

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

WATCO TRANSLOADING, LLC

and

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO (LOCAL) USW 10-1

Cases: 04-CA-136562
04-CA-137372
04-CA-138060
04-CA-141264 and
04-CA-141614

and

DENNIS L. ROSCOE, an Individual

Case: 04-CA-138265

NOTICE OF RESUMPTION OF HEARING

The hearing in this matter will resume on Wednesday, December 2, 2015, at 9:30 a.m. at the National Labor Relations Board, Region 4, 615 Chestnut Street, 7th Floor, Philadelphia, Pennsylvania. The hearing will continue on Thursday, December 3, until completed.

Dated: Washington, D.C. October 23, 2015



Susan A. Flynn
Administrative Law Judge

Jenkins, Rechona

From: Jenkins, Rechona
Sent: Friday, October 23, 2015 12:24 PM
To: Faye, David; 'Anthony.Byergo@ogletreedeakins.com'; 'mmcgurrin@galfandberger.com'; 'ralbanese@karpf-law.com'
Subject: WATCO TRANSLOADING 4-CA-136562(Et al.)
Attachments: WATCO Order.pdf

Importance: High

Tracking:	Recipient	Delivery
	Faye, David	Delivered: 10/23/2015 12:24 PM
	'Anthony.Byergo@ogletreedeakins.com'	
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	'ralbanese@karpf-law.com'	

Good afternoon Counsel:

In the above case ALJ Flynn's Order was e-mailed to all parties.

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and

DENNIS ROSCOE An Individual	04-CA-138265
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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. McGurrin, 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 5 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.

¹ This lead case number which is the first charge filed by the Union does not appear on the cover sheet of some transcripts and exhibits.

5 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.

10 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.

15 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

20 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.

30 II. ALLEGED UNFAIR LABOR PRACTICES

Background

35 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 3-3 ½ 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. 45 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.

5 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.² In April 2014, Watco hired Dennis Roscoe as a carman.

10 Webb is the owner of the company, headquartered in Pittsburg, Kansas. Brooke Beasley is one of 7 People Service Managers (human resources) for Watco Companies, located in corporate headquarters in Pittsburg. She had primary responsibility for 5 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.

15 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.³ Subordinate to the terminal manager were 4 shift supervisors.

20 The trains are operated by 3-man crews: a conductor, an engineer, and a brakeman. There are also 2-man teams of mechanics, called carmen, who inspect and perform general maintenance and repairs on the railcars.

25 All employees normally work twelve 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.

30 There are 2 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.

35

Employees Contact the Union

40 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.

² 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.

³ Spiller was promoted to Regional Director of Operations in January 2015, succeeding Nathan Henderson. Henderson became Senior Vice President of Houston Operations in August 2015; Spiller succeeded him as Vice President of Operations.

Spiller's Comments About Union Activity

5 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. 111-12.⁴ 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 2 or 3 occasions. In early August, Peters
asked Gordon his opinion about unionizing, Gordon expressed his anti-union sentiments and
10 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

15 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
20 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.

25 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, 2 of Onuskanych’s sons were hired to do the same work as the black employees,
30 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 3:00 p.p. for over 2 hours. Tr. 273-74, 405, 407, 410. Spiller recalled the meeting
35 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
40 received that email. None of those employees again complained to Spiller about race
discrimination.

⁴ Respondent fired Gordon in November 2014. However, his testimony on this point was not contradicted by Spiller; thus I credit it.

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.⁵ 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

⁵ Spiller was on vacation at the time and did not see the email until his return.

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 engineer.⁶ 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.

⁶ None of the employees interviewed by Beasley testified in the instant hearing other than Peters and Roscoe. Pettiford did not testify. As to the results of Beasley's investigation, I rely on her written report of August 29, 2014. Resp. Exh. 4.

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. Resp. 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.

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 2 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. Resp. 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
5 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 aware of the situation from their
10 perspective.

Employee Interaction With Union

On August 21, Peters, Roscoe, Horne, 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
15 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.
20

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. 655.⁷
25
30

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 2:00 p.m. At about 3:30 Spiller and Beasley summoned Peters to Spiller's office and terminated his employment.
35

⁷ 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 unable to contact Spiller on Thursday, August 21, Friday, August 22, or over the weekend.

Peters appealed his termination to the Director of Operations Nathan Henderson. As a result, Beasley conducted more interviews on August 28⁸ and apparently, for the first time, authored a written report of her investigation on August 29. Henderson denied Peters' appeal.

5 *Legal Analysis regarding John Peters' discharge*

10 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.⁹ 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).

20 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.¹⁰ 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.

30 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,

⁸ This suggests that Respondent did not have sufficient information to justify the termination prior to August 28.

⁹ *Flowers Baking Company, 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).

¹⁰ Respondent's post termination conduct may be considered in determining anti-union animus, 2 *Sisters Food Group*, 357 NLRB 1816, 1836-37 (2011).

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 memoranda. Respondent has a progressive discipline policy, G.C. 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. 363-64.¹¹

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.¹² 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 Section 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.

¹¹ 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.

¹² 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' 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.

5 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.

10 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 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 No. 195 (2015), was similarly broad.

15 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.

25 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.

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

35 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.

40 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. 89.¹³ 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

¹³ 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 G.C.'s witnesses, I am disinclined to credit their testimony.

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 paragraph 4(c))

5

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 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 at \$2-\$3 per hour raise, Tr. 332-334.

10

15

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. I find Spiller's denials at least as credible as Roscoe's accusations and therefore dismiss complaint paragraph 4(c).

20

Meetings in early September 2014 (complaint paragraphs (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 October 4, 2014.

25

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.¹⁴

30

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.

35

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. 677-78. 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.

40

¹⁴ 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), enfd. mem. 83 F.3d 419 (5th Cir. 1996).

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 is 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 No. 49 (2005), slip op. 1, n. 4, 9-10, 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*, slip opinion pg. 1, n. 4.

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

In the afternoon of August 21, shift supervisor Ryder issued 2 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
5 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 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
10 he was charged with 2 ½ hours of unauthorized overtime, Roscoe testified that he worked, and requested, only one 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
15 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 2
20 disciplinary warnings on August 21, 2014.

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

On September 23, 2014, ten days before the scheduled representation election at Watco,
25 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
30 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
35 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
40 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
45 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
5 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.

10 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
20 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
25 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
30 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, G.C. Exh. 34. In addition to insubordination, the suspension was based on a finding that Roscoe had made inappropriate gestures of a sexual nature.

35 The representation election was conducted at the PES facility on October 3 and 4. 13 employees voted against union representation; 7 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.

40 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.
45

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.

5 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
10 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 n.5
15 (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
20 conclude that it was a pretextual reason to insure 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
25 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.

30 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
35 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.
40

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.
45

Roscoe's discharge

There are 3 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, 525-32¹⁵. 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

1. Respondent violated Section 8(a)(3) and (1) by terminating the employment of John Peters and Dennis Roscoe.
2. Respondent violated Section 8(a)(3) and (1) in suspending Dennis Roscoe for 14 days in October 2014.
3. Respondent violated Section 8 (a)(3) and (1) in issuing 2 written warnings to Roscoe.
4. Respondent, by Brooke Beasley, did not violate Section 8(a)(1) by instructing John Peters to keep her interview with him confidential.
5. 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.

¹⁵ 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 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.

5 6. 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).

10 7. 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 slippers, in order to discourage support for the Union.

15 8. 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

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

25 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 for the Retarded*, 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.

35 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 No. 10 (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 recommended¹⁶

ORDER

5

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

1. Cease and desist from

10

(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.

15

(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.

20

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

25

(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 exists, to substantially equivalent positions, without prejudice to seniority or any other rights or privileges previously enjoyed.

30

(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.

35

(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.

40

(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.

¹⁶ 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.

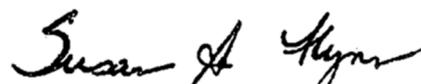
(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all 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."¹⁷ 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 as it alleges violations of the Act not specifically found.

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



Susan A. Flynn
Administrative Law Judge

¹⁷ 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."

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 discharge or otherwise discriminate against any of you for engaging in union or other protected activity, including your support for United Steelworkers Local 10-1 or any other union.

WE WILL NOT announce, promise, or grant you benefits in order to discourage you from supporting United Steelworkers Local 10-1 or any other union.

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

WE WILL, within 14 days from the date of this 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 their seniority or any other rights or privileges previously enjoyed.

WE WILL make John D. Peters and Dennis Roscoe whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest compounded daily.

WE WILL compensate these employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

WE WILL make Dennis Roscoe whole for any loss of earnings and other benefits resulting from his September-October 2014 suspension, less any net interim earnings, plus interest compounded daily.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

Case 04-CA-136562
 04-CA-137372
 04-CA-138060
 04-CA-141264
 04-CA-141614

04-CA-138265

**ORDER TRANSFERRING PROCEEDING TO
 THE NATIONAL LABOR RELATIONS BOARD**

A hearing in the above-entitled proceeding having been held before a duly designated Administrative Law Judge and the Decision of the said Administrative Law Judge, a copy of which is annexed hereto, having been filed with the Board in Washington, D.C.,

IT IS ORDERED, pursuant to Section 102.45 of the National Labor Relations Board's Rules and Regulations, that the above-entitled matter be transferred to and continued before the Board.

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

By direction of the Board:

Gary Shiners

Executive Secretary

NOTE: Communications concerning compliance with the Decision of the Administrative Law Judge should be with the Director of the Regional Office issuing the complaint.

Attention is specifically directed to the excerpts from the Board's Rules and Regulations and on size of paper, and that requests for extension of time must be served in accordance appearing on the pages attached hereto. **Note particularly the limitations on length of briefs with the requirements of the Board's Rules and Regulations Section 102.114(a) & (i).**

Exceptions to the Decision of the Administrative Law Judge in this proceeding must be received by the Board's Office of the Executive Secretary, 1015 Half Street SE, Washington, DC 20570, on or before **May 3, 2017**.

Confirmation Number	1000134524
Date Submitted	4/19/2017 11:37:25 AM (GMT-05:00) Eastern Time (US & Canada)
Case Name	Watco Transloading LLC
Case Number	04-CA-136562
Filing Party	Charged Party / Respondent
Name	Donahue, Julie
Email	julie.donahue@ogletree.com
Address	1735 Market Street Philadelphia, PA 19103
Telephone	(215) 995-2800 Ext: 2806
Fax	
Original Due Date	5/3/2017
Date Requested	5/17/2017
Reason for Extension of Time	Counsel for Respondent Anthony Byergo is engaged in 3 sets of collective bargaining negotiations through May 11, 2017, and Counsel for Respondent Julie Donahue is set for trial the week of April 24, 2017.
What Document is Due	Exceptions to ALJD
Parties Served	<p>Michael W. McGurrin Galfand Berger, LLP 1835 Market Street, Suite 2710 Philadelphia, PA 19103 mmcgurin@galfandberger.com</p> <p>Mark Kaltenbach, Counsel for the General Counsel Region 4, National Labor Relations Board 615 Chestnut Street, Suite 710 Philadelphia, PA dennis.walsh@nlrb.gov mark.kaltenbach@nlrb.gov</p> <p>Ari R. Karpf Zachary Zahner Karpf, Karpf, & Cerutti, PC 3331 Street Road Two Greenwood Square, Suite 128 Bensalem, PA 19020 zzahner@karpf-law.com</p>



United States Government

**OFFICE OF THE EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
1015 HALF STREET SE
WASHINGTON, DC 20570**

April 19, 2017

Re: Watco Transloading, LLC
Cases 04-CA-136562, et al.

**EXTENSION OF TIME TO FILE
EXCEPTIONS AND SUPPORTING BRIEF**

The request for an extension of time in the above-referenced case is granted. The due date for the receipt in Washington, D.C. of Exceptions to the Administrative Law Judge's Decision and Brief In Support of Exceptions is extended to **May 17, 2017**. This extension applies to all parties.

/s/ Roxanne L. Rothschild
Deputy Executive Secretary

cc: Parties
Region

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

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO (LOCAL) USW 10-1,	Case No.	04-CA-136562 04-CA-137372 04-CA-138060 04-CA-141264 and 04-CA-141614
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Union,

DENNIS ROSCOE,	Case No.	04-CA-138265
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An Individual,

and

WATCO TRANSLOADING, LLC,
Respondent.

**RESPONDENT'S EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S DECISION**

Respondent Watco Transloading, LLC ("Respondent), by its undersigned counsel and pursuant to Rule 102.46 of the Board's Rules and Regulations, files the following exceptions to the decision of Administrative Law Judge ("ALJ") Susan A. Flynn dated April 5, 2017¹ filed in the above-captioned matter.

A. Complaint ¶¶ 6(a), (f) – Discharge of John Peters

1. Respondent excepts to the ALJ's reliance on lawful comments and actions regarding the union as evidence to support a finding of union animus in the decision to termination John Peters ("Peters") because such a finding is contrary to the law. ALJD p. 4 lines 3-11.

¹ Citations to the Administrative Law Judge's decision will be referenced as "ALJD" followed by the appropriate p. and line numbers. The Consolidated Complaint, Order Consolidating Cases and Notice of Hearing will be referenced as "Compl." followed by the appropriate paragraph number.

2. Respondent excepts to the ALJ's failure to consider testimony from Peters and Terminal Manager Brian Spiller ("Spiller") regarding various complaints that Peters raised during his employment regarding safety and wage issues with no hint of threats or reprisals and that Peters worked without incident until the reports of homophobic comments. ALJD p.4 lines 3-11.

3. Respondent excepts to the ALJ's conclusion that text messages between Peters and co-worker Leroy Henderson were similar to the complaints made by Curtis Pettiford ("Pettiford") regarding Peters' homophobic comments because that conclusion is not supported by the preponderance of the evidence where Peters failed to produce his own text messages and the text messages contain no discriminatory or harassing behavior on the basis of sex, sexual orientation or other protected classification. ALJD p. 5 lines 3-35.

4. Respondent excepts to the ALJ's finding that Respondent did not have sufficient information to justify Peters' termination prior to August 28 because Brooke Beasley ("Beasley") conducted additional interviews and drafted a report after Peters appealed his termination where the preponderance of the evidence shows that multiple interviews confirmed Peters' conduct prior to August 28th and additional interviews were done after Peters continued to deny the conduct and appealed his termination. ALJD p. 9, line 2 and fn. 8.

5. Respondent excepts to the ALJ's application of the *Wright Line*, 251 NLRB 1083 (1980) framework in this case, in that the ALJ improperly placed the burden on Respondent to prove that Peters engaged in the misconduct for which he was discharged and ignoring the burden on the General Counsel to show disparate treatment and that Respondent's reasons for its actions were pretext for union animus. ALJD p. 9, lines 7-17. As a result, the ALJ's analysis is not in accord with applicable NLRB precedent.

6. Respondent excepts to the ALJ's finding of union animus based on Respondent's conduct that is protected by Section 8(c) while ignoring the preponderance of the evidence showing that Respondent had knowledge of Peters' pro-union feelings since the beginning of his employment but never took any action against him and that Respondent made the decision to discharge Peters prior to Respondent's knowledge of the union activity. ALJD p. 9, lines 19-28.

7. Respondent excepts to the ALJ's finding that the timing of Peters' discharge was suspicious because it is based on improper speculation and contrary to the preponderance of the evidence. ALJD p. 9, lines 30-40; p. 10, lines 1-31.

8. Respondent excepts to the ALJ's failure to make any finding whether Respondent would have discharged Peters absent any union activity because it is contrary to applicable NLRB precedent. ALJD p. 10, lines 1-31.

B. Complaint ¶¶ 4(d-f) – Allegedly Unlawful Promise of Raise and Grant of Benefits by Providing Rain Gear to Employees

9. Respondent excepts to the ALJ's finding that Spiller promised employees a raise and rain gear in response to union organizing because the preponderance of the evidence shows that Spiller had requested a salary survey prior to the union organizing and that rain gear was normal seasonal uniform equipment. ALJD p. 13, lines 11-22.

C. Complaint ¶ 4(g) – Allegedly Unlawful Grant of Benefits by Providing Lunch to Employees

10. Respondent excepts to the ALJ's finding that Respondent provided lunch to employees on a more frequent basis in response to union organizing because the preponderance of the evidence shows that breakfast or lunch was provided at all company meetings both before and after the union organizing. ALJD p. 13, lines 27-33.

D. Complaint ¶¶ 6 (b-e) – Discipline and Discharge of Dennis Roscoe

11. Respondent excepts to the ALJ's conclusion that Respondent retaliated against Roscoe for complaints regarding discrimination and smoking, because the ALJ failed conduct any analysis or making any finding that Respondent harbored animus based on such complaints. ALJD p. 13, lines 42-44.

12. Respondent excepts to the ALJ's finding that Roscoe's complaint about individuals smoking in non-designated area constitutes protected concerted activity because there is no evidence that Roscoe made such a complaint on behalf of anyone but himself and thus the ALJ's finding is contrary to applicable law. ALJD p. 13, lines 44-46.

13. Respondent excepts to the ALJ's failure to apply *Wright Line* framework to the finding that the August 21, 2014 warnings issued to Roscoe violated the Act because the ALJ made no finding of animus towards the protected concerted activity allegedly engaged in by Roscoe and thus the General Counsel did not make a prima facie showing. ALJD p. 13, lines 37-47, p. 14, lines 1-20.

14. Respondent excepts to the ALJ's failure to consider Spiller's testimony regarding his observations of Roscoe prior to leaving the facility because the ALJ provided no basis to discredit that testimony or to credit Roscoe's self-serving testimony. ALJD p. 13, lines 37-47, p. 14, lines 1-20.

15. Respondent excepts to the ALJ's finding that Roscoe's suspension violated Section 8(a)(3) because the ALJ ignored the preponderance of the evidence that shows that Roscoe's suspension was based, in part, on insubordinate behavior that was witnessed and corroborated in testimony another co-worker. ALJD p. 14, lines 25-47, p. 15, lines 1-44, p. 16, lines 1-43.

16. Respondent excepts to the ALJ's finding that Respondent's interviews of other employees during its investigation of the incident demonstrates Respondent's lack of good faith belief and pretext because that conclusion is entirely speculative and not supported by the preponderance of the evidence in the record. ALJD p. 16, lines 23-25.

17. Respondent excepts to the ALJ's finding that Respondent is obligated to call an hourly employee as a witness to reiterate his complaint against Roscoe because the relevant inquiry is whether Respondent had a good faith belief based on the investigation at the time. ALJD p. 16, lines 37-39.

18. Respondent excepts to the ALJ's failure to consider that the General Counsel did not produce any evidence of disparate treatment of others who had engaged in the same conduct but had not been similarly disciplined or any evidence that Respondent would not have taken the same action absent union activity. ALJC p. 16, lines 1-43.

19. Respondent excepts to the ALJ's finding that Respondent did not have a good faith belief in Roscoe's misconduct based on reports made to Respondent by a co-worker and a third party because that conclusion is not supported by a preponderance of the evidence in the record. ALJD p. 17, lines 13-21.

20. Respondent excepts to the ALJ's finding that Roscoe's account of the events leading to his termination is credible despite the contradictions and inconsistencies in his testimony. ALJD p. 17, fn. 15.

21. Respondent excepts to the ALJ's failure to consider that the General Counsel did not produce evidence of any disparate treatment or that Respondent would not have taken the same action absent union activity. ALJD p. 17, lines 3-44.

22. Respondent excepts to the ALJ's conclusion that Respondent violated Section 8(a)(3) and (1) by terminating John Peters and Dennis Roscoe because the preponderance of the evidence, much of which is not considered or addressed in the ALJ's decision, does not support this conclusion. ALJD p. 17, lines 28-29.

23. Respondent excepts to the ALJ's conclusion that Respondent violated Section 8(a)(3) and (1) by suspending Dennis Roscoe for 14 days in October 2014 because the preponderance of the evidence, much of which is not considered or addressed in the ALJ's decision, does not support this conclusion. ALJD p. 17, lines 31-32.

24. Respondent excepts to the ALJ's conclusion that Respondent violated Section 8(a)(3) and (1) by issuing two written warnings to Roscoe because the preponderance of the evidence, much of which is not considered or addressed in the ALJ's decision, does not support this conclusion. ALJD p. 17, line 34.

25. Respondent excepts to the ALJ's conclusion that Respondent violated Section 8(a)(1) by promising benefits to employees, including Brian Spiller 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, because the preponderance of the evidence, much of which is not considered or addressed in the ALJ's decision, does not support this conclusion. ALJD p. 18, lines 7-10.

26. Respondent excepts to the ALJ's conclusion that Respondent violated Section 8(a)(1) by 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 because the preponderance of the evidence, much of which is not considered or addressed in the ALJ's decision, does not support this conclusion. ALJD p. 18, lines 12-14.

27. Respondent excepts to the ALJ's proposed remedies because the preponderance of the evidence, much of which is not considered or addressed in the ALJ's decision, does not support any such remedies. ALJD p. 18 lines 18-41.

28. Respondent excepts to the contents of the ALJ's proposed Order in its entirety because the preponderance of the evidence, much of which is not considered or addressed in the ALJ's decision, does not support the issuance of any such Order or portion thereof. ALJD p. 19 lines 5-43; p. 20 lines 1-35.

Respectfully submitted,

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WATCO TRANSLOADING, LLC**

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2017, the foregoing was filed with the NLRB's Division of Judges via the NLRB's electronic filing system and copies of the foregoing Respondent's Exceptions to the Administrative Law Judge's Decision were served via electronic mail to the following:

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ATTORNEY FOR RESPONDENT

29862004.1

Confirmation Number	1000140617
Date Submitted	5/19/2017 10:13:40 AM (GMT-05:00) Eastern Time (US & Canada)
Case Name	Watco Transloading LLC
Case Number	04-CA-136562
Filing Party	Charging Party
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Original Due Date	5/31/2017
Date Requested	6/14/2017
Reason for Extension of Time	Local Counsel represented the Charging Party at the Hearing. Antonia Domingo, In-house Counsel for the Union, was just assigned this case in order to respond to the Charged Party's Exceptions. Given the 700-plus page transcript, she will need an additional two weeks to prepare the Union's response.
What Document is Due	Answering Brief to Exceptions

Parties Served	<p>Anthony B. Byergo Ogletree, Deakins, Nash, Smoak & Stewart, P.C. 800 Fifth Avenue, Suite 4100 Seattle, WA 98104 anthony.byergo@ogletreedeakins .com</p> <p>Julie A. Donahue Ogletree, Deakins, Nash, Smoak & Stewart, P.C. BNY Mellon Center, Suite 3000 1735 Market Street Philadelphia, PA 19103 julie.donahue@ogletreedeakins.c om</p> <p>Ari R. Karpf Karpf, Karpf, & Cerutti, P.C. 3331 Street Road Two Greenwood Square, Suite 128 Bensalem, PA 19020 akarpf@karpf-law.com</p> <p>Dennis P. Walsh, Regional Director Region 4, National Labor Relations Board 615 Chestnut Street, Suite 710 Philadelphia, PA 19106 dennis.walsh@nlrb.gov</p>
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United States Government

**OFFICE OF THE EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
1015 HALF STREET SE
WASHINGTON, DC 20570**

May 19, 2017

Re: Watco Transloading LLC
Case 04-CA-136562

**EXTENSION OF TIME TO FILE ANSWERING BRIEF TO EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

The request for an extension of time in the above-referenced case is granted. The due date for the receipt in Washington, D.C. of Answering Brief to Exceptions to the Administrative Law Judge's Decision is extended to **June 14, 2017**.¹ This extension applies to all parties.

/s/ Roxanne L. Rothschild
Deputy Executive Secretary

cc: Parties
Region

¹ Please note that when a party is granted an extension of time to file an answering brief to exceptions to an Administrative Law Judge's decision, this extension does not automatically extend the time for filing cross-exceptions to that decision. As no request was made for extending the time for filing cross-exceptions, the due date for filing cross-exceptions remains May 31, 2017.



United States Government

**OFFICE OF THE EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
1015 HALF STREET SE
WASHINGTON, DC 20570**

May 22, 2017

Re: Watco Transloading LLC
Case 04-CA-136562. et al.

**EXTENSION OF TIME TO FILE CROSS-EXCEPTIONS
AND BRIEF IN SUPPORT OF CROSS-EXCEPTIONS**

The request for an extension of time in the above-referenced case is granted. The due date for the receipt in Washington, D.C. of Cross-Exceptions and Brief in Support of Cross-Exceptions is extended to **June 14, 2017**.¹ This extension applies to all parties.

/s/ Roxanne L. Rothschild
Deputy Executive Secretary

cc: Parties
Region

¹ On May 19, 2017, I granted an extension of time for filing answering briefs to exceptions in this case to June 14, 2017.

**BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

WATCO TRANSLOADING, LLC

and

UNITED STEEL, PAPER AND	Cases 04-CA-136562
FORESTRY, RUBBER,	04-CA-137372
MANUFACTURING, ENERGY,	04-CA-138060
ALLIED INDUSTRIAL AND SERVICE	04-CA-141264 and
WORKERS INTERNATIONAL UNION,	04-CA-141614
AFL-CIO (LOCAL) USW 10-1	

DENNIS ROSCOE, an Individual	Case 04-CA-138265
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**GENERAL COUNSEL’S CROSS-EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

Pursuant to 29 CFR § 102.46(c), the General Counsel files the following cross-exceptions to the April 5, 2017 decision of the Administrative Law Judge (“ALJ”):

1. The ALJ’s conclusion that Watco Transloading, LLC (“Respondent”) was justified in forbidding employee John D. Peters from discussing Respondent’s disciplinary investigation with any other person is contrary to Board precedent (ALJD at p. 10, line 33 through p. 11, line 29).
2. The ALJ made no determination as to whether Respondent, by its manager Brian Spiller, unlawfully interrogated employees in early September 2014 regarding union activity, despite finding facts establishing such a violation (ALJD at p. 12, line 20 through p. 13, line 22).
3. Respondent violated Section 8(a)(1) by issuing employee Dennis Roscoe two disciplinary warnings on August 21, 2014 because he engaged in protected

concerted—as opposed to union—activity, but the ALJ inadvertently stated this conduct also violated Section 8(a)(3) (ALJD at p. 13, line 35 through p. 14, line 20; p. 17, line 34).

4. The ALJ inadvertently failed to order Respondent to rescind two adverse actions Respondent took against Roscoe at the same time it suspended him for fourteen days on October 2, 2014—specifically, the “Final Warning” it issued against Roscoe and his placement on a “Performance Improvement Plan”—despite concluding that the suspension was unlawfully motivated (ALJD at p. 14, line 22 through p. 16, line 45).
5. The ALJ made no determination as to whether Respondent, by its manager Brian Spiller, on September 16 or 17, 2014, unlawfully promised employees that he would try to procure heavy gloves and hats or masks for them to discourage them from forming a union, despite finding facts establishing such a violation (ALJD at p. 12, line 20 through p. 13, line 22).
6. The ALJ made no determination as to whether Respondent, by its manager Brian Spiller, on September 16 or 17, 2014, unlawfully solicited employee grievances and promised to try to resolve them to discourage employees from forming a union, despite finding facts establishing such a violation (ALJD at p. 12, line 20 through p. 13, line 22).

[Signature page to follow.]

Respectfully submitted,

/s/ Mark Kaltenbach

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615 Chestnut Street
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Philadelphia, Pennsylvania 19106-4413

Dated: June 14, 2017

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

WATCO TRANSLOADING, LLC

and

UNITED STEEL, PAPER AND
FORESTRY, RUBBER,
MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO (LOCAL) USW 10-1

Cases 04-CA-136562
04-CA-137372
04-CA-138060
04-CA-141264 and
04-CA-141614

DENNIS ROSCOE, an Individual

Case 04-CA-138265

GENERAL COUNSEL'S BRIEF IN ANSWER TO RESPONDENT'S EXCEPTIONS

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Dated: June 14, 2017

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I. INTRODUCTION

The Administrative Law Judge (“ALJ”) determined that Watco Transloading, LLC (“Respondent”) committed multiple violations of Sections 8(a)(3) and (1) of the Act, most of which were in response to an effort by its employees to form a union. Specifically, the ALJ determined that, to keep its employees from forming a union, the Respondent promised employees a raise and new equipment, instituted a new practice of buying employees a free meal every week, fired one of the two leaders of the organizing drive, John D. Peters (“Peters”), and disciplined, suspended, and fired the other leader, Dennis Roscoe (“Roscoe”).

The Respondent filed numerous exceptions to the ALJ’s decision. The Respondent’s primary contention is that the ALJ should have credited Respondent’s witnesses but did not always do so. The Respondent also claims that the ALJ at times failed to abide by Board precedent, and that proper application of that precedent would exonerate Respondent from some of the allegations against it.

Contrary to the Respondent’s exceptions, the ALJ’s credibility resolutions are supported by the record. Furthermore, the ALJ correctly applied Board precedent to conclude the Respondent violated the Act. Therefore, the Respondent’s exceptions are without merit.

II. ISSUES

1. Did the ALJ correctly conclude that Respondent violated the Act by promising its employees a raise to prevent them from forming a union?

Yes. The credited testimony revealed that a manager asked employees why they thought they needed a union and, when the employees complained about low wage rates in response, promised to try to procure a two to three dollar per hour raise for them. This conduct unlawfully coerced employees in deciding whether to form a union.

2. Did the ALJ correctly conclude that Respondent violated the Act by indicating to its employees that Respondent would provide them with rain gear and boot slips to prevent them from forming a union?

Yes. The credited testimony reveals that employees had long expressed a desire for equipment to protect them against adverse weather and that, in response to the organizing drive and just before the vote on whether to unionize, a manager collected employees' measurements and told them he was ordering such equipment for them. This conduct unlawfully coerced employees in deciding whether to form a union.

3. Did the ALJ correctly conclude that Respondent violated the Act by instituting a new practice of providing employees with a free meal every week to discourage them from forming a union?

Yes. The credited testimony reveals that, in response to the employees' effort to organize a union, the employer instituted a new practice of buying the employees a free meal every week. This conduct unlawfully coerced employees in deciding whether to form a union.

4. Did the ALJ correctly conclude that Respondent violated the Act by discharging Peters because he led the effort to form a union among Respondent's employees?

Yes. The General Counsel proved that Peters's initiation and leadership of the effort to form a union was a motivating factor in his discharge, and Respondent did not show that it would have discharged Peters even absent his union activity.

5. Did the ALJ correctly conclude that Respondent violated the Act by issuing two written warnings to Roscoe because he engaged in protected concerted activity?

Yes. The General Counsel proved that Roscoe protesting, on behalf of Respondent's black employees, perceived discrimination based on race in Respondent's promotion and

wage decisions was a motivating factor for the two warnings, and Respondent did not show that it would have issued the warnings even absent Roscoe's protected concerted activity.

6. Did the ALJ correctly conclude that Respondent violated the Act by suspending Roscoe in the weeks leading up to and during the Board-conducted union election because Roscoe led the effort to form a union among Respondent's employees?

Yes. The General Counsel proved that Roscoe's leadership of the effort to form a union was a motivating factor in his suspension, and Respondent did not show that it would have suspended Roscoe even absent his union activity.

7. Did the ALJ correctly conclude that Respondent violated the Act by discharging Roscoe because he led the effort to form a union among Respondent's employees?

Yes. The General Counsel proved that Roscoe's leadership of the effort to form a union was a motivating factor in his discharge, and Respondent did not show that it would have discharged Roscoe even absent his union activity.

III. BACKGROUND

Respondent contracts with Philadelphia Energy Solutions ("PES"), an oil refinery, to move, inspect, and perform minor repairs on oil-carrying rail cars at PES's Philadelphia, Pennsylvania location. To accomplish these services, Respondent employs conductors, engineers, and brakemen to move the rail cars from place to place within the worksite and carmen to inspect and make minor repairs on the rail cars. (ALJD at 2-3.) The present case involves an effort by the members of all of these classifications to form a bargaining unit and be represented by a union.

Brian Spiller (“Spiller”) was the Terminal Manager during the union drive and when the unfair labor practices at issue here occurred (Spiller has since been promoted to a more senior management position with Respondent). Four shift supervisors worked under Spiller. (ALJD at 3.) At the relevant times, the shift supervisors were Brandon Lockley (“Lockley”) (ALJD at 12),¹ Gary Plotts (“Plotts”) (ALJD at 5), Joe Ryder (“Ryder”) (ALJD at 7), and David James Gordon, Jr. (“Gordon”) (ALJD at 4). Spiller and the shift supervisors comprised the onsite management at the Philadelphia location (ALJD at 3). In addition, Brooke Beasley (“Beasley”) and Sofrana Howard (“Howard”), human resources officials at Respondent’s corporate headquarters in Pittsburg, Kansas, occasionally assisted with human resources matters at the Philadelphia site. Spiller reported to Nathan Henderson, a management official located in Houston, Texas. (ALJD at 3.)

The Philadelphia worksite consisted of a parking lot at which Respondent personnel parked their personal vehicles, a network of rail tracks, and two trailers (ALJD at 2-3, 8). Employees kept their personal belongings and spent their downtime in one trailer (“employee trailer”) and supervisors’ offices were located in the other trailer (“supervisor trailer”). The two trailers were connected by a short elevated platform across which one could move from one trailer into the other. (ALJD at 3.)

In August 2014, a serious effort commenced among Respondent’s employees to form a union (ALJD at 8). On September 2, 2014, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (Local) USW 10-1 (“Union”) petitioned the Board for a representation election among the employees (ALJD at 12). The Board conducted the election on October 3 and 4, 2014, and a

¹ The ALJ mistakenly referred to Brandon Lockley as “Brian Lockley” (ALJD at 12).

majority of employees did not vote to authorize the Union to bargain on their behalf (ALJD at 15).

IV. ARGUMENT

A. Promise of a Raise

1. Facts

The ALJ concluded that Respondent violated Section 8(a)(1) by promising to try to procure a raise for the employees to discourage them from forming a union. The ALJ based her findings of fact on this matter entirely on the testimony of Matthew Horne (“Horne”). The ALJ reasoned that Horne, who was Respondent’s employee at the time of his testimony but was not a discriminatee with a personal financial interest in the outcome of the proceeding, had no incentive to fabricate incriminating testimony about Respondent’s conduct. To the contrary, Horne put himself at risk of retaliation in his employment by testifying to incriminating statements by Spiller. Horne was therefore credible. (ALJD at 12.) The ALJ’s decision to credit Horne on this basis is well-supported by Board precedent. E.g., *Stanford Realty Associates, Inc.*, 306 NLRB 1061, 1064 (1992); *Perfection Macaroni Co.*, 191 NLRB 82, 89 (1971).

According to Horne’s credited testimony, in early September 2014, Spiller addressed Horne and Horne’s fellow employees Marcell Salmond and Greg Baranyay in the employee trailer (Tr. 75-76). Spiller, holding a notepad, asked the employees why they would want to bring in a union and what gripes or issues the employees had (Tr. 76). In response, the employees raised a number of criticisms regarding their terms and conditions of employment, complaining of poor health benefits, the absence of sick leave, too little vacation leave, Respondent’s failure to promote from within the existing work force, Respondent’s failure to follow seniority in decision-making, and wage rates that were below those paid by Respondent’s

competitors in the region (Tr. 76-77). As the employees voiced these concerns, Spiller wrote them down on the notepad (Tr. 76). When the employees complained of below-market wage rates, Spiller replied that he would try to procure a two to three dollar per hour raise for them (Tr. 77). The ALJ concluded that this promise to try to procure a raise violated the Act (ALJD at 12-13).

2. Analysis

The ALJ's conclusion that Spiller's conduct violated Section 8(a)(1) is correct. An employer who, in response to an effort by its employees to organize a union, solicits and promises to remedy employee grievances unlawfully interferes with its employees' right to decide whether to unionize. See, e.g., *Sacramento Recycling and Transfer Station*, 345 NLRB 564, 564 (2005) (manager asking drivers during a union organizing drive "why the drivers wanted a union and what it would take to make the drivers happy" a violation); *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1192 (2004) (manager violated the Act when, in midst of organizing drive, he solicited complaints and conspicuously took notes on responses); *Maple Grove Health Care Center*, 330 NLRB 775, 775, 785 (2000) (employer violated the Act where, after learning of organizing activity, manager told employee that "he had heard that employees were having problems and he wanted to know if he could help the employees with any problems."); *Traction Wholesale Center Co., Inc.*, 328 NLRB 1058, 1058-59 (1999), *enfd.* in relevant part 216 F.3d 92 (D.C. Cir. 2000); *Reliance Electric Co.*, 191 NLRB 44, 44-45 (1971) (employer violated the Act when, upon learning of organizing activity, manager held meetings to hear employee complaints and promised to strive to adjust the complaints), *enfd.* 457 F.2d 503 (6th Cir. 1972). By such conduct, the employer is "urging on his employees that the combined

program of inquiry and correction will make union representation unnecessary.” *Reliance*, above at 46.

Here, Spiller asked outright what complaints the employees had that would make them think they needed a union, conspicuously took notes when the employees made their complaints, one of which was that wage rates were too low, and promised that he would strive to get the employees a raise. By this behavior, Spiller was communicating to employees that Respondent would find out their desires and correct them itself, and a union was thus unnecessary. The Board has repeatedly held that such conduct impermissibly interferes with employees’ freedom to decide whether to form a union. The ALJ’s finding of a violation was therefore correct.

3. Respondent’s Exceptions

The Respondent excepted to the ALJ’s conclusion that it violated the Act in this manner. The Respondent does not dispute the ALJ’s decision to credit Horne’s account of what Spiller said. Instead, the Respondent posits several legal arguments as to why Spiller’s statements were not unlawful. (R. Br. at 23-24.) Each lacks merit.

Respondent asserts that Spiller’s actions were not unlawful because Spiller did not say that the employees would only receive raises if they abandoned their effort to form a union. However, the Board has never required that an employer explicitly condition improvements on opposition to a union to find a violation. See, e.g., *Sacramento*, 345 NLRB at 564; *Alamo Rent-A-Car*, 336 NLRB 1155, 1155 (2001); *Maple Grove*, 330 NLRB at 785; *Insight Communications Co.*, 330 NLRB 431, 455-56 (2000); *Embassy Suites Resort*, 309 NLRB 1313, 1316 (1992), enf. denied on other grounds sub nom. *Lotus Suites, Inc. v. NLRB*, 32 F.3d 588 (D.C. Cir. 1994); *Reliance*, 191 NLRB at 44-46. Instead, an employer unlawfully interferes with its employees’ right to freely choose whether to form a union by soliciting complaints and promising to remedy

them in reaction to employees' union activity, even if the employer does not condition its beneficence on the employees abandoning their organizing. See *ibid.* The vice in such conduct is not that the employer is making a bargain with employees to keep the union out in exchange for improvements in working conditions. Rather, it is that the employer is “urging on his employees that the combined program of inquiry and correction will make union representation unnecessary”—a message that the Board has long and consistently held unlawfully coercive. E.g., *Reliance*, above at 46. This danger adheres regardless of whether the employer overtly conditions the grant of benefits on specific actions by the employees.

In addition, the Supreme Court specifically rejected Respondent's exact argument in *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 408, 409-410 (1964). The Court identified the “danger inherent in well-timed increases in benefits [to be] the suggestion of a fist inside the velvet glove”—in other words, by granting benefits in response to a union drive, an employer sends a message to employees “that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.” *Id.* at 410. The Court observed that the coercive threat implicit in a grant of benefits exists even for “benefits [that] are conferred permanently and unconditionally,” because employees understand that the employer controls the grant of “additional benefits or renegotiation of existing benefits...in the future.”² *Id.* at 409-10.

² Indeed, in *Exchange Parts*, the Fifth Circuit Court of Appeals had determined that the employer's grant of benefits during an organizing campaign was lawful because “the benefits were put into effect unconditionally on a permanent basis, and no one has suggested that there was any implication the benefits would be withdrawn if the workers voted for the union”—the exact same argument the Respondent makes now. *Exchange*, above at 408 (internal quotation marks omitted). The Supreme Court rejected this reasoning and reversed the lower court. *Id.* at 409-10.

In summary, extant law identifies two coercive messages inherent in a promise of benefit in response to an organizing drive: (1) that employees do not need a union because the employer will solicit their complaints and solve them on its own, *Reliance*, above at 46; and (2) that the employer controls the employees' terms and conditions and can take away just as easily as it can give, *Exchange Parts*, above at 409-10. Both coercive messages are communicated regardless of whether the benefits are conditioned on union opposition. Therefore, Respondent's argument that Spiller's conduct was not unlawful because he did not tell employees he would procure them a raise only if they abandoned their efforts to unionize is meritless.

Respondent cites *Hampton Inn NY-JFK Airport*, 348 NLRB 16 (2006), to support its argument that Spiller's statements were lawful because he did not overtly condition improvements on union opposition, but that case does not stand for any such principle (R. Br. at 24). Instead, in *Hampton Inn*, the Board reaffirmed the existing principle that, for a promise of benefits to violate Section 8(a)(1), "it must be made in specific response to organizing" and that therefore "employer knowledge of union activity is an essential element of this 8(a)(1) violation." *Id.* at 18. Because the employer in *Hampton Inn* had no knowledge of union activity at the time it made a promise of benefits, it did not violate the Act. *Ibid.* Here, in contrast, Respondent undisputedly knew that its employees were attempting to form a union and undertook the solicitation and promise to try to procure a raise "in specific response" to that organizing. *Ibid.* Indeed, Spiller opened the meeting in question by asking the employees why they thought they needed a union. Thus, the ALJ's finding of a violation is entirely consistent with *Hampton Inn*.

Respondent also argues that Spiller's actions were lawful because he never said that the employees would receive a raise, only that he would try to get them a raise (R. Br. at 24).

Rejecting this same argument, the Board explained:

While the management officials, who conduct the May meetings, phrased their replies to some of the complaints in such circumspect terms as undertaking to "look into" or "review" them, or could not recall whether they made a similar response to other complaints, such cautious language, or even a refusal to commit Respondent to specific corrective action, does not cancel the employees' anticipation of improved conditions if the employees oppose or vote against the unions.

Reliance, 191 NLRB at 46; accord *MEMC*, 342 NLRB at 1192 ("A violation is established even if the employer does not actually promise to remedy the problems, but rather only to consider and try to correct the sources of employee dissatisfaction.") (internal quotation marks omitted); *Bakersfield Memorial Hospital*, 315 NLRB 596, 600 (1994) (solicitation of grievances "clearly does violate the Act whenever coupled with an express or implied promise to, at least, consider and try to correct the sources of employee dissatisfaction"); see also *Flamingo Hilton-Laughlin*, 324 NLRB 72, 108-09, 112-13 (1997) (violation where, in response to union organizing, managers asked employees about work problems and told employees they would "try" to fix the problems raised), *enfd.* in relevant part 148 F.3d 1166 (D.C. Cir. 1998). Here, Spiller promised to try to get employees a two to three dollar per hour raise for the purpose of impressing upon them that Respondent was going to increase their pay on its own and that the employees therefore did not need a union. That he used "cautious language...does not cancel" the coercive nature of his message. *Reliance*, above at 46. Respondent's argument is without merit.

Respondent additionally argues that the "ALJ erred in finding that Spiller promised employees a raise...in response to union organizing because the preponderance of the evidence shows that Spiller had requested a salary survey prior to the union organizing" (R. Br. at 5).

Respondent never explains why it believes Spiller asking Respondent to conduct a salary survey at some point prior to the union drive is relevant to the lawfulness of his solicitation of employees' reasons for desiring a union and promise to try to adjust one of those reasons by procuring a two to three dollar per hour raise for employees (R. Br. at 5, 23-24). There is no discernible reason why such a request would render Spiller's later conduct lawful.³

Finally, Respondent argues that "there is no evidence of record that Respondent made any changes—let alone significant changes—to its past manner and method of soliciting grievances" (R. Br. at 24). "The Respondent's contention is based on a misapprehension of Board policy." *Manor Care Health Services—Easton*, 356 NLRB 202, 220 (2010), *enfd. per curiam* 661 F.3d 1139 (D.C. Cir. 2011) (summary enforcement because employer conceded this violation). It is true "that an employer who has had a past practice and policy of soliciting employee grievances may continue to do so during an organizational campaign," provided the employer does not "significantly alte[r] its past manner and methods of solicitation during the union campaign." *House of Raeford Farms, Inc.*, 308 NLRB 568, 569 (1992). The Board explained:

The point of the "past practice" exception for solicitation of grievances is that the solicitation is not reasonably perceived as an implied promise to remedy grievances to discourage union representation when it is merely the continuation of business as usual for employer and employee. In other words, because it is an ongoing practice, and would be expected to have occurred without regard to the union campaign, the solicitations will not reasonably be perceived as a change in

³ The ALJ made no finding one way or the other as to whether Spiller ever requested that Respondent conduct a survey of area pay rates. To support its claim that Spiller did make such a request, Respondent incorrectly asserts that Horne testified that Spiller mentioned previous efforts to obtain a raise for the employees (R. Br. at 23-24). Horne gave no such testimony; the portions of the transcript Respondent cites to support its untrue claim to the contrary do not include any of Horne's testimony. Instead, Horne's credited testimony was only that, after Spiller solicited employees' reasons for desiring a union and employees complained about below-market wage rates, Spiller said "he would try to get two to three dollars an hour" (Tr. 77).

practice and policy designed to interfere with employees' choice of whether or not to select union representation.

Manor Care, above at 221. "That defense is not satisfied where, as here, in the midst of a union campaigning, the employer holds meetings where it explains to employees that they don't need a union and that we can 'fix' your problems without a union." *Ibid.* In other words, an employer who solicits grievances for the stated purpose of finding out why employees are considering a union and then promises to remedy those grievances on its own so as to convey to the employees that a union is unnecessary cannot avail itself of the past practice exception. *Ibid.* "[T]he expressed antiunion rationale for the promise to remedy employee grievances makes [such] meetings fundamentally different from anything conducted by the Respondent in the past." *Ibid.*; accord *Aldworth Co.*, 338 NLRB 137, 179, 186, 191 (2002), *enfd.* 363 F.3d 437 (D.C. Cir. 2004); *Edward A. Utlaut Memorial Hospital*, 249 NLRB 1153, 1156 (1980).

In the present case, Spiller approached employees and asked what complaints made them desire a union, conspicuously took notes as employees voiced their complaints, then promised to try to resolve one of the complaints, namely that wages were too low. Thus, Spiller sought to determine why employees wanted a union and to convey to employees that Respondent would fix the problems without a union. This unlawfully interfered with employees' freedom to choose whether to form a union regardless of Respondent's past solicitation practice. *Manor Care*, above at 220-22; *Aldworth*, above at 179, 186, 191; *Utlaut*, above at 1156.

In summary, the ALJ correctly concluded that Spiller's conduct violated Section 8(a)(1) of the Act. Respondent's exception to this conclusion is without merit.

B. Promise of Rain Gear and Boot Slip-ons**1. Facts**

The ALJ determined that Respondent violated Section 8(a)(1) by telling employees, after the petition was filed and a few weeks before the election, that Respondent would provide them with rain gear and boot slip-ons. Here again, the ALJ based her findings of fact entirely on Horne's testimony, which she credited for the same, Board-endorsed reasons already discussed (ALJD at 12-13). E.g., *Stanford*, 306 NLRB at 1064; *Perfection*, 191 NLRB at 8.

Horne testified that on September 16 or 17, 2014, in the employee trailer, Spiller asked employees Mike, Joe, and Kevin Onuskanych, Marcell Salmond, Lou Gentile, Greg Baranyay, and Horne to write down their sizes for rain gear and boot slip-ons so that Spiller could purchase them. Supervisor Lockley was also present. (Tr. at 77-78.) The employees asked for heavy gloves and hats or face masks for the winter as well, and Spiller responded that he would do his best to get them for the employees (Tr. at 78-79). Spiller then asked the employees what gripes or issues they had and what Spiller could do to resolve them (Tr. at 79). In response, the employees complained that their wage rates were too low, their health benefits cost too much for too little coverage, they had no sick leave, they had too little vacation leave, seniority was not followed, the Respondent relied on outside hiring instead of promoting current employees, and supervisors were out of control (Tr. at 79-80). Spiller told the employees that he would do his best to remedy their grievances (Tr. 81).

Horne responded that it would be no problem to resolve the grievances when the employees designated the union to represent them (Tr. 81). Spiller replied that he, Spiller, would not be negotiating on behalf of Respondent in the event employees unionized and told the employees about a Respondent facility where employees unionized then went years without a

collective bargaining agreement and another Respondent facility where employees had relatively low wage rates (Tr. 81-82).

Horne also testified that he and other employees attended “safety meetings” conducted by Respondent in May, June, and July of 2014, before the employees began organizing a union (Tr. 86). At some of these meetings, employees requested rain gear, boot slip-ons, and other protective clothing and equipment (Tr. at 86, 91). At that time, Spiller told the employees that he was working to get the requested items (Tr. at 91).

2. Analysis

The ALJ correctly concluded that Spiller asking employees, shortly before the union election, to write down their sizes for adverse weather equipment so that he could order it violated Section 8(a)(1). “[A]bsent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act.” *Sisters’ Camelot*, 363 NLRB No. 13, slip op. at 7 (2015) (internal quotation marks omitted).

Here, at a time when there was no union organizing taking place, multiple employees asked Spiller for clothing and equipment that would increase their comfort and make it easier for them to perform their jobs in adverse weather conditions. Spiller told the employees that he was working to get it, but there is no other evidence that he actually took any action to address the employees’ requests. (Tr. at 86, 91.) Then, just over two weeks before the employees were scheduled to vote on whether to form a union, Spiller approached employees and announced that he needed their measurements so that he could order the equipment they had asked for months earlier (Tr. at 77-78). Respondent has not even tried to establish a legitimate business reason for the timing of Spiller’s conduct (see R. Br. at 23-24). Therefore, because there has been no

“showing of a legitimate business reason for the timing” of the grant of the rain gear and boot slip-ons just before the union vote, “the Board will infer improper motive and interference with employee rights under the Act.” *Sister’s*, above, slip op. at 7. The ALJ correctly concluded that Spiller’s conduct constituted unlawful interference with employees’ freedom to choose whether to form a union.

3. Respondent’s Exceptions

Respondent excepted to this conclusion on a number of grounds. First, as with Spiller’s promise to try to procure a raise for employees, Respondent claims that Spiller did not overtly condition provision of the adverse weather gear on employees’ abandoning their efforts to unionize (R.Br. at 24). This argument founders here for the same reason it did previously. An employer may unlawfully interfere with its employees’ right to choose whether to bargain collectively by granting the employees a benefit even if the benefit is not conditioned on opposing the union. E.g., *Exchange Parts*, 375 U.S. at 408, 409-10; *Insight*, 330 NLRB at 455-56; see also *Comcast Cablevision of Philadelphia*, 313 NLRB 220, 250 (1993) (employer violated the Act by announcing one week before an election that a benefit would be granted to employees even though did not condition benefit on union activity).

Next, Respondent asserts that “contrary to the ALJ’s findings, there is no evidence that Respondent indicated that employees ‘would receive’ ...rain gear and boot slips,” declaring that “the ALJ did not provide any cite to the record in support of this finding” (R. Br. at 24, 24 fn. 5). Respondent’s claim is not true. Horne, whose testimony the ALJ credited and relied upon entirely with regard to this violation (ALJD at 12-13), said that, on September 16 or 17, 2014, Spiller approached a group of employees and “asked us to fill out a sheet with the sizes for rain gear and boot slip ons for the winter time,” telling the employees that “[h]e wanted us to put our

sizes down so that he could order” (Tr. at 78). By this conduct, Spiller not only indicated to employees that they would be receiving the adverse weather gear, he took the concrete step of obtaining the employees’ measurements, which would have impressed upon the employees that he seriously intended to give them the benefit. Respondent’s assertions are wrong.

Respondent also suggests that Spiller telling employees prior to the union drive that he was working to get them adverse weather gear somehow renders his conduct on September 16 or 17 lawful (see R. Br. at 23-24). Respondent offered no evidence that Spiller actually took any action to obtain such gear prior to the employees’ effort to form a union; although Respondent called Spiller as a witness, he was not asked to testify regarding the rain gear and boot slip-ons. An employer unlawfully interferes with its employees’ right to choose whether to unionize when, shortly before a union election, it grants a benefit that “responds to a request made by employees well before the organizing campaign.” *Caterpillar Logistics, Inc.*, 362 NLRB No. 49, slip op. at 9 (2015), *enfd.* 835 F.3d 536 (6th Cir. 2016); accord, *Comcast Cablevision*, above at 250-51 (employer violated the Act where “there is no probative evidence that previously expressed wishes of the employees for direct deposit would have been granted absent the Teamsters’ campaign here”); *R. Dakin & Company*, 284 NLRB 98, 98-99 (1987); *Delta Data Systems*, 279 NLRB 1284, 1291 (1986) (“The testimony is convincing that whatever was discussed back in 1981 was neither put in writing nor scheduled to be implemented at any specific future date. It was revived only because the union organization drive began.”). An employer’s grant of a benefit that was discussed with employees before the union campaign but not previously acted upon is no less coercive than one not discussed previously. *Ibid.*; accord, *Rodeway Inn*, 228 NLRB 1326, 1327-28 (1977) (where employees had complained about not receiving free lunches and manager had indicated to employees that she was working on getting them free lunches,

employer violated the Act by granting the free lunches in response to an organizing drive). Here, to dissuade employees from unionizing, Spiller addressed an employee concern raised months earlier and theretofore ignored. His conduct violated the Act.⁴

C. Purchasing Meals

1. Facts and Analysis

The ALJ concluded that Respondent violated Section 8(a)(1) by providing employees with free meals in order to discourage their effort to form a union. Here again, the ALJ credited Horne (ALJD at 13). Respondent hired Horne on May 28, 2014 (Tr. at 73). According to Horne, from that date until the union campaign began in earnest—a period of more than two months—Respondent bought Horne and his co-workers lunch only on one or two occasions. After the effort to form a union began, however, Respondent purchased employees lunch once per week. (Tr. at 82.) Respondent has not offered a “legitimate business purpose” for granting this new benefit during the employees’ organizing drive, and so “the Board will infer improper motive and interference with employee rights under the Act.” *Sisters’ Camelot*, 363 NLRB No. 13, slip op. at 7. The ALJ correctly concluded that the Respondent violated the Act by providing employees a weekly complimentary meal to discourage them from forming a union.

⁴ In its list of exceptions, Respondent asserts that the ALJ erred in concluding that Spiller’s adverse weather gear announcement violated the Act “because the preponderance of the evidence shows...that rain gear was normal seasonal uniform equipment” (R. Br. at 5). However, the record is clear that Respondent had not provided this equipment before Spiller took the employees’ measurements to order it just before the union election—otherwise, Respondent would not have had to order the gear because it would have already had it. Moreover, employees were requesting the gear in May, June, and July of 2014, establishing that Respondent had not previously provided it (Tr. at 86, 91). Therefore, before the employees’ effort to form a union, rain gear was not “normal seasonal uniform equipment” at Respondent’s facility. Instead, it was a new benefit provided to employees for the first time to undermine their organizing drive.

2. Respondent's Exceptions

Respondent excepts to this conclusion. Its principal contention is that the ALJ should have credited Respondent's witness Spiller instead of Horne (R. Br. at 25). Spiller testified that Respondent always provided meals at employee meetings and that it did not hold meetings more frequently after the union drive began (Tr. at 679-80). The Board does not overrule an ALJ's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces the Board that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). As already explained, the ALJ's decision to credit Horne is grounded in logic long approved by the Board. E.g., *Stanford Realty*, above at 1064; *Perfection Macaroni*, above at 8. Meanwhile, Respondent's only argument as to why the ALJ's decision to credit Horne was incorrect is that "Horne had only been employed with Respondent three months when the union activity began" so "his ability to testify as to Respondent's past practice is significantly limited" (R. Br. at 25). However, two to three months is long enough to ascertain that Respondent did not have a practice of providing a free meal every week until the employees began to organize a union. Therefore, the ALJ's decision to credit Horne to determine that the Respondent implemented a new benefit is reasonable.

In the alternative, Respondent argues that, even if it did begin buying employees lunch each week in response to the union drive, this practice did not constitute a benefit to employees (R. Br. at 25). To ascertain whether an employer's action constitutes a benefit to employees, the "relevant inquiry is whether the employees reasonably would view it as a benefit to them." *Durham School Service, L.P.* 360 NLRB 708, 709 (2014) (internal quotation marks and brackets omitted); *Sun Mart Foods*, 341 NLRB 161, 163 (2004). Respondent's employees would "reasonably" view being provided with a complimentary meal every week, which conferred a

concrete and substantial financial value to the employees, “as a benefit to them.” *Durham*, above at 709. In fact, the Board has recognized that regularly providing free meals in response to an organizing drive interferes with employees’ right to freely choose whether to be represented by a union. *Rodeway*, 228 NLRB at 1327-28. The Respondent’s argument that providing employees a free meal every week in response to the union drive did not constitute a benefit to the employees is without merit.⁵

D. Discharge of John D. Peters

1. Introduction

The ALJ concluded that Respondent discharged Peters because of his union activity in violation of Sections 8(a)(3) and (1) of the Act (ALJD at 9-10). The Act “makes unlawful the discharge of a worker because of union activity.” *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 394 (1983) (citing 29 U.S.C. Secs. 158(a)(1), (3)). In other words, under Sections 8(a)(3) and (1), an employer commits an unfair labor practice if a causal relationship exists between an employee engaging in union activity and the employee’s termination. See *ibid.* In *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), the Board set forth a framework “to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of their employer which detrimentally affect such employees’ employment.” *Id.* at 1089.

Under *Wright Line*, the General Counsel must prove “that an employee’s protected conduct was a motivating factor in an employer’s decision to take adverse action against the

⁵ Respondent also argues that, because it did not condition the free meals on opposition to the union, this benefit did not interfere with employees’ rights under the Act—the same argument it raised in defense of its promise to procure a raise and its announcement that it would provide employees with adverse weather equipment (R. Br. at 5, 25). This argument fails here for the reasons previously discussed. E.g., *Exchange*, 375 U.S. at 408-10; see also *Reliance*, 191 NLRB at 46.

employee.” *Mesker Door, Inc.*, 357 NLRB 591, 592 (2011); accord, *Wright Line*, above at 1089. “The elements commonly required to support a finding of discriminatory motivation are union activity by the employee, employer knowledge of that activity, and antiunion animus by the employer.” *Mesker*, above at 592 (citing *Williamette Industries*, 341 NLRB 560, 562 (2004)).

“Once the General Counsel makes this initial showing, the burden of persuasion shifts to the employer to prove as an affirmative defense that it would have taken the same action even if the employee had not engaged in the protected activity.” *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6 (2016) (citing *Manno Electric*, 321 NLRB 278, 283 fn. 12 (1996), enfd. mem. 127 F.3d 34 (5th Cir. 1997)).

Here, the ALJ correctly determined (1) the evidence established the elements necessary to prove that Peters’s initiation of an effort to form a union motivated Respondent to discharge him and (2) Respondent did not prove that it would have taken the same action had Peters not launched the organizing drive.

2. The General Counsel’s Initial Showing

a. Union Activity

The ALJ found that Peters and Roscoe spearheaded the effort among Respondent’s employees to form a union (ALJD at 8). Peters contacted the Union on August 21, 2014 (Tr. at 130-32), invited union representatives to come talk with employees in the parking lot at Respondent’s worksite that same day (Tr. at 132-33), alerted all of Respondent’s employees that the meeting would take place (Tr. at 133), actually attended the meeting and spoke in support of union representation during it (Tr. at 97), and passed out cards authorizing the union to bargain on behalf of employees from August 21 until Respondent discharged him a few days later (Tr. at 136, 138-39). Peters also openly advocated for forming a union among the employees (Tr. at

132, 138-39. In short, as one of the two employees responsible for instigating the organizing drive, Peters engaged in extensive union activity in the days before his discharge. The evidence establishes this first element needed to prove that union activity was a motivating factor in Peters's discharge. *Mesker*, above at 592.

b. Respondent's Knowledge of That Activity

The Respondent knew that Peters was the initiator and leader of a burgeoning effort among its employees to form a union at the time it discharged him on August 26, 2014. The ALJ concluded that multiple supervisors observed the meeting with the union representatives in the employee parking lot on the afternoon of August 21, 2014 (ALJD at 8). In addition, Spiller himself testified that, on August 24, 2014, supervisors observed Peters (along with Roscoe) in the parking lot handing out authorization cards and alerted Spiller the following day (Tr. at 655).⁶

Furthermore, prior to any of these events, Spiller told supervisor Gordon that Peters might attempt to form a union and that Gordon should keep an eye out for signs that a union drive might be underway and convey to employees Gordon's own negative views of unions (ALJD at 4).⁷ Thus, to Spiller, Peters leading a meeting of employees with union officers and handing out authorization cards was the fruition of a long-held concern.

Respondent disputes that it knew of Peters's union activity when it decided to discharge him. The Respondent argues that it decided to fire Peters on August 19, 2014, before Peters organized the meeting with the Union on August 21. The only evidence that the decision to discharge was made on August 19 is the discredited testimony of certain of Respondent's

⁶ Thus, Respondent concedes that a manager responsible for terminating Peters knew that Peters was leading a unionization effort before Respondent discharged Peters.

⁷ The ALJ credited Gordon's testimony as to these statements by Spiller, and the Respondent did not except to the ALJ's decision to do so.

witnesses—namely, Beasley, Howard, and Spiller. Therefore, as Respondent acknowledges, for its argument to succeed, the Board will have to overturn the ALJ’s credibility resolutions. (R. Br. at 18-19.)

The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall*, 91 NLRB at 545. The ALJ’s decision to discredit the testimony of Beasley, Howard, and Spiller that the decision was made to discharge Peters during a conference call on August 19 is supported by the record. The Respondent introduced no documentary evidence, such as notes, memoranda, e-mails, and the like, as to what occurred during the August 19 call. If the managers had in fact made the significant decision to discharge Peters during this call, some sort of contemporaneous written record of that decision would be expected, yet the Respondent produced none.

In addition, the managers’ claim that they decided to discharge Peters on August 19 is inconsistent with the fact that Peters was not actually discharged until August 26, a full week later. The Respondent’s explanation for this delay is that the managers decided on August 19 that human resources representative Beasley should be present for the discharge meeting and that Beasley could not fly to Philadelphia from corporate headquarters in Kansas until August 25. The Respondent did not offer any reason for supposedly thinking that a human resources official needed to be present at the discharge meeting. There is no evidence of any Respondent policy requiring such a representative to be present. And, when Respondent discharged Roscoe in October 2014, it not only did not fly a human resources representative to the worksite, it actually told Roscoe he was fired via e-mail, without any sort of meeting (ALJD at 15). The

Respondent's explanation for the week-long delay between its purported decision to discharge Peters and the discharge itself does not withstand scrutiny.

Furthermore, the Respondent permitted Peters to continue working normally between August 19 and August 26. If, as the managers claimed, they decided on August 19 that Peters engaged in discharge-worthy misconduct, logically they would not have permitted him to continue to work as though nothing were wrong for an additional week. They would either have discharged him immediately or, if for some reason they could not do that, they would have suspended him until they could do so. The Respondent did neither. It is not plausible that Respondent permitted Peters to continue working for a full week after deciding to terminate him for serious misconduct.

Finally, as discussed more fully below, Respondent's ostensible lawful reason for discharging Peters is pretextual. That Respondent did not discharge Peters for the misconduct it claims it did further discredits its managers' testimony that they decided to discharge Peters for that misconduct on August 19. Put another way, because Respondent did not decide to discharge Peters for the misconduct in question at all, it necessarily did not decide to do so on August 19.

In conclusion, the clear preponderance of the relevant evidence does not show the ALJ's decision to discredit Beasley, Howard, and Spiller's testimony to have been incorrect. *Standard Dry Wall*, above at 545. Instead, the ALJ's credibility resolution is logical and supported by the evidence.⁸

⁸ In addition, the Respondent inaccurately asserts that the ALJ's discrediting of Beasley, Howard, and Spiller on this point was not "based on the demeanor of the witnesses" (R. Br. at 18). However, although the ALJ did not discuss demeanor in her specific analysis as to why she found the testimony of these witnesses incredible (ALJD at 7, 9-10), she did state generally that

The evidence therefore shows that the Respondent knew about Peters's union activity when it decided to fire him. The second element needed to establish a causal relationship between that activity and Peters's discharge is established.

c. Antiunion Animus

The final element necessary to prove that Peters's initiation and leadership of the incipient union drive motivated Respondent to discharge him is antiunion animus by Respondent. *Mesker*, 357 NLRB at 592. The evidence amply establishes such animus.

i. Direct Evidence

There is direct evidence that Spiller was averse to Peters in particular attempting to form a union. As stated earlier, Gordon, who worked under Spiller as a supervisor, gave credited testimony that on several occasions from May to August 2014 Spiller told Gordon that there was "union talk" among the employees and that Peters was the ring leader, and instructed Gordon to keep his "ear to the ground" for organizing activity and to share Gordon's antiunion views with employees (ALJD at 4; Tr. at 107-08, 109-10, 111-12). Where an employer's supervisors discuss an employee's union activity with one another in a hostile way, the discussion is "direct evidence of antiunion animus." *The Fund for The Public Interest*, 360 NLRB 877, 877 fn. 1, 884 (2014). Spiller's expressions of concern to Gordon that Peters would attempt to organize the employees into a union and instructions that Gordon look out for signs that Peters was doing so and preemptively discourage employees from unionizing therefore constitute direct evidence of Respondent's animus toward the formation of a union and specifically toward Peters instigating such formation. See *ibid.*

her findings of fact were at least partially based on her "observation of the demeanor of the witnesses" (ALJD at 2).

ii. Timing

Respondent's antiunion animus is further established by the close timing between Respondent learning that Peters was taking concrete steps toward forming a union and his discharge. E.g. *Schaeff Incorporated*, 321 NLRB 202, 217 (1996), *enfd.* 113 F.3d 264 (D.C. Cir. 1997) (where employees were terminated "within days" of engaging in protected conduct, this "alone...suggest[ed] antiunion animus [w]as a motivating factor" in their discharges) (internal quotation marks omitted). Peters arranged for employees to meet with the union in the parking lot on August 21, 2014, a Thursday, an event observed by the Respondent; the Respondent witnessed him soliciting union authorization cards from his coworkers in the parking lot on August 24, a Sunday; and by August 26, a Tuesday, Respondent had fired him. Thus, Peters initiated a union drive in earnest and was fired in less than a week. The extremely close timing between Peters's union activity and his discharge gives rise to a powerful inference that the former caused the latter. *Ibid.*

iii. Unlawful Interference With Employees' Decision Whether to Form a Union

Respondent's antiunion animus is also demonstrated by the violations of Section 8(a)(1) already discussed—namely, Spiller soliciting employees' reasons for desiring a union and promising to try to get them a two to three dollar per hour raise, Spiller announcing that employees would be receiving adverse weather equipment, and Respondent instituting the new benefit of a free meal once per week, all in response to the organizing drive among the employees. Respondent's unlawful interference with its employees' right to decide whether to form a union demonstrates its hostility to unionization and toward Peters's spearheading of the unionization effort. See, e.g., *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 203 (2007), *enfd.* 519 F.3d 373 (7th Cir. 2008).

iv. **Pretextual Nature of Respondent's Stated Reason for Discharging Peters**

Finally, Respondent's animus is shown by the pretextual nature of its stated reason for discharging Peters. "It is well settled that when a respondent's stated reasons for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal." *Suburban Electrical Engineers/Contractors, Inc.*, 351 NLRB 1, 5 (2007) (citing *Loudon Steel*, 340 NLRB 307, 312 (2003)). "Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt.""¹ *Loudon*, above at 312 (quoting *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000)). "Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision."² *Ibid.*

Disparate Treatment

Respondent claims to have discharged Peters because he harassed another employee, Curtis Pettiford ("Pettiford"). The evidence establishes that Respondent did not actually discharge Peters for this reason. The falsity of Respondent's stated reason for the discharge is evidenced first by the fact that it reacted to comparable misconduct committed by another employee around the same time with indifference. On August 1, 2014, employee Leroy Henderson, who was to relieve Peters, called out sick. Peters called Henderson to try to get him to come in because Peters had just worked a 12-hour shift and dreaded the prospect of having to work another 12-hour shift immediately thereafter. Soon after this phone call, Henderson sent Peters a series of intensely vitriolic text messages. (ALJD at 5.) The text messages are laced with profane language, contain personal insults toward Peters, and threaten violence against

Peters. For instance, Henderson texted Peters to “SHUT THE FUCK UP AND MIND YOUR OWN FUCKING BUSINESS. better [sic] yet go and bury you [sic] fucking head under a fucking rock. You fucking drunk...I shocked [sic] that no one has punched you the fuck out. Fuck you John Peters and go the fuck to hell.” (GC Exh. 20.)

Peters showed these messages to Plotts, the supervisor on duty. Later that same evening, Henderson arrived at the worksite inebriated. Plotts instructed him to meet with Plotts and Peters, and Henderson refused Plotts’s instruction. The following day, Peters reported the incident to Spiller and to Respondent’s human resources department, including by sending them the text messages sent by Henderson (Tr. at 174-75). The Respondent took no disciplinary action of any kind against Henderson for these events. (ALJD at 5.)

Respondent’s claim that it discharged Peters because of his harassment of a coworker is not consistent with its failure to take any disciplinary action against Henderson for his profane threats of violence and personal attacks against Peters, which Peters reported to Respondent only a few days before Pettiford reported Peters’s alleged harassment. Where an employer treats a union supporter’s misconduct far more harshly than it treats comparable misconduct by other employees, it gives rise to an inference that the union supporter’s union activity was the true cause of the employer’s action. See, e.g., *Lucky Cab Company*, 360 NLRB 271, 274 (2014). Respondent’s disparate treatment of Henderson and Peters reveals its asserted nondiscriminatory reason for discharging Peters to be pretext.

In addition, the record reveals that employees routinely made taunts pertaining to one another’s sexuality at Respondent’s worksite (Tr. at 112-13), that Spiller and other supervisors observed this conduct (Tr. at 112-13, 223), and that neither Spiller nor any other manager ever instructed employees not to engage in such taunts or disciplined any employee for doing so (Tr.

at 112-13, 223). Respondent's professed sudden intense concern for conduct that it had long condoned further suggests that the concern is a pretext designed to shield Respondent's true motivation. *Superior Coal Co.*, 295 NLRB 439, 451-52, 452-53 (1989).

The Respondent's Failure to Adhere to Its Own Disciplinary Policies

Furthermore, Respondent failed to follow its progressive disciplinary policy with regard to Peters. Respondent maintained a written policy declaring Respondent's adherence to progressive discipline (GC Exh. 43). Nevertheless, the Respondent discharged Peters on August 26, 2014 even though he had never been disciplined before (ALJD at 10) and was considered an excellent employee by the Respondent (and specifically by Spiller) (Tr. at 108-09). The Respondent disregarding its published progressive discipline policy and firing Peters for his first instance of alleged misconduct suggests Respondent had an ulterior motive for wanting Peters out of its employees' ranks. E.g., *Aliante Casino and Hotel*, 364 NLRB No. 78, slip op. at 1 (2016); *Tubular Corporation of America*, 337 NLRB 99, 99 (2001).

The Respondent's Investigation

Respondent's asserted reason for discharging Peters is further belied by the bizarre manner in which its investigation into Peters's alleged misconduct proceeded. Pettiford complained to the Respondent about Peters's purported harassment on August 4 and identified a long list of employees whom he said witnessed Peters harass him (ALJD at 5-6). On August 4 and 5, Beasley called some of these witnesses. She also called Peters himself on August 5. Beasley then stopped her investigation without contacting the remaining individuals Pettiford claimed witnessed Peters's misconduct. Other than scheduling Peters and Pettiford on different shifts from one another, Respondent took no additional action until it discharged Peters 21 days

later, on August 26, ostensibly based on what it learned on August 4 and 5. (ALJD at 6.) In the meantime, Peters continued to work normally.

It is not plausible that Respondent concluded on August 5 that Peters engaged in discharge-worthy misconduct and then took no action against him for a full three weeks. If, as Respondent claims, it knew Peters engaged in misconduct warranting summary firing on August 5, it surely would have taken action against him with more haste. The very long delay between Respondent ostensibly discovering Peters's misconduct and Respondent discharging Peters for that misconduct further shows that the misconduct was not the reason for the discharge but rather an excuse for it.

That Respondent did not truly discharge Peters for his purported harassment of Pettiford is further established by its hasty effort to bolster its evidence of such harassment after it had already discharged Peters (ALJD at 6-7). Again, Respondent discharged Peters on August 26. On August 28, Beasley called six additional employees to ask them whether they had ever seen Peters engage in the misconduct for which he had supposedly been discharged two days earlier. In addition, Respondent prepared a report on its investigation for the first time on August 29, when Peters had already been fired for three days. (ALJD at 8-9; R. Exh. 4.) Respondent's post hoc scramble to find additional evidence of wrongdoing on the part of Peters as well as to make a record of its purported nondiscriminatory reasons for discharging him suggests a cover up—Respondent was clambering to make its excuse for discharging Peters plausible.

In summary, the record shows Respondent's claim to have discharged Peters because he harassed Pettiford to be untrue. Respondent's dissembling with respect to its reasons for firing Peters "warrant[s] an inference that the true motive is an unlawful one that the respondent desires to conceal," *Suburban*, 351 NLRB at 5, and constitutes "affirmative evidence of guilt," *Loudon*,

340 NLRB at 312. The pretextual nature of Respondent’s asserted reasons for discharging Peters further establishes its animus toward employees’ forming a union and toward Peters’s role as initiator and leader of the unionization effort.⁹

3. The Respondent’s Affirmative Defense

The evidence therefore establishes that Peters’s instigation and leadership of the nascent organizing drive was a motivating factor in his discharge. Ordinarily at this stage, “the burden of persuasion shifts to the employer to prove as an affirmative defense that it would have taken the same action even if the employee had not engaged in the protected activity.” *Adams*, 363 NLRB No. 123, slip op. at 6. To establish this affirmative defense, it is not enough for an employer to show that it “*could* have discharged” the employee for a nondiscriminatory reason. *Metropolitan Transportation Services, Inc.*, 351 NLRB 657, 659 (2007) (emphasis in original). Instead, “[t]he question...is whether [the employer] has gone beyond merely articulating a legitimate reason for the discharge and shown by a preponderance of the evidence that it did, in fact, rely on that reason.” *Ibid.* “[I]f the evidence establishes that the reasons given for the Respondent’s action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected

⁹ Chairman Miscimarra believes that “under *Wright Line*, the General Counsel must establish a link or nexus between the employee’s protected conduct and the employer’s decision to take the employment action alleged to be unlawful.” *Tschiggfrie Properties, Ltd.*, 365 NLRB No. 34, slip op. at 1 fn. 1 (2017) (Miscimarra, concurring). Such a link or nexus is established here by the following facts: (1) Spiller made statements to supervisor Gordon indicating the former’s fear that Peters specifically would lead a union drive, (2) the Respondent engaged in multiple unfair labor practices to thwart the organizing drive that Peters initiated and led, (3) Peters was discharged less than a week after taking concrete steps toward organizing a union, and (4) the Respondent’s stated reasons for discharging Peters were pretexts. There is therefore an abundance of evidence to show the Respondent’s hostility to Peters’s protected conduct in particular. This is not a case where the General Counsel is relying on evidence unrelated to Peters’s situation to demonstrate animus. Even under the Chairman’s view, the General Counsel proved that Peters’s union activity motivated his discharge. See *ibid.*

conduct.” *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982)). As the Board explained in *Limestone*, “a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.” *Limestone*, above at 722.

As already explained, the evidence reveals that the Respondent did not rely upon allegations of misconduct on the part of Peters in deciding to discharge him. Instead, those allegations were nothing more than an excuse used by Respondent to conceal its true, unlawful motive. Therefore, Respondent necessarily cannot “sho[w] by a preponderance of the evidence that it did, in fact, rely on” those allegations in terminating Peters, which is what Respondent would have to show to establish this affirmative defense. *Metropolitan*, above at 659.

E. Issuance of Disciplinary Warnings to Roscoe

1. Introduction

The ALJ concluded that Respondent violated the Act by issuing two disciplinary warnings to Roscoe on August 21 because he engaged in protected concerted activity. “An employer violates Section 8(a)(1) of the Act by taking adverse action against employees because of their protected concerted activities.” *Amglo Kemlite Laboratories, Inc.*, 360 NLRB 319, 325 (2014), *enfd.* 833 F.3d 824 (7th Cir. 2016). “By its terms, *Wright Line* applies to 8(a)(1) allegations that adverse action was motivated by protected concerted activity, just as it does to 8(a)(3) allegations of actions motivated by union activity.” *Id.* at 325 fn. 15. Therefore, the principles deployed above to assess whether a causal relationship existed between Peters’s initiation and leadership of the union drive and his rapidly ensuing discharge apply equally to assess whether a causal relationship existed between Roscoe’s protected concerted activity and

the two disciplinary warning he received on August 21. Accordingly, to prove that Roscoe's protected concerted activity was a motivating factor in the warnings, the evidence must establish "(1) the employee's protected concerted activity, (2) the respondent's knowledge of that activity, and (3) the respondent's animus." *Id.* at 325. Once an unlawful motive is proven, the burden of persuasion shifts to the Respondent "to show that it would have taken the same action even in the absence of the employee's protected activity." *Ibid.*

2. The General Counsel's Initial Showing

a. Roscoe's Protected Concerted Activity

The ALJ concluded that Roscoe engaged in two forms of protected concerted activity that motivated his August 21, 2014 warnings (ALJD at 13). On July 29, 2014, Roscoe hand-delivered a letter to Spiller (ALJD at 4). On its face, the letter indicates that it is being sent on behalf of all of Respondent's black carmen and actually names those carmen—Roscoe, Carl Pinder, and Kim Bronson. The letter alleges that the Respondent favored white carmen over black carmen in deciding who to promote and in setting wage rates. The letter concludes: "We would like to schedule a meeting to discuss this situation with management tomorrow if possible. I appreciate you taking the opportunity to investigate and allow us to voice our concerns." (GC Exh. 21.) The ALJ concluded that Roscoe engaged in protected concerted activity by preparing and hand-delivering this complaint as the representative of Respondent's black carmen to voice a group concern among those carmen that Respondent was discriminating against them based on their race (ALJD at 13). This conclusion is endorsed by Board precedent. *Tanner Motor Livery, Ltd.*, 148 NLRB 1402, 1403-04 (1964), *enfd.* in relevant part 349 F.2d 1 (9th Cir. 1965). Moreover, Respondent did not except to the ALJ's conclusion that Roscoe's July 29 complaint of racial discrimination constituted conduct protected by the Act. This alone is enough to

establish that Roscoe engaged in protected concerted activity, the first element needed to prove unlawful motive.

b. Respondent's Knowledge of That Activity

It is evident that Respondent knew that Roscoe protested Respondent's perceived discrimination based on race on behalf of all of Respondent's black carmen. Roscoe delivered the letter registering the protest to Spiller by hand. Furthermore, the day after Roscoe delivered the letter, Spiller instructed Roscoe, Pinder, and Bronson to come to his office to discuss the letter. During this meeting, the employees further explained their belief that Spiller was favoring white employees because they were white. In response, Spiller asserted that it was his prerogative to promote employees using whatever procedure he chose. Following the meeting with Spiller, Roscoe e-mailed a copy of the letter complaining of racial discrimination to Beasley. (ALJD at 4.) In short, Spiller and Beasley were aware that Roscoe complained of discrimination on behalf of black employees because Roscoe made those complaints directly to Spiller and Beasley.

c. Respondent's Animus

i. Background

Finally, the ALJ concluded that Respondent bore animus toward Roscoe's accusations of racial bias. The evidence establishes that, on August 15, Roscoe stayed past the end of his shift because he was in the middle of finishing repairs to a car and needed to brief his relief on the repairs. Staying late when repairs remained unfinished in order to either finish the repairs or ensure that one's relief would finish them was standard practice—Roscoe himself had regularly done so in the past without incident. On this day, however, Roscoe's supervisor, Ryder, radioed Roscoe about forty minutes after Roscoe's shift ended demanding that Roscoe come to the

supervisor trailer, which Roscoe did. There, Ryder instructed Roscoe to stop working. Roscoe replied that he was in the midst of ensuring that a repair was completed, after which Ryder acceded to him staying until the repair was done. Roscoe ultimately put in for one hour of overtime. (ALJD at 7-8. 13-14.)

Five days later, on August 21, Ryder gave Roscoe two disciplinary warnings, both ostensibly for misconduct he engaged in on August 15 (Tr. at 292). One alleged that Roscoe sat in the employee trailer at a time when he should have been working (GC Exh. 26). The other alleged that Roscoe was insubordinate because he put in for 2.5 hours of overtime even though he was only authorized for 1 hour; the warning asserted that Roscoe put in the extra 1.5 hours of overtime for time spent eating and tidying up the employee trailer (GC Exh. 25). Ryder informed Roscoe that he was not the one who decided to issue the warnings and that the decision to do so came from above him (Tr. at 293-94). A few days later, Spiller informed Roscoe that he, Spiller, was the one who decided to issue Roscoe the warnings (Tr. at 298-99).

ii. Timing

The ALJ found that animus was established by the close timing between Roscoe's protected concerted activity and the warnings and by the pretextual nature of the Respondent's stated reasons for issuing the warnings. As to timing, Spiller ordered the issuance of the warnings to Roscoe roughly three weeks after Roscoe accused Spiller of discriminating against Roscoe and other black employees. Prior to August 21, Roscoe had never been disciplined or reprimanded (Tr. at 707-08). The temporal proximity between Roscoe's protected protest and his warnings suggests the former motivated the latter. E.g. *Schaeff*, 321 NLRB at 217.

iii. **Pretext**

In addition, the ALJ found that the accusations of misconduct against Roscoe were fabrications (ALJD at 13-14). One warning was based on Spiller's claim to have observed Roscoe sitting in the employee trailer at a time when he should have been working (GC Exh. 26). Yet, no supervisor said anything to Roscoe about his supposed loafing at that time. Instead, the first time Roscoe heard about his purported loafing was in the warning he received six days later. As the ALJ explained, this version of events is simply not credible; it cannot reasonably be believed that a worksite's top supervisor (Spiller) personally observed an employee (Roscoe) loafing on the clock yet no action was taken to spur the employee to his duties. Therefore, the ALJ concluded that the accusation that Roscoe loafed was fabricated. (ALJD at 14.)

The ALJ similarly found that the allegations for which Spiller claimed to have issued the other warning—Roscoe's supposed insubordination by taking 2.5 hours of overtime when he was only authorized to take 1—were untrue. It would have been extremely easy for Spiller to find out how much overtime Roscoe put in for on August 15. Had he done so, he would have seen that Roscoe only put in for one hour, which the warning itself indicates was the authorized amount. (GC Exh. 25.) Yet, Spiller apparently either did not bother to perform this simple, dispositive check or did perform it and nevertheless plowed forward with the discipline knowing the falsity of the underlying allegations. The obvious and easily ascertained untruth of the allegations suggests that they were not the true reason for the discipline.

As explained above, “[i]t is well settled that when a respondent's stated reasons for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal.” *Suburban*, 351 NLRB at 5. Here,

Spiller's stated reasons for issuing the warnings were demonstrably false, suggesting Spiller harbored an ulterior, unlawful motive for wanting to discipline Roscoe that he wished to hide.

In summary, the ALJ found that, only a few short weeks after Roscoe led a protest against perceived racial discrimination on the part of Spiller, Spiller invented reasons to issue Roscoe two disciplinary warnings. The ALJ correctly concluded that the evidence shows animus on the part of Respondent toward Roscoe's protected concerted protest against perceived discrimination. The evidence shows that Roscoe engaged in protected concerted activity, that Respondent knew about that activity, and that Respondent was hostile to that activity. The evidence therefore establishes that Roscoe's protected concerted activity was a motivating factor in his discipline.¹⁰ E.g., *Amglo*, 360 NLRB at 325.

3. The Respondent's Affirmative Defense

In addition, because the nondiscriminatory reasons Respondent claims to have relied on in disciplining Roscoe were pretexts, Respondent necessarily cannot establish the affirmative defense that it would have disciplined Roscoe for those reasons notwithstanding his protected conduct. E.g., *Golden State*, 340 NLRB at 385; see also *Metropolitan*, 351 NLRB at 659 ("The question...is whether [the employer] has gone beyond merely articulating a legitimate reason for the discharge and shown by a preponderance of the evidence that it did, in fact, rely on that reason."). The ALJ correctly concluded that Respondent violated the Act by issuing two disciplinary warnings to Roscoe on August 21 because he engaged in protected concerted activity.

¹⁰ In addition, the evidence of pretext and suspicious timing establishes a link between Roscoe's protected concerted activity and the August 21 warnings; the General Counsel does not rely on circumstances unrelated to Roscoe's protected concerted activity to establish animus. Therefore, even under Chairman Miscimarra's view of *Wright Line*, the evidence shows that Roscoe's protected concerted activity was a motivating factor in the warnings. See fn. 9, above.

F. Roscoe's Suspension

The ALJ concluded that Respondent violated Sections 8(a)(3) and (1) of the Act by suspending Roscoe for 14 days because he was the leader of the effort to form a union, a mantle Roscoe picked up after the Respondent fired Peters (ALJD at 14-16). In ascertaining whether a causal relationship existed between Roscoe's leadership of the union drive and his suspension, the same principles used to evaluate Peters's discharge apply.

1. The General Counsel's Initial Showing**a. Roscoe's Union Activity and Respondent's Knowledge of That Activity**

The presence of the first two elements needed to prove that the Respondent suspended Roscoe because of his union activity—union activity by Roscoe and the Respondent's knowledge of that activity—are not disputed. Along with Peters, Roscoe initiated the effort among Respondent's employees to form a union. Peters contacted the union after he and Roscoe discussed the merits of collective bargaining in the employee trailer on August 21 (Tr. at 129-31). At the August 21 meeting with union representatives in the parking lot, Roscoe stood on a roughly three-foot high parking barrier and passionately extolled the virtues of being part of a union (Tr. at 135). As stated above, multiple supervisors witnessed this meeting and saw Roscoe stand on the barrier and give his speech to the assembled employees (ALJD at 8). In addition, Roscoe asked his co-workers to sign authorization cards both at the August 21 meeting and in the ensuing days (ALJD at 8; Tr. at 655). Again as already stated, supervisors witnessed Roscoe and Peters handing their co-workers authorization cards in the parking lot on August 24 and reported what they had seen to Spiller (Tr. at 655).

After Respondent discharged Peters on August 26, Roscoe was left as the sole leader of the attempt to organize Respondent's employees into a union. On September 2, Roscoe went

with the Union's president, Jim Savage, to the National Labor Relations Board to file a petition for an election to determine whether the employees wished to be represented. That same day, Roscoe delivered a copy of the filed petition to Spiller by hand. (Tr. at 360-63.)

In summary, along with Peters, Roscoe was the chief proponent of Respondent's employees organizing into a union. After Respondent terminated Peters, Roscoe became the principal champion of unionization among the employees. The Respondent was keenly aware of Roscoe's role.

b. Respondent's Antiunion Animus

The ALJ concluded that the record established that Respondent was hostile to its employees forming a union. A variety of factors support the ALJ's conclusion.

i. Respondent's Unlawful Interference With Its Employees' Decision Whether to Form a Union

As with Peters's discharge, Respondent's multiple unfair labor practices designed to defeat the union drive demonstrate its animus toward unionization and, accordingly, to Roscoe's advocacy of unionization. See, e.g., *St. Margaret*, 350 NLRB at 203.

ii. Timing

In addition, as noted by the ALJ, the timing of Roscoe's suspension suggests animus. Respondent suspended Roscoe pending investigation on September 23, a mere ten days before employees were scheduled to begin voting on whether to unionize on October 3. On the afternoon of October 2, fewer than 24 hours before the unionization vote was to commence, Respondent instructed Spiller to come to the worksite for a meeting with Spiller and Nate Henderson. (ALJD at 14-15.) The meeting lasted roughly a minute (Tr. at 349) and consisted of Spiller handing Roscoe a notice that Respondent was suspending him for fourteen days retroactive to September 23 (ALJD at 15). The notice specified that the last day of Roscoe's

suspension would be Monday, October 6—two days after voting ended on October 4 (the election lasted two days) (GC Exh. 34). Thus, ten days before employees were to vote on whether to form a union the Respondent suspended the leading proponent of unionization, ordered his appearance at the worksite hours before voting began to hand him a notice, and set the end of his discipline for just after employees finished voting (when it would be too late for Roscoe to whip support for the union or monitor Respondent's campaign against unionization). This timing raises an inference that Roscoe's role as chief employee organizer motivated his suspension. E.g. *Schaeff*, 321 NLRB at 217.

iii. The Pretextual Nature of Respondent's Stated Reasons for Suspending Roscoe

Respondent's Investigation Did Not Support the Allegations Against Roscoe

Furthermore, the evidence reveals Respondent's stated reasons for suspending Roscoe to be pretextual. Respondent claims to have suspended Roscoe because, on September 23, Roscoe had an altercation with coworker Joe Onuskanych during which he made an obscene gesture and subsequently was insubordinate to supervisor Lockley (GC Exh. 34). However, as noted by the ALJ, Respondent's investigation did not support its allegations against Roscoe (ALJD at 16). Respondent collected statements from a number of employees regarding the argument between Roscoe and Joe Onuskanych (R.Exhs. 8, 10-15). Of these, the only person who corroborated Joe Onuskanych's version of events was his father, Mike Onuskanych, whom the record does not show even witnessed Roscoe make the alleged obscene gesture. Mike Onuskanych's written statement and the report of his interview with Respondent's human resources representative are ambiguous as to whether he actually witnessed Roscoe make the obscene gesture or was just reporting what he was told by someone else (most likely his son, Joe), and Respondent did not call Mike Onuskanych as a witness to clarify this issue (R. Exhs. 8, 14).

Meanwhile, employees John C. Peters, Jr., Horne, and Greg Baranyay—the three employees with the least reason to dissemble regarding what they saw because they did not have a personal stake in the investigation nor any familial or other special relationship with either involved employee—contradicted Joe Onuskanych’s version (R. Exhs. 8, 10, 15). Each of these employees did not see Roscoe make an obscene gesture. Each asserted that Joe Onuskanych and Roscoe insulted each other and shared blame for the argument. And each indicated that the argument was not a significant event. In fact, Baranyay expressed confusion about why Respondent suspended Roscoe (R. Exh. 8). Notwithstanding the results of its investigation, Respondent suspended Roscoe for fourteen days, adopted Joe Onuskanych’s version of events without amendment, and took no disciplinary action against Joe Onuskanych of any kind despite his role in the argument. The gulf between what Respondent’s investigation revealed and the conclusions it supposedly drew suggests it was using Roscoe’s argument with Onuskanych as an excuse to eject the chief employee organizer from its workplace just before the election.

Disparate Treatment

That Respondent’s stated reasons for suspending Roscoe were not its true reasons is further bolstered by the fact that it had reacted to other incidents of employees insulting or even threatening violence against other employees with indifference. Thus, as discussed with regard to Peters’s discharge, Respondent took no disciplinary action of any kind against Leroy Henderson when he used extremely profane language to insult and even threaten violence against Peters (ALJD at 5; GC Exh. 20). In addition, Leroy Henderson arrived at the workplace inebriated hours after his shift was supposed to start then flatly refused his supervisor’s instruction to meet with Peters and the supervisor to discuss Henderson’s attack on Peters—conduct that plainly constituted insubordination—yet the Respondent did not discipline

Henderson for this either (ALJD at 5). Respondent's disparate treatment of Roscoe and Henderson suggests that Roscoe's leadership of the union drive was the true motive for his suspension. E.g., *Lucky Cab*, 360 NLRB at 274.

Respondent reacted with similar lack of concern to a signed statement from employee Carl Pinder that supervisor Gary Plotts told a group of employees on September 5, 2014 to commit physical violence against Roscoe because he made safety complaints and thereby put employees' jobs in jeopardy (GC Exh. 31). Roscoe relayed Pinder's statement to Respondent (GC Exh. 32; Tr. 313). There is no evidence that Respondent disciplined Plotts or even investigated his statement.

In addition, on August 28, Joe Onuskanych smeared a sweatshirt bearing a union emblem that Roscoe had worn to work and momentarily set on a chair in the employee trailer with oil, ruining it, and turned the sweatshirt around to hide the union emblem. When Roscoe reported this to Spiller and Lockley and showed them the ruined clothing, Spiller scolded Roscoe for not putting his things in a locker and sarcastically promised to buy Roscoe another sweatshirt. Joe Onuskanych was not disciplined. (Tr. at 330-31.)

Collectively, these incidents show that Respondent did not discipline employees even when they leveled intensely vitriolic language (in the case of Henderson) or threats of violence (in the case of Henderson and Plotts) against one another, acted insubordinately (in the case of Henderson), and deliberately destroyed one another's property (in the case of Onuskanych). The Respondent took a lackadaisical approach toward employee arguments. The fact that it inexplicably suspended Roscoe for fourteen days for such an argument shows that this was not its true motive. *Superior Coal*, 295 NLRB at 451-52, 452-53.

Conclusion as to Pretext

The incongruity between the Respondent's investigations and its conclusions as well as between its treatment of past comparable instances of misconduct and Roscoe's supposed misconduct establishes that this purported misconduct was an excuse to conceal Respondent's true motive for suspending Roscoe.¹¹

2. Respondent's Affirmative Defense

In addition, because Respondent's stated reasons for suspending Roscoe were pretextual, Respondent necessarily cannot establish as an affirmative defense that it in fact relied upon those reasons in issuing the suspension. *Golden State*, 340 NLRB at 385.

G. Roscoe's Discharge

1. The General Counsel's Initial Showing

a. Roscoe's Union Activity and Respondent's Knowledge of That Activity

Finally, the ALJ concluded that Respondent violated the Act by discharging Roscoe because of his union activity (ALJD at 17). The first two elements of *Wright Line* are established for the same reasons they were established with regard to Roscoe's suspension. Roscoe was the principal proponent of Respondent's employees forming a union, and Respondent knew that.

b. Respondent's Animus

i. Other Unfair Labor Practices and Timing

That Respondent harbored animus toward Roscoe's union activity is established by several factors. As with the Respondent's other discriminatory actions, its animus toward

¹¹ Because the evidence reveals that Respondent was hostile to the particular protected conduct engaged in by Roscoe and because there are links between Roscoe's union activity and his discipline, the General Counsel made his initial showing even under Chairman Miscimarra's view of *Wright Line*. See fn. 9, above.

Roscoe's leadership of the union drive is shown by its multiple unfair labor practices intended to defeat that drive. E.g., *St. Margaret*, 350 NLRB at 203. In addition, Respondent discharged Roscoe only a few days after employees voted against forming a union (the last day of voting was October 4 and Respondent notified Roscoe he was discharged on October 11). The close proximity between the election, which Roscoe was to a large extent responsible for bringing about, and Roscoe's termination further establishes that the Respondent was motivated to discharge Roscoe by his union activity. E.g., *B. J. & R. Machine Co.*, 270 NLRB 267, 269 (1984) (finding it significant that "the layoffs of the three known union activists occurred shortly after the Union lost the election").

ii. Pretext

Finally, Respondent's cursory investigation into the misconduct for which it supposedly discharged Roscoe reveals the misconduct to have been a pretext. Respondent claimed that it discharged Roscoe for making profane comments and threats toward Leroy Henderson as the two passed one another in their cars on October 9 (GC Exh. 39). Respondent learned of this alleged incident when Leroy Henderson told his supervisor as well as Howard and Nate Henderson about it (R. Exh. 16). Respondent instructed Leroy Henderson to write a statement regarding what happened (Tr. at 631, 676). Someone from Respondent spoke with someone from PES (the company for which Respondent provided rail services) to discuss Henderson's allegations, and PES solicited a written statement from a PES employee who was in the car with Henderson as to what had occurred, which PES then sent to Respondent (Tr. at 676, R. Exh. 17). In addition, Spiller testified that PES told Respondent it would suspend Roscoe's access to the PES property "pending [Respondent's] outcome of what [Respondent's] decision was" (Tr. 676). There is no evidence that Respondent inquired about the PES employee's relationship to

Henderson and why she was in Henderson's car. Nor is there any evidence that Respondent asked Henderson or the PES employee or anyone else what reason Roscoe could possibly have had to engage in unprompted profane insults and threats against Henderson.

The next morning (morning of October 10), Spiller, Nate Henderson, and Howard talked to Respondent's legal counsel about the allegations against Roscoe. There is no evidence as to why the managers wanted to consult with an attorney. (Tr. at 676-77.) When Roscoe reported for work on October 10, a supervisor immediately escorted him off the property (Tr. at 363-64). Then, on October 11, Respondent e-mailed Roscoe a letter informing him that he was fired (Tr. at 364-65; GC Exh. 39).

Respondent never asked Roscoe about the allegations against him, nor did it conduct any additional investigation beyond that already mentioned (ALJD at 17). Its explanation for why it did not do so is a demonstrable fabrication. Respondent asserted that "[s]ince Roscoe was not permitted by PES to be on their property, Watco did not have any opportunity to question Roscoe in person or to inform Roscoe of his termination in person in the presence of a Human Resources representative as it had with Peters" (R. Br. 36). First, Spiller never said PES banned Roscoe from their property; instead, he testified that someone from PES told someone from Respondent that it would suspend Roscoe's badge allowing him to access PES property "pending [Respondent's] outcome of what [Respondent's] decision was" (Tr. 676). Therefore, Spiller himself testified that PES was deferring to Respondent's judgment as to how to handle the situation, not insisting that Roscoe never enter the property again. Moreover, obviously, Respondent could have interviewed Roscoe about the accusations against him remotely, via phone, e-mail, text message, videochat, or any number of ways. Indeed, Beasley conducted

Respondent's entire investigation into Pettiford's complaints against Peters by phone and ostensibly relied on that phone investigation to fire him (Tr. at 569).

Respondent's lack of interest in learning the truth of what happened between Henderson and Roscoe and its demonstrably untrue assertions as to why it failed to conduct even a basically adequate investigation give rise to an inference that Respondent harbored an ulterior, unlawful motive for discharging Roscoe that it did not want to state openly. See, e.g., *Joseph Chevrolet, Inc.*, 343 NLRB 7, 17 (2004), *enfd. per curiam* 162 Fed.Appx. 541 (6th Cir. 2006).

In addition, as stated already, Respondent failed to discipline other employees who engaged in threats of violence against their colleagues but were not union leaders. Specifically, it took no discipline against Leroy Henderson himself for threatening violence against Peters via text on August 1, nor did it discipline or even bother to investigate Plotts for encouraging employees to assault Roscoe to retaliate against him for complaining about perceived unsafe conditions. Its disparate treatment of comparable accusations against Roscoe further demonstrates an ulterior motive for discharging him.¹²

The evidence therefore establishes the elements needed to prove that Roscoe's union activity was a motivating factor in his discharge.¹³

¹² Finally, as noted by the ALJ (ALJD at 17), the Respondent told Roscoe that it discharged him because he had received the two disciplinary warning on August 21 and the suspension from September 23 through October 6 (GC Exh. 39). For the reasons already discussed, these earlier disciplines were themselves discriminatorily motivated. Respondent's discharging Roscoe based on unlawfully issued prior discipline is an independent reason the discharge was unlawful. *Dynamics Corp.*, 296 NLRB 1252, 1254 (1989), *enfd.* 928 F.2d 609 (2nd Cir. 1991).

¹³ The General Counsel made his initial showing even under Chairman Miscimarra's view of *Wright Line*. See fn. 9, above.

2. Respondent's Affirmative Defense

As already explained, Respondent's perfunctory investigation of Roscoe's purported misconduct (including its failure to even ask Roscoe himself what happened), its disparate treatment of Roscoe's alleged misconduct relative to comparable misconduct by employees not active in the organizing drive, and the evident falsity of its explanation for the deficiencies in its investigation all combine to show that it did not truly rely on Roscoe's alleged misconduct in firing him. Therefore, by definition, Respondent cannot establish the affirmative defense that it did rely on that misconduct. *Golden State*, 340 NLRB at 385; see also *Metropolitan*, 351 NLRB at 659.

V. CONCLUSION

For the foregoing reasons, Respondent's exceptions to the ALJ's decision are without merit. The General Counsel therefore respectfully requests that Respondent's exceptions be rejected in their entirety.

Respectfully submitted,

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Dated: June 14, 2017

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WATCO TRANSLOADING, LLC,)	
)	Cases 04-CA-136562
)	04-CA-137372
and)	04-CA-138060
)	04-CA-141264
)	04-CA-141614
UNITED STEEL, PAPER AND FORESTRY,)	
RUBBER, MANUFACTURING, ENERGY,)	
ALLIED INDUSTRIAL AND SERVICE)	
WORKERS INTERNATIONAL UNION,)	
AFL-CIO, CLC (LOCAL) USW 10-1)	
)	
and)	
)	
)	
DENNIS ROSCOE, An Individual)	04-CA-138265
)	

**CHARGING PARTY UNITED STEEL, PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION, AFL-CIO LOCAL 10-1'S
ANSWERING BRIEF IN OPPOSITION TO RESPONDENT'S EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S DECISION**

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June 14, 2017

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I. INTRODUCTION

Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO Local 10-1 (“Union” or “USW”), by its undersigned counsel and pursuant to Rule 102.46 of the National Labor Relation Board (“NLRB” or “Board”), files this Response in Opposition to Watco Transloading, LLC’s (“Watco” or “Company”) Exceptions to the Administrative Law Judge’s Decision (“ALJD”). The Administrative Law Judge (“ALJ”) correctly found that the Company violated Section 8(a)(1) and (3) of the National Labor Relations Act (“Act”) when it discharged both of the employees who were leading union organizing efforts, when it promised employees a pay raise and appropriate gear after the Union filed for an election, and when it began providing free meals on a weekly basis after the union campaign began.

The Company’s exceptions are largely based on the ALJ’s credibility resolutions, which are adequately explained and supported by the record; the Company’s credibility, however, is greatly impacted by the objective fact that it terminated one leading union supporter five days after he engaged in open union activity, and suspended a second for a lengthy period that included the election. All of the Company’s exceptions, moreover, involve a misstatement of the ALJ’s reasoning, as well as the relevant facts and law, and the Board should therefore uphold the ALJD.

II. STATEMENT OF FACTS

A. **The Company begins operations at the Philadelphia Energy Solutions facility.**

The Company provides rail switching services for industrial customers. (ALJD at 2, line 20.) In late 2013, the Company began preparing to service Philadelphia Energy Solutions (“PES”), a petroleum refinery located in Philadelphia, Pennsylvania. (ALJD at 2, lines 21-22.)

The Company hired John D. Peters (“Peters”) as an Engineer on October 1, 2013. (Tr. at 127.) Peters was one of the Company’s first hires for the PES facility. On October 1, 2013, the Company also hired Brian Spiller (“Spiller”) as the Terminal Manager for the facility and David Gordon (“Gordon”) as a Conductor.¹ (Tr. at 104, 645). The Company officially began operations at the PES facility on October 17, 2013. The Company subsequently hired Dennis Roscoe (“Roscoe”), as a Carman, on April 8, 2014.² (Tr. at 272.)

The Company is responsible for operating, inspecting, and repairing CSX trains, which consist of 100-120 cars loaded with crude oil, once these trains arrive at the PES facility. (ALJD at 2, lines 34-36; Tr. at 536.) A Company crew consisting of an Engineer, a Conductor, and a Switchman (or Brakeman) operate the train and drive it to the appropriate track. (ALJD at 2, lines 36-37; Tr. at 536.) The crew must then disconnect the cars from the locomotive and lock out the tracks. (ALJD at 2, lines 39-41; Tr. at 537-538.) A supervisor is responsible for “blue flagging” the tracks, a process that indicates to the rest of the employees that the tracks are locked out and safe. (ALJD at 2, lines 40-41; Tr. at 539.) The process of operating the train, disconnecting the cars, and locking out and blue-flagging the tracks usually takes 3 ½ hours. (ALJD at 2, line 41; Tr. at 540.)

Once the supervisor has blue-flagged the tracks, he or she posts the associated paperwork in the employee trailer and also writes the train information on a whiteboard, notifying the employees waiting in the employee trailer that a train has been “spotted.” (ALJD 2, line 42-43; Tr. at 541-542.) At that point, the Carmen leave the employee trailer to inspect the train cars and make minor repairs. (ALJD at 2, line 43-44; Tr. 542). A Carman cannot leave to inspect the train

¹ The Company promoted Gordon to Shift Supervisor in May 2014 and terminated him on November 14, 2014.

² All following dates are 2014 unless otherwise noted.

until he has the appropriate paperwork. (Tr. at 543). The Carmen routinely wait inside the employee trailer until a train has been spotted. (Tr. at 541, 697.)

B. Spiller tells Gordon to “keep his ear to the ground” for union activity and Peters and Roscoe independently contact a union for the first time.

In May, the Company promoted Gordon from Conductor to Shift Supervisor. (Tr. at 104, 105-106). Shortly after his promotion, Spiller told Gordon that “there was union talk,” to “keep [his] ear to the ground,” and to share his negative opinion on unions with the hourly employees. (ALJD at 4, lines 3-7; Tr. at 108-109). Spiller also told Gordon that Peters was the “ring leader.” (ALJD at 4, line 5; Tr. at 107).

In June and July, both Peters and Roscoe contacted the United Transportation Union (“UTU”). (ALJD at 3, lines 38-39; Tr. 130). Peters and Roscoe contacted the UTU independently, without each other’s knowledge. (ALJD at 3, lines 38-39; Tr. 130). Both men had also spoken to their fellow hourly employees about unionization. (ALJD at 3, lines 40-41; Tr. at 193, 455).

C. Roscoe sends a racial discrimination complaint to the Company.

On July 29, Roscoe, who is African-American, hand-delivered a letter to Spiller addressing “the unfavorable and discriminatory hiring practices and promotions taking place at the Philadelphia Terminal of Watco.” (GC Ex. 21). Specifically, Roscoe protested the Company’s decision, in mid-May, to promote a white Carman, Mike Onuskanych (“Onuskanych”) to Lead Carman. (ALJD at 4, lines 15-22; Tr. at 657-658). This position did not previously exist and the Company did not advertise the new position. (ALJD at 4, line 22; Tr. 658). Therefore, Roscoe complained that the Company promoted Onuskanych without allowing the African-American Carmen, Roscoe, Carl Pinder (“Pinder”) and Kim Bronson (“Bronson”), an opportunity to apply for the new position. (GC Ex. 21.). Roscoe also protested

that Onuskanych's sons, Joe Onuskanych ("J. Onuskanych") and Kevin Onuskanych ("K. Onuskanych") were hired for the same position and pay as Roscoe, Pinder, and Bronson, despite having less work experience, formal training, and certification. (*Id.*).

Roscoe also emailed his letter to Brooke Beasley ("Beasley"), the Company's Human Resources³ Manager, who worked at the Company's headquarters in Pittsburg, Kansas. (ALJD at 3, lines 9-11 and 4, lines 37-38; Tr. at 274, 563, 565). Beasley never responded. (ALJD at 4, lines 36-39; Tr. at 274).

On July 30, Spiller called Roscoe, Pinder, and Bronson to a meeting in the supervisor trailer. (ALJD at 4, lines 31-34; Tr. at 274). Spiller told the men that promotions were within management's prerogative and that he did not have to post new positions. (ALJD at 4, 34-35; Tr. at 274). A few days after the meeting, Spiller called Beasley and informed her of Roscoe, Pinder, and Bronson's concerns. (ALJD at 4, lines 36-37; Tr. at 584).⁴

D. Spiller speaks with Gordon again about potential unionization and Gordon expresses his anti-union views to Peters.

In early August, Spiller had another conversation with Gordon about unionization. (ALJD at 4, line 7; Tr. at 109). Spiller repeated that Peters was the ringleader of any union activity at the Company. (ALJD at 4, line 7; Tr. at 109). Around the same time, Peters asked Gordon for his opinion of unions. (ALJD at 4, lines 8-10; Tr. at 109). Gordon told Peters that "having a union wasn't the best." (ALJD at 4, lines 9-10; Tr. at 110). Gordon also had first-hand knowledge that Peters was pro-union because Peters was vocal about his feelings. (ALJD at 4, lines 9-10; Tr. at 109-110).

³ The Company refers to its Human Resources Department as "People Services."

⁴ On October 6, Roscoe filed a complaint with the Equal Employment Opportunity Commission over the same issue (GC Ex. 36).

E. Peters complains to the Company about threatening text messages he received from his coworker Leroy Henderson and the Company does not investigate or discipline Henderson.

On August 1, Leroy Henderson (“Henderson”), an Engineer for the Company, called off sick. (ALJD at 5, lines 3-4; Tr. at 173). Henderson was scheduled to relieve Peters on that day. (ALJD at 5, line 3; Tr. at 173). Peters called Henderson and told him to come to work because Peters could not work 24 hours in a row (all hourly employees work 12-hour shifts). (ALJD at 5, lines 4-5; Tr. at 253). Henderson then sent Peters a series of offensive text messages:

By the way i [sic] got fired from the CXST⁵ due to me being a stand up guy and not bending over and if you really want to know i [sic] got fired for the lack of being represented fairly . . . You fucked me out of the job with SMS RAILROAD⁶ and now you fucked another guy out of a job with Watco⁷ because you [sic] running your FUCKING mouth. Why don’t you just go and sit the hell down some fucking where and enjoy the rest of your fucking life instead of trying to be so fucking involved all of the time. And I know that you where [sic] the mother fucking reason that i [sic] didn’t get the job with the SMS RAILROAD. SHUT THE FUCK UP AND MIND YOUR OWN FUCKING BUSINESS. better [sic] yet go and bury you [sic] fucking head under a fucking rock. You fucking drunk. Your [sic] a fucked up dude. How the hell do you bad mouth another guy when your [sic] fucked up just like the next guy. I [sic] shocked that know [sic] one has punched you the fuck out. Fuck you John Peters and go the fuck to hell . . .

(ALJD at 5; lines 5-6; Tr. at 173; GC Ex. 20, all caps in the original). Henderson did eventually show up for his shift, but he was visibly intoxicated and immediately set up a bed in the tool room. (ALJD at 5, line 9; GC Ex. 19). Peters showed his phone with the text messages to Gary Plotts (“Plotts”), the Shift Supervisor on duty. (ALJD at 5, lines 6-7; Tr. at 175). Plotts attempted to meet with Henderson but Henderson refused. (ALJD at 5, lines 8-10; GC Ex. 19).

⁵ CXST is a railroad company where both Henderson and Peters worked prior to working for the Company. (Tr. at 260, 261).

⁶ Prior to working for the Company, Henderson applied for a job at SMS Railroad. The Superintendent of SMS Railroad asked Peters for his opinion on Henderson, and Peters told the Superintendent that Henderson was fired from his previous job at CSXT for insubordination. (Tr. at 261).

⁷ Peterson believed that Henderson was angry at him for not recommending Henderson’s friend to a position with the Company. (Tr. 262; GC Ex. 19).

The next day, Peters sent Spiller, who was on vacation, an email about the text messages and asked Spiller to speak with Henderson. (ALJD at 5, lines 11-12; Tr. at 175; GC Ex. 19). Peters stated: “I believe these messages are against WATCO company policy [not] to threaten, intimidate, and harass another team member. At this point I am requesting you to speak to Mr. Henderson to cease such behavior which subjects me to great concern.” (GC Ex. 19). Spiller never responded. (ALJD at 5, 17; Tr. at 175). Approximately a week later, Peters sent both Spiller and Beasley copies of the text messages. (ALJD at 5, line 23; Tr. at 175). No one from the Company responded to Peters.

Spiller later testified that he did not think Henderson’s texts were inappropriate or threatening. (ALJD at 5, lines 30-31; Tr. at 687). Specifically, Spiller testified that he did not know what Henderson meant when he texted that he was fired for “not bending over.” (Tr. at 687). Spiller stated that he did not consider this remark to constitute sexual harassment or sexual innuendo (Tr. at 687). Spiller testified further that while it was not unusual for Company employees to use crude language, he drew the line “when someone finds it so offensive that they ultimately complain to a Supervisor, Manager, or Human Resources.” (Tr. at 710).

Spiller acknowledged that he received the copies of the text messages, and testified that he spoke with Peters and Henderson separately when he returned from vacation. (ALJD at 5, lines 17-18; Tr. at 653). Spiller felt that the “situation had essentially diffused itself” and took no further action, apart from informing Beasley of the “disagreement” between the two men. (Tr. at 607, 653). Peters never informed Spiller or Beasley that he was satisfied with the Company’s response. (ALJD at 5, lines 20-21). The Company did not conduct any type of investigation or discipline Henderson. (ALJD at 5, lines 27-28; Tr. at 689).

F. Employee Curtis Pettiford emails Human Resources, complaining that Peters repeatedly called him a faggot. Beasley immediately conducts an investigation but the Company holds off on disciplining Peters.

On August 4, employee Curtis Pettiford (“Pettiford”) emailed Beasley and Nathan Henderson⁸ (“N. Henderson”), Director of Operations, stating that Peters repeatedly called Pettiford a faggot, to his face and with coworkers. (ALJD at 5, lines 39-41; Tr. at 566; Resp. Ex. 2). Pettiford attached an incident report to his email in which he described his complaint in detail:

This has been going on for some time now, John Peters has repeatedly been referring to me and/or Calling [sic] me and I quote “A Faggot”. This last time on Friday went overboard. I am feed-up [sic] with the Name [sic] calling and the fact he is calling me this to everyone. I have asked him to stop and now The [sic] name calling has gotten worse. I received a call from a co-worker this weekend who stated John was on duty fiercely talking about me and calling me homosexual names. This is to stop today. I and several of the crew members were in the break room. Everyone was engaged in a conversation (something about the railroad, I was not really paying much attention) when all of a sudden John Peters points at me saying, “That guy is a faggot”, this got my attention. We had a heated exchange of words. I told him not to call me a faggot anymore, I did not like it.

(Resp. Ex. 3). Pettiford identified employee Jim Clyde (“Clyde”), Onuskanych, J. Onuskanych, and K. Onuskanych as witnesses. Pettiford requested that the Company transfer him to another facility. Beasley testified that she received Pettiford’s email and the attachment. (Tr. at 566).

Beasley immediately began investigating Pettiford’s complaint. (ALJD at 5, lines 43-44; Tr. at 569). She spoke with Pettiford on the phone that same day. (ALJD at 5, lines 44-45; Tr. at 571). Pettiford said that Peters had begun harassing him in 2013, and identified employees Bronson, Roscoe, Greg Baranyay (“Baranyay”), Henderson, Pinder, and David Shertel (“Shertel”) as additional witnesses. (ALJD at 5-6, lines 45, 1-2; Resp. Ex. 4). Beasley also spoke

⁸ No relation to employee Leroy Henderson.

to Henderson⁹ that day, who stated that he had heard Peters refer to Pettiford as gay when Pettiford was not present.¹⁰ (Resp. Ex. 4). Henderson did not provide a time frame or additional witnesses, and Beasley did not ask. (Tr. 601-602). On August 4, the Company also took steps to ensure that Pettiford and Peters did not work the same shift.¹¹ (Tr. at 575).

The following day, Beasley spoke to Bronson, Roscoe, and Baranyay individually on the phone. Bronson stated that he had never witnessed any offensive or derogatory name calling between Peters and Pettiford. (Resp. Ex. 4). Roscoe stated that he had no knowledge of Pettiford's accusations. (*Id.*). Baranyay said that Peters had called Pettiford gay in a joking manner, and that the last incident was at least two months prior. (*Id.*). Baranyay also stated that Peters joked around with him (Baranyay) about going to gay bars. (*Id.*).

Beasley also called Peters on August 5. (*Id.*). Peters denied Pettiford's accusations, but admitted that he joked around with Baranyay and employee Lou Gentile ("Gentile) about going to gay bars. (ALJD at 6, lines 31-33; Resp. Ex. 4). Beasley testified that she suspended her investigation on that day because Spiller was on vacation. (ALJD at 6, lines 34-35; Tr. at 572). She did, however, share her report with her superiors N. Henderson and Sofrona Howard ("Howard"), Director of Human Resources. (ALJD at 6, lines 35-37; Tr. at 572). N. Henderson had the authority to terminate Peters without Spiller's input. (ALJD at 6, lines 36-37).

⁹ Beasley took notes as she spoke to Pettiford and the witnesses, and eventually compiled an investigation report. (Tr. at 569; Resp. Ex. 4).

¹⁰ Beasley testified that she was not aware of the complaint Peters made against Henderson two days before. She did acknowledge that Spiller told her about a "disagreement" between the two men, although the date of the conversation between Beasley and Spiller is not clear from the record. (Tr. at 606-607).

¹¹ According to Peters' testimony, Peters and Pettiford did not currently work the same shift and had not worked the same shift since March 2014. (Tr. at 162). No witness contradicted Peters on this point.

G. Roscoe complains to his supervisor, Spiller, and Beasley that supervisors and employees are smoking in non-designated areas.

On August 6, Roscoe informed Plotts that he had observed Shift Supervisor Joe Ryder (“Ryder”) and Onuskanych smoking in a non-designated area. (ALJD at 7, lines 14-15; Tr. at 274). Roscoe suggested that Plotts post a memo reminding employees and supervisors to smoke in the designated hut. (ALJD at 7, lines 20-21; Tr. at 274). Roscoe also informed the PES Safety Coordinator and reported the smoking issue on the Company website. (ALJD at 7, lines 24-27; Tr. at 275-276). The PES Safety Coordinator told Roscoe that he would speak to Spiller about the smoking situation. (ALJD at 7, line 26; Tr. at 276).

Shortly after Roscoe spoke to Plotts and the PES Safety Coordinator, he observed Ryder smoking in a non-designated area again. (ALJD at 7, lines 14-15; Tr. at 275). Roscoe told Ryder that he should only smoke in the smoking hut. (ALJD at 7, lines 14-15; Tr. at 275). Ryder responded that he was the boss, and who was Roscoe to tell him what to do. (ALJD at 7, line 16; Tr. at 276).

On August 13, Roscoe sent Spiller an email stating that “[t]he policy of smoking in non-designated areas is being violated by smoking employees and putting workers’ and management’s lives at risk.” (GC Ex. 22). Roscoe offered to “provide the names of these employees in person.” (*Id.*)¹²

H. Roscoe waits until a train is spotted before leaving the employee trailer to begin inspecting the train and works past the ending time of his shift to complete a repair and paperwork.

On August 15, two days after sending the email about the smoking situation to Spiller, Roscoe worked a 6am to 6pm shift. Spiller observed Roscoe sitting in the employee trailer. (Tr. at 665). Spiller testified that a train had been spotted for several hours at the point he

¹² On September 4, Roscoe filed a complaint with OSHA over the smoking issue. The Company received the complaint on the same day. OSHA ultimately dismissed the complaint. (GC Ex. 28).

observed Roscoe. (*Id.*). Roscoe testified that the train was spotted at 1pm, and he left the employee trailer immediately after to inspect the train. (*Id.* at 429). Roscoe testified further that while the train may have arrived earlier, he must wait for the crew to disconnect the train and lock out the tracks. (*Id.* at 430). As explained above, Carmen routinely wait in the employee trailer until a supervisor has blue-flagged the tracks and handed the Carman on duty the necessary paperwork. (*Id.* at 431, 697). Per company policy, Roscoe left his cell phone in the employee trailer when he left to go work on the train. (*Id.* at 435). The ALJ credited Roscoe's testimony.

Towards the end of his shift, Roscoe noted that several knuckle pins were broken. (*Id.* at 281). Roscoe was briefing the night crew on the repairs when Ryder, who was Roscoe's Shift Supervisor that day, tried to call and text him. (*Id.* at 282). Ryder then called Roscoe over the walkie-talkie and told him to come to the supervisor trailer. (*Id.*). Roscoe went to the supervisor trailer and Ryder told Roscoe to go home as his replacement had arrived. (*Id.* at 283). Roscoe explained that he had to brief the incoming crew on the repair and complete his paperwork. (*Id.* at 284). Supervisors do not generally send employees home if paperwork or repairs are not completed, and employees do not have to request overtime in advance to cover these situations.¹³ (ALJD at 14, lines 12-16; Tr. at 284). Ryder agreed that Roscoe could stay. (Tr. at 284). Roscoe worked about an hour of overtime, signed out, and stayed an additional hour and a half to change and clean up. (ALJD at 14, lines 9-13; Tr. at 284).

¹³ The General Counsel introduced evidence that Roscoe worked an hour of overtime on July 28 without permission and received no discipline. (Tr. at 285; GC Ex. 24). That same time sheet, which covers the period of July 26 to August 1 demonstrates that Pinder, Pettiford, Horne, Shertel, Peters, Bronson, Henderson, and Salmond all worked a few hours of overtime that week.

I. Roscoe emails Beasley voicing his concern that supervisors and employees are violating the Company's smoking policy and that management is retaliating against him.

On August 17, Roscoe emailed Beasley, informing her about the violations of the Company's smoking policy. (Tr. at 586; GC Ex.23). Roscoe told her that "[e]mployees still continue to smoke in non-smoking areas . . . As a result of me voicing my concern, I feel that management has retaliated against me since I am not management, but only a worker." (GC Ex. 23). Beasley responded, thanking Roscoe for bringing the matter to her attention and asking for more information on retaliation. (Tr. at 586). Roscoe did not respond. (*Id.*). On August 20, Beasley emailed Roscoe and told him that Spiller would handle the smoking situation. (*Id.*).

J. Spiller, Beasley, Howard, and N. Henderson have a phone call to discuss Pettiford's complaint against Peters.

On August 19, two weeks after Pettiford sent his complaint to management, Spiller, Beasley, Howard, and N. Henderson held a conference call to discuss Beasley's investigation of Pettiford's accusation against Peters. (ALJD at 7, lines 1-3). Spiller, Beasley, and Howard¹⁴ testified that they decided to terminate Peters' employment on this call. (Tr. at 574-575, 619, 651). They also testified that they decided Beasley, as a representative of Human Resources, should be present at the termination. There is no documentation, such as notes or follow up emails, to support the Company's representatives' testimony. (ALJD at 7, lines 6-10). Beasley booked her flight to Philadelphia on the morning of August 21. (Resp. Ex. 6).

K. Ryder issues two written warnings to Roscoe based on the events of August 15.

On August 21, Shift Supervisor Ryder handed Roscoe two written warnings. (ALJD at 14, line 7; Tr. at 669). Spiller testified that he made the decision to discipline Roscoe and prepared the written warnings. (Tr. at 671). The Company issued the first warning for quality of

¹⁴ N. Henderson did not testify at the hearing.

work, claiming that Roscoe did not leave to begin his inspection and repairs of the train until two hours after the train had been spotted. (GC Ex. 26). The Company issued the second warning for insubordination, alleging that Roscoe claimed overtime to which he was not entitled. (GC Ex. 25). This is the first time that the Company had ever disciplined Roscoe. (Tr. at 708).

L. Peters and Roscoe contact the USW for the first time and openly distribute union authorization cards in the parking lot.

On their break on August 21, Peters and Roscoe had a conversation about unionization in the employee trailer. (ALJD at 8, lines 14-15; Tr. at 129, 326). Specifically, Peters discussed an article he had read about an election that the Union had recently won. (Tr. at 130). Peters sent a message to the Union on their website. (ALJD at 8, lines 15-17; Tr. at 93, 131). James Savage (“Savage”), the Union’s President, Nancy Minor (“Minor”), the Union’s Vice-President, and Charley Wilson (“Wilson”), the Union’s Grievance Committee Chair, called Peters a few hours later. (Tr. at 93, 131). Savage, Minor, Wilson, and Peters agreed that the Union representatives would come to the Company’s parking lot around 5:30pm to speak to interested employees as the shifts changed. (ALJD at 8, lines 22-23; Tr. at 133).

The Union representatives met with about 12 employees, including Peters and Roscoe. (ALJD at 8, lines 26-27; Tr. at 135). Savage spoke about the benefits of unionization and passed out union authorization cards. (Tr. at 75, 135-136). Roscoe stood on top of concrete barrier blocks in the parking lot and gave a speech about why the employees needed a union, based on his prior experience as a union member. (Tr. at 329). Roscoe spoke for about a minute. (*Id.*). Several employees signed cards, including Peters and Roscoe. (ALJD at 8, line 26; Tr. at 328). At least two supervisors witnessed the employees meeting with union representatives as they walked through the parking lot to their cars. (ALJD at 8, lines 27-29; Tr. at 110, 135). These supervisors reported the union meeting to Spiller. (ALJD at 8, lines 27-29, fn. 7; Tr. at 655).

Savage gave Peters and Roscoe blank cards to continue distributing. (Tr. at 96, 136, 328). Peters and Roscoe openly distributed the cards to their fellow employees in the parking lot over the next few days. (Tr. at 138, 329, 460).

M. The Company terminates Peters five days after the employees met with the Union in the Company parking lot.

Beasley arrived in Philadelphia on the night of August 25. (ALJD at 8, lines 31-32). She testified that Spiller and N. Henderson informed her of the employees' union activity during a layover earlier that evening. (ALJD at 8, lines 32-33; Tr. at 587). Spiller picked Beasley up the next day and drove her to the PES facility. (ALJD at 8, lines 33-34; Tr. 656.)

Soon after Peters reported to work on August 26, he was summoned to the supervisor trailer to meet with Beasley and Spiller. (ALJD at 8, lines 35-36; Tr. at 143). Spiller read from a termination letter. (Tr. at 144; GC Ex. 12). The letter, signed by Spiller, stated “[f]ollowing sexual harassment allegations and a thorough investigation, we have found you to be in violation of the [sexual harassment and team members conduct and discipline] policies . . . Based on this serious rules violation, you are hereby assessed the following termination of employment.” (GC Ex. 12). This was the first time the Company had ever disciplined Peters. (Tr. at 169).

Peters questioned what a “thorough investigation” meant, requested a copy of the complaint, and signed his termination letter stating he would appeal the decision. (Tr. at 145-146). Beasley responded that he had the right to appeal but did not give him a copy of the investigation. (Tr. at 146-147). Employee Matt Horne (“Horne”) and Shift Supervisor Brandon Lockley (“Lockley”) observed Peters as he cleaned out his locker, and then transported Peters to the front gate in a company truck where two plant security guards were waiting. (Tr. at 147). Peters filed his appeal that evening. (ALJD at 9, line 1; Tr. at 149).

As a result of Peters' appeal, Beasley reopened her investigation. (ALJD at 9, lines 1-3; Tr. at 582). Beasley interviewed Pinder, Shertel, Onuskanych, K. Onuskanych, and J. Onuskanych. (Resp. Ex. 4). Shertel stated that he witnessed Peters call Pettiford gay on one occasion "some time ago." (*Id.*) Onuskanych stated that he witnessed Peters call Pettiford gay in a joking manner one or two times "months ago." (*Id.*) Onuskanych never witnessed Pettiford asking Peters to stop. (*Id.*) Pinder, K. Onuskanych, and J. Onuskanych all denied any knowledge of Pettiford's accusation. (*Id.*)

N. The Union files a petition for a representation election and the Company denies Peters' appeal.

On September 2, the Union filed a petition for a representation election at the Company's PES facility. (GC Ex. 4). Savage sent a letter to Spiller on the same day, requesting that the Company recognize the Union. Also on September 2, N. Henderson and Chris Spear ("Spear"), the Vice President of Human Resources, sent Peters a letter, denying Peters' appeal.

O. Spiller meets with employees twice and solicits grievances, tells employee he will try and get them a raise, and promises to provide employees with rain and winter gear. The Company begins to provide the employees weekly lunches.

Spiller met with employees twice in the employee trailer in early September. (ALJD at 12, lines 26-30; Tr. at 75, 77). At the first meeting, in which Horne, Salmond, and Baranyay were present, Spiller asked the employees for their "gripes" and asked why they wanted a union. (ALJD at 12, lines 31-32; Tr. at 76). The employees identified health benefits, sick and vacation time, internal promotions, and wages as issues. (ALJD at 12, lines 32-33; Tr. at 77). Spiller responded that he would try and obtain a \$2-3 raise for the employees.

On September 11, 2014, The Union and the Company stipulated that the election will be held on October 3 and 4. (ALJD at 12, lines 23-25; GC Ex. 8). On September 16 or 17, Spiller met with employees again in the employee trailer. (Tr. at 77-78). Horne, Onuskanych, J.

Onuskanych, K. Onuskanych, Salmond, Gentile, Baranyay, and Shift Supervisor Lockley were all present. (Tr. at 78). Spiller asked the employees to fill out their sizes to receive rain gear and boot slippers. (ALJD at 12, lines 35-37; Tr. at 78). The employees asked about winter gear and Spiller responded that he would attempt to obtain winter hats and gloves for them as well. (ALJD at 12, lines 36-37; Tr. at 78-79). Again, Spiller asked employees for their “gripes.” (ALJD at 12, line 31; Tr. at 79). The employees responded that wages, health care, sick and vacation time, internal promotions, and supervisor behavior were all issues. (ALJD at 12, lines 31-32; Tr. at 79-80). Spiller responded that he would do his best to look into these issues. (Tr. at 81).

In addition to Spiller’s meetings with employees, the Company began to provide the employees with weekly lunches after the union campaign began. (ALJD at 13, lines 28-29; Tr. at 82). Prior to the commencement of the union campaign, the Company had only provided the employees with a free lunch one or two times. (ALJD at 13, lines 26-27; Tr. at 82).

P. The Company sends Roscoe home and then suspends him for a two-week period that includes the election. The Union loses the election.

On September 23, Roscoe had a confrontation with J. Onuskanych in the employee trailer. (ALJD at 14, line 30-31; Tr. at 615). J. Onuskanych was not scheduled to work that day, but came in for overtime hours. (ALJD at 14, lines 30-31, Tr. at 339). Roscoe questioned why J. Onuskanych was at work and said the only reason J. Onuskanych and his brother, K. Onuskanych, had jobs with the Company was because their father was Lead Carman. (ALJD at 14, lines, 35-36; Tr. at 615). J. Onuskanych claimed that Roscoe also made an obscene gesture. (ALJD at 15, lines 13-14; Tr. at 672).

Shift Supervisor Lockley entered the trailer and Roscoe asked him when Human Resources opened. (ALJD at 14, lines 39-40; Tr. at 339). Lockley responded that he was tired of Roscoe disrupting daily operations and that Roscoe should go do his job. (ALJD at 14, 40-41; Tr.

at 340). Roscoe stated that he had spoken to Spiller earlier, and that Spiller told Roscoe that he could wait 10 minutes for Spiller to arrive so that Roscoe could give him a statement pertaining to another issue.¹⁵ (ALJD at 14, lines 42-43; Tr. 341).

Spiller testified that Lockley called him and reported the dispute between Roscoe and J. Onuskanych. (Tr. at 671). Spiller spoke with N. Henderson and Howard, and Howard advised Spiller to send Roscoe home. (ALJD at 14, lines 45-47; Tr. at 621, 673). Howard also told Spiller to obtain statements from witnesses. (ALJD at 15, line 1; Tr. at 622). Spiller did send Roscoe home and collected witness statements from Peters, Jr., Lockley, Onuskanych, J. Onuskanych, and Horne. (Tr. at 622; Resp. Ex. 10, 11, 13, 14, and 15).

J. Onuskanych claimed that Roscoe said “the only reason I got this job is because of my dad and he was [a] dicksucker in the form of hand and mouth gestures.” (Resp. Ex. 11). The only witness statement that corroborates J. Onuskanych’s claim is his father’s statement: “Denise [sic] Roscoe make [sic] a remark in front of our coworkers, that the only reason Joe Onuskanych and Kevin Onuskanych are employed by Watco, because Mike Onuskanych sucks management’s dick and stood there and made that motion of sucking dick in front of my coworkers.” (Resp. Ex. 14). Horne stated, in contrast, that “Rossco [sic] asked Joe O. another question and Joe O. went on the offensive. A petty discussion occurred. Joe O. told rossco [sic] he did know how to do any of his jobs . . .” (Resp. Ex. 15). Peters Jr. stated: “Carman Roscoe and Flagman Joe were

¹⁵ Roscoe wanted to give Spiller a statement from Pinder, which included the following allegation:

Plotts . . . stated that our jobs were in jeopardy because “Roscoe” had called OSHA with a complaint. Mr. Plotts stated that the employees “should take [Roscoe] out behind the trailer and do something about it.”

(GC Ex. 31, brackets in the original). Roscoe testified that he handed the statement to Spiller when he arrived at the employee trailer, and that Spiller looked “real angry”, left, and went to the supervisor trailer. Lockley called Roscoe to the supervisor trailer for a meeting shortly thereafter. (Tr. at 344-345).

engaging in a petty argument . . . At first it seemed like non hostile ‘ball busting’ but it soon escalated into a loud, insane argument . . . Overall, it was a pointless argument mainly started by Roscoe, however he is not to blame mainly for this incident Joe immediately retorted to all of Roscoe’s comments.” (Resp. Ex. 10). Peters, Jr. was the only witness to testify to this incident at the hearing.¹⁶ Peters, Jr. did not recall Roscoe making any obscene gestures. (Tr. at 615).

Howard received the statements from Spiller and decided to conduct an investigation. (Tr. at 622). She arrived at the Company’s PES facility on September 25 and interviewed J. Onuskanych, Lockley, Onuskanych, Horne, Baranyay, and Roscoe. (ALJD at 15, lines 4-5; Tr. at 628). Again, the only person who confirmed J. Onuskanych’s claim was his father. (Resp. Ex. 8). Lockley claimed that Roscoe was insubordinate when he told him to go to work and that “[a]ll team members present were looking perplexed at [Roscoe’s] escalated behavior. Matt [Horne] even tried to pull me aside, I believe in an attempt to end Roscoe’s behavior.” (*Id.*). However, Horne remembered that “Brandon [Lockley] came in and Roscoe asked him for paperwork,” Lockley told Roscoe he was going to send him home, and “[n]othing” happened after that. (*Id.*). Horne further stated that “. . .Roscoe asked Joe why he was there. Joe took it wrong. They started arguing.” (*Id.*). Baranyay corroborated Horne’s statement: “It was not a big deal. Roscoe asked why Joe was there and Joe got mad about it.” (*Id.*)

Based on the results of the investigation, the Company decided to officially suspend Roscoe. (Tr. at 629). On October 1, Beasley sent Roscoe an email requesting that he meet with Spiller and N. Henderson the following day. (GC Ex. 33; Tr. at 349). On October 2, the day before the representation election, Roscoe met with management. (ALJD at 15, line 28-29; Tr. at 349). Spiller handed him a letter giving Roscoe a final warning and placing him on a 14-day

¹⁶ Onuskanych, J. Onuskanych, and Lockley did not testify at all. Horne was not asked about this incident.

unpaid suspension for violating the Company's Employee Conduct and Discipline Policy and the Sexual Harassment Policy. (GC Ex. 34). The Company suspended Roscoe from September 23, 2014¹⁷ to October 6, 2014, a two-week period that included the representation election.

The election was held on October 3 and 4, 2014. (ALJD at 14, line 27; GC Ex. 9). Roscoe was allowed to vote. (Tr. at 363). Thirteen employees voted against union representation, and seven employees voted in favor. (GC Ex. 9).

Q. The Company terminates Roscoe for allegedly engaging in an incident with Henderson. The Company does not conduct an investigation.

Roscoe returned to work on October 7. (ALJD at 15, lines 37-38). On October 9, Henderson called N. Henderson and Howard, claiming that Roscoe had pulled his car even with Henderson's and made threatening remarks. (ALJD at 15, lines 40-43; Tr. at 675). N. Henderson informed Spiller, who asked Henderson and Henderson's passenger, Sabrina Harris ("Harris") to write statements. (Tr. at 676; Resp. Ex. 16, 17). In Henderson's statement, he said that he also informed Lockley of the situation and Lockley met Henderson at the plant entrance after the incident. (Resp. Ex. 16). The Company conducted no further investigation.

The next day, Spiller and Henderson consulted an attorney and decided to terminate Roscoe. (ALJD at 15, lines 42-43; Tr. at 677). Spiller sent Roscoe a termination letter by email on October 11, 2014. (ALJD at 15, lines 43-44; GC Ex. 39). Spiller later testified that the Company had no prior issues with Roscoe and that management "felt the underlying reason [for Roscoe's alleged disciplinary issues] was based on the union activity that was currently going on." (Tr. at 709).

¹⁷ The Company initially sent Roscoe home on September 23, 2014 before conducting its investigation, so the suspension began on that date. Roscoe did not report to work during the two week period except for the October 2 meeting and to vote in the election.

III. STANDARD OF REVIEW

Although the Board reviews the entire record, *Standard Dry Wall Prods., Inc.*, 91 NLRB 544, 545 (1950), *enf'd* 188 F.2d 362 (3rd Cir. 1951), it is a basic principle that the Board will not second-guess the ALJ's credibility findings. 91 NLRB at 545. The ALJ, unlike the Board, has the superior advantage of hearing testimony and observing witnesses. *Id.* For that reason, the Board's longstanding policy is to attach "great weight" to the ALJ's credibility findings when they are based on demeanor. *Id.* Such findings should not be overturned unless the Board is convinced, by a "clear preponderance of all the relevant evidence," that they are incorrect. *Overnite Transp. Co.*, 336 NLRB 387, 388 (2001) (citing *Standard Dry Wall Prods., Inc.*, 91 NLRB at 545).

IV. ARGUMENT

A. **The ALJ reached proper credibility determinations.**

As stated above and as the Company correctly recognizes, the Board "do[es] not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of *all* the relevant evidence convinces us that the Trial Examiner's resolution was incorrect." *Standard Dry Wall Prod., Inc.*, 91 NLRB 544, cite (1950), *enf'd* 188 F.2d 362 (3d Cir. 1951) (emphasis in original). The Company claims that the ALJ's credibility determinations failed to pass this low threshold, arguing that "[t]he ALJ provided no support for her [credibility] determinations and failed to explain why she resolved almost all of the credibility issues in favor of the General Counsel's witnesses." (Resp. Brief in Supp. of Excepts., at 11). As a threshold matter, the fact that the ALJ credited more witnesses of the General Counsel than Respondent does not establish

bias.¹⁸ *See Husky Oil Co.*, 217 NLRB 430 n.1 (1975) (stating that even crediting all of the General Counsel’s witnesses does not constitute a basis for finding bias) (citing *NLRB v. Pittsburgh S.S. Co.*, 337 U.S. 656, 659 (1949)).

More importantly, the Company’s assertion is incorrect. The ALJ’s decision did support and explain her credibility determinations. The ALJ made the following explicit credibility determinations. First, Gordon testified that Spiller told him as early as July 2014 to “keep his ear to the ground” for union talk among the employees and that Peters was the ringleader of unionization efforts. Spiller repeated these comments on 2 or 3 occasions, and asked Gordon to share his anti-union views with employees. The ALJ explicitly credited Gordon because Spiller never contradicted this testimony. (ALJD at 4, fn. 4). *See St. George Warehouse, Inc.*, 349 NLRB 870, 904 (2007) (Board upheld ALJ’s decision noting that Respondent’s witnesses did not contradict employee’s testimony).

Second, the ALJ did not credit Beasley, Howard, and Spiller’s testimony that they decided to terminate Peters on their August 19 call. (ALJD at 7, lines 9-10). The Company provided no evidence to support this assertion, apart from management representatives’ own testimony and an electronic invitation simply confirming that a call for “JP investigation discussion” took place. (ALJD at 10, lines 5-9; Resp. Ex. 5). The Company did not produce any documentation such as participants’ notes from the call, follow-up emails, or internal memoranda to support management’s testimony of the substance of the call. Nor did the witnesses explain

¹⁸ It is worth noting that the ALJ did not uniformly resolve credibility issues in favor of the General Counsel’s witnesses. Peters testified that Spiller told employees that the owner of the Company would shut the plant down in the event of unionization. (Tr. at 140). The ALJ credited Spiller’s denial of these comments because the other witnesses did not corroborate Peters. (ALJD at 11, lines 40-43). Similarly, the ALJ discredited Roscoe’s testimony that Spiller told Roscoe in a private meeting that he would pay Roscoe to throw away signed authorization cards and that management had discussed a raise for the employees. (ALJD at 12, lines 6-18).

why the Company did not produce documentation supporting their testimony. This lack of documentation, coupled with the suspicious timing of Peters' discharge, justifies the ALJ's credibility determination. *See Miramar Hotel Corp.*, 336 NLRB 1203, 1215 (2001) (“[A]n adverse inference may be drawn regarding the employer’s ‘real’ motive where the employer relies on ‘weak’ evidence . . . where the employer is in possession of stronger evidence which would either corroborate or contradict the testimonial claims, but which the employer nevertheless fails to introduce.”); *see also Int’l Protective Servs, Inc.*, 339 NLRB 701, 703 (2003) (Board upheld ALJ’s discrediting of “self-serving” testimony).

Third, the ALJ did not credit Spiller’s testimony that he first learned of the employees’ union activity on Monday, August 25. (ALJD at 8, fn. 7). As explained above, the ALJ credited Gordon who testified that Spiller spoke of Peters as the “ringleader” of organization efforts and asked Gordon to report any union activity as early as July. Therefore, at least one supervisor was aware that Spiller wanted to be notified of any organizing happening at the plant. Moreover, at least two supervisors witnessed the union meeting on August 21. It strains credulity that shift supervisors would wait four days to report open and notorious union activity, especially when the record demonstrates that shift supervisors would frequently call Spiller, sometimes at home, to report issues at work.¹⁹ Further, Spiller’s testimony is confusing. He stated that he first found out about the employees’ union activity on August 25 when a supervisor (Spiller stated that he did not remember which supervisor) told him about the union meeting “the night before” (Tr. at 655). Yet the Union’s meeting took place four days prior, on August 21.

¹⁹ For example, a supervisor called Spiller the same day to report the altercation between Roscoe and J. Onuskanych, and a supervisor called Spiller at home soon after Roscoe did not respond to his calls to return to the employee trailer. (Tr. at 667-668, 671).

Similarly, the ALJ did not credit Beasley's testimony that she first became aware of Peters' union activities on August 25. Again, Peters openly engaged in obvious union organizing at the first meeting in the parking lot and over the next several days, distributing cards and soliciting signatures. The record demonstrates that Spiller was in frequent contact with his superiors about issues at the plant; he certainly would have contacted them about an active union campaign as soon as a supervisor informed him. (Tr. at 589, 601, 621, 673).

Fourth, the ALJ credited Horne's testimony and discredited testimony contrary to Horne's. (ALJD at 11, fn. 13). Horne was the only witness who still worked for the Company. The testimony of current employees who are risking retaliation by testifying is "particularly reliable" and a "significant factor" because they are testifying adversely to their pecuniary interests. *Flexsteel Indus., Inc.*, 316 NLRB 745, 745 (1995); *see also Georgia Rug Mill*, 131 NLRB 1304 n. 2 (1961). Therefore, Horne's testimony that Spiller met with employees twice, soliciting grievances and promising to try and obtain raises, rain gear, and winter gear, and that the Company provided free lunches on a far more frequent basis after the union campaign started, is particularly reliable and the ALJ was right to credit him.

Fifth, the ALJ credited Roscoe's testimony that on August 15, he left the employee trailer to work on the train when it was spotted at 1pm and that he only requested one hour of overtime. (ALJD at 14, lines 4-5, 10-11). Spiller testified that he saw Roscoe sitting in the trailer a few hours after the train had been spotted. (Tr. at 665). However, as the ALJ explained, Spiller did not explain why he waited six days to issue a warning, rather than speaking to Roscoe at the time. (ALJD at 14, lines 5-7). Moreover, the Company did not produce any additional evidence, such as the paperwork that the supervisor posts to the whiteboard, that would have established the time the train was spotted that day. (*See* Tr. at 541-542). *See Miramar Hotel*, 336 NLRB

at 1215. Nor did the Company call Ryder as a witness, the Shift Supervisor on duty that day, to corroborate Spiller's testimony. *See Parksite Group*, 354 NLRB 801, 805 (2009) (factfinder may draw inference that uncalled witness's testimony would damage that party's case if party fails to call witness under its control). As for the Company's claim that Roscoe requested 2 ½ hours of unauthorized overtime, the Company did not produce the time sheet or similar documentation within its control to establish the hours Roscoe requested. *See Miramar Hotel*, 336 NLRB at 1215. Finally, the Company never contradicted Roscoe's testimony that employees routinely explain necessary repairs to the oncoming crew, and that the Company had never required employees to request overtime to cover these situations. *See St. George Warehouse*, 349 NLRB at 904. Indeed, the July 26 to August 1 timesheet establishes that Roscoe and several other employees worked overtime that week without requesting permission in advance, supporting Roscoe's testimony that this was a routine practice. (GC Ex. 24).

B. The Company violated 8(a)(1) by promising raises and rain and winter gear and by providing more frequent free meals in response to the Union campaign.

The ALJ correctly found that the Company unlawfully promised employees raises and rain and winter gear and provided more frequent free meals after it learned of the Union organizing campaign. The Company excepts to the ALJ's finding, claiming that Spiller was attempting to obtain raises and appropriate gear for employees prior to the commencement of the union campaign. However, the Company only provides Horne's and Peters Jr.'s testimony that Spiller himself told employees he was "working on providing rain gear prior to the union activity" and that "he had previously requested wage increases." (Resp. Brief in Supp. of Excepts., at 23). The Company also pointed to Spiller's testimony that he had requested a wage analysis before August. (*Id.* at 24). The Company, however, never provided *any* independent evidence to corroborate Spiller's claims, such as documentation of his wage analysis request,

emails regarding wages or appropriate gear, or testimony from a Company representative who would have received these alleged requests. *See Miramar Hotel Corp.*, 349 NLRB at 904 (permissible to draw adverse inference when employer fails to introduce evidence within its control that would corroborate its claim).

Even if Spiller was “working on” obtaining raises and appropriate gear for employees prior to the union campaign, promising these benefits still violated Section 8(a)(1) unless the Company had made a “firm” decision to implement benefits prior to its discovery of the union organizing campaign. *Caterpillar Logistics, Inc.*, 362 NLRB No. 49 slip op. 1 n.4, 10 (2015), *enf’d*. 835 F.3d 536, 545 (6th Cir. 2016) (promising a benefit violates 8(a)(1) when there is “no credible evidence that a firm decision was made” to grant benefit prior to filing of representation election). Here, the Company did not even attempt to argue that it made a “firm” decision to provide these benefits prior to the advent of the union campaign. Instead, the Company claimed that Spiller submitted a request for a wage analysis and was waiting for Human Resource’s approval, and he was “working on” obtaining rain and winter gear. Even if the Company’s claims were true, such attempts fall far short of the “firm decision” required to avoid 8(a)(1) liability.²⁰ *See Manor Care of Easton, PA*, 356 NLRB 202, 222 (2010) (finding that the employer

²⁰ Moreover, the evidence does not support the Company’s contention that Spiller was “working on” raises and gear. The Company claims that “the evidence clearly shows that Spiller had been working on getting raises approved for the employees well before the union activity began,” and makes several citations to the Transcript. (Resp. Brief in Supp. of Excepts., at 17). The Company first cites to Peters, Jr.’s testimony that Spiller met with employees in late August and at that meeting stated he was waiting on approval from Human Resources for a raise. (Tr. at 46, lines 1-3, 48, lines 23, 24). The ALJ discredited this testimony as Horne, whom she credited, only testified to meeting with Spiller twice in early September. (ALJD at 11, fn. 13). Had the ALJ credited this portion of Peters Jr.’s testimony, his testimony also demonstrated that Spiller was well aware of the union campaign at this meeting, and that he made the comment about waiting for Human Resources after stating that the Company President would “rip up its contract with PES” in the event of unionization. (Tr. at 46, lines 21-25, 48, lines 15-18, 23-24). Moreover, Peters, Jr. stated that Spiller did not tell the employees when he had allegedly submitted the wage

“offer[ed] nothing to show that the wage increases were likely, much less planned, or a foregone conclusion, or ‘essentially decided on’ prior to the commencement of any union activity”) (citing *Int’l Baking Co.*, 342 NLRB 136, 142 (2004), *enf’d* 185 Fed.Appx. 691 (9th Cir. 2006)).

The Company also claims that there is no evidence to support the ALJ’s finding that Spiller indicated employees *would* receive a wage increase and appropriate gear. (Resp. Brief in Supp. of Excepts., at 24). First, Spiller told employees to fill out their sizes to receive rain gear and boot slips, which is a strong indication that they could expect to actually receive these items. Second, an employer is still liable for promising to attempt to remedy employee grievances, even if the employer does not state that employees *will* receive the benefit. *Manor Care*, 356 NLRB at 220 (finding liability when the employer “said that they would try to fix” issues raised by employees and that certain items had to go through corporate headquarters).

request to Human Resources, so there was no testimonial evidence that Spiller submitted the request prior to learning of union activity. (Tr. at 66, lines 2-5, 8-13, 69, lines 22-25).

Second, the Company cites to Gordon’s testimony that Spiller knew of union activity as early as July. (Tr. at 111, line 14, 112, line 16). Gordon did not testify that Spiller was trying to get raises for the employees prior to his knowledge of the union campaign. Third, the Company cites to Peters, Jr.’s testimony that Spiller had already promised to provide rain and winter gear prior to meeting with employees. However, Peters, Jr. simply confirmed that Spiller himself made that claim:

Q: With respect to the supplying of parkas and remain [sic] gear and the Carhartt [sic] gloves, that was all in November and October of 2014, well after the election was conducted. Correct?

A: Correct.

Q: And to your understanding, even as the time that those issues were even raised, Mr. Spiller had already committed to providing those things. Correct?

A: He had said that, yes.

(Tr. at 69, lines 22-25).

Further, the Company's claim that Spiller was simply continuing the Company's past practice of soliciting employee grievances is immaterial.²¹ Even if the Company had a past practice of asking employees for their "gripes," "the issue is . . . whether the instant solicitation implicitly promises a benefit." *American Red Cross*, 347 NLRB 347, 352 (2006); *see also Manor Care*, 356 NLRB at 221 ("a past practice of solicitation does not sanction express promises to remedy newly solicited grievances in a direct effort to discourage employees from choosing representation"). Here, Spiller implicitly and expressly promised to remedy employee's grievances immediately after he asked them about the union and for their "gripes."

The ALJ also correctly found that the Company violated 8(a)(1) by providing free lunches on a weekly basis in response to the union campaign. Horne testified that the Company only provided employees with free lunch one or two times before the campaign began. (Tr. at 82). The Company argues that the ALJ erred, pointing to Spiller's self-serving testimony that he simply continued the past practice of regularly providing meals. (Resp. Brief in Supp. of Excepts., at 25). The Company claims that the ALJ failed to make a credibility determination regarding Spiller's testimony, and that Horne's ability to testify was limited as he had only worked for the Company for three months before the union campaign began.

First, the ALJ did make a credibility determination regarding Spiller's testimony. As previously discussed, because Horne is currently employed by the Company and risked retaliation by testifying in the Hearing, she explicitly credited his testimony and discredited conflicting testimony. (ALJD at 12, lines 27-30 & n.14 and at 13, line 31). Second, while the Company did hire Horne in late May, the Company had only begun operations in late October of

²¹ The Company's claim is also unconvincing. Spiller started the meetings by asking employees why they wanted a union. (Tr. at 76). Further, Horne clearly interpreted Spiller's promises as a reaction to the union campaign. (Tr. at 81).

2013. The record does not indicate that Horne was hired significantly later than other employees; Roscoe was hired one month before Horne, and Peters, Jr. was hired two months later. (Tr. at 43, 272). At any rate, Horne testified that in the three months he worked for the Company before the advent of the union campaign, the Company provided free lunch once or twice but began providing free lunch on a weekly basis after it became aware of union activity. (Tr. at 82). Horne's testimony thus indicates a significant increase in Company-provided meals.

The Company further argues that “no witness testified that lunch was ever a concern of the employees or considered as some form of quid pro quo for their votes” and that “there is no evidence linking the purchase of lunches to the union campaign.” (Resp. Brief in Supp. of Excepts., at 25). Horne's testimony contradicts the Company's argument. Horne testified that the Company began providing weekly lunches after the union campaign began, clearly linking the benefit to the union activity. (Tr. at 82). Further, an employer need not explicitly offer free lunches in exchange for their employees voting no on the union campaign. Rather, “the relevant inquiry is whether the employees reasonably would view [the lunch] as a benefit to them.” *Sun Mart Foods*, 341 NLRB 161, 163 (2004).²²

Employees would reasonably have viewed the significant increase in free lunches, especially in the context of additional promises from the Company, as a benefit provided shortly before the union campaign. *See Rodeway Inn*, 228 NLRB 1326, 1328 (1977) (free lunches in

²² Contrary to the Company's assertions, implied promises, not just explicit quid pro quo inducements, violate the Act. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409-410 (1964). The Company claims “[a]bsent a finding that benefits are promised in some manner as a quid pro quo for rejecting the union's organizing attempt, or contingent on the union's loss of the election, then there can be no finding of a violation,” and cites *Field Family Assocs., LLC d/b/a Hampton-Inn NY-JFK Airport*, 348 NLRB 16 (2006), in support of its proposition. (Resp. Brief in Supp. of Excepts., at 24). *Hampton-Inn*, however, stands for the proposition that it is lawful for an employer to improve conditions “in an attempt to reduce the general appeal of unionization *when no union is actively organizing*” but also restates the well-established rule that an employer cannot offer benefits to induce employees to vote against the union. *Id.* at 17 (emphasis added).

response to union organizing campaign and before union election were a benefit in violation of 8(a)(1)).

C. The Company violated the Act by terminating Peters five days after he organized a pro-union meeting in the Company parking lot.

The ALJ correctly found that the Company violated Section 8(a)(1) and (3) when it terminated Peters five days after he engaged in open and notorious union activity in the Company parking lot. *Wright Line*, 251 NLRB 1083 (1980), requires the General Counsel to demonstrate that 1) the employee engaged in protected activity; 2) the Company was aware of that activity; 3) the Company subjected the employee to an adverse employment action; and 4) the Company was motivated by union animus. After the General Counsel has established his or her prima facie case, the burden shifts to the Company to prove that it would have subjected the employee to the adverse employment action even had the employee not engaged in protected activity. The Company claims that the ALJ misapplied the *Wright Line* test because 1) there is no evidence of the Company's union animus; and 2) the Company proved that it would have terminated Peters had he not engaged in protected activity.

The ALJ relied on the Company's illegal promise of benefits and the suspicious timing of Peters' discharge in finding union animus.²³ As already discussed *supra*, there is ample evidence supporting the ALJ's finding that the Company illegally promised benefits and solicited grievances during the union campaign. In short, Spiller specifically asked employees why they wanted a union, impermissibly solicited grievances, and then promised to respond. (Tr. at 76-81).

²³ The Company claims that "the ALJ impermissibly relied on evidence that Spiller had previously told a supervisor to share his personal negative experiences with unions with Peters as evidence of animus." (Resp. Brief in Supp. of Excepts., at 16). The Company is incorrect. While the ALJ did credit Gordon's testimony that Spiller asked him to share his negative opinion of unions, the ALJ did not rely on this fact in finding that the Company violated Section 8(a)(1) and (3) in terminating Peters. The ALJ never mentioned Gordon's conversation with Peters in analyzing Peters' discharge. Instead, she focused solely on the Company's illegal promise of benefits and the timing of Peters' discharge. (ALJD at 9-10, lines 7-40, 1-31).

The context of these conversations demonstrates that the Company implicitly promised its employees benefits if they voted against the Union. Further, Spiller made these promises *after* the Company inarguably had knowledge of the union campaign. He met with the employees twice in early September, promising a wage increase and rain and winter gear. (Tr. at 76-81). The ALJ credited Horne's testimony that the Company began providing free lunches to employees on a weekly basis after the union campaign began.

The ALJ also focused on the suspicious timing of Peters' discharge to support her finding that the Company terminated him in response to his union activity. The Company raises several objections to this analysis. First, the Company claims that the ALJ ignored Peters' and Spiller's testimony that the Company did not retaliate against Peters for complaints he made prior to engaging in union activity. (Resp. Brief in Supp. of Excepts., at 17). The Company only points to one specific instance, in which Peters requested a bonus payment for all hourly employees in February or March. (*Id.*; Tr. at 189). Peters raised this issue well before the Company was aware of any union activity at the site. Responding to the perceived threat of unionization is qualitatively different than responding to an employee complaint in the absence of any union activity. Indeed, Spiller himself testified that Peters' prior complaints were "minor." (Tr. at 648). This testimony is absent from the ALJD because Peters' prior complaints are irrelevant. The ALJ did not err, she simply declined to draw the inference that the Company wanted.

Second, the Company claims that "[i]t was obvious at that point [when Pettiford made his initial complaint] that any finding would result in severe discipline—indeed, termination is indisputably the consistent penalty applied by Watco in such cases. (Resp. Brief in Supp. of Excepts., 17-18). The Company provides no support for this assertion. The Employee Handbook provides for progressive discipline: "The Company will investigate all complaints of harassment

thoroughly and promptly. If an investigation confirms that a violation of this policy has occurred, the Company will take appropriate, corrective action *including discipline up to and including immediate termination of employment.*” (Resp. Ex. 18, emphasis added). The Company’s witnesses did not provide a single concrete example of another employee who engaged in similar behavior and was terminated. In fact, Beasley testified that Pettiford’s complaint was the first time she investigated a sexual harassment complaint in her 2 ½ years as Human Resources Manager. (Tr. at 604).

Third, the Company claims that “the uncontradicted evidence is that the decision to terminate [Peters] was made on August 19,” before the union meeting in the Company’s parking lot. (Resp. Brief in Supp. of Excepts., at 18). The only evidence that the Company provided in support of this claim is Beasley’s, Howard’s, and Spiller’s self-serving testimony, which the ALJ was under no obligation to credit. The Company provided zero documentary or additional evidence that management actually made the decision to terminate Peters on this call. The Company goes on to state “[l]ogically, the fact that Beasley even travelled to Philadelphia for the meeting strongly supports that the intended discipline was termination . . .” (*Id.* at 18). Yet Beasley’s trip to Philadelphia does not necessarily support the inference that the Company intended to terminate Peters. When the Company investigated Roscoe’s alleged infractions, for example, Howard flew to Philadelphia to interview employees in person after reviewing the initial witness statements. (Tr. at 628). It is equally possible, particularly absent documentary evidence of the substance of the August 19 discussion, that Beasley flew to the PES facility to conduct in person interviews.

Fourth, the Company claims that the ALJ erred in finding that the Company would have terminated Peters despite his union activity. Specifically, the Company attacks the ALJ’s reliance

on the suspicious timing of Peters' discharge. As stated above, the Company conducted an investigation on August 5 but did not terminate Peters until August 26, five days after he participated in an open union meeting in the employee parking lot. After the meeting and until his termination, Peters continued to openly solicit signatures on union authorization cards.

The Company claimed that it waited so long to discharge Peters because first Spiller, and then N. Henderson, were on vacation and that August 19 was the earliest date they could discuss the results of Beasley's investigation. However, as the ALJ points out, the Company had all of the evidence upon which it relied to discharge Peters on August 5. It is inexplicable why the Company would allow Peters to continue working for *three* weeks if it was as concerned with Peters' behavior as it subsequently claimed.²⁴ N. Henderson, who was not on vacation at the time, had the authority to terminate Peters immediately. Alternatively, the Company could have suspended Peters, as it later did with Roscoe, until Spiller returned. In short, the Company simultaneously argues that Beasley's investigation demonstrated that Peters had engaged in such egregious behavior that his termination was justified, *and* that it was perfectly reasonable for the Company to wait three weeks before actually discharging Peters. The Company cannot have it both ways.

Further, not a single witness in Beasley's investigation corroborated Pettiford's complaint against Peters. Pettiford claimed that Peters pointed at him in the break room, stated "that guy is a faggot," and then the two men had a "heated exchange of words." (Resp. Ex. 3). He identified

²⁴ Beasley testified that she immediately took steps to ensure that Pettiford and Peters did not work the same shift. (Tr. at 575). The Company, however, did not provide any details as to what those steps were. Peters testified that the two men did not work the same shift at the time of Pettiford's complaint and had not worked the same shift for four months. (Tr. at 162). Even if the Company ensured that Peters and Pettiford did not work together, there were only two shifts and 21 employees at the plant. The two men would undoubtedly cross paths as they arrived and left work.

four witnesses in his complaint and an additional six when he spoke to Beasley on the phone. Beasley spoke to four witnesses in her initial investigation and five after she reopened her investigation. No witness corroborated Pettiford's complaint about the break room incident. Five witnesses denied any knowledge of Pettiford's accusations entirely. The other five stated that they had heard Peters refer to Pettiford as "gay" once or twice several months ago. The Company's failure to take immediate action supports the ALJ's finding that the Company was not particularly concerned with Pettiford's unsubstantiated complaint until it learned that Peters was actively participating in the union campaign. *See Adco Elec. Inc.*, 307 NLRB 1113, 1128 (1992), *enf'd* 6 F.3d 1110 (5th Cir. 1993); *Elec. Data Sys. Corp.*, 305 NLRB 219, 220 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991), *enf'd* 972 F.2d 341 (4th Cir. 1992) (relying upon employer's other violations of the act, failure to conduct a thorough investigation; and more lenient treatment of other employees to find discharge unlawful).

The Company's explanation of its actions with respect to Pettiford's complaint is inconsistent with its failure to investigate Peters' earlier, wholly substantiated complaint that Henderson sent him threatening text messages, including "go bury you [sic] fucking head under a fucking rock . . . I [sic] shocked that know [sic] one has punched you the fuck out." (GC Ex. 20). The Company provided no explanation as to why Pettiford's complaint merited a complete investigation and Peters' eventual termination, even though not a single witness corroborated Pettiford's claim, while the Company did not discipline Henderson at all, despite receiving conclusive evidence (copies of Henderson's text messages) to support Peters' complaint and despite the fact that Henderson arrived at work intoxicated on that date.

The Company also claims that in analyzing Peters' discharge, the ALJ impermissibly substituted her business judgment for the Company's. (Resp. Brief in Supp. of Excepts., at 20-

21). The Company cites two cases, both of which are easily distinguishable. In *Tinney Rebar Servs., Inc.*, 354 NLRB No. 61 (2009)²⁵, the Company terminated an employee after she announced her intention to quit, in accordance with its uncontested and well-established policy. In finding that the employer provided a legitimate and non-discriminatory reason for discharging the employee, the ALJ stated that “it is worth a reminder that the Board admonishes judges . . . not to substitute their business judgment for that of the employer.” *Id.* slip op. at 9. The crucial factor is “whether [the employer’s proffered reason] was honestly invoked and was in fact that cause of the action taken.” *Id.* slip op. at 9-10. Here, the ALJ properly found that the Company’s proffered reason was pretextual, based on an inconclusive investigation and suspicious timing.

In the Company’s second case, *Aero Detroit*, 321 NLRB 1101 (1996), the ALJ found that the employer’s proffered economic justification for laying off employees was pretextual because the employer continued to pay its employees overtime. *Id.* at 1104. The Board disagreed, finding that the ALJ improperly substituted her own business judgment. *Id.* *Aero Detroit* is irrelevant to the instant case, where the ALJ did not rely upon any judgment regarding the Company’s responses to business conditions.

D. The Company violated 8(a)(1) and (3) by disciplining Roscoe, then suspending him for a period that included the union election, and ultimately terminating him.

The Company disciplined Roscoe three times: 1) the Company issued two written warnings six days after Roscoe allegedly sat in the employee trailer after a train was spotted and then worked two hours of unauthorized overtime; 2) the Company suspended Roscoe for a two-week period that included the union election for allegedly making an obscene gesture to a co-worker; and 3) the Company terminated Roscoe after he returned to work from his suspension

²⁵ This case was decided by a two-member board and was abrogated by *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

for allegedly threatening a co-worker. The ALJ properly found that all three of these disciplines violated the Act.

Regarding the written warnings, the ALJ found that Roscoe's racial discrimination and smoking complaints were protected activity, and that this protected activity motivated the Company to discipline Roscoe. (ALJD at 13-14, lines 43-46, 15-20). The Company argues that Roscoe's smoking complaint was not protected²⁶ because "Roscoe never discussed his concerns about smoking with other employees" and "an individual complaint that is actually contrary to the interests of one's co-workers (i.e. turning them in for potential discipline) can hardly be considered an action for 'mutual aid and protection.'" (Resp. Brief in Supp. of Excepts., at 29-30). The Company is incorrect on both the law and the facts. First, the Supreme Court has held that an employee acting alone may still be engaged in concerted activity. *NLRB v. City Disposal Systems*, 465 U.S. 822, 835-836 (1984) (holding employee who individually refused to drive unsafe truck protected by Section 7). This is especially true when individual complaints involve workplace safety issues, such as Roscoe's.²⁷ See *U.S. Postal Serv.*, 338 NLRB 1052, 1057 (2003) (stating complaints to OSHA are protected activity); *Garage Management Corp.*, 334 NLRB 940, 951 (2001).

²⁶ The Company does not, and cannot, argue that Roscoe's racial discrimination complaint was unprotected. Even if his smoking complaint falls outside of the mutual aid and protection clause, Roscoe inarguably engaged in protected activity when he complained to Spiller that the Company was not providing promotion opportunities to its African-American employees.

²⁷ At the Hearing, the Company attempted to establish that Roscoe was incorrect when he worried that supervisor and employee smoking outside of designated areas constituted a serious safety concern. Even if Roscoe's complaint lacked merit (which is unlikely as the train cars entering the PES facility held flammable oil), he still engaged in protected activity. See *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 slip op. 4 (2014) ("[t]he protected, concerted nature of an employee's complaint to management is not dependent on the merit of such complaint"); *Dandridge Textile*, 279 NLRB 89, 96 (1986) ("whether the concerns of the employees were justified is not relevant to whether the activity in voicing their concern was protected").

Second, Roscoe's complaints mainly concerned supervisors smoking outside of designated areas, not his co-workers. (Tr. at 274, 275). Even had Roscoe's complaint solely concerned his fellow hourly workers, his activity would still be protected. The mutual aid and protection clause has never required the workforce to unite behind the complaint. *See Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, at slip op. 3 (2014) ("concertedness is not dependent on a shared objective or on the agreement of one's coworkers with what is proposed"); *Circle K Corp.*, 305 NLRB 932, 933 (1991), *enf'd* 989 F.2d 498 (6th Cir. 1993) (co-workers' thoughts on individual's actions had "little bearing" on whether her activity was concerted).

The Company further argues that the ALJ failed to link Roscoe's racial discrimination and smoking complaints to the written warnings and that the ALJ ignored Spiller's testimony that Roscoe engaged in insubordination. However, as discussed above, the ALJ properly credited Roscoe and found that the Company's description of the events of August 15 were false. (ALJD at 13, lines 46-47).²⁸ It is well-established that an inference of animus is appropriate when an employer proffers a false or pretextual explanation for discipline. *DHL Express (USA), Inc.*, 360 NLRB 730, n.1 (2014) (Board inferred animus from pretextual reasons given for an adverse employment action); *Lucky Cab Co.*, 360 NLRB 271, 274 (2014) (finding of pretext defeats

²⁸ The ALJ did not ignore Spiller's contradictory testimony as the Company claims; she properly discredited it when the Company failed to provide relevant evidence within its control or call witnesses to corroborate the Company's claims. Further, the ALJ properly found it incredible that Spiller, after allegedly observing Roscoe sitting in the trailer several hours after a train had been spotted, would call the supervisor and tell him to ensure that Roscoe did not work overtime at the end of his shift and then wait six days to issue a warning, rather than telling the supervisor to admonish Roscoe immediately. The Company claims that "it is clear that Spiller believed in good faith that Roscoe engaged in misconduct," but it provides zero support for this assertion. (Resp. Brief in Supp. of Excepts., at 31). As the ALJ correctly found, the circumstantial evidence supports a finding that the Company's reason for disciplining Roscoe was a pretext and that it did not have a good faith belief that he engaged in misconduct.

employer's rebuttal); *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB 633, 637 (2011), *enf'd* 498 Fed. Appx. 45 (D.C. Cir. 2012).

Regarding Roscoe's suspension, the ALJ properly focused her analysis on two suspicious elements of the Company's decision to suspend Roscoe. After the Company fired Peters, Roscoe became the "ringleader" of union efforts in the workforce. On September 23, a little more than two weeks before the election, the Company sent him home and eventually suspended him until October 6, ensuring that he would not be able to speak with his fellow employees at work about the benefits of unionizing or be physically present in the critical days leading up to the election. The suspension, following Peters' termination, also sent a message that the Company would discipline union supporters. The ALJ properly considered the implications of the timing of Roscoe's suspension, and found that it indicated pretext on the Company's part. *Tinney Rebar*, 354 NLRB at 429.

The ALJ also properly weighed the fact that while a major justification for Roscoe's termination was the alleged obscene gesture he made during his altercation with J. Onuskanych, the results of the investigation did not establish that Roscoe actually made the gesture. As explained above, the only witness who corroborated J. Onuskanych's claim was his father, who claimed that Roscoe "made that motion of sucking dick in front of my coworkers." (Resp. Ex. 14). None of Onuskanych's co-workers, however, corroborated this claim. Moreover, the witness statements did not clearly assign responsibility for the argument to Roscoe.²⁹ The lack of corroboration found in the Company's investigation, coupled with the suspicious timing, is

²⁹ Peters, Jr. stated that while Roscoe started the argument, J. Onuskaynch immediately retorted to all of his comments, while Horne and Baranyay stated that J. Onuskanych overreacted to Roscoe's question. (Resp. Ex. 10, 15).

enough to support the ALJ's conclusion that the Company's proffered reasons for suspending Roscoe were pretextual.

The Company also argues that the ALJ ignored Peters, Jr.'s testimony that Roscoe later told Lockley that Lockley "didn't have the balls" to send him home. (Resp. Brief in Supp. of Excepts., at 32). However, the import of Peters, Jr.'s testimony is unclear.³⁰ None of the initial witness statements, including Peters, Jr.'s, included this alleged comment. Peters, Jr. never shared this information with the Company. At the time the Company decided to send Roscoe home, it was relying solely on Lockley's allegation. The only two witnesses who later confirmed overhearing this comment in Howard's investigation were Onuskaynch and J. Onuskanych, both of whom had a motivation to negatively portray Roscoe. Horne stated that nothing happened after Lockley told Roscoe that he would send him home³¹; Baranyay stated that the whole incident was "not a big deal." (Resp. Ex. 8). That Peters, Jr. later testified that he heard the comment, over a year after the Company had suspended and terminated Roscoe, is immaterial. The important point is that the Company decided to suspend a vocal union supporter two weeks before the election, and the investigation upon which its decision was allegedly based was contradictory and inconclusive. The ALJ rightly inferred that the Company used this exchange as a pretext to ensure that Roscoe was not present for the critical time leading up to the election.³² She correctly inferred, from all of the circumstances, that the Company's proffered reason for

³⁰ The Company states "[n]otably, the General Counsel's own witness, John C. Peters, Jr. confirmed at a hearing the key elements of the exchange . . ." (Resp. Brief in Supp. of Excepts., at 32). Actually, the Company called Peters, Jr. as its witness and elicited this testimony. Peters, Jr. continued to testify that he was present for the entire exchange between Roscoe and J. Onuskanych and that Roscoe did not make an obscene gesture. (Tr. at 615).

³¹ Horne's statement directly contradicts Lockley, who claimed "All team members present were looking perplexed at [Roscoe's] escalated behavior. Matt [Horne] even tried to pull me aside, I believe in an attempt to end Roscoe's behavior." (Resp. Ex. 8).

³² The Company also critiques the ALJ for crediting Roscoe's blanket denial of his alleged statement to Lockley. The ALJ never credits Roscoe's testimony on this point.

suspending Roscoe was pretextual, regardless of whether he actually made the statement to Lockley.

Second, the Company claims that “[t]he ALJ further erred in making the almost bizarre finding that Respondent’s investigation of the incident between Roscoe and Joe Onuskanych demonstrates Respondent’s bad faith.” (Resp. Brief. In Supp. of Excepts., at 32). The Company misstates the ALJ’s reasoning. The ALJ made the point that the Company did not take J. Onuskanych’s complaint at face value and that it conducted an investigation to confirm his allegations. (ALJD at 16, lines 23-24). The *results* of this investigation, not the investigation itself, demonstrated the Company’s bad faith. As explained above, the witness statements in this investigation were contradictory and inconclusive, calling into question the Company’s assertion that Roscoe’s suspension was justified.

Third, the Company claims that the General Counsel was required to provide evidence of disparate treatment. The Company misstates the law. *See Mesker Door*, 357 NLRB 591, 592 (2011) (disparate treatment one factor among many Board may rely upon to support inference of discriminatory animus); *Avondale Indus., Inc.*, 329 NLRB 1064, 1066 n.9 (1999) (“Contrary to the Respondent, the General Counsel is not required to prove disparate treatment”); *Fluor Daniel*, 304 NLRB 970 (1991), *enf’d* 976 F.2d 744 (11th Cir. 1992) (proof of discriminatory animus may be established through direct evidence or inferred from circumstantial evidence).³³ The Company further claims that the ALJ ignored evidence that management treated Roscoe

³³ The Company cites *Kmart Corp.*, 320 NLRB 1179 (1996), and *GHR Energy Corp.*, 294 NLRB 1011 (1989), *aff’d* 924 F.2d 1055 (5th Cir. 1991), for its claim that the General Counsel must provide an example of disparate treatment to establish an 8(a)(3) violation. (Resp. Brief in Supp. of Excepts., at 22). Neither of these cases stand for this proposition. In both cases, the employer simply satisfied its rebuttal burden by proving that it would have taken the same adverse action despite the employees’ union activism. *Kmart*, 320 NLRB at 1180; *GHR*, 294 NLRB at 1014.

more favorably because of his involvement with the Union.³⁴ But the only evidence that the Company treated Roscoe more favorably was Spiller's self-serving testimony. (Tr. at 674). The Company did not provide a single concrete example of an employee who was not involved with the Union and received similar or harsher discipline.³⁵ Spiller claimed that no employee had as many disciplinary incidents as Roscoe, but the Company failed to provide any documentary evidence to support this claim. (Tr. at 677). In fact, the Company did not provide a single example of any other employee being disciplined *at all*, apart from Roscoe and Peters.

Regarding Roscoe's termination, the Company claims that the ALJ erred in finding it lacked a good faith belief that Roscoe threatened Henderson, that the ALJ erroneously credited Roscoe's testimony, and that the General Counsel failed to provide evidence of disparate treatment. First, the Company failed to conduct any investigation into Henderson's allegation and terminated Roscoe without asking him for his side of the story. The Company claims that "the ALJ provides no basis for her conclusion that Respondent should have disbelieved the consistent accounts of both Leroy Henderson and Harris . . ." (Resp. Brief in Supp. of Excepts., at 35). The Company misstates the ALJ's reasoning. She did not conclude that the Company should have disbelieved Henderson and Harris. She rightly noted that the Company, without any

³⁴ The Company cites *Great Atlantic & Pacific Tea Co.*, 260 NLRB 482 (1982), and *Valley Special Needs Program, Inc.*, 314 NLRB 903 (1994), to support its argument that the Company's alleged leniency towards Roscoe undermines any inference of animus. These cases bear no meaningful resemblance to the matter at hand. In *Great Atlantic*, the employer disciplined an employee 6 times for cash register shortages. 260 NLRB at 483. The employer exercised leniency an additional 2 times because the shortages could have been caused by a malfunctioning register. *Id.* The Board specifically disclaimed the ALJ's statement that the General Counsel had not made a *prima facie* case. 260 NLRB at 482 n. 2. In *Valley Special Needs*, the employer exercised leniency when it reinstated known union supporters. 314 NLRB at 916.

³⁵ The evidence indicates exactly the opposite. The Company never conducted an investigation or disciplined Henderson for sending threatening texts to Peters, and the Company never disciplined J. Onuskanych, despite several witnesses stating he was equally to blame for the altercation between him and Roscoe.

explanation, chose not to conduct an investigation or even speak to Roscoe, calling into question the Company's good faith belief in Henderson's allegation.

The Company also critiques the ALJ for failing to take into account Howard's testimony that Henderson's voice was shaking when he called her and that he was extremely upset. (Resp. Brief in Supp. of Excepts., at 35). But Howard's testimony does not explain why the Company did not conduct an investigation or ask Roscoe what happened. The Company also failed to present Henderson (whom the Company still employs) or Harris as witnesses. *Parksite Group*, 354 NLRB 801, 805 (2009) (factfinder permissibly draws inference that uncalled witness's testimony would have been damaging). The Company additionally faults the ALJ for discounting Spiller's testimony that a PES security guard suspended Roscoe's badge. (Resp. Brief in Supp. of Excepts., at 36). However, the Company provided no additional evidence to support Spiller's claim, such as the security guard's testimony or documentation of such a suspension. *Parksite Group*, 354 NLRB at 805. Therefore, the ALJ rightly found that the Company lacked a good faith belief in Henderson's allegation.

Second, the Company critiques the ALJ for crediting Roscoe's testimony. (Resp. Brief in Supp. of Excepts., at 36). Again, the Company failed to present Henderson and Harris as witnesses, while Roscoe testified under oath. The ALJ was right to credit Roscoe when the Company failed to produce witnesses under its control with relevant information. *Parksite Group*, 354 NLRB at 805. The Company additionally claims that Roscoe's testimony conflicted with the statement he provided to the Board. (Resp. Brief in Supp. of Excepts. At 36). Specifically, the Company states "[d]espite claiming [in his Board statement] to have witnessed Leroy Henderson yelling or cursing at him, Roscoe testified that he never had any argument or personal problem with Leroy Henderson." (*Id.*). Roscoe's testimony and the Board statement do

not actually conflict. Roscoe was consistent in stating that he had no personal problem with Henderson and that he did not react to Henderson.

Third, and finally, the Company yet again critiques the General Counsel for failing to provide evidence of disparate treatment. (*Id.* at 37). As explained above, the General Counsel is not required to establish disparate treatment. The Company makes the conclusory statement that “[t]he record is clear that Watco did not treat Roscoe differently from any other employee.” (*Id.* at 37). In fact, the record contains vague, self-serving statements from Company representatives that claim Roscoe was treated no differently, without any concrete examples of other employees who received discipline.

V. CONCLUSION

For the reasons given above, the Board should adopt the ALJD that the Company violated 8(a)(1) and (3) of the Act when it unlawfully disciplined and discharged two leading union supporters, promised employees pay increases and appropriate gear in order to influence their vote in the upcoming election, and provided frequent free meals after the advent of the union campaign. The Board should also adopt the ALJ's recommendation that the Company immediately reinstate Peters and Roscoe and make them whole for all losses associated with their unlawful discharges.

Dated: June 14, 2017

Respectfully submitted,

/s/Antonia Domingo

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

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO (LOCAL) USW 10-1, Union,	Case No.	04-CA-136562 04-CA-137372 04-CA-138060 04-CA-141264 and 04-CA-141614
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DENNIS ROSCOE, An Individual,	Case No.	04-CA-138265
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and

WATCO TRANSLOADING, LLC,
Respondent.

**RESPONDENT’S RESPONSE TO GENERAL COUNSEL’S
CROSS-EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE’S DECISION**

Pursuant to Section 102.46(d) of the Board’s Rules and Regulations, Respondent submits the following Answering Brief to the General Counsel’s Cross-Exceptions to the Administrative Law Judge’s Decision.

I. Introduction

The General Counsel (“GC”) filed six cross-exceptions to the Administrative Law Judge’s (“ALJ”) Decision and Order. The GC excepted to 1) the ALJ’s conclusion that Watco did not violate Section 8(a)(1) when Brooke Beasley requested that John Peters not discuss her interview of him with others; 2) the ALJ’s purported failure to determine whether Watco, through manager Brian Spiller, unlawfully interrogated employees in early September 2014 regarding union activity; 3) the ALJ’s “inadvertent” finding that Watco’s issuance of two disciplinary warnings on August 21, 2014 violated Section 8(a)(3)¹; the ALJ’s purported failure to rescind Roscoe’s final warning and performance improvement plan; 5) the ALJ’s purported

¹ Watco does not oppose the General Counsel’s third cross-exception.

failure to determine whether Spiller unlawfully promised employees that he would try to procure heavy gloves and hats; and 6) the ALJ's purported failure to determine whether Spiller unlawfully solicited employee grievances on September 16 or 17, 2014.

II. The ALJ Properly Found That Watco Did Not Violate Section 8(a)(1) By Requesting that John Peters Keep His Interview Confidential.

The ALJ properly found that Watco did not violate Section 8(a)(1) when Brooke Beasley requested that John Peters not discuss her interview of him with anyone. Watco disputes any contention that Beasley "prohibited" anyone from speaking to others about the investigation. Instead, Beasley represented that the company would keep their information confidential and requested that they do so also. As Beasley quite credibly testified:

Q. Speaking of this representation of confidentiality that you gave the witnesses, in conducting the interviews on August 4th and 5th, what is it that you explained to the witnesses, if anything, relative to confidentiality?

A. I would say to them that we would request that you keep this as confidential as possible, due to this being an open and ongoing investigation.

Q. Okay.

A. And then would also guarantee them that we would keep their information confidential.

Q. So consistent with what you said previously you told them that the Company will keep your statements confidential. We're not going to share this with other people.

A. Right.

Q. Is that a yes?

A. Yes.

Q. And relative to any requests that you made to them your request was you'd ask them to keep it confidential while it was ongoing.

A. Correct.

- Q. What is it that you would want them to keep it confidential while it was ongoing?
- A. For the integrity of the investigation, we wouldn't want to intentionally or unintentionally skew any memories or facts of the evidence.

Tr. 580:60 to 581:5. There is no evidence that (a) Beasley suggested that there was any disciplinary consequence if employees did not keep the investigation confidential, or (b) the request could be viewed to extend beyond the completion of the investigation.

On these facts, there is no basis to find a violation of the Act. In *Banner Health System*, 362 NLRB No. 137 (June 26, 2015), the Board held that a blanket rule or practice of requesting employees to keep an investigation confidential and where there was a suggestion of disciplinary consequences for not doing so violates employee Section 7 rights. 362 NLRB No. 137, p. 5 (noting that the employer in *Banner Health* used a form that could be viewed as suggesting a disciplinary consequence).² In so holding, the Board reaffirmed certain prior precedent indicating that confidentiality requests could be justified for the duration of any ongoing investigation. *Id.* at 6 (citing *Caesar's Palace*, 336 NLRB 271 (2001) (confidentiality rule could be applied to an ongoing investigation where there was risk of a cover-up or retaliation); *Phoenix Transit Systems*, 337 NLRB 510 (2002) (confidentiality rule was unlawful where it applied to closed investigations and the need for confidentiality had expired)). The General Counsel did

² Notably, on appeal the District Court for the District Court of Columbia remanded the issue of whether Banner Health's form constituted a categorical request for nondisclosure regarding any kind of investigation because the evidence of record did not support such a determination. *Banner Health Sys. v. Nat'l Labor Relations Bd.*, 851 F.3d 35, 44 (D.C. Cir. 2017). The court noted, "As it stands, the record is devoid of evidence that any employee was aware of the form or the content of its nondisclosure script. Odell's testimony suggested that, despite the header, Banner's policy was not to request nondisclosure in 'all investigations.' But her testimony was simply too terse and unclear to sustain the Board's determination that Banner had a policy of categorically requesting nondisclosure of the entire subset of investigations that addressed 'alleged sexual harassment, hostile work environment claim, charge of abuse, or similar alleged misconduct.'" Similarly here, Beasley was never asked if she requested that any of the eleven other witnesses interviewed keep the interview confidential or if she had a practice of making such requests in every type of investigation. Accordingly, the General Counsel did not elicit evidence to establish that Watco had "a policy of categorically requesting nondisclosure regarding any particular kind of investigation."

not introduce any evidence to show that Watco has a “blanket rule” that all employees are required to keep all investigations confidential. Only Peters testified that Beasley made such an instruction during her investigation. The General Counsel called no other witnesses to corroborate such an alleged prohibition – despite Beasley speaking to eleven (11) other witnesses. Thus, current Board law clearly recognizes that confidentiality is often important to protect the integrity of an ongoing investigation (precisely the rationale used by Beasley to ensure memories are not “intentionally or unintentionally skew[ed]”),³ so long as the confidentiality rule doesn’t apply beyond its necessary usefulness in an ongoing investigation (which is precisely how it was applied here).

Furthermore, to the extent that *Banner Health* is read more broadly to render Beasley’s request as violative of Section 8(a)(1) or to otherwise prohibit any rule of confidentiality pertaining to ongoing investigations, then *Banner Health* should be reversed as an unreasonable application of the Act. As articulated by Chairman Miscimarra in his dissent, the majority test articulated in *Banner Health* does not appropriately balance employee Section 7 rights vs. the business justifications for maintaining the confidentiality of workplace investigations. 362 NLRB No. 137, pp. 13-17. Watco incorporates such reasoning by reference.

Moreover, the failure to permit confidentiality rules generally in the context of ongoing investigations, elevates employee Section 7 rights over all other employee rights that are preserved by a reasonable application of confidentiality rules, such as:

- Employee rights to privacy concerning personnel matters.
- Employee rights under federal, state and local laws to be free from sexual and other workplace harassment based on protected characteristics, and the corollary

³ The very real risk that an individual’s recollection of events may change based on conversations with others about those events has been long recognized by psychology researchers. See *Remembering in Conversations: The Social Sharing and Reshaping of Memories*, Annual Review of Psychology pp. 55-79 (Vol.63, January 2012).

right to be able to make complaints of such harassment without fear of wide and unnecessary dissemination of the often demeaning conduct.

- Employee rights to have a fair investigation conducted, whether they are the victim or the accused, without potential witnesses being influenced. Indeed, one imagines an arbitrator, judge or jury finding significant due process issues in any investigation where witnesses compared stories during an ongoing investigation.

The importance of keeping witnesses from talking to one another in order to protect the integrity of the evidence being gathered is every bit as important in a workplace investigation in which jobs and legal rights are on the line as it is in a hearing before an ALJ or a trial before a court – where “the rule” excluding witnesses and prohibiting them from speaking with one another about their testimony is routinely invoked without any special showing of need. There is no logical basis to distinguish between the need to preserve the integrity of evidence in one situation and not the other – another point aptly made by Chairman Miscimarra in his dissent. *Id.* at 18. Accordingly, the ALJ’s determination that Watco did not violate the Act by requesting that Peters keep his interview confidential should be upheld.

III. The ALJ Addressed All Allegations of Section 8(a)(1) Violations Regarding Brian Spiller’s Meetings with Employees in September 2014.

The General Counsel filed three exceptions asserting that the ALJ did not make a determination as to whether Watco violated Section 8(a)(1) by 1) “unlawfully interrogating” employees about union activity; 2) “unlawfully promis[ing]” employees heavy gloves and hats; and 3) “unlawfully solicited” employee grievances in meetings allegedly held by Brian Spiller in September 2014. Contrary to the General Counsel’s argument, in addressing the allegations contained in complaint paragraphs (d), (e), and (f) – which set forth the allegations of solicitation of grievances, interrogation, and promise of giving employees hats and gloves, the ALJ ultimately determined that Watco had violated Section 8(a)(1) of the Act. No further remedy would be granted by making specific determinations on the individual allegations.

To the extent the ALJ failed to make such determinations, the evidence did not establish that Watco engaged in unlawful interrogations or solicitations of grievances and/or violated the Act by providing its employees with hats and gloves.⁴ The Board has long addressed alleged unlawful interrogations under the standards set forth in *Blue Flash*, 109 NLRB 591 (1954) and reaffirmed in *Rossmore House*, 269 NLRB 1176 (1984), *aff'd* 760 F.2d 1006 (9th Cir. 1985). Under Board law, “interrogations of employees are not per se unlawful, but must be evaluated under the standard of whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act.” *Norton Healthcare, Inc.*, 338 NLRB 320, 320-21 (2002) (internal quotations omitted). To support a finding of illegality, either the words used or the context in which they are said must suggest coercion or interference. *Rossmore House*, 269 NLRB 1176, 1177-78 (1984). Likewise, isolated, sporadic, and innocuous inquiries of a few employees do not constitute unlawful interrogation within the meaning of Section 8(a)(1) of the Act. *Mission Clay Prods. Corp.*, 206 NLRB 280 (1973); *Blue Flash*, 109 NLRB 591, 597 (1954).

The Board applies a “totality of the circumstances” test to determine whether an alleged interrogation is lawful, considering, among other factors, (i) the nature of the information sought, i.e., whether the interrogator appears to have been seeking information on which to base taking action against individual employees; (ii) the identity of the interrogator, i.e., his or her placement in the employer’s hierarchy; (iii) the place and method of the interrogation; and (iv) whether the interrogated employees are open and active union supporters. *See Celco Partnership*, 349 NLRB 640, 653 (2007) (questioning of “an ‘open and active’ supporter of the Union” concerning

⁴ Watco’s provision of heavy hats and gloves is no different than its provision of rain gear. As set forth fully in Watco’s Brief in Support of Exceptions, incorporated herein by reference, there is no evidence to show that Watco provided appropriate seasonal gear (heavy hats, gloves, rain boots) to employees in an effort to interfere or undermine union activity. *See Field Family Assocs., LLC d/b/a Hampton Inn NY-JFK Airport*, 348 NLRB 16 (2006) (“to find an employer’s promise of economic benefits unlawful, the Board must focus on whether the respondent intended to interfere with actual union organizational activity among its employees).

“his union activities, in the absence of threats or promises, does not violate the Act”); *Milum Textile Servs. Co.*, 357 NLRB No. 169 at 33 (2011) (not unlawful for employer to ask open and active union supporters “why they wanted a union” where the “question was posed without animosity or intimidating comment and did not, therefore, tend to restrain, coerce, or interfere with the employees’ statutory rights”). The Board has held questioning to be permissible where (i) the employer voiced opposition to unionization, but such statements were free from threats or promises; (ii) the questioner did not appear to be seeking information upon which to take action against any individual employee; and (iii) the questioning was casual and amicable. *John W. Hancock, Jr., Inc.*, 337 NLRB 1223 (2002); *see also Sunnyvale Medical Clinic, Inc.*, 277 NLRB 1217 (1985) (similar).

Here, Watco acknowledges that Spiller was aware that Peters and Roscoe were involved in organizing. As such, Spiller’s questions about employee issues did not tend to restrain Peters, Roscoe, or other employees from the exercise of their statutory rights. Peters and Roscoe admit that they were both open and active in distributing authorization cards over the last weekend in August 2014. And there was no evidence that the conversations or meetings in September 2014 were somehow less than amiable or that there was any threat made in connection with any comments. *See Celco Partnership*, 349 NLRB at 653 (2007) (questioning of “an ‘open and active’ supporter of the Union” concerning “his union activities, in the absence of threats or promises, does not violate the Act”); *Milum Textile Servs. Co.*, 357 NLRB No. 169 (not unlawful for employer to ask open and active union supporters “why they wanted a union” where the “question was posed without animosity or intimidating comment and did not, therefore, tend to restrain, coerce, or interfere with the employees’ statutory rights”); *Hotel Emps. And Restaurant Emps. Union, Local 11 v. NLRB*, 760 F.2d 1006, 1009 (9th Cir. 1985) (“Employers often mingle

with their employees, and union activities are a natural topic of conversation. A standard which considers the totality of the circumstances surrounding an employee interrogation is a realistic approach to the enforcement of section 8(a)(1).”). In fact, Matthew Horne, then a Watco employee, testified that Spiller often had meetings with employees to discuss issues. Tr. at 86:9-17. Horne further testified that Spiller never made any sort of threat to any employee. Tr. at 89:10-14. No witness testified that Spiller offered employees raises or any other changes to the terms and conditions of employment in exchange for refusing to support the Union. Under these circumstances there can be no finding that Watco violated Section 8(a)(1).

IV. The ALJ Ordered All Warnings to be Removed From Dennis Roscoe’s File.

The General Counsel argues that the ALJ failed to order Respondent to rescind the Final Warning and Performance Improvement Plan issued to Roscoe in connection with his suspension. However, the ALJ did order Respondent to remove “any reference to the . . . Dennis Roscoe’s written warnings and suspension.” (ALJD at 19, lines 39-41). Such an order necessarily encompasses the Final Warning and Performance Improvement Plan issued along with Roscoe’s suspension.⁵

V. Conclusion

For the reasons stated above, the ALJ properly found that Watco did not violate Section 8(a)(1) in issuing a confidentiality request to John Peters regarding his interview with Brooke Beasley. The ALJ’s determination in this regard should be upheld. Further, the ALJ determined that Watco violated Section 8(a)(1) when it had meetings with employees in September 2014, to which Watco has filed exceptions. Any specific findings regarding interrogations, promises of

⁵ Watco has filed Exceptions to the ALJ’s determination that Watco violated Section 8(a)(3) when it suspended Roscoe as well as the ALJ’s ordered remedy.

hats and gloves, or solicitation of grievances are duplicative and does not warrant any further remedy.

Respectfully submitted,

/s/ Anthony B. Byergo

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CERTIFICATE OF SERVICE

It is certified that a copy of Watco Transloading, LLC's Response to the General Counsel's Cross-Exceptions to Administrative Law Judge's Decision in the above-captioned case has been served by email on the following persons on this 28th day of June, 2017:

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

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO (LOCAL) USW 10-1,	Case No.	04-CA-136562 04-CA-137372 04-CA-138060 04-CA-141264 and 04-CA-141614
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Union,

DENNIS ROSCOE,

An Individual,

Case No.	04-CA-138265
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and

WATCO TRANSLOADING, LLC,

Respondent.

**WATCO TRANSLOADING, LLC'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE'S DECISION**

Respondent Watco Transloading, LLC (“Watco”) submits this Reply to the Answering Briefs in Opposition to Watco’s Exceptions to Administrative Law Judge Susan A. Flynn’s Decision filed by the General Counsel and Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (Local) USW 10-1 (“Union”) (hereinafter cited to as “GC Opp.” and “CP Opp.,” respectively). Most of the arguments raised by the General Counsel and Union are addressed already in Watco’s Brief in Support of Exceptions and need not be repeated here. However, Watco will address the General Counsel’s and Union’s unsupported speculations and misstatements of the record. As Watco previously has argued, the ALJ’s findings of fact and conclusions of law are not supported by a preponderance of the relevant evidence in the record and/or are contrary to established Board law or policy.

I. The ALJ Erred in Finding that Respondent Violated Section 8(a)(1) and (3) By Terminating John Peters.

A. The ALJ Provided No Basis to Discredit the Testimony of Brooke Beasley, Safrona Howard, and Brian Spiller as to the Timing of the Discharge Decision and Supported Her Own Findings With Surmise and Speculation.

As discussed in detail in Watco's Brief in Support of Exceptions, the General Counsel failed to produce evidence that Watco's termination of John D. Peters was based on union animus. In their opposition briefs, both the General Counsel and the Union argue that the ALJ properly discredited the testimony of Beasley, Howard and Spiller regarding the timing of the decision to terminate Peters. GC Opp. at 22; CP Opp. at 20. The General Counsel speculates that those managers would have made a written record of the decision if it had occurred on August 19. GC Opp. at 22. Similarly, Union asserts that Watco should have had notes or emails documenting the call. CP Opp. at 20. Such arguments amount to nothing more wildly speculative alternative facts wholly unsupported by any actual record evidence. There was no evidence that Watco follows some routine practice of documenting every phone call in which a termination decision is made with a contemporaneous written record. Indeed, there is no evidence in the record to support the claims that there should be "more evidence" in the form of notes or otherwise of the timing of the termination decision than exists.

Further, the ALJ, along with the General Counsel and Union, completely ignore the ample documentary evidence that is of record. First, there is absolutely no dispute in the record that Watco was conducting an investigation of the very serious allegations of misconduct against Peters in August pre-dating any union activity. This investigation irrefutably included interviews of Peters, the complaining employee Curtis Pettiford, and numerous possible witnesses. This was an investigation of not merely workplace misconduct, but unlawful conduct by Peters in violation of local Philadelphia law prohibiting workplace harassment on the basis of sexual

orientation (and conduct the federal courts are now construing violates Title VII). Peters' conduct required Watco to take decisive action to prevent any recurrence if the allegations were substantiated – which they were. The unrefuted evidence at hearing was that Watco terminates every employee where there is a substantiated complaint of sex-based harassment – the General Counsel and Union offered nothing to the contrary, and there is no basis in the record for the ALJ to have made any finding to the contrary. Simply put, the only evidence in the record showed that, if the investigation led Watco to conclude that Peters engaged in harassment based on sex or sexual orientation, then Peters would be terminated.

Further, the ALJ, General Counsel and Union all ignores the further paper trail showing that the decision to terminate was made prior to any knowledge of any union activity – i.e., the documentation of the August 19 telephone meeting as well as the records documenting Beasley's travel to Philadelphia to conduct the termination. Er. Ex. 5 (calendar entry corroborating phone meeting); Er. Ex. 6 (flight reservation confirmation). The fact that a flight reservation was made underscores that the decisionmakers had already decided to take the most serious disciplinary action (i.e., termination) as a result of the investigation. Lesser discipline obviously would not have necessarily required corporate HR attendance. Yet, bizarrely, the General Counsel questions why a human resources professional would endeavor to be present for the termination – ignoring that the effort to have HR present actually underscores the fact that the decision was to terminate. The General Counsel's suggestion of alternative facts, as well as the ALJ's guess that maybe there was some other business that took Beasley to Philadelphia, are nothing more than rank speculation. There is no evidence to support the findings of the ALJ – just surmise and conjecture. The case of the General Counsel and the Union, and the decision of the ALJ (and the Board), must be based on evidence – something not present here.

B. Leroy Henderson Did Not Engage in the Same Conduct as Peters.

In an effort to show disparate treatment of employees for the same offense (something the ALJ's decision failed to do), both the General Counsel and Union argue that disparate treatment and animus was shown because Watco allegedly treated Leroy Henderson differently than Peters. GC Opp. at 27; CP Opp. at 32. Specifically, the General Counsel points to text messages allegedly sent from Henderson to Peters, which contain a number of expletives.¹ To the extent that Henderson engaged in the alleged conduct (and it can be determined fairly that Peters did not engage in similar conduct toward Henderson in texts that Peters deleted), Henderson's conduct would nevertheless be clearly distinguishable from the conduct Watco concluded that Peters had engaged in towards Curtis Pettiford.

First, Henderson's conduct happened while he was off-duty and was wholly unrelated to any work at Watco. There is no clear record evidence that Henderson's off-duty conduct violated any specific Watco policy – as opposed to Peters' conduct, which clearly did. Second, and more importantly, the text messages by Henderson (again, which clearly were responding to spoliated texts by Peters) do not contain any discriminatory or harassing statements based on any protected class. This is an overwhelmingly distinguishing feature as Watco is required to act in response to unlawful discriminatory or harassing comments based on sex, sexual orientation, and other protected classes.

Even assuming the incomplete text messages show Henderson directed profanities and other inflammatory comments to Peters, there is no evidence of derogatory comments made

¹ Watco objected to the admission of these text messages at the hearing. Tr. 172:24-174:15. Most significantly, the corresponding text messages sent from Peters to Henderson were deliberately deleted to therefore show only one side of the conversation. The content of Henderson's text messages rather obviously respond to texts from Peters that one can readily infer were similarly antagonistic, if not provocative of Henderson's responses. The incompleteness of the texts make them inherently unreliable and they should not have been admitted, much less relied upon, by the ALJ.

because of Peters' sex, sexual orientation, or other protected classification. Further, this appeared a single incident that Peters and Henderson had resolved between themselves. In contrast, Pettiford complained that Peters had been harassing him since November 2013 with derogatory comments about his sexual orientation; that he had repeatedly asked Peters to stop; and that Peters refused. Tr. at 566:8-12. Ultimately, Peters was found to have made comments towards Curtis Pettiford regarding his sexual orientation, which is protected under the Philadelphia Fair Practices Ordinance. Pettiford's accusations against Peters were corroborated by five different co-workers. Tr. at 571:16-572:2; Tr. 582:25-583:15; Er. Ex. 4. Simply put, there is no indication that the text messages between Henderson and Peters were anything more than a personal off-duty dispute between two individuals who had worked together for a number of years. Tr. 653:5-11. Spiller spoke to both Peters and Henderson about the messages and they indicated to him that the issue had been resolved. Tr. 688:18-24.

II. The ALJ Erred in Finding that Respondent Violated Section 8(a)(1) and (3) By Disciplining and Terminating Dennis Roscoe.

A. Watco's Investigation of Roscoe's September 2015 Conduct Supported Its Suspension Decision.

In arguing that the results of Watco's investigation did not support its suspension of Roscoe, the General Counsel, like the ALJ, ignores Roscoe's insubordinate behavior towards Brandon Lockley. GC Opp. at 39-40. Roscoe was suspended not only for his engaging in a verbal altercation with Joe Onuskanych, but also for ignoring the direction of his supervisor, Lockley, and telling Lockley that he did not "have the balls" to send him home. This conduct was corroborated by witnesses during the investigation and by the testimony of John C. Peters, Jr. at the hearing (and even in the investigation the Region conducted prior to the hearing). The repeated effort of the General Counsel to ignore these facts cannot be similarly disregarded by the Board here – indeed, it underscores a manifest injustice to the Respondent in even having to

defend against this claim. Regardless, that insubordination alone, which occurred shortly after Roscoe's insubordinate behavior on August 15, 2015, justified Roscoe's suspension.

B. None of the Individuals Identified by the General Counsel Engaged in the Same Threatening Conduct as Roscoe Did Towards Henderson.

Moreover, the General Counsel's argument that Watco treated Roscoe differently from other employees in terminating him after his threatening conduct towards Henderson is meritless. The General Counsel argues that Watco treated Roscoe differently from Leroy Henderson, Gary Plotts, and Joe Onuskanych. GC Opp. at 40-41. Contrary to the General Counsel's assertion, there is no evidence of record that Leroy Henderson refused to meet with Brian Spiller or otherwise engaged in insubordinate behavior. In fact, Spiller testified just the opposite – he discussed the dispute between Henderson and Peters with both of them and it appeared to be resolved. Tr. 688:18-24.² Further, the General Counsel's mischaracterizes Henderson's text messages to Peters, which may contain expletives and vulgar language but do not contain threats of violence. Likewise, there is no evidence of any threats by Plotts or Joe Onuskanych toward Roscoe or others. In Plotts' situation, there is (at most) a vague statement suggesting Roscoe's co-workers needed to address issues with him that might cause trouble for all of them; in Joe Onuskanych's case, the allegation is merely one of smearing oil on a sweatshirt that Roscoe had left in the employee trailer. These acts are simply and obviously not the same, and the suggestion by the General Counsel that they are is disingenuous.

Moreover, Roscoe was not remotely similarly situated to Henderson, Plotts, or Onuskanych at the time he made the corroborated threats towards Henderson. None of the three, even if they could be found to have engaged in remotely similar conduct, did not have anything remotely similar to Roscoe's overall employment record consisting of multiple acts of

² The General Counsel's allegation that Henderson arrived to work inebriated is nothing more than an attempt to besmirch Henderson's character and distract from the egregiousness of Roscoe's pattern of threatening behavior.

insubordination by the time of his threats towards Henderson. “A conclusion of disparate treatment, by definition, is measured by comparing whether or not an alleged discriminatee ‘was treated differently than other similarly situated employees who violated work rules of comparable seriousness.’” *Marksman Metals Co., Inc. & Sheet Metal Workers' Int'l Ass'n, Local 10*, E 18-CA-15383, 2000 WL 33664306 (July 11, 2000) (quoting *Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1404 (10th Cir. 1997)) (internal citations omitted). Accordingly, the General Counsel has not made any showing of disparate treatment.

III. CONCLUSION

For the foregoing reasons and the reasons set forth in Respondent Watco Transloading, LLC’s Brief in Support of Exceptions to Administrative Law Judge Decision, the ALJ’s Decision and Order should be rejected by the Board.

Respectfully submitted this 28th day of June, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is certified that a copy of Watco Transloading, LLC's Reply Brief in Support of Exceptions to Administrative Law Judge's Decision in the above-captioned case has been served by email on the following persons on this 28th day of June, 2017:

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

WATCO TRANSLOADING, LLC

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO (LOCAL) USW 10-1	Cases 04-CA-136562 04-CA-137372 04-CA-138060 04-CA-141264 and 04-CA-141614
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DENNIS ROSCOE, an Individual	Case 04-CA-138265
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GENERAL COUNSEL’S REPLY BRIEF IN SUPPORT OF CROSS-EXCEPTIONS

On April 5, 2017, the Administrative Law Judge (“ALJ”) issued a decision in this case. The General Counsel filed cross-exceptions to the ALJ’s decision on June 14, 2017, to which Watco Transloading, LLC (“Respondent”) filed an answering brief on June 28, 2017. As permitted by the Board’s Rules and Regulations, 29 CFR § 102.46(e), the General Counsel now files this reply brief to address matters raised in Respondent’s answering brief.¹

The General Counsel filed a cross-exception to the ALJ’s failure to conclude that Respondent violated the Act by prohibiting its employee from discussing a disciplinary interview. Respondent makes an untimely challenge to the ALJ’s findings of fact regarding this allegation for the first time in its answering brief. In addition, Respondent misstates the legal standard the Board uses to evaluate restrictions on employees discussing investigations and

¹ In addition to the General Counsel’s cross-exceptions, which are the concern of the present brief, Respondent filed exceptions to the ALJ’s decision and a supporting brief on May 17, 2017. The General Counsel filed an answering brief to Respondent’s exceptions on June 14, 2017, as did a charging party in this case, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (Local) USW 10-1. Respondent filed a reply brief in support of its exceptions on June 28, 2017.

mischaracterizes the record in an attempt to downplay the severity of the prohibition Respondent imposed. Respondent also asks the Board to reverse its precedent with regard to such restrictions in favor of a new standard under which Respondent's conduct would still be unlawful.

Furthermore, contrary to Respondent's assertion, additional remedies would be warranted if the Board concluded that Respondent unlawfully interrogated employees. Finally, notwithstanding Respondent's assurances about its understanding of the ALJ's recommended order, clarifying the order would eliminate any risk of controversy as to the order's scope.

I. Respondent's Prohibition on Its Employee Discussing a Disciplinary Interview

A. Respondent's Challenge to the ALJ's Findings of Fact Is Untimely

In its answering brief, Respondent, for the first time, challenges the ALJ's findings of fact relating to the allegation that Respondent violated the Act by forbidding its employee from discussing a disciplinary interview with anyone (Ans. Br. at 2-3).² The ALJ credited employee John D. Peters's testimony over People Services Manager Brooke Beasley's testimony regarding what Beasley said to Peters during a telephonic disciplinary interview on August 5, 2014 (ALJD at 6). According to Peters's credited testimony, Beasley "said that [Peters] was absolutely forbidden to discuss any of this conversation with anyone" (Tr. at 167). Respondent now "disputes any contention that Beasley 'prohibited' anyone from speaking to others about the investigation" (Ans. Br. at 2). Instead, Respondent asserts that Beasley gave "quite credibl[e]" testimony as to the contents of the interview (Ans. Br. at 2-5). However, because no exceptions or cross-exceptions were filed to the ALJ's factual findings as to this interview, Respondent may not challenge those findings now.

² Citations to Respondent's answering brief will appear as "Ans. Br. at" followed by the relevant page number. In addition, citations to the ALJ's decision will appear as "ALJD at" followed by the relevant page number. Finally, citations to the transcript of the hearing will appear as "Tr. at" followed by the relevant page number.

Respondent filed no exceptions to the ALJ's decision to credit Peters over Beasley on this point. Although the General Counsel did file a cross-exception to the ALJ's legal conclusion that the "absolut[e]" proscription on discussion imposed by Beasley was legally justified, he did not cross-exception to the ALJ's factual determination as to what Beasley said (which is not surprising given that the ALJ adopted the version of the facts alleged by the General Counsel). Thus, the ALJ's findings of fact as to what Beasley said during the phone call were the subject of neither exceptions nor cross-exceptions. They therefore may not be challenged. 29 CFR § 102.46(a)(1)(ii) ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived."); 29 CFR § 102.46(f) ("Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding."); see also *Minteq International, Inc.*, 364 NLRB No. 63, slip op. at 1 fn. 1 (2016) enfd. 855 F.3d 329 (D.C. Cir. 2017) (declining to address an asserted defect in the administrative law judge's decision first raised by respondent in its answering brief to the General Counsel's exceptions); *Manno Electric, Inc.*, 321 NLRB 278, 278 fn. 10 (1996) enfd. per curiam 127 F.3d 34 (5th Cir. 1997) (same for a defect first raised in answering brief to cross-exceptions). Respondent's attempt to dispute the ALJ's findings for the first time in its answering brief runs afoul of the Board's Rules and Regulations.

Even if Respondent had raised its challenge in timely fashion, that challenge would have failed. The only evidence as to what occurred during Beasley's disciplinary interview of Peters is the testimony of Peters and Beasley. Therefore, to adopt Respondent's version of events, the Board would have to reverse the ALJ's decision to credit Peters and discredit Beasley. The Board does not overturn an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that those resolutions are

incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Respondent cites no evidence to support its contention that the ALJ erroneously credited Peters over Beasley (Ans. Br. at 2-3), let alone evidence adequate to overcome the Board's deference when it comes to credibility resolutions. Therefore, even if Respondent's challenge to the ALJ's findings of fact were eligible for consideration, it would fail.

B. Respondent Misstates the Legal Standard for Evaluating Restrictions on Discussing Disciplinary Investigations

1. An Individualized Restriction on an Employee's Ability to Discuss a Disciplinary Investigation Can Violate the Act

Respondent misstates the Board's standard for evaluating the legality of an employer's restriction on an employee's ability to discuss a disciplinary investigation. Specifically, Respondent asserts that the Act prohibits "a blanket rule" requiring confidentiality, that the evidence does not establish that Respondent had "a blanket rule" but instead only shows that it imposed confidentiality on Peters, and that such an individualized imposition does not violate the Act (Ans. Br. at 3-4). The Board has rejected this argument on multiple occasions.

For instance, in *American Federation of State County 5 MI Loc Michigan State Employees Association (MSEA)*, the employer argued that the Board "had found unlawful *blanket* rules prohibiting disclosure in a wide range of circumstances" but "that the prohibition at issue [in *MSEA*] was not such a blanket prohibition" and instead was "directed at a specific employee who was under investigation." 364 NLRB No. 65, slip op. at 17 (2016) (emphasis in original). In concluding that the employer's prohibition violated the Act notwithstanding that it was issued to a single employee, the Board explained that "the central point" is that an employer has a "duty to justify its effort to prohibit communication which otherwise would be protected" by proving the existence of "extraordinary circumstances." *Ibid.* True, "[a]s a result of this

reasoning, blanket prohibitions must necessarily be unlawful, because they apply to all situations, the ordinary as well as the extraordinary.” *Ibid.* But individualized restrictions still “prohibit communication which otherwise would be protected,” and therefore an employer still must justify them by demonstrating “extraordinary circumstances.” *Ibid.*; accord *Dish Network*, 365 NLRB No. 47, slip op. at 3 fn. 8 (2017) (Board evaluates the lawfulness of an employer’s confidentiality instruction issued to single employee using the same framework as it does for a general confidentiality rule); *Inova Health System*, 360 NLRB 1223, 1228 (2014), *enfd.* 795 F.3d 68 (D.C. Cir. 2015) (“We recognize that the Respondent’s instruction to [the employee] not to discuss her suspension does not constitute a confidentiality ‘rule’...Nonetheless, the same balancing of employer business justification against employee rights in evaluating the lawfulness of a confidentiality rule likewise applies to determine whether a confidentiality instruction issued to a single employee violates the Act.”). In summary, “showing that a particular prohibition is not a blanket rule does not carry an employer’s burden of establishing extraordinary circumstances” that justify the infringement on the employee’s Section 7 rights. *MSEA*, above, slip op. at 17.

Explained differently, the existence of a blanket rule prohibiting discussion of disciplinary investigations is *sufficient* to establish a violation of Section 8(a)(1). Such a rule by definition interferes with protected discussions even where there are no extraordinary circumstances to justify the interference. However, the existence of a blanket rule is not *necessary* to establish a violation. An individualized restriction also interferes with an employee’s right to discuss investigations, and, absent adequate justification, this interference violates the Act.

2. **Respondent Threatened Peters with Discipline if He Discussed the Disciplinary Interview with Anyone**

Respondent also contends that “[t]here is no evidence that...Beasley suggested that there was any disciplinary consequence if employees did not keep the investigation confidential” and that this renders Beasley’s action lawful (Ans. Br. at 3). Initially, Respondent is incorrect as an evidentiary matter. According to Peters’s credited testimony, Beasley told Peters he was “absolutely forbidden to discuss any of this conversation with anyone” (ALJD at 6; Tr. at 167). Any reasonable employee would take from this that Respondent would discipline him if he discussed the interview. See *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 5 (2015) enfd. in part and remanded 851 F.3d 35 (D.C. Cir. 2017) (Board considered confidentiality instruction to threaten discipline because “from an employee’s standpoint” it could “reasonably be read” to do so). Put simply, a manager’s instruction to an employee that particular conduct is absolutely forbidden carries the unmistakable implication that there will be disciplinary consequences if the employee engages in that conduct.

In any event, even if Beasley had not threatened Peters with discipline if he discussed the interview and had merely requested that he not discuss it, her actions still would have violated the Act. An employer violates Section 8(a)(1) when it requests that an employee not discuss discipline or a disciplinary investigation with others because such requests have a “reasonable tendency to inhibit protected activity.” *The Boeing Company*, 362 NLRB No. 195, slip op. at 3 (2015) (citing *Heck’s, Inc.*, 293 NLRB 1111, 1114, 1119 (1989) (instruction to employees that the “company requests you regard your wage as confidential” violated the Act) and *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992) enfd. 987 F.2d 1376 (8th Cir. 1993) (instruction to employees that “[y]our salary...is confidential, and shouldn’t be discussed with anyone” violated the Act)); see also *Banner Estrella*, above, slip op. at 5, 5 fn. 14 (finding irrelevant whether the

employer's request that employees not discuss an investigation was accompanied by threat of discipline or merely "suggestive" in nature).

3. Respondent's Restriction on Peters's Ability to Discuss the Disciplinary Interview Was Unlimited in Duration

Respondent makes the additional claim that "[t]here is no evidence that...the request could be viewed to extend beyond the completion of the investigation" (Ans. Br. at 3). This is also incorrect. According to the credited testimony of Peters, Beasley prohibited him from discussing the disciplinary interview with any other person without any limitation as to the prohibition's duration (ALJD at 6; Tr. at 167). A reasonable employee would therefore understand the prohibition as continuing indefinitely. See *Banner Estrella*, above, slip op. at 5.

Regardless, even if Beasley had limited her directive to the investigation's pendency, the directive still would have violated the Act. The Board has rejected the argument that a prohibition on discussion of a disciplinary investigation is lawful if it "applie[s] only while an investigation [i]s ongoing," explaining:

The investigative period—before the Respondent has reached any conclusions—would seem to be the period when employees likely would be most interested in, and most likely to benefit from, discussion with their coworkers and union representatives.

Banner Estrella, above, slip op. at 5. In other words, a restriction on an employee's right to discuss a disciplinary investigation only while the investigation is ongoing violates the Act because this is the period when that right is most significant.

4. Respondent's Conduct Was Unlawful Even According to the Dissenting Opinion in *Banner Estrella*

In the alternative, Respondent argues that *Banner Estrella*, above, should be overturned in favor of the interpretation of the Act espoused by then-Member Miscimarra in his dissent in that case, *id.*, slip op. at 7-21, the reasoning of which Respondent "incorporates...by reference"

in its brief (Ans. Br. at 4). However, such a change would not affect the outcome of the present case, because even under now-Chairman Miscimarra’s view, Respondent’s actions violated the Act.

In *MSEA*, the employer required an employee under disciplinary investigation to complete an investigatory questionnaire containing the instruction that the questionnaire’s “contents shall remain confidential and is not to be discussed outside union representation.” 364 NLRB No. 65, slip op. at 16-17. The only evidence the employer presented to justify this restriction was testimony of its President, who stated that “[t]he purpose [of the restriction] was to assure that there was an open dialogue to protect the integrity of the investigation.” *Id.*, slip op. at 18.

Then-Member Miscimarra “concur[red] in finding that the Respondent violated Sec. 8(a)(1) when it required [the employee] to complete the investigatory questionnaire.” *Id.*, slip op. at 2 fn. 6. As the concurrence explained:

On the one hand, the questionnaire...required [the employee], on pain of discharge, to keep the contents of the questionnaire confidential, a requirement that had a substantial impact on the exercise of Sec. 7 rights. On the other hand, testimony regarding the business ends served by the confidentiality requirement—[employer] President Moore’s testimony that it was necessary “to protect the integrity of the investigation”—lacked particularity and was unsupported by other evidence. Balancing the respective rights and interests, Member Miscimarra finds that the Respondent has not established an interest justifying its nondisclosure requirement that outweighs the impact of that requirement on the exercise of Sec. 7 rights. See *Banner Estrella*[, above, slip op. at 7-21] (Member Miscimarra, dissenting in part).

Ibid.

Here, as in *MSEA*, “[o]n the one hand,” Respondent forbade an employee under disciplinary investigation from discussing the contents of an interrogation that was part of that investigation (ALJD at 6; Tr. at 167), thereby having a “substantial impact on the exercise of

Sec. 7 rights.” Ibid. Also as in *MSEA*, “[o]n the other hand, testimony regarding the business ends served by the confidentiality requirement...lacked particularity and was unsupported by other evidence.” Ibid. Indeed, the *only* evidence regarding why the restriction on Peters was necessary was Beasley’s testimony that she imposed it “[f]or the integrity of the investigation” (Tr. at 581). Beasley’s testimony bears a remarkable similarity to the employer’s President’s testimony in *MSEA* that the confidentiality restriction was necessary “to protect the integrity of the investigation,” which testimony the concurrence found inadequate to justify the imposition on Section 7 rights. Ibid. Thus, as was true for the employer in *MSEA*, Respondent’s actions violate the Act even under the interpretation espoused in the *Banner Estrella* dissent.

II. Respondent’s Interrogation of Employees in Early September 2014

The General Counsel filed a cross-exception to the ALJ’s failure to conclude that Terminal Manager Brian Spiller unlawfully interrogated employees in early September 2014. In answer, Respondent contends that “[n]o further remedy would be granted by making specific determinations” as to the interrogation allegation (Ans. Br. at 5, 8-9). This is not correct. The ALJ’s recommended order does not currently require Respondent to cease and desist from coercively interrogating employees about their union or other protected concerted activities (ALJD at 19-20). Relatedly, the ALJ’s recommended Notice to Employees does not assure employees that Respondent will not interrogate them about their union or other protected concerted activities (ALJD, Appendix). Therefore, contrary to Respondent’s contention, were the Board to conclude that Spiller unlawfully interrogated employees in early September 2014, additional remedies would be warranted.

In the alternative, Respondent argues that Spiller’s interaction with employees in early September 2014 was not an unlawful interrogation (Ans. Br. at 6-8). Respondent states that

“Spiller was aware that Peters and [employee Dennis] Roscoe were involved in organizing” and argues that because Peters and Roscoe were “open and active union supporters” Spiller’s questioning of them was lawful (Ans. Br. at 6-7). The trouble with Respondent’s argument is that Peters and Roscoe were not the subjects of the interrogation in question. Rather, the ALJ’s factual findings establish that Spiller interrogated employees Matthew Horne, Marcell Salmond, and Greg Baranyay (Tr. at 75-76). There is no evidence that Horne, Salmond, or Baranyay were open and active union supporters. Therefore, Respondent’s argument is inapposite.

III. Remedy for Respondent’s Unlawful Discipline of Roscoe on October 2, 2014

Respondent states that it understands the ALJ’s recommended order as requiring it to rescind the Final Warning and placement on a Performance Improvement Plan that it imposed on Roscoe at the same time it suspended him for two weeks on October 2, 2014 (Ans. Br. at 8). Nevertheless, the General Counsel reiterates his request that the Board clarify the order to make this requirement explicit, which will eliminate any risk of controversy as to the order’s scope.

IV. Conclusion

For the foregoing reasons, the General Counsel requests that the Board reject the arguments raised against his cross-exceptions in Respondent’s answering brief.

Respectfully submitted,

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Dated: July 12, 2017

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

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

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

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

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

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

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.

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."

DECISIONS OF THE NATIONAL LABOR RELATION BOARD

as it alleges violations of the Act not specifically found.

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