

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11**

MORGAN CORP.

and

Case 10–CA–250678

RUSSELL PAUL BANNAN, an Individual

**COUNSEL FOR GENERAL COUNSEL’S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

**To: The Honorable Judge Sharon Levinson Steckler
Administrative Law Judge
National Labor Relations Board**

Dated: August 19, 2020

Respectfully submitted,

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Table of Contents

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

A. SUMMARY OF CASE 4

B. FACTS 5

 1. RESPONDENT OPERATES A SITE PREPARATION COMPANY HEADQUARTERED IN DUNCAN, SOUTH CAROLINA 5

 2. RESPONDENT HIRED BANNAN AND GAVE HIM A RAISE WITHIN 60 DAYS 6

 3. BANNAN MISSED SIX DAYS OF WORK AND RESPONDENT ISSUED HIM A FIRST WRITTEN WARNING. 7

 4. BANNAN IGNORED RESPONDENT’S WARNINGS REGARDING EMPLOYEES DISCUSSING THEIR WAGES BY TELLING OTHER EMPLOYEES ABOUT HIS RAISE AND URGING THEM TO SEEK THEIR OWN RAISES..... 8

 5. RESPONDENT DISCHARGED BANNAN BECAUSE OF HIS CONCERTED DISCUSSIONS REGARDING HIS AND OTHER EMPLOYEES’ WAGES..... 12

C. ARGUMENT 14

 1. GENERAL COUNSEL’S WITNESSES ARE CREDIBLE, AND RESPONDENT’S PRIMARY WITNESS LACKS CREDIBILITY 14

 2. RESPONDENT DISCHARGED BANNAN BECAUSE OF HIS CONCERTED ACTIVITIES 15

 a) *Applicable principles* 15

 b) *Bannan engaged in concerted activity and Respondent knew of Bannan’s activity*..... 16

 c) *Bannan’s concerted activities were a motivating factor in Respondent’s decision to discharge him*..... 18

 d) *Respondent failed to show that it would have discharged Bannan absent his concerted activity*..... 20

 i. Bannan’s attendance issues were inconsequential to his discharge..... 21

 ii. Respondent uses “professionalism” and “adherence to policy” as euphemisms for concerted activity 22

 iii. Respondent “did not see a path forward for Mr. Bannan with Morgan as a manager” because of his concerted activities, not because of his work performance..... 23

 iv. Respondent would not have discharged Bannan absent his concerted activity 25

D. CONCLUSION AND PROPOSED REMEDY 27

APPENDIX: PROPOSED NOTICE TO EMPLOYEES AND MEMBERS..... 28

Table of Authorities

Cases

<i>Blue Star Services, Inc.</i> , 328 NLRB 638 (1999)	22
<i>Brookshire Grocery Company</i> , 294 NLRB 462 (1989)	17, 19
<i>Diehl Equipment Co., Inc.</i> , 297 NLRB 504 (1989)	7
<i>Embassy Vacation Resorts</i> , 340 NLRB 846 (2003)	16
<i>Frye Electric, Inc.</i> , 352 NLRB 345 (2008)	21
<i>General Motors LLC</i> , 369 NLRB No. 127, slip op. at 15 (2020).....	26
<i>Golden State Foods Corp.</i> , 340 NLRB 382 (2003)	25
<i>Kidd Electric, Inc.</i> , 313 NLRB 1178 (1994)	7
<i>Laurus Technical Institute</i> , 360 NLRB 1155 (2014)	19
<i>Local 9431, Communications Workers of America, AFL-CIO (Pacific Bell)</i> , 304 NLRB 446, fn. 4 (1991).....	7
<i>Lou’s Transport, Inc.</i> , 361 NLRB 1446 (2014)	20
<i>Meyers Industries (Meyers II)</i> , 281 NLRB 882 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987)	16, 17
<i>N.L.R.B. v. Melrose Processing Co.</i> , 351 F.2d 693 (8th Cir. 1965)	20
<i>Pace Industries, Inc.</i> , 320 NLRB 661 (1996)	23
<i>Parexel International</i> , 356 NLRB 516 (2011)	16, 20
<i>Plastic Composites Corp.</i> , 210 NLRB 728 (1974)	17
<i>Richfield Hospitality, Inc.</i> , 368 NLRB No. 44 (2019)	22

Tschiggfrie Properties, LTD.,
368 NLRB No. 120, slip op. at 11 (2019)..... 15

Tyson Foods,
311 NLRB 552 fn. 2 (1993)..... 7

Wendt Corporation,
369 NLRB No. 135, slip op. at 2 (2020)..... 25

Wright Line,
251 NLRB 1083 (1980), enfd. on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied,
455 U.S. 989 (1982)..... 15, 16, 25

A. Summary of Case

Charging Party Russell Bannan alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act by discharging him because he told other employees about his raise and urged them to ask for a raise. This is a classic concerted activity case in which Respondent harbored serious and substantial animus toward employees discussing their wages with one another. On October 4, 2019,¹ Respondent gave Bannan an unusually high pay raise for a probationary employee, bumping him from \$17.00 per hour to \$20.00 per hour. Shortly afterward, Respondent's Project Manager/Estimator Ben Boland warned Bannan not to tell anyone at the job site about his raise, including Superintendent Kenneth Weston. Foreman/Acting Superintendent Ronnie Rust also warned Bannan, stating that Respondent's policy was for employees not to discuss their wages. Bannan ignored Respondent's warnings. In around mid-October, Bannan told several employees about his raise and urged his coworkers to seek raises for themselves, including employee Jeremy Elsenpeter. Elsenpeter told Respondent about his wage discussions with Bannan, and Respondent took decisive action. On October 25, within a week of Bannan's wage discussions with other employees and only days after it learned of Bannan's concerted activities, Respondent discharged Bannan. The evidence demonstrates that Respondent violated Section 8(a)(1) of the Act by discharging Bannan for his concerted activities, and that Respondent's defenses are pretextual and run contrary to the evidence.

The Complaint and Notice of Hearing, which the Acting Regional Director issued on January 30, 2020, was based upon an unfair labor practice charge that Bannan filed in Case 10–CA–250678 on October 28. Administrative Law Judge Sharon Levinson Steckler presided over the hearing in this case from July 14, 2020, to July 15, 2020, by videoconference technology.

¹ Unless otherwise specified, all dates took place in 2019.

B. Facts

1. Respondent operates a site preparation company headquartered in Duncan, South Carolina

Respondent is an “earth moving” company that prepares various work sites for other building contractors.² (T. 20) For example, Respondent may grade a work site, pave or bury utilities in the ground, or move dirt for mining operations. (T. 20) Respondent has a corporate headquarters in Duncan, SC, where it maintains its administrative office and shop, equipment repair operations, and Spartanburg divisional construction office. (T. 22) Respondent organizes its business operations into geographic divisions, including a division located in Duncan, SC, that Respondent calls its Spartanburg division. (T. 21-22) William (Bill) Heape serves as Vice President of Respondent’s Spartanburg Division. (T. 19)

Out of its Spartanburg division, Heape oversees an average of 80 to 90 employees and 5 to 7 work sites. (T. 21) During the period of August to October, Heape oversaw a work site in Rockingham, NC. (T. 19) At its Rockingham site, Respondent contracted with a client to strip overburden material from a mining area to allow its client to continue its quarrying and crushing operations at the site. (T. 23) Overburden is the dirt and other broken material atop the area rock strata. (T. 23, 86) Heape employed Project Manager Chase Wideman and Superintendent Kenneth Weston to help him manage the Rockingham project. (T. 26) From August to October, Weston supervised about seven or eight employees at the Rockingham site. (T. 25) Weston’s responsibilities included answering employees’ work questions, monitoring attendance, and discipling employees. (T. 24) Rockingham site employees utilized vehicles to remove and

² In this brief, the following citations apply: “GC” designates a General Counsel exhibit, “J” designates a joint exhibit, “R” designates a Respondent Exhibit, and “T” designates a portion of the hearing transcript.

relocate overburden material, including three to four haul trucks, an excavator, and a bulldozer.
(T. 25)

2. Respondent hired Bannan and gave him a raise within 60 days

Respondent hired Russell Bannan on August 14. (T. 85) At the time, Bannan expressed a desire to work in management, but Respondent felt that Bannan lacked the necessary experience. (R. 11, pg. 4; T. 122) Respondent hired Bannan as a haul truck driver for the Rockingham site, a job title he held throughout his tenure with the company. (T. 85) As a haul truck driver, Bannan was responsible for transporting overburden material from one location to another at the job site. (T. 85-86) As his employment began, Bannan wore a red construction hat, signifying that he was still in his probationary period. (T. 102) Bannan wore a red hat throughout work tenure with Respondent, including upon his discharge on October 25.³ (T. 103) Bannan never had any supervisory duties or responsibilities. (T. 42, 200) As it had with other new hires, Respondent asked employee Jeremy Elsenpeter to train Bannan including how to operate the haul truck and reviewing job site rules. (T. 145) From August 14 to October 4, Bannan earned \$17.00 per hour. (T. 26)

On October 4, having worked less than 60 days for Respondent, Bannan met with Heape to discuss his future. (T. 26) Bannan asked Heape for a timeline of development for Bannan to progress toward a salaried position. (T. 90) Heape responded that there was not a set timeline or procedure for employees to move into a salaried position. (T. 90) Heape wanted Bannan to gain additional experience in the industry. (T. 53) To assuage Bannan's concerns regarding his career direction, Heape offered Bannan a \$3.00 per hour raise. (T. 53, 91) Bannan went from making

³ There were three hat colors available to those working at Respondent's Rockingham job site: a red hat signifying an employee in his/her probationary period, a green hat signifying an employee outside of his/her probationary period, and a white hat signifying a supervisor or manager.

\$17.00 per hour to \$20.00 per hour. (T. 53, 91) Heape stated the reason he gave Bannan a raise in the processing paperwork, explaining that “Russell has taken on additional lead person-type duties as he seeks to expand his knowledge of construction and understand Morgan’s culture.” (GC 2; T. 29)

Bannan’s raise was unusual. Respondent does not routinely schedule or otherwise provide probationary employees with a raise during their first 60 days (T. 26-27) In context, an employee’s yearly increase would regularly range between \$.50 to \$1.00 per hour. (T. 209-210) Therefore, Bannan’s raise was unique because it was three to six times higher than other wage increases and occurred before Bannan had completed his probationary period.

3. Bannan missed six days of work and Respondent issued him a first written warning.

While working for Respondent, Bannan missed a total of six workdays due to sickness. (R: 15; T. 30, 113) More than a week before he received his raise, Bannan called in sick on September 24 and 25. (R: 15; T. 30) Bannan also missed four more days of work from October 7 to October 10. (R: 15; T. 30) On all but one occasion, Bannan gave Superintendent Weston prior notice that he was unable to attend work the following day. (T. 30) The outlier was when Bannan failed to provide prior notice regarding work on October 9. (T. 30) Project Manager/Estimator Ben Boland⁴ and Weston discussed Bannan’s missed workdays through text message on October

⁴ Contrary to Respondent’s position, Boland is a Section 2(11) supervisor under the Act and his statements can be attributed to Respondent. Boland holds the same Project Manager job title as Chase Wideman, whom Respondent admits is a Section 2(11) supervisor (GC 1(e); T. 92) Moreover, Superintendent Weston testified that despite Boland’s job title as Estimator, Boland is “considered management”, is in charge of employees, and “manages jobs from time to time.” (T. 171-172) Notwithstanding that Boland is a supervisor under Section 2(11) of the Act, Boland is also a 2(13) agent under the Act. The Board has held that an employer may be responsible for the statements of a non-supervisory employee who is acting as the employer’s agent, either with actual or apparent authority. See *Local 9431, Communications Workers of America, AFL-CIO (Pacific Bell)*, 304 NLRB 446, 446, fn. 4 (1991); *Diehl Equipment Co., Inc.*, 297 NLRB 504, 507 (1989); *Kidd Electric, Inc.*, 313 NLRB 1178, 1180 (1994); *Tyson Foods*, 311 NLRB 552, 552 fn. 2 (1993). A reasonable employee would have concluded that Boland represented Respondent in matters of employee management, including Respondent’s rules on a job site, considering that Boland was a Project Manager and Respondent’s own superintendent Weston believes that Boland

7 and 8, including their displeasure with his failure to respond to text messages. (R. 17) Boland told Weston to “treat it like you would anybody else,” and “[d]on’t take it easy on him on my account. I’ll see if I can send a driver up if you need to give him the rest of the week off.” (R.17)

On October 15, Respondent issued Bannan a “first warning.” (GC 3) At the time, Weston admits that he was aware of Bannan’s six missed workdays (T. 181, 184) According to Weston, he “recommended a write-up” for Bannan and that Project Manager Wideman “backed me on that.” (T. 181, 184) Weston testified that he and Wideman issued Bannan the first warning on October 15 based on his attendance issues, and that the first warning encompassed all of Bannan’s missed workdays. (T. 181, 184) On the discipline, Weston noted that this was Bannan’s “first warning” by checking the appropriate box and wrote that the consequences of further infractions would be “time off without pay.” (GC 3) The discipline further identifies that the “action to be taken” against Bannan is a “warning,” as opposed to the other identified possibilities like probation, suspension, or dismissal. (GC 3) Neither Weston nor Wideman communicated or consulted with Vice President of the Spartanburg Division Heape about Bannan’s attendance prior to or shortly after issuing Bannan his first warning. (T. 60)

Respondent’s purpose in issuing employee discipline is to correct a problem or to prevent recurrence. (T. 34) With that understanding, Bannan’s first warning achieved its goal. Following October 15, Bannan did not miss another workday for any reason. (T. 34, 118)

4. Bannan ignored Respondent’s warnings regarding employees discussing their wages by telling other employees about his raise and urging them to seek their own raises.

On two occasions after receiving his substantial raise, Respondent warned Bannan not to discuss wage information with other employees. The first occasion took place on the same day

is still part of management. (T. 92, 172) As a result, Boland’s statements to Bannan on October 4 are attributable to Respondent for the purpose of proving animus towards employee concerted activities.

Bannan received his raise. (GC 8; T. 95-97) On October 4, Project Manager/Estimator Boland text messaged Bannan. (GC 8; T. 95-97) In the text message conversation, Bannan and Boland discussed Heape's rationale for giving Bannan a raise, including that "he knew [Bannan was] worried about money with the baby on the way," "he knew [Bannan] had potential," "he was going to work toward getting [Bannan] into a supervisor or PE⁵ role," and "he hoped [Bannan] could stick with it without having set timeframes." (GC 8) Boland also warned Bannan that "I would not tell anyone at the job including Kenny [Superintendent Weston] about your pay raise." (GC 8; T. 97)

About two weeks later, Respondent again warned Bannan not to discuss wage information with other employees. (T. 106-108) During the week of October 15, Foreman Ronnie Rust served as Acting Superintendent at the Rockingham site while Weston was away.⁶ (T. 106) While on a lunch break that week, Rust and Bannan had a conversation about Rust's former and current wage rates. (T. 107) During the conversation, Rust admitted that he earned more as a foreman than he had previously earned as a bulldozer operator. (T. 107) When Bannan asked him about the difference between Rust's two wage rates, Rust responded that "company policy is to not talk about our wages." (T. 107-108) When Bannan stated that federal law gives employees the right to discuss their wages, Rust responded that "company policy really doesn't abide by that." (T. 108)

Despite Respondent's warnings, Bannan discussed wage information with at least three employees from October 14 to October 25. On one occasion during the two-week period, Bannan

⁵ There is no testimony evidence regarding what a "PE role." PE likely refers to a lead or foreman role with Respondent. (T. 50)

⁶ Regardless of the circumstances, Rust is a 2(11) supervisor. In Rust's usual role as foreman, Respondent admits that he is a 2(11) supervisor. (GC 1(e)) During the week of October 15, Rust served as Acting Superintendent at the Rockingham site, replacing Weston, another admitted 2(11) supervisor. (GC 1(e); T. 106) Thus, throughout the relevant time period, Rust was a 2(11) supervisor under the Act and his actions may be attributed to Respondent.

spoke with employee Leon.⁷ (T. 104) While at a hotel in Rockingham, NC, Bannan noticed that Leon was wearing a green hat, signifying that he had completed his probationary period. (T. 102) Bannan asked Leon how his performance review had gone, and Leon said that it went well. (T. 103) Bannan also asked Leon if he had received a raise after his performance review. (T. 103) Leon said that he had not received a raise. (T. 103) Bannan told Leon that other employees had received raises after their performance reviews in the past and that Bannan had recently received a raise too, even though he was still working in his probationary period. (T. 103-104) Leon “seemed surprised” and told Bannan that the situation was “messed up.” (T. 103-104) Bannan suggested that if Leon wanted anything, “you’ve got to make some noise” and that he “should ask management.” (T. 104)

On October 21, Bannan had a wage discussion with an employee named Danny Locklear. (T. 105) When Bannan and Locklear walked to their trucks, Locklear asked Bannan if he was still being trained for a project engineer position. (T. 105) Bannan, who at one time believed that Respondent would train him for the position, sarcastically said “that’s what I’ve been told.” (T. 105) Bannan also told Locklear that Respondent gave him a raise. (T. 105)

Perhaps Bannan’s most significant wage discussion took place on about October 17. Since Elsenpeter was still training Bannan around this time, he and Bannan spoke often. (T. 99, 145) During an October 17 phone call, Bannan told Elsenpeter that Respondent had given him a \$3.00 per hour raise. (T. 100, 146) Elsenpeter told Bannan that he was a “little peeved” about Bannan receiving the raise because Elsenpeter had recently received a \$.50 per hour raise and was Bannan’s trainer (T. 147) Elsenpeter said that it was “messed up that [Bannan] was making more than [he was].” (T. 101) Bannan told Elsenpeter that it “sucked,” that “he should ask for a

⁷ Leon’s last name is unknown. Bannan also testified that an employee nicknamed “Tweetie” may have been present for the conversation as well, but that he could not remember for sure. (T. 102)

raise,” and that “he should be strategic and play his cards right.” (T. 101, 147). Thus, Bannan both told Elsenpeter about his raise and urged Elsenpeter to seek a higher raise for himself.

Feeling upset about his own hourly wage and that Respondent gave Bannan such a substantial raise, Elsenpeter confided in Superintendent Weston. (T. 147-148) Early during the week of October 21, Elsenpeter and Weston had a conversation in Weston’s pickup truck (T. 148) Elsenpeter told Weston that he was “upset considering that I had trained Mr. Bannan and I had only received a 50-cent raise just recently,” and that Bannan had received a \$3.00 per hour raise. (T. 148, 176) Elsenpeter told Weston that he “thought I would have gotten a little bit more considering I was training new employees.” (T. 155) Weston told Elsenpeter that he “would check into” Bannan’s raise situation and that he would “get [Elsenpeter] more money.” (T. 148) According to Weston, Elsenpeter was so upset about the wage discrepancy between he and Bannan that “he threatened to leave the job, to quit.” (T. 185) At hearing, Weston testified that he and Elsenpeter did not discuss Bannan’s attendance during this conversation. (T. 176).

Learning that Bannan shared his raise information with other employees was the “final straw” for Weston (T. 185) Regarding employees making comments about their wages, Weston testified that he “didn’t allow that kind of talk,” “[does] not condone that...[i]t makes for bad blood,” and felt that “it doesn’t make a good atmosphere.” (T. 178, 182) Based on his conversation with Elsenpeter, Weston believed that Bannan had caused “issues that are festering just below the surface.” (GC 5, T. 176-177) Weston was afraid that he would “loose [sic] some of the crew” as a result. (GC 5, T. 176-177) Respondent tried to assuage Elsenpeter by having Project Manager Wideman call to say that it couldn’t give him a raise, but that it would “make it up to [him] later on when it was [his] evaluation time.” (T. 157) But as for Bannan, Weston felt

that Bannan's disclosure of his wage information "was the final straw that made [him] call Mr. Heape" about the situation. (T. 185) Bannan's days working for Respondent were numbered.

5. Respondent discharged Bannan because of his concerted discussions regarding his and other employees' wages.

On October 23, Weston emailed Vice President of the Spartanburg Division Heape about the situation. (GC 5) Weston asked Heape to call him to discuss "Russell [Bannan] and the issues that are festering just below the surface and me not wanting to possibly loose [sic] some of the crew." (GC 5) The following day, on October 24, Heape called Weston and memorialized that discussion in a handwritten note. (GC 6; T. 37-38) During their conversation, Weston told Heape about a few issues, including Bannan's recent sick days, that Bannan "throws Ben Boland's name [around]," and that "people don't speak with him." (GC 6) Notably, this was the first time that Weston or anyone had come to Heape about Bannan's attendance. (T. 60) Weston also mentioned that Bannan "told Jeremy [Elsenpeter] that his is making \$3 hr. more." (GC. 6; T. 39) At the hearing, Heape testified that "it concerned me" that Bannan told Elsenpeter about his raise. (T. 42). Based on his conversation with Weston, Heape scheduled a meeting with Bannan for the next day, October 25. (T. 39-40) According to Heape, Bannan's discharge was the singular reason for that meeting. (T. 43)

On October 25, Bannan met with Heape and HR Recruiter Jeff Fields at Respondent's Duncan, SC headquarters facility. (T. 110-111) Heape started the meeting by telling Bannan that Heape "had a mutiny on his hands" after Bannan "had spoken with at least one person about [his] wages." (T. 111) Heape told Bannan that he received a report that Bannan "told a more tenured operator the specifics of his [Bannan's] hourly rate increase. [And that] [t]his knowledge created unrest with our tenured operator." (GC 4; T. 43, 199) After reviewing events including

Bannan's October 4 raise, his recent sick days, and Bannan's conversation with Elsenpeter about the raise, Heape discharged Bannan. (GC 4) According to Heape, when Bannan asked if he was being fired because he discussed his raise, Heape denied the accusation, saying that "it was a combination of several issues." (GC 4)

Respondent's position regarding why it discharged Bannan has been inconsistent. Respondent argues that it has no policy against employees discussing their wages since there is no written policy in its handbook. (T. 125) Instead, Heape testified that he discharged Bannan because he "missed numerous days...his professionalism, his adherence to policy were in question. I could not feel that he was acting in keeping with Morgan's code of conduct when it came to performance and conduct, and I did not see a path forward for Mr. Bannan with Morgan as a manager." (T. 57)

However, Respondent's documented reasons for Bannan's discharge differ from its stated position at trial. Heape described Bannan's discharge in two documents: a typed note and a handwritten document entitled "Explanation for letting Russell go." (GC 4, GC 7) These documents directly contradict Heape's hearing testimony that he did not discharge Bannan based on Bannan's wage discussions. (T. 58) Heape's typed note states what Heape recalls occurred at Bannan's discharge meeting. (T. 43) Heape state that he called the discharge meeting "upon receipt of notice from our Rockingham project superintendent that there were issues with Russell on the job site and that we could possible [sic] lose some of our crew as a result." (GC 4) Heape also states that he addressed Bannan's wage discussions during the discharge meeting, and that he discharged Bannan "upon reviewing these issues," including the Bannan's wage discussions. (GC. 4) Heape's handwritten "Explanation for letting Russell go" document includes the

following reason: “Spread the word of the raise and we now have problems on the job site. The raise not a truck driver raise... a progression raise.” (GC 7, T. 45)

Respondent also presented a list that it had prepared for hearing, showing all employees discharged from August 2019 to April 2020, which included Respondent’s reason for each discharge. (R. 14; T: 76) In contrast to the laundry list of reasons that Heape testified about, Respondent’s list contains a single reason for Bannan’s discharge: “Conduct.” (R. 14)

C. Argument

1. General Counsel’s witnesses are credible, and Respondent’s primary witness lacks credibility

At hearing, General Counsel called two employee witnesses on direct examination, both of whom testified in a straightforward, consistent, and detailed manner. Neither of General Counsel’s witnesses substantively contradicted one another. Specifically, Elsenpeter has no fondness for Bannan, as evidenced by his subpoena-compelled testimony, his assertion that Bannan had been “name dropping” at the Rockingham site, and his irritation regarding Bannan’s lack of experience in the industry. (R. 19 pg. 14; T. 144, 153-154) Despite his feelings about Bannan, Elsenpeter credibly testified that he had a conversation with Bannan about their respective raises, and that he told Weston about his discussions with Bannan. (T. 147-148) General Counsel’s witnesses’ testimony confirmed and corroborated all documentary evidence produced at hearing. Finally, Respondent did not produce any evidence that would damage General Counsel’s witnesses’ testimony.

Meanwhile, Respondent’s primary witness lacks credibility. Heape’s self-serving testimony contradicted the documentary evidence. For example, Heape testified that he did not factor Bannan’s wage discussions into his decision to discharge Bannan. (T. 58) However, Heape

also acknowledged authoring a document entitled “Explanation for letting Russell go” which includes the following: “[Bannan] spread the word of the raise and we now have problems on the job site.” (GC. 7; T. 45) Heape also lacks credibility because he failed to directly answer questions at the hearing. For example, despite writing in his typed account of Bannan’s discharge meeting that Bannan’s wage discussions had caused “unrest” with a tenured operator, Heape tried to dodge that admission when Counsel for General Counsel questioned him at hearing. (GC 4; T. 41) Heape only acknowledged the tenured operator’s “unrest” and his concerns regarding Bannan’s wage discussions after Your Honor’s direct questioning. (T. 41-42) Heape’s uncorroborated and unforthcoming testimony is not credible.

2. Respondent discharged Bannan because of his concerted activities

a) Applicable principles

It is settled that an employer’s decision to take adverse action against an employee is unlawful if motivated by the employee’s concerted or union activity. See *Wright Line*, 251 NLRB 1083, 1087 (1980), enfd. on other grounds, 662 F. 2d 899 (1st Cir. 1981, cert. denied, 455 U.S. 989 (1982)). Under *Wright Line*, an employee must show that the activity was a motivating factor in his discipline. *Id.* If shown, then the employer must show that it would have taken the same action even in the absence of the activity. *Id.* In determining whether or not the activity was a motivating factor, the Board analyzes: 1) if the employee engaged in concerted activity, 2) whether the employer knew about the concerted activity, 3) if the employer had animus toward the concerted activity, and 4) whether an adverse action occurred. *Id.* Evidence of timing, pretext, and the existence of other unfair labor practices are relevant and important to the Board’s analysis. *Id.* General Counsel need not produce direct evidence of animus, since animus “can be inferred from circumstantial evidence based on the record as a whole.” *Tschiggfrie Properties*,

LTD., 368 NLRB No. 120, slip op. at 11 (2019); citing *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

By definition, in order for an employee's actions constitute concerted activity, they must be both concerted and protected. *Wright Line*, 251 NLRB at 1087. For an employee's actions to be concerted, "there must be evidence that the employee at any relevant time or in any manner joined forces with any other employee, or by his activities, intended to enlist the support of other employees in a common endeavor." *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986), *affd.* 835 F. 2d 1481 (D.C. Cir. 1987). Moreover, even if the employees' actions are not concerted, the Board may still find that an employer violated the Act if it discharged an employee as a pre-emptive strike to prevent the employee or other employees from engaging in future concerted activities. See *Parexel International*, 356 NLRB 516, 519 (2011) For an employee's actions to be protected, they must involve terms or conditions of employment, and the employee's method of protest must be protected. *Id.*

b) Bannan engaged in concerted activity and Respondent knew of Bannan's activity

After receiving his raise, Bannan consistently engaged in concerted activity. Between October 14 and October 25, Bannan discussed his raise with several employees, including Leon, Locklear, and Elsenpeter. (T. 100-105; 145-147) Moreover, in those discussions, Bannan encouraged his coworkers to seek raises for themselves. For example, after learning that Leon had not received a raise after completing his probationary period, Bannan told Leon to "make some noise and that...you should ask management" about obtaining a raise for himself. (T. 103-104). Later, when Elsenpeter told Bannan that he was a "little peeved" about Bannan receiving a higher raise than him, Bannan told Elsenpeter that it "sucked." (T. 101, 147). Bannan told

Elsenpeter that “he should ask for a raise,” and that “he should be strategic and play his cards right.” (T. 101).

Bannan’s wage discussions with other employees are clearly concerted. The Board generally protects employees’ rights to discuss wage information with their coworkers. See *Brookshire Grocery Company*, 294 NLRB 462, 463 (1989) Moreover, by encouraging other employees to seek raises for themselves, Bannan “enlist[ed] the support of other employees in a common endeavor” to obtain higher wage rates for Respondent’s employees. *Meyers Industries*, 281 NLRB at 887. This “common endeavor” becomes clear in light of Elsenpeter’s actions following his discussion with Bannan. After Bannan tells Elsenpeter that he “should ask for a raise,” Elsenpeter proceeds to Weston and discusses his dissatisfaction with his own recent raise. (T. 101) For these reasons, Bannan’s wage discussions are concerted⁸.

It is undisputed that Respondent had knowledge of Bannan’s concerted activities. A few days before Bannan’s discharge, Elsenpeter told Superintendent Weston that he and Bannan had discussed wage information. (T. 101, 148) During that discussion, Elsenpeter also jockeyed for his own raise. (T. 148) (T. 148) Elsenpeter told Weston that he knew about Bannan’s \$3.00 raise and that he was upset that he had only received a \$.50 raise. (T. 148, 176) Weston immediately viewed this conversation as a raise request, as he told Elsenpeter that he would “get [him] more money.” (T. 148) Respondent went so far as to have Project Manager Wideman assure Elsenpeter in a later phone call that, although it couldn’t give him a raise, it would “make it up to [him] later.” (T. 157) The evidence proves that Respondent knew about Bannan’s concerted

⁸ In its brief, Respondent argues that this case is factually similar to *Plastic Composites Corp.*, 210 NLRB 728 (1974). Respondent’s argument is not persuasive. In *Plastic Composites*, the Board held that an employee was not engaged in concerted activity when he, in response to his coworkers questions, “briefly and casually” stated that he had received a higher pay rate from a former employer than his current employer offered employees. See 210 NLRB at 738. The Board found that “there is no evidence that as a group or individually any of them did anything or were about to do anything about that subject.” *Id.* Here, unlike in *Plastic Composites*, there is evidence that Elsenpeter acted on his concerted conversations with Bannan by bringing the wage and raise issues to Weston. (T. 101). Thus, *Plastic Composites* and the present case are not analogous.

wage discussions and considered them to be “issues that are festering just below the surface.” (GC 5, T. 176-177).

c) Bannan’s concerted activities were a motivating factor in Respondent’s decision to discharge him.

Respondent discharged Bannan because of his wage discussions with other employees. The evidence demonstrates Respondent’s unlawful motivation in two ways: Respondent’s statements of animus and direct evidence of Respondent’s unlawful motivation in Heape’s decisional writings.

Several of Respondent’s supervisors clearly indicated their hostility toward employees discussing their wages. On October 4, the same day that Bannan received his raise, Project Manager/Estimator Boland made Respondent’s animus clear in a text message he sent to Bannan. (GC 8). Boland warned Bannan that he “would not tell anyone at the job including Kenny about [Bannan’s] pay raise.” (GC 8; T. 97). A week or two later, Foreman Rust also warned Bannan against discussing his wages with others. (T. 108) Rust told Bannan that “company policy is to not talk about our wages.” (T. 108) After Bannan asserted federal law to the contrary, Rust responded that “company policy really doesn’t abide by that.” (T. 108). Respondent did not present Boland or Rust at hearing to refute these statements.⁹ Both statements demonstrate considerable Respondent animus toward employees engaging in protected concerted activities.

In addition, Weston readily admitted that he has animus toward employee wage discussions. At the hearing, when asked about employees discussing their wages, Weston testified that he does “not condone that...[i]t makes for bad blood.” (T. 182) Weston further

⁹ See GC Brief footnote 4; Rust is an admitted 2(11) supervisor and Boland is a 2(11) supervisor or a 2(13) agent based on the evidence.

testified that such discussion “doesn’t make a good atmosphere” and that he “didn’t allow that kind of talk.” (T. 178, 182) Weston was responsible for supervising and disciplining employees at Respondent’s Rockingham site. (T. 24) Weston’s disdain for Section 7 activities clearly motivated his supervisory actions at the site, as he testified that Bannan’s wage discussions with other employees “was the final straw that made [him] call Mr. Heape,” resulting in Bannan’s discharge. (T. 185); See *Laurus Technical Institute*, 360 NLRB 1155, 1162 (2014) (in which the employer admitted that the employee’s concerted activity was the “proverbial straw that broke the camel’s back.”). Though Respondent has no written policy prohibiting employees from discussing their wages, Boland, Rust, and Weston make clear that Respondent maintained such a policy, albeit unwritten.

Aside from animus statements, Respondent also demonstrates its unlawful motivation through Vice President Heape’s decisional documents. In a typed statement, Heape states that he organized the October 25 discharge meeting “upon receipt of notice from our Rockingham project superintendent that there were issues with Russell on the job site and that we could possible [sic] lose some of our crew as a result.” (GC 4) The typed statement corroborates Heape’s hearing testimony in which he admitted to conducting Bannan’s discharge meeting based on what Weston had told him on October 23 and 24, including Bannan’s wage discussion. (GC 6; T. 39-40). In the second, handwritten document entitled “[e]xplanation for letting Russell go,” Heape’s reasoning includes that Bannan “spread the word of the raise and we now have problems on the job site.” (GC. 7)

Bannan’s concerted activities were clearly a motivating factor in Respondent’s decision to discharge him. An employer may not discharge employees for discussing wage information. See *Brookshire Grocery Company*, 294 NLRB 462, 463 (1989) (in which the employer

discharged an employee for discussing salaries) After Elsenpeter confronted Weston about obtaining a raise, Respondent saw a slippery slope caused by Bannan's wage discussions. Respondent discharged Bannan as a way to nip these wage discussions, and any future concerted activity, in the bud in order "to "erect a dam at the source of supply" of potential, protected activity." *Parexel*, 356 NLRB at 519; See also, *Lou's Transport, Inc.*, 361 NLRB 1446, 1447 (2014) (in which the employer feared that the employee was "stirring up the crowd" of other employees) Since Bannan's concerted activities were a motivating factor in his discharge, Respondent's actions were unlawful.

d) Respondent failed to show that it would have discharged Bannan absent his concerted activity

Respondent denies that it unlawfully discharged Bannan. Instead, based on Heape's testimony at hearing, Respondent will argue that it discharged Bannan based on his attendance, professionalism, adherence to policy, lack of performance, and that Heape "did not see a path forward for Mr. Bannan with Morgan as a manager." (T. 57) As more fully stated below, Respondent's proffered reasons are not persuasive. "The Respondent's defense burden under *Wright Line* is not to identify legitimate grounds for which it *could* impose discipline, but to persuade that it *would* have disciplined the employee even absent his or her protected activity." *Wendt Corporation*, 369 NLRB slip op. at 3. "When "the reasons advanced [for a discharge] are not persuasive, the [protected activity] may well disclose the real motive behind the employer's action." *Wright Line*, 251 NLRB at 1097; citing *N.L.R.B. v. Melrose Processing Co.*, 351 F.2d 693, 699 (8th Cir. 1965) In sum, Respondent failed to show that Bannan's fall from grace was for any reason other than his concerted activities.

i. Bannan's attendance issues were inconsequential to his discharge

Bannan's attendance was not the impetus for his discharge. Bannan missed six total days of work during his work tenure with Respondent: September 24 and 25, and October 7 through 10. (R. 15) On October 15, and aware of all six missed workdays and backed by Project Manager Wideman, Weston issued Bannan a "first warning." (GC 3; T: 181, 184) At the time, Weston did not discuss Bannan's attendance with Heape or otherwise elevate the matter after issuing the first warning. (T. 60) Weston's intention was for the October 15 first written warning to encompass all of Bannan's missed workdays. (T. 181) For all intents and purposes, Bannan's attendance matter was resolved on October 15.

Respondent's argument that it based its decision to discharge Bannan on his attendance is not persuasive. Bannan had no intervening attendance issues to warrant further escalation. Following October 15, Bannan worked as usual and never missed another workday. (T. 34, 118) There is no evidence that Bannan ever received another attendance discipline. Instead, there is only one intervening factor between October 15 and October 24, when Heape called Weston to discuss Bannan's "issues that are festering just below the surface:" Bannan's wage discussions. (GC 5) Within days of learning that Bannan had discussed his raise with Elsenpeter, Weston notified Heape of the incident. (GC. 6; T. 39) One day later, Heape discharged Bannan. Respondent's timing in discharging Bannan so soon after his concerted activities makes clear that it was motivated by his wage discussions, not his attendance. See *Frye Electric, Inc.*, 352 NLRB 345, 351 (2008) (in which the employer demonstrated its unlawful motivation through "stunningly obvious timing.")

Also, Respondent's own exhibits contradict its position that Bannan's attendance played a role in his discharge. At the hearing, Director of Human Resources Bethany Linder presented a

list of every employee that Respondent discharged from its Rockingham, NC site from August 2019 to April 2020. (R. 14; T: 76) According to the list, Respondent discharged four employees for attendance-related issues, noting the reason as “No Call No Show” (R. 14) However, Respondent’s list does not mention Bannan’s attendance. Instead, Respondent’s list only provides one reason for Bannan’s discharge: “Conduct.” (R. 14) The evidence, including Respondent’s own exhibit, shows that Bannan’s attendance was not a motivating factor in his discharge.

ii. Respondent uses “professionalism” and “adherence to policy” as euphemisms for concerted activity

Respondent’s arguments that Bannan was unprofessional and did not adhere to its conduct policies are pretextual. Vice President Heape provided two written accounts regarding his reasons for discharging Bannan and how the meeting transpired, only one of which barely mentions “professionalism” or “adherence to policy.” (GC 4, 7) In his typed statement, Heape briefly mentions that Bannan’s updates regarding his sickness during the week of October 7 were “very sporadic and not in keeping with company policy.” (GC 4) Heape also lists “professionalism” and “adherence to policy” at the end of his typed statement with no additional details or evidence. (GC 4) In his handwritten document entitled “[e]xplanation for letting Russell go,” Heape makes no mention of Bannan’s alleged “professionalism” or “adherence to policy.” (GC 7) Instead, Heape seems to use the term “professionalism” in the same way that other employers use terms like “attitude” and “troublemaker” in reference to discriminatees: as “code words” for concerted activity. See *Blue Star Services, Inc.*, 328 NLRB 638, 639 (1999); See also, *Richfield Hospitality, Inc.*, 368 NLRB No. 44 (2019) Respondent’s attempt to reframe Bannan’s unlawful discharge does not mesh with the evidence.

Also, Respondent's assertion that it discharged Bannan for interacting unprofessionally with coworkers and managers is pretextual. On October 24, Weston told Heape that Bannan "throws Ben Boland's name" and "people don't speak with him." (GC 6) If Heape believed Bannan's interactions with his coworkers warranted his discharge, one would reasonably expect him to include those reasons in his "[e]xplanation for letting Russell go" document or typed statement regarding the discharge meeting. Yet, neither of Heape's statements include Bannan's "name dropping" or otherwise unprofessional behavior towards coworkers. (GC 4, 7) These omissions show that "professionalism," "adherence to policy," and "name dropping" were not motivating factors in Bannan's discharge. Respondent's argument otherwise is pretextual and supplies its unlawful motivation. See *Pace Industries, Inc.*, 320 NLRB 661, 661 (1996) (Board found that the Administrative Law Judge, after discrediting respondent's offered reasons for its adverse action, "was entitled to infer that there was another reason.")

- iii. Respondent "did not see a path forward for Mr. Bannan with Morgan as a manager" because of his concerted activities, not because of his work performance

At hearing, Respondent implied that it had loftier expectations for Bannan. According to Respondent, it was grooming Bannan for a salaried position, but that his work quality, performance, and experience was at the "bottom of the list." (T. 42, 168) Respondent asserts that it "did not see a path forward" for Bannan since he did not live up to those expectations. Respondent's position is not supported by the evidence.

As a preliminary matter, Respondent's representation of Bannan's "manager hopeful" position is misleading. Respondent suggests that it only hired Bannan to be on the management track and that he failed in that role. However, there is no evidence that Bannan's role as a "manager hopeful" differed from other haul truck drivers in any meaningful way. Respondent

hired Bannan as a haul truck driver; a title he held throughout his tenure with Respondent. (T. 199-200) Bannan had no supervisory duties or responsibilities as a haul truck driver. (T. 42) Though Heape told Bannan that he wanted to eventually get him into a lead role for experience and to prove leadership, he also told Bannan that there was not a certain timeline or “way in which people move into salary positions.” (R. 11; T: 90-91) There is no evidence to suggest that Bannan was anything other than a haul truck driver with potential.

Regarding his performance, Bannan’s alleged work issues were not a factor in Respondent’s decision to discharge him. For example, Respondent’s decisional documents do not support that it substantively considered Bannan’s work performance in his discharge. Heape does not mention Bannan’s work performance in his notes from his October 24 conversation with Weston. (GC 6) Heape does not mention Bannan’s job performance in his typed statement describing the October 25 discharge meeting. (GC 4) Heape does not mention Bannan’s work performance in his handwritten statement regarding his “[e]xplanation for letting Russell go.” (GC 7) The only contemporaneous document that mentions Bannan’s work performance is Respondent’s separation notice Bannan, which lists Bannan’s work performance as one of Respondent’s reasons for discharging him. (R. 10) Even then, the separation notice makes the general assertion with no supporting detail. (R. 10) Based on the documentary evidence, Respondent did not consider Bannan’s work performance to be a genuine factor in his discharge.

Moreover, in context, Project Manager/Estimator Boland and Superintendent Weston’s October 7 and 8 text messages about Bannan do not support Respondent’s assertion. After discussing concerns that they had about Bannan, Boland told Weston to treat Bannan “like you would anyone else” and not to “take it easy on him on my account.” (R. 17) On October 15, Weston chose to issue Bannan a first warning rather than a harsher discipline. (GC 3) In doing

so, Weston proved that he did not view Bannan's alleged work performance issues as a reason to discharge him. Furthermore, there is no evidence that Bannan had any work performance issues after October 15, so Respondent cannot use Bannan's work performance to explain why Weston called Heape on October 24. Bannan's concerted activities, which Weston characterized as "the final straw," are the only reasonable explanation for why Weston abruptly escalated Bannan's wage discussions to Heape's attention on October 24. (T. 185)

iv. Respondent would not have discharged Bannan absent his concerted activity

Respondent has failed to prove that it would have discharged Bannan absent his concerted activities. To avoid liability, if an employer proves that it would have taken the same action in the absence of protected activity, it may avoid liability. *Wright Line*, 251 NLRB at 1087. "However where the evidence establishes that the reasons given for the [employer's] action are pretextual – that is, either false or not in fact relied upon – the [employer] fails by definition to show that it would have taken the same actions for those reasons, absent the protected conduct." *Wendt Corporation*, 369 NLRB No. 135, slip op. at 2 (2020); citing *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003)

Here, Respondent has failed to carry its burden. Respondent claims that it discharged Bannan for a myriad of reasons, including his attendance, lack of professionalism, disregard for policy, and inadequate performance. But the facts are clear. Respondent did not view Bannan's attendance as a dischargeable offense, because it encompassed all six missed workdays in the October 15 first warning it issued him. Respondent did not consider Bannan's professionalism, adherence to policy, or overall work performance as problematic, because it did not substantively include those reasons in Heape's decisional documents. Respondent's alleged reasons are pretextual. Instead, the evidence shows that a single factor motivated Respondent's decision to

discharge Bannan – his wage discussions with other employees. Respondent has not asserted and presented no evidence at trial that Bannan’s concerted activities involved the type of “abusive conduct” that could cost him protection of the Act. See *General Motors LLC*, 369 NLRB No. 127, slip op. at 15 (2020)

In *Wright Line*, the employer based its adverse actions on “a predetermined plan to discover a reason to discharge [the charging party] and thus rid the facility of [him.]” Id. at 1091. The present case is nearly identical. There is a clear and unequivocal catalyst to Respondent’s actions. Prior to the week of October 21, Respondent tolerated Bannan despite his alleged attendance and performance issues. But within days of discovering Bannan’s wage discussions, an activity that Respondent’s own superintendent “do[es] not condone,” Vice President Heape swiftly discharged Bannan. (T. 37, 182)

D. Conclusion and Proposed Remedy

In sum, Respondent saw Bannan as a problem and took action to rid itself of him. On two occasions, Respondent admonished Bannan not to discuss his wages with other employees. When Respondent discovered that Bannan had ignored Respondent's warnings and shared his wage and raise information with other employees, that was the "final straw." (T. 185) Respondent then acted swiftly to discharge Bannan because of his concerted activities, in violation of Section 8(a)(1) of the Act.

Counsel for General Counsel respectfully submits that he has carried the burden to prove the violation alleged in the Complaint. Accordingly, Counsel for General Counsel urges that the Judge grant a full remedy for Respondent's violations, including the traditional cease and desist order, that Charging Party Russell Bannan be made whole, and that Respondent post the notice proposed in the appendix to this brief.

Respectfully submitted this 19th day of August 2020.

/s/ Joel R. White
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Appendix: Proposed Notice to Employees and Members
Notice To Employees and Members
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 a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

YOU HAVE THE RIGHT to discuss your wages, hours, and working conditions with other employees, and **WE WILL NOT** stop you from discussing your wages, hours, and working conditions with other employees.

WE WILL NOT discipline, demote, or discharge you because you discuss your wages, hours, and working conditions with other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under the National Labor Relations Act.

WE WILL offer Russell Paul Bannan the job he was performing before we discharged him and, if that job does not exist, we will offer him a similar job. He will not lose any seniority or any other rights or privileges that he enjoyed before we discharged him. **WE WILL** pay him, with interest, for the wages and benefits he lost because we discharged him.

WE WILL remove from our files all references to Russell Paul Bannan's discharge and **WE WILL** tell him in writing that we have done so and that his discharge will not be used against him in any way.

Certificate of Service

I hereby certify that copies of the foregoing Counsel for General Counsel's Brief to the Administrative Law Judge have this date been served by electronic mail and first-class mail upon the following parties:

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Dated at Winston-Salem, NC, August 19, 2020

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