cir. 2016). Watco has not rebutted this inference.

Complaint paragraph 4(g): Allegation that the Respondent provided lunch to employees on a more frequent basis in September 2014 than it had prior to the union organizing campaign

Matthew Horne testified that prior to the commencement of the union organizing campaign, Respondent bought lunch for its employees only once or twice. After the campaign started, he testified that the company bought lunch once a week, Tr. 82. Brian Spiller testified there was no change in its providing food for employees after the commencement of the union campaign. I credit Horne for the reasons stated previously. The increase in the frequency of this benefit after the commencement of the organizing campaign violates Section 8(a)(1), *Caterpillar Logistics, Inc.*, supra, 395 fn. 4.

Complaint paragraphs 6 (b)-(e): Discipline of and termination of Dennis Roscoe

On the afternoon of August 21, Shift Supervisor Ryder issued two written warnings to Roscoe. He told Roscoe they were from HR. (GC Exh. 25 and 26.) One warning was for insubordination to his supervisor regarding his overtime on August 15, and the other was a quality of work warning for sitting in the trailer instead of immediately beginning his maintenance activity. There is no evidence that Respondent was aware of any union activity on the part of Dennis Roscoe prior to the evening of August 21, 2014. However, I find that his complaint about race discrimination and his antismoking activity constitute protected concerted activity. Although Roscoe did not discuss his safety concerns regarding smoking with other employees, his complaints were made on behalf of all employees and were not purely personal concerns. Management was well aware of his complaints. Further, the facts asserted in the warnings are false; I credit Roscoe’s testimony as to what occurred on August 15. On a daily basis, as a carman, Roscoe sits in the employee trailer waiting until a train arrives and is “spotted.” On August 15, as on all other dates, he had no knowledge of when the train arrived and was ready for inspection until it was locked down, and the supervisor posted it on the board in the trailer. Roscoe testified that the train was spotted about 1 p.m. He then got dressed and went to the tracks to conduct his inspection. If Spiller or Ryder had been aware at the time that Roscoe was sitting in the trailer after being

¹³ The testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these

witnesses are testifying adversely to their pecuniary interest.” *Flexsteel Industries*, 316 NLRB 745 (1995), enf. mem. 83 F.3d 419 (5th Cir. 1996).

advised that the train had been spotted, they certainly would have said something to him then, rather than waiting to issue a warning. Roscoe informed Ryder that he signed out at 7 p.m. (one hour of overtime). He was not paid for "turnstile time," the time he spent getting undressed, cleaned up, changing, and cleaning up the trailer. Although he was charged with 2½ hours of unauthorized overtime, Roscoe testified that he worked, and requested, only 1 hour of overtime. The additional time that he was onsite he had signed out. Moreover, Roscoe testified, and I credit his testimony, that it is standard procedure for him to explain needed repairs to the oncoming crew, that it had never been necessary to request overtime in advance in such situations, but rather that it was routine to continue working until those discussions had concluded. I find that the General Counsel has met his burden and that the Respondent has not met its burden of demonstrating that it would have issued the warnings in the absence of Roscoe's protected concerted activity.

Therefore, I find that the Respondent violated Section 8(a)(3) and (1) in issuing Roscoe two disciplinary warnings on August 21, 2014.

Incidents of September 23, 2014; Respondent sends Dennis Roscoe home

On September 23, 2014, 10 days before the scheduled representation election at Watco, Respondent sent Dennis Roscoe home in what was essentially a suspension pending an investigation. He was not allowed to return to work until October 6 or 7, but voted in the election that was conducted by the Board on October 3 and 4.

On September 23, shortly after he arrived at work, Roscoe confronted Joseph Onuskanych, who was not scheduled to work that day. Onuskanych had come to work for overtime pay as a flagman. Roscoe questioned why Onuskanych was at work, suggesting that his presence was not necessary for the work that was to be performed that day. Roscoe threatened to call human resources to complain about this.

At some point Roscoe said that the only reason Joseph Onuskanych and his brother Kevin had jobs at Watco was because of their father, Michael Onuskanych, lead carman at Watco.

Roscoe also had a dispute with Shift Supervisor Brandon Lockley the same day. After his conversation with Onuskanych, Roscoe told Lockley that he wanted to report to human resources that Onuskanych was being allowed to be at work with nothing to do. Lockley told Roscoe that he was tired of Roscoe disrupting operations and that Roscoe should go do his work. Roscoe said that he had talked to Brian Spiller and that Spiller said he could wait for Spiller to get to work so that Roscoe could give him papers about another issue he had.

After talking to Lockley, Terminal Manager Brian Spiller consulted with his boss, Nathan Henderson, and Human Resources Manager Sofrana Howard. Spiller then sent Roscoe home, essentially suspending him pending an investigation.

Howard instructed Spiller to obtain statements from witnesses. On September 23, Spiller took statements from the following employees: Joseph Onuskanych, Shift Supervisor Brandon Lockley, Michael Onuskanych, Matthew Horne, John C. Peters, Jr., Gregory Baranyay and Dennis Roscoe. Howard also flew to Philadelphia and conducted face to face interviews on

September 25 with Joseph Onuskanych, Brandon Lockley, Mike Onuskanych, Matthew Horne, Greg Baranyay and Dennis Roscoe. Roscoe referred Howard to his attorney shortly after Howard called him. On September 29, Respondent interviewed Lockley a second time.

Of these witnesses only Roscoe, Matthew Horne, and John C. Peters, Jr. testified in this proceeding. Neither Horne nor Peters was asked about the events of September 23 concerning Dennis Roscoe.

Onuskanych's statement includes the following: Roscoe said, "the only reason I got this job is because of my dad and he was dicksucker in the form of hand and mouth gestures," (R. Exh. 11). Joseph's father gave a statement that Roscoe "make a remark in front of our coworkers that the only reason Joe Onuskanych and Kevin Onuskanych are employed by Watco [is] because Mike Onuskanych sucks management's dick and stood there and made the action of sucking dick in front of my coworkers," (R. Exh. 14). It is not clear that Mike Onuskanych was present during the exchange between Roscoe and his son, or whether he was relating what his son had told him. In this hearing, Roscoe denied making any crude, rude, or obscene gesture to Joe Onuskanych (Tr. 347, 503).

Other than Joe and Mike Onuskanych, no other witness claimed that Roscoe suggested in any way that Mike Onuskanych performed oral sex on management. Brian Lockley did not mention that in this initial statement, but in his second statement on September 29 stated that Joe Onuskanych told him that Roscoe had made "rude comments." (R. Exh. 8.)

On October 2, the day before the beginning of the representation election, Respondent called Roscoe into work to meet with Nathan Henderson and Brian Spiller. Spiller gave Roscoe a letter dated October 1 assessing a 14-day unpaid suspension, dating from September 23, and a final written warning. It also put Roscoe on a performance improvement plan, (GC Exh. 34). In addition to insubordination, the suspension was based on a finding that Roscoe had made inappropriate gestures of a sexual nature.

The representation election was conducted at the PES facility on October 3 and 4. Thirteen employees voted against union representation; seven voted in favor. No objections to the conduct of the election were filed and the Board certified the election results. Roscoe returned to work on October 7, 2014.

On or about October 9, Nathan Henderson called Spiller and told him that employee Leroy Henderson (no relation to Nathan Henderson) had complained that Roscoe pulled his car even with Henderson's and started cursing and threatening Henderson. Spiller and Henderson consulted with an attorney and decided to fire Roscoe on October 10, 2014. Respondent notified Roscoe of his termination by email on October 11.

Legal Analysis with regard to the suspension and discharge of Dennis Roscoe

The legal principles in *Wright Line*, 251 NLRB 1083 (1980), apply to the suspension and discharge of Dennis Roscoe. The General Counsel made it initial showing of discrimination. Respondent was aware of Roscoe's union activities and had demonstrated animus towards the organizing campaign by virtue of its illegal grant of benefits to unit employees. Moreover, in the absence of sufficient non-discriminatory justification, the length

of the suspension, encompassing the dates of the representation election, is another indication of discriminatory motive. The burden of proof thus shifts to the Respondent to prove that it suspended and discharged Roscoe for non-discriminatory reasons.

To satisfy its burden under *Wright Line*, an employer need not prove that an employee actually engaged in misconduct to justify discipline or discharge if it establishes that it had a good faith belief that the misconduct occurred, *McKesson Drug Co.*, 337 NLRB 935, 937 fn. 5 (2002).

Roscoe's suspension and, more importantly, the length of the suspension were based in part of Respondent's conclusion that he made an obscene gesture directed at Joseph Onuskanych. I find that Respondent did not have a good faith belief that this occurred. To the contrary, I conclude that it was a pretextual reason to ensure that Roscoe was on suspension at the time of the representation election.

Had Respondent merely taken Joseph Onuskanych's complaint at face value, it would have been unnecessary to interview witnesses. However, Respondent did interview a number of witnesses and none of them corroborated Onuskanych's story, except for his father. As to the latter, it has not been established that Mike Onuskanych was present when Roscoe supposedly made this obscene gesture. There is, for example, no evidence of his reaction to such a remark, which one would expect under the circumstances.

Sofrana Howard testified that "it was found that he (Roscoe) made the alleged comments to Mr. Joe Onuskanych and that he made the alleged comments and then was insubordinate to Mr. Lockley," (Tr. 629). I would note that the use of the passive voice is often used to avoid pinning responsibility on the person who performed an act or made a decision. However, more importantly, there is no explanation as to the basis upon which Respondent credited the assertions of Joe Onuskanych over Dennis Roscoe's denials.

I believe it also relevant to the question of the Respondent's good faith belief that Roscoe denied making the obscene remark under oath in the instant trial, while Respondent relied completely on hearsay and did not call Joe Onuskanych as a witness.

As a result of the above, I conclude that the Respondent has not established that it had a good faith belief that Roscoe made the obscene gesture and has not met its burden of proving that the length of his suspension was determined on a non-discriminatory basis.

Roscoe's discharge

There are three different versions of what happened on or about October 9, 2014 between Dennis Roscoe and Leroy Henderson. Roscoe testified under oath as to what transpired. Henderson and his passenger Sabrina Harris did not. Henderson authored a document (R. Exh. 16), in which he stated that Roscoe pulled up next to him, yelled unprovoked obscenities at him, threatened him (i.e., Roscoe stated "he knew where I resided") and cut off his vehicle. Leroy Henderson then called Sofrana Howard and Nathan Henderson, but apparently not the police. Henderson's passenger, Sabrina Harris, a security guard for PES,

gave an almost identical statement and also appears not to have contacted the police. Respondent, by Nathan Henderson and Brian Spiller, decided to fire Roscoe without getting his side of the story.

Neither Leroy Henderson, who still worked for Watco at the time of this trial, nor Sabrina Harris testified in this proceeding. Roscoe, on the other hand, denied under oath ever having a confrontation with Henderson (Tr. 365-66, 525-32.)¹⁴ I find his testimony to be credible. There is no explanation for the basis upon which Respondent took the allegations of Leroy Henderson at face value. Sabrina Harris did not know the identity of the individual with whom Henderson allegedly had a confrontation.

In light of this, I conclude that Respondent has not established that it had a good faith belief that Dennis Roscoe cursed and threatened Leroy Henderson. Moreover, Roscoe's discharge is tainted by his 14-day discriminatory suspension. Therefore, I find that Respondent has not met its burden of proving that it would have fired him on October 10 or suspended him for 14 days on October 1 in the absence of its animus towards his union activities.

SUMMARY OF CONCLUSIONS OF LAW

Respondent violated Section 8(a)(3) and (1) by terminating the employment of John Peters and Dennis Roscoe.

Respondent violated Section 8(a)(3) and (1) in suspending Dennis Roscoe for 14 days in October 2014.

Respondent violated Section 8 (a)(3) and (1) in issuing two written warnings to Roscoe.

Respondent, by Brooke Beasley, did not violate Section 8(a)(1) by instructing John Peters to keep her interview with him confidential.

Respondent did not violate Section 8(a)(1) on August 25, 2014 by interrogating John Peters, by creating the impression that employees' union sympathies were under surveillance or threatening to terminate Watco's presence at the PES site.

Respondent did not violate Section 8(a)(1) on or about August 28, 2014 by interrogating Dennis Roscoe, creating the impression that employees union activities were under surveillance, telling Dennis Roscoe that it would give him a raise if he threw away union authorization cards, soliciting employee grievances and impliedly promising to remedy them and making the other statements alleged in complaint paragraph 4(c).

Respondent, by Brian Spiller, violated Section 8(a)(1) of the Act in September 2014 by promising benefits to employees, including telling employees that he would try to get them a raise and in indicating that they would be receiving rain gear and boot slips, in order to discourage support for the Union.

Respondent violated Section 8(a)(1) in buying lunch on a more frequent basis than it had previously after it became aware of the union organizing drive and after the representation petition had been filed.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom

looked like he was yelling or cursing at Roscoe. However, Roscoe told the Board Agent that he kept his windows rolled up and did not say anything to Henderson and assumedly kept driving, Tr. 529-30.

¹⁴ Roscoe's testimony is a bit curious with regard to an affidavit he gave the Board Agent during the investigation the charge. He told her that Leroy Henderson was leaning outside the window of his car and

and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged John Peters and Dennis Roscoe, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall compensate John Peters, Sr., and Dennis Roscoe for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. *King Soopers, Inc.*, 364 NLRB No. 93 (2016). Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

The Respondent shall compensate John Peters and Dennis Roscoe for the adverse tax consequences, if any, of receiving lump sum backpay awards. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). In accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 4 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁵

ORDER

The Respondent, Watco Transloading, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, disciplining, or otherwise discriminating against any employee on the basis on their support for United Steel Workers Local 10-1, or any other union.

(b) Announcing, promising, and/or granting benefits in order to dissuade employees from supporting United Steel Workers Local 10-1, or any other union.

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

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

(a) Within 14 days from the date of the Board's Order, offer John D. Peters and Dennis Roscoe full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to seniority or any other rights or privileges previously enjoyed.

(b) Make John D. Peters and Dennis Roscoe whole for any

loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Compensate John D. Peters and Dennis Roscoe for the adverse tax consequences, if any, of receiving lump sum backpay awards, and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) Compensate John D. Peters and Dennis Roscoe for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the John D. Peters and Dennis Roscoe discharges and Dennis Roscoe's written warnings and suspension and within 3 days thereafter notify John D. Peters and Dennis Roscoe in writing that this has been done and that the discharges and Roscoe's warnings and suspension will not be used against them in any way.

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

(g) Within 14 days after service by the Region, post at its Philadelphia, Pennsylvania (PES) facility copies of the attached notice marked "Appendix."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 26, 2014.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar

¹⁵ 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.

¹⁶ 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."

as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., April 5, 2017