

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 7**

**MICHIGAN BELL TELEPHONE
COMPANY and AT&T SERVICES, INC.,**

and

**LOCAL 4034, COMMUNICATIONS
WORKERS OF AMERICA (CWA),
AFL-CIO,**

**CASE: 07-CA-161545; 07-CA-165384;
07-CA-166130; 07-CA-170664;
07-CA-176618; 07-CA-177201;
07-CA-182490; 07-CA-184669;
07-CA-190631**

**SUPPLEMENTAL BRIEF ON REMAND OF RESPONDENTS
MICHIGAN BELL TELEPHONE COMPANY AND AT&T SERVICES, INC.**

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I. INTRODUCTION

The National Labor Relations Board remanded this case to Administrative Law Judge Ira Sandron ("ALJ") to "make specific findings or resolve conflicting testimony as to the events surrounding" the disciplines issued to Brian Hooker and the termination of his employment.¹ Although the Board found Respondents Michigan Bell Telephone Company and AT&T Services, Inc. (collectively "Company" or "AT&T") violated the Act by returning Hooker to the workload after working full time for CWA Local 4034 ("Union" or "Local 4034") and requiring him to fill out union activity logs, the Board expressly held the Company's actions could not be considered in the aggregate when assessing whether the Company lawfully disciplined and terminated Hooker. The Board disagreed with Your Honor's conclusion that "none of Hooker's disciplines nor his discharge would have occurred but for the [Company's] unlawful decision to place Hooker back in the load and require an activity log." (Board Decision at 5). Through this conclusion, the Board also rejected General Counsel's principal theory of the case: that Hooker's discipline and discharge were inherently unlawful as "fruit of the poisonous tree," solely because the Company's decision to place him in the load was unlawful. Because each discipline issued to Hooker and his termination was based on misconduct committed by Hooker, the Company's decisions to discipline and discharge him did not violate Sections 8(a)(1) or (3) of the Act.

With respect to each discipline issued, the ALJ Decision credited the testimony of the Company's managers regarding Hooker's misconduct. And the ALJ Decision did *not* credit Hooker's testimony on any of the events that resulted in discipline, and specifically discredited his

¹ The issues on remand include disciplines issued to Hooker on March 3, April 27, May 10, September 6 and October 10, 2016, and his termination on October 14, 2016. The verbal warning issued to Hooker on August 12, 2016 is not at issue on remand.

testimony on several incidents involving his misuse of time. Hooker's recourse for objecting was to "work and grieve." He did neither.

The credited evidence and undisputed facts prove that Hooker's incessant and unyielding campaign of misusing time and avoiding work over a ten-month period constituted intentional misconduct and warranted his disciplines and discharge. His misconduct plainly violated work rules for TFS technicians and constituted just cause for his disciplines and termination, irrespective of the reasons for the Company's initial decision to place him in the load.

Nor is there any evidence that Area Manager Ted Brash harbored animus towards Hooker because of any protected conduct. Brash indisputably made the decisions to discipline and terminate Hooker. The Company's patient, progressive discipline and eventual discharge of Hooker were not motivated by his union activities and would have occurred in any event absent those activities, and thus did not violate Sections 8(a)(1) or (3), under the *Wright Line* standard.

II. RELEVANT FACTUAL OVERVIEW

The facts of this case are comprehensively addressed in Respondent's Post-Hearing Brief, filed with the NLRB Division of Judges on May 11, 2018. Following is an abbreviated discussion of the facts relevant to the issues on remand.

A. Background of the Parties

AT&T provides telephone, internet and television services to customers. For years, Communications Workers of America ("CWA") has been the collective bargaining representative for bargaining unit employees in AT&T's Michigan operations. AT&T and affiliated entities have long been parties to collective bargaining agreements with CWA. The parties' most recent agreement, effective April 12, 2015, through April 14, 2018, covers bargaining unit employees in AT&T's network telephone operations in the traditional five-state "Midwest" region – Indiana,

Illinois, Michigan, Ohio and Wisconsin. (“CBA”)(GC 2).² CWA District 4 is a geographical subdivision of CWA. Charging Party, CWA Local 4034 represents employees in Grand Rapids and Lansing, Michigan, and in various AT&T Market Business Units, including Technical Field Services (“TFS”) and Internet and Entertainment Field Services (“IEFS”). (JX 2).³

B. Brian Hooker’s Employment with AT&T

At all material times, Brian Hooker was employed as a Customer Service Specialist in the TFS organization at the 36th Street Garage. Hooker was employed from May 12, 1996, until he was terminated on October 13, 2016. (JX 2). At the time of his termination, Hooker reported to Manager Network Services Andrew Sharp, who reported to Area Manager Ted Brash, who reported to Director George Mrla.

Hooker was a member of CWA Local 4034 and its Administrative Assistant (“AA”). Beginning in 2010, Hooker performed union duties full-time. Hooker returned to work in the load on Sunday, December 13, 2015. Sharp arranged for ride-along training that day with an experienced technician. Hooker also completed ride-along training with an experienced technician on December 20, January 2, 3, 10, 23, and 24. (Sharp 2198, 2204, 2207; R 26, p. 13).

Before returning to work in the load, Hooker expressly foreshadowed that he did not intend to perform productive work for the Company. Hooker did not refute the following facts:

- On October 20, 2015, when Brash called Hooker about returning to the load, Hooker declared that the Company was “going down a path fraught with peril.” (Brash 1027-28).

² As used herein, the references to “JX,” “R” and “GCX” refer to the Joint Exhibits, Respondent Exhibits and General Counsel Exhibits, respectively. The references to “[Witness Name]__” refer to the witness and the transcript pages of the witness’s testimony, from the official Transcript of Proceedings of the hearing held before Administrative Law Judge Sandron, held in Grand Rapids, Michigan on August 15-17, October 30-31, November 1-3, and December 11-15, 2017. The references to “D__:_” refer to the pages and lines from the ALJ’s Decision, issued on June 21, 2018, which is referred to herein as the “ALJ Decision.”

³ A Stipulated Glossary of Terms was entered into evidence as JX 2, which defines relevant technical terms that may not otherwise be defined herein.

- On October 20 and October 21, 2015, Hooker told Brash that he would “never serve a day in the load.” (Hooker 751; Brash 1061).

Thus, the ALJ’s Decision expressly noted, as discussed below, “[e]arly on, Brash came to believe that Hooker was not paying attention during his ride-alongs, not taking steps to ensure that his vehicle was completely stocked, and creating excuses not to perform tech work. Hooker’s conduct at times reinforced these conclusions.” (D 17:29-31)

C. Andrew Sharp’s Management Experience

In November 2015, Sharp became manager at the 36th St. Garage, which was then the worst performing garage in Brash’s district. Sharp was a highly skilled technician, and Brash believed his technical skills would help improve the garage’s performance. When Sharp became Manager at the 36th St Garage, he proactively reached out to representatives of Local 4034, including Chief Steward Charles Johnson, Lead Steward Caresian Campbell, and Brian Hooker, to express that he was looking forward to working with them and to discuss goals they had in common, such as improving safety, avoiding discipline, and improving performance. (Sharp 2166-68). In a meeting with Johnson and Campbell, they responded positively, indicating they were looking forward to working with Sharp. (Sharp 2166-68). In contrast, in December 2015, Hooker told Sharp that he would “absolutely never work with anyone with the Company.” (Sharp 2169).

Sharp was a novice first-level manager who had no agenda other than to develop Hooker into a productive field technician. He had absolutely no reason to lie and demonstrated no animus towards the Union or towards Hooker. As demonstrated below, his testimony regarding the incidents that resulted in Hooker’s discipline should be credited.

D. March 3: Written Warning for Misuse of Time on February 11, 14, and 21

1. February 7: Hooker performs no work

On February 7, Hooker was scheduled to work from 8:00 am to 4:45 pm. However, he completed no work or training that day and never even left the garage. (Brash 1263-64 R 28, p. 4, 07-Feb-2016).⁴ Hooker claimed he could not find his vehicle registration and was told by the Duty Manager to complete trainings. Hooker failed to complete any training courses that day. (R 31). The next morning, Sharp looked in Hooker's truck and immediately saw the registration in plain sight. (Sharp 2224). Brash considered issuing discipline for Hooker's work avoidance but he hoped to change Hooker's behavior through dialogue rather than discipline. (Brash 1267).

Hooker did not testify about the events of February 7.

2. February 11: Hooker works unauthorized overtime, claiming he did not know how to use a flip phone

On February 11, towards the end of his shift, Hooker called Sharp and left a voicemail message that he would not be able to finish his assigned job. (Brash 1274; Sharp 2236). Hooker's message clearly stated he had to leave at the end of his scheduled shift and was not available to work overtime. (D 25:43-44; Brash 1274; Sharp 2237; Hooker 559). Sharp made calls and arranged for another technician to complete the job, who had to drive 30 minutes to the worksite and to finish the work on overtime. (Brash 1275; Sharp 2239). Sharp called Hooker to let him know another technician was on his way. Sharp also sent Hooker a text. Hooker did not answer his phone, did not respond to the text message and never called Sharp back that afternoon. (Brash 1275-76; Sharp 2238-40). Sharp later learned that Hooker stayed on the job to receive overtime pay, without authorization. (D 26:12-16). When Hooker returned to the garage, he disingenuously

⁴ R 28 is a compilation of the Job Detail Report (aka "Work Ticket") for Hooker for each of the days on which he worked in the load during 2016. Hereinafter, the citations to "R 28, p. 4, 07-Feb-2016" refers to the page number and date listed in the top left-hand corner of the Work Ticket for the particular day in question.

told Sharp “*he did not know how to use his cell phone*” because he had not yet read the instruction manual for the simple “flip” phone. (D 26:2-10; Brash 1274, 1276-77; Sharp 2241). Hooker repeated this explanation in a February 22 meeting with Sharp. (D 27:5-6). Sharp had never given instructions to any tech on operating a flip phone and did not believe Hooker’s explanation that he needed to read the instructions to operate his phone. (D 26:5-10). The ALJ Decision expressly credited Sharp's testimony about the February 22 meeting over Hooker's testimony. (D 27: 4).

Brash and Sharp concluded that Hooker’s conduct on February 11 violated Tech Expectations, because he (1) failed to obtain authorization to work overtime; (2) remained on the worksite with another technician without authorization from his supervisor; and (3) remained on the worksite after he was no longer dispatched on that job. (R 5, p. 3-4; D 26:5-10).

3. February 14: Hooker Wastes 3 Hours on a Job Requiring No Service

On February 14, Hooker violated Tech Expectations when he went AWOL from 8:00 to 11:03 am, without accounting for his time or explaining why he was not working. Hooker dispatched on a simple “BPC” ticket at 8:08 am.⁵ (Brash 1283-84, 1287; Sharp 2245; R 28, p. 6, 14-Feb-2016). At **11:03 am**, Hooker called Sharp and reported there was nothing to do at the job. (Brash 1286-87; Sharp 2247). Hooker completed no work on that job and never accounted for his time from 8:00 to 11:03 am – three full hours. On February 22, Sharp asked Hooker what he did during that time. Hooker said he “did not really remember.” (Sharp 2259; D 27:6-7). Hooker violated Tech Expectations in that he (1) failed to deliberately plan to minimize lost time, and (2) failed to properly close out the job. (R 5, p. 2-3). Staying on a job for three hours with no work

⁵ “BPCs” (i.e., Bad Plant Conditions) are defects in the plant or cosmetic damage to the infrastructure, which would lead to future service problems if not repaired. They are usually identified and reported by technicians. For example, if a technician sees a pedestal that has been hit by a car or a dented Cross Box, the technician will report the BPC, and a work ticket will be created for a technician to repair it in the future. (Brash 976)

to perform is blatant work avoidance and “extremely rare” in the TFS organization. Such misuse of time normally results in discipline on the first occurrence. (Brash 1289, 1293; Sharp 2261).

February 7 and 14 were two of the first three days that Hooker worked in the load on his own. (RX 26) He engaged in multiple acts of misuse of time at his very first opportunities.

4. February 18: Mrla and Brash Meet with Letts and Beach in Lansing

On February 18, Brash and Mrla met with Local President Ryan Letts and Local Vice President Pam Beach, in Lansing. (Brash 1295; Mrla 2653). Hooker had been working on the load (training and on his own) for two-plus months, and management saw a troubling pattern of “work avoidance.” Although Hooker had pledged to “work and grieve,” he instead purposefully avoided work to protest the decision to put him on the load. Mrla and Brash solicited the Union’s help to correct Hooker’s conduct. They hoped to enlist Letts’ and Beach’s support to encourage Hooker to stop misusing time and avoid disciplinary consequences. (Brash 1300-01; Mrla 2656-57). Mrla (and Brash) had routinely asked other CWA Locals for similar assistance to avoid disciplining employees when possible. (Mrla 2657; Brash 1303-04).

Mrla explained Hooker’s performance problems to Letts and Beach. He expressed that Hooker was “heading down the wrong road.” Letts defiantly responded “I wish all of my members were like Brian Hooker.” (Mrla 2656-57; Brash 1302; Letts 313). Mrla understood the Union had no interest in developing a constructive working relationship or even addressing Hooker’s misconduct. Mrla concluded there was no reason to continue the meeting. (Mrla 2658; Brash 1303).

5. February 21: Hooker Waits 90 Minutes Before Dispatching

Hooker’s next scheduled day to work in the load was Sunday, February 21. (RX 26) Yet on that day Hooker *again* violated Non-Management Expectations when he failed to leave the garage until after 9:30 am – more than 90 minutes after his shift started. The expectation is to

leave within 20 minutes. Hooker continued to avoid work the rest of the day. (Brash 1308-09; Osterberg 2054; R 33).

Lansing Manager Jeff Osterberg was Duty Manager on February 21. At 9:23 am, a Load Balance Manager from the dispatch center called Hooker to find out why he had not yet dispatched on a job. (Brash 1310; R 33). Hooker did not answer that call, did not return the call, and did not call the Duty Manager to explain what he was doing. (Brash 1310). Hooker's Work Ticket for the day shows that he dispatched on his first job at 9:31 am. (R28, p. 8. 21-Feb-2016). This was three minutes after he sent an email to Brash and Sharp (at 9:28 am) that had nothing to do with his work assignments for the day. (R. 34).

At 11:16 am, Hooker sent an email to Osterberg with a photo of the pedestal he was dispatched to repair and described what he believed to be the issue with the pedestal and how he planned to make the repair. (R 33). Hooker wrote that the pedestal was "not smashed" but he identified preventative maintenance issues that he could take care of. Hooker wrote "[t]here is some PM [preventative maintenance] to do such as a grommet to be place and some bonds I think need to be rescuers so as to be individualized on the bus." (R33). At 1:29 pm, Hooker closed out of that job and returned it incomplete. (Brash 1316; R28 p. "CMP 13:29"). On the Work Ticket narrative, Hooker inputted "Not trained on BPC protocol; inadequate truck, tools, supplies. Truck brake failure." (R 28, p. 8; Brash 1316). Hooker's claim of not being trained on BPC "protocol" was false. There is no such thing as a "BPC protocol," and he explained in his 11:16 am email exactly what needed done on the job. (Brash 1317).

When subsequently interviewed, Hooker provided no explanation for dispatching 90 minutes after his 8:00am shift start time on February 21, and there was no indication he performed any work that day. (Brash 1308, 1317-18). On February 22, Sharp interviewed Hooker and asked

what he did for those 90 minutes. Hooker said he did not want to do administrative work, which made no sense to Sharp. (D 27:8-9). Brash considered Hooker's entire work day to be a misuse of time (up to the point later in the afternoon when his truck was towed due to a brake light being on). (Brash 1318). Hooker violated Tech Expectations by (1) failing to deliberately plan to minimize lost time, and (2) failing to be at his reporting location and ready to start work at the beginning of the tour. (R 5, p. 2-3).

6. March 3: Hooker Receives a Written Warning.

Hooker received a disciplinary written warning on March 3, 2016, for violating Tech Expectations on February 11, 14, and 21. (GC 26). The Manager's Guide to Corrective Action ("Manager's Guide") sets forth guidelines for issuing discipline. (R 32). It provides that a *single violation* of Tech Expectations (aka "Non-Management Expectations") warrants a written warning and one-day suspension, and that a third violation merits termination. However, Brash issued only a written warning – with no suspension – notwithstanding that more severe discipline was warranted based on Hooker's multiple violations over a 10-day span. (R 32, p. 9-10).

E. GPS Devices and Hooker's New Vehicle on February 28

The Company installs GPS devices on all technician vehicles, typically under the steering column. The device plugs into an adaptor, which is wired into the vehicle's electronic system. The GPS device transmits data regarding the vehicles' location and movements to two Company systems, "Telogis" and "U-dash." (Brash 1387; GC 2, p. 131).

On February 28, Sharp re-assigned Hooker the work truck previously assigned Caresian Campbell. Sharp allotted Hooker the full day on February 28 to "move into" his new vehicle. (Brash 1382; Sharp 2275). Management later learned that the GPS device last reported a movement on February 27 at 4:45 pm – the moment Campbell last turned off the vehicle. (R67, p. 13) *The*

GPS unit in Hooker's new vehicle stopped reporting the very morning that Hooker took over the vehicle. As discussed below, the Company did not discover the issue for another six weeks because it had no reason to monitor the GPS device on Hooker's vehicle.

F. May 10: Hooker Receives Two Final Written Warnings/3-Day Suspensions for Misuse of Work Time and GPS Tampering

1. April 10: Hooker failed to complete any work and disingenuously claimed he was unable to open the locks on his truck

On Sunday, April 10, Hooker was scheduled to work on the load from 8:00 am to 4:45 pm. He waited more than an hour before dispatching on his first job, and then emailed the Duty Manager claiming he could not access his tools because he did not know the combination to the locks on his truck. The Duty Manager (Sidney Bragg) informed Hooker that morning that the lock combination was the last 4 digits of the vehicle number – the same for all trucks at the 36th St. Garage. (R 40). Hooker also drove this same vehicle on March 6, 20 and 27, without reporting a problem opening the locks on his truck's toolboxes. (Hooker 855-56). At 12:05 pm, Bragg left church, went to Hooker's jobsite, and opened the combination lock immediately, using the same combination he had given Hooker: last 4 digits of the truck number. (R 40; Brash 1396). Hooker had no explanation for why he was unable to open the lock or why it took so long to report he was having difficulty. The ALJ Decision expressly discredited Hooker's testimony on this issue. (D 30:30-31). It appeared Hooker was merely looking for an excuse to justify wasting the day in his truck without attempting any work on his assigned task. (Brash 1398). Despite working for seven hours, Hooker failed to complete any work tickets on April 10.

2. April 17 and 18: Discovery of Hooker's Disconnected GPS

Hooker's next scheduled work day was Sunday, April 17. Duty Manager Jason Bigelow tried to locate Hooker's vehicle that morning to conduct a Safety Inspection.⁶ Bigelow looked for Hooker's vehicle on Telogis and discovered the GPS device had not reported data since February 28. (R 41, p. 18; R 67, p. 11). Bigelow informed Hooker his GPS was not reporting. (Brash 1403).

At 3:27 pm on April 17 – shortly *after* Bigelow arrived at Hooker's worksite – Hooker submitted a repair ticket to address minor issues with his truck, disingenuously reporting “A strange device is laying in the driver side door storage.” (R 41, p. 21, 28). It was the GPS device that had been unplugged and not reporting data for the prior six weeks that Hooker drove it.

On April 18, Fleet Mechanic Richard Straub completed repairs on Hooker's vehicle and sent an email to Hooker, Sharp and John Asaro (Fleet Manager) advising “the electronic item in the door panel is the GPS unit that plugs in under the dash.” (R 41, p. 27-28; R 67, p. 36). Straub later informed Asset Protection Investigator Jody Vilks there had been no history of GPS units coming loose, and he thought someone had tampered with it. (Vilks 1953; Brash 1427-28).

3. Asset Protection Investigation

a. April 19-24

On April 19, Brash reported possible GPS tampering (by Hooker) to Mrla, Human Resources, Labor Relations, and the Asset Protection department. The case was assigned to Asset Protection Investigator Jody Vilks. (Brash 1414-15; Vilks 1909). Vilks requested records from Brash to begin her investigation and called Bigelow to discuss how he learned of the GPS issue on April 17. (Vilks 1935, 1938). Brash sent Vilks the GPS records from Hooker's truck and relevant time

⁶ While an unrelated grievance was pending, the Company did not update vehicle assignments in Telogis. As a result, the Telogis reports show Hooker's truck (2008133-215) as being assigned to Caresian Campbell. (See e.g., R 41, p. 12). It is undisputed, though, that Hooker began driving that vehicle on February 28.

records and work tickets showing when Hooker was in the truck. (Vilk 1935-36; R 42). Vilk gathered and reviewed various other documents as part of her investigation, which is comprehensively addressed in the Asset Protection Report and her notes. (R 41, 67).

b. April 24

Hooker's next scheduled workday was Sunday, April 24. Brash instructed the Duty Manager, Jeff Osterberg, to monitor Hooker's GPS that day to see if it continued to transmit data (after Straub had reconnected it on April 18). (Osterberg 2055). The ALJ Decision expressly credited Osterberg's testimony in reporting what he witnessed. (D 7: 17-18). The GPS device again stopped reporting at 10:19 am that morning when Hooker was leaving a worksite. (R 41, p. 9).

At 9:02 am, more than an hour after shift start, Hooker dispatched on a BPC ticket to replace a pedestal, a simple job. (Osterberg 2058, 2064; R 28, p. 18, 24-Apr-2011; R 33a, p. 5). Osterberg used "U-Dash" to find Hooker's jobsite. When Osterberg arrived, he saw Hooker sitting his in truck and not making effort to perform the assigned work. (Osterberg 2065-67). At 10:19am, Osterberg saw Hooker drive away from the worksite in his truck. Osterberg checked the Telogis system. It showed Hooker's GPS stopped reporting when Hooker left the worksite, at 10:19 am. (R43a, p.15; Osterberg 2076-78). Brash spoke with Osterberg again and asked him to visually confirm if the GPS device had been disconnected. (Brash 1429).

At about 1:00 pm, Osterberg went to the job site, spoke briefly with Hooker, and visually saw that the GPS unit in Hooker's truck had been unplugged. The unit again was in the driver-side door pocket, hidden under a booklet. (Osterberg 2084). Osterberg *did not tell Hooker the GPS device stopped reporting*. (Osterberg 2084; R 43b, p. 4-7). Nor did Hooker tell Osterberg the GPS had become disconnected or that he knocked it out. (Osterberg 2085-86; Brash 1747). Osterberg then looked at the pedestal that Hooker was to replace. To that point (1:00 pm), Hooker had not completed any work on the job. (D 30:40-42; Osterberg 2086).

Hooker called Osterberg at 4:26 pm and reported he did not complete the job. (Osterberg 2087). Hooker returned the job incomplete, with two minor tasks remaining. Hooker simply chose not to complete the job at hand. (Osterberg 2088-89).

c. April 25-26

On April 25, Brash informed Vilk that the GPS on Hooker's vehicle stopped reporting at 10:19 am the prior day, and that Osterberg had found the unit in the vehicle's driver-side door pocket. (R 43b, p. 4-7; R 67, p. 5). Later that day, Osterberg provided Vilk (and Brash) with a timeline of the events he observed on April 24 and relevant documents matching his timeline. (Osterberg 2090; Vilk 1965; R 41, p. 31-32). Brash relayed to Vilk that Hooker had called Fleet Manager John Asaro that day asking if there had been any safety issues with GPS devices in his vehicle model. (Vilk 1967-68). This indicated to Vilk that Hooker *knew* his pending interview with Asset Protection was about the GPS device, though only Vilk and Brash knew the topic. (Vilk 1967-69). The only logical inference is that Hooker had intentionally disconnected the device.

d. April 27: Vilk's Interview of Hooker

On April 27, Vilk interviewed Hooker and obtained a written statement (contained in the AP Report). (D 28:14-27; Vilk 1978-84; R 41, p. 34-35). The ALJ Decision expressly credited Vilk's account of this interview, on which Hooker did not testify. (D 8: 8-9). Hooker admitted knocking out the GPS on February 28, illogically claiming it happened as he was *setting* the parking brake. (Vilk 1980, 1982). Hooker also admitted a fellow Union rep had told him on *April 12* that the device in his vehicle door pocket was the GPS unit. Thus, Hooker's April 17 report to Fleet of a "strange device" was disingenuous at best. (R 67, p. 38; Vilk 1981). Hooker also admitted knocking out the GPS device on April 24, but claimed it was an accident. (R 67, p. 38). Hooker claimed he knocked the device out as he was *setting* the emergency brake with his *right foot*. Hooker even attempted to demonstrate the act for Brash to support his claim of lifting his

right foot over his left leg to *set* the brake – an impossible act. (Vilk 1982; Brash 1448). Hooker also falsely claimed that he had reported the disconnected GPS to Sharp on February 28, and that the manager instructed him to submit a repair ticket to Fleet. After the interview, Hooker was suspended pending the outcome of the investigation. Again, Hooker offered no testimony at hearing regarding his interview by Vilk.

The following day, Vilk confirmed with Sharp that Hooker had not reported the GPS problem on February 28, and that he (Sharp) never directed Hooker to submit a repair ticket. She also confirmed with Asaro that Fleet had not received any repair tickets for a disconnected GPS on Hooker's vehicle prior to Hooker's report on April 17. (Vilk 1984-86).

Brash reasonably concluded that Hooker intentionally tampered with his GPS device on February 28 and on April 24. He simply did not believe Hooker's account that he accidentally disconnected the GPS device those days. (Brash 1747; D 30:1-13).

Tampering with the GPS device violates the COBC and Tech Expectations, which expressly prohibit tampering with or obstructing an "Intelligent Vehicle Device." (R 5). Demonstrating his tampering was not an accident. Hooker did not report the disconnected GPS unit on February 28, but waited more than six weeks to report it to Fleet. He only reported it immediately *after* his encounter with Bigelow on April 17. In other words, Hooker did not report his misconduct until right after the Company discovered it.

4. May 10: Hooker Receives Two Final Written Warnings/3-Day Suspensions for Misuse of Work Time and GPS Tampering

On May 10, Hooker received two Final Written Warnings/3-Day Suspensions, one each for (1) recurring incidents of misusing work time (April 10 and 24), and (2) tampering with the GPS device on his vehicle. Labor informed Brash that within the past two years, the Company had issued a Final Written Warning and 3-Day Suspension in two Midwest cases involving GPS

tampering. As a result, Brash decided to issue the same discipline to Hooker, notwithstanding his *two* tampering incidents and recent disciplinary issues. (Brash 1454-55).

When Brash and Sharp issued the discipline, Hooker offered no explanation for misusing work time on April 10 or April 24. Brash concluded that Hooker was again simply avoiding productive work on both days.⁷ Brash emphasized the seriousness of the situation to Hooker and his Union representative. Brash warned that these were true final warnings and that Hooker would be terminated if he continued to avoid work and misuse time. Brash bluntly told Hooker to “Get out of your truck and do your job.” (Brash 1468). The ALJ Decision expressly credited Brash's testimony about his meeting with Hooker on May 10. (D 30: 43-45).

G. May 2016: Hooker Bids on a Monday-Friday Work Schedule

In May, Hooker bid on a Monday-Friday work schedule for the first time. Letts then claimed he needed Hooker on Union business every weekday for five weeks. Brash denied the request; Hooker's weekday schedule did not excuse him from work full time. Brash told Letts he would accommodate Hooker's work for the Local as much as possible, but that based on business needs, he expected Hooker to work when scheduled unless Union leave was approved in advance. (Brash 1475-76). Although Letts falsely claimed that Brash's position was a “reneege” on Mrla's alleged “commitment” in the October and November meetings, the extensive correspondence between the parties in the weeks and months after November 2015 refutes Letts' claim that Hooker should be excused from work if he pulled a Monday-Friday shift. (See GC 8; R2, p. 1; R. 2, p. 2; R 24, p. 3; GC 11; GC 10; GC 13; GC 14; GC 17; GC 18 and R 44).

⁷ As part of his story for April 24, Hooker said he had pulled up on his iPad a program called “Translore,” which technicians use to review blueprints of the network. Not only did that indicate Hooker was connected to the VPN, but the admission would be noteworthy to Brash regarding Hooker's September 20 misconduct. (Brash 1466).

The disagreement came to a head on June 9, when Brash sent Letts and Hooker a comprehensive letter explaining his expectations for Hooker. The letter plainly stated, “Mr. Hooker is not excused from reporting to work for his scheduled shift unless the Company approves the request for leave in advance.” (R 45, p. 2).

H. June–August 2016: Hooker Defies Management’s Directives and Refuses to Work his Scheduled Shifts

In June 2016, Hooker began disregarding his work obligations altogether, taking time off without approval and when his supervisor had instructed him to be at work. Monday, June 6 was Hooker’s first day scheduled to work a shift of Monday-Friday, 8:00 am - 4:45 pm. (Brash 1494). Despite being specifically told he was not approved to take Union leave on June 6 and June 10, Hooker failed to report for his scheduled shifts on those days. (R 44; Brash 1491-92; D 21:25-36). He did not report for work at all on Monday, June 6. (Brash 1497). On June 10, Hooker failed to report at his scheduled 8:00 am start time. At 9:00 am, an hour after his scheduled start, Hooker arrived at the 36th St Garage for a grievance meeting. (D 22:1-7; Brash 1513).

Later on June 10, Hooker submitted a request to take a vacation day on June 18. (R 46). Sharp denied Hooker’s request because another technician had already scheduled vacation that day. (Brash 1517; Sharp 2325). On June 18, Hooker called in sick and was absent, which was unexcused. (Brash 1540). Hooker did not work in the load a single day during June. As a result of these incidental absences, Sharp issued two counseling notices (June 6 absence and June 10 tardy) and a written warning (June 18 absence). (D 22:43-46; Sharp 2332; GC 30, 31, 32).

I. Hooker Continues to Misuse Time, Resulting in his Termination

1. September 20: Hooker wastes an entire day without completing a single job

The ALJ Decision discredited Hooker’s version of the events that occurred on September 20, describing them as “confusing and contradictory.” (D 31: 34-35). Hooker was scheduled to

begin working on the load at 8:00 am. He dispatched at 8:46 am to a POTS (Plain Old Telephone Service) repair after a customer lost service. (Sharp 2384-86; Brash 1600). Hooker waited until 9:28 am to leave the garage – one hour and eight minutes late. (Brash 1601). At 3:30 pm, six hours after he dispatched, Hooker called Sharp and requested assistance. Caresian Campbell then took over the job and quickly realized the problem needed to be addressed by reestablishing a connection inside the Central Office (“CO”). Because it was late in the day, there were no CO Technicians at the CO. Including his time waiting for a CO Technician to arrive to finish that work, Campbell completed the job in about two hours. Hooker was dispatched on the job for more than six hours, yet failed to fix the problem.

Hooker spent the entire day finding reasons not to work. He violated several provisions of Tech Expectations, including: (1) Be at your reporting location and ready to start work at the beginning of the tour, (2) Deliberately Plan Job to Minimize Lost Time, (3) Advise supervisor of any roadblocks or excessive time on job, and (4) If the technician is unable to complete the job prior to taking their meal period, he/she must contact their supervisor for guidance. (R. 5, p. 1-2).

2. September 21: Hooker waited more than two hours to leave the garage and then failed to complete a single job

Hooker offered no testimony on the events of September 21, and the ALJ Decision credited Sharp’s un rebutted testimony. (D 32:33-35). Hooker was scheduled to start at 8 am (Sharp 2364; Brash 1603). He used his Company iPad to dispatch on a job at 8:53 am, a POTS repair to restore service. (Sharp 2364; R 61, 62). Hooker waited until 10:13 am to leave the garage. (Sharp 2364; Brash 1603; R 70). Without notifying a manager of his delay, he departed the garage two hours and 13 minutes after the start of his shift. When Sharp later asked why it took him so long to start work, Hooker claimed he could not find his iPad charger and spent the morning looking for it. He eventually found the charger *in his truck*. (Sharp 2365-67). Hooker also claimed there were

thunderstorms in the area, and he did not want to drive in the storm. (Sharp 2365; Brash 1603). Every other scheduled TFS technician left the garage on time. (Sharp 2371-72; Brash 1603).

Hooker worked on the same job throughout the day. (Sharp 2368). He claimed he ran an “MLT test” at the cross box, which revealed a problem with the “F1” cable (between CO and cross box). (Sharp 2412; R 28, p. 33). Hooker said he then spent time testing the “F2” cable (between cross box and terminal), even though initial testing demonstrated the problem in the F1. (Sharp 2405). Hooker returned the job without completing it. (Sharp 2371).

Without explanation or notice to his manager, Hooker left the jobsite and went to the garage at 2:45 pm (Sharp 2369). Another technician took over the job and restored service in less than an hour. (D 33:17-19; Sharp 2371). Hooker was assigned to one job, which should have lasted an hour, at most. His conduct violated several provisions of Tech Expectations, including: “Be at your reporting location and ready to start work at the beginning of the tour,” “Deliberately Plan Job to Minimize Lost Time,” and others. (R. 5, p. 1-5).

On September 22, Sharp interviewed Hooker to see what he did the prior two days and later conferred with Brash. (Brash 1605; Sharp 2373; R 61, 62). Brash and Sharp reached the same tentative conclusion, that Hooker again was misusing time on his assignments to avoid work. (D 34:1-2; Brash 1609, 1616; Sharp 2400). In an abundance of caution, Brash wanted more information about Hooker’s conduct on September 21, so he asked Sharp to meet with Hooker again to get additional information. (Brash 1616). On October 5, Sharp met with Hooker again, transcribed his conversation and sent it to Brash. (R 63; Brash 1616; Sharp 2410-11).

3. September 23 and October 3: Hooker wasted 5.75 hours and failed to complete required training

Technicians must complete certain trainings each month on their Company iPads. Each training module has an expected completion time, usually 15-30 minutes. (R 57; Brash 1619-20). Technicians usually complete such trainings in the time allotted on down time during the day.

Through September, Hooker had not completed four scheduled trainings for August or September. (Brash 1619-20). On September 23, Sharp gave Hooker a few hours at the end of his shift to complete the training modules, with a total expected duration of one hour and 45 minutes. (Brash 1621; R 57, 58). Hooker reported 2.75 hours to complete training on his September 23 time sheet, yet did not complete a single training module. (D 34:8-11; Brash 1621; R 26, p. 21; R 29). On October 3, Sharp gave Hooker three more hours at shift end to finish the four trainings. (Brash 1622; R 1, p. 13; R 26, p.22; R 29). Hooker claimed he did not have enough time. (Brash 1624). He reported three hours for training for October 3 *but did not complete any*. (D 34:13-14; Brash 1621; R 26, p. 21; R 29). For those two days, Hooker was paid 5.75 hours to complete trainings having a total estimated duration of 1.75 hours. Yet, he failed to complete any of those training modules. His misuse of time those days violated Tech Expectations by failing to “Deliberately Plan Job to Minimize Lost Time.”

Hooker received approval to take leave for Union business (MXUU) on October 4. (Brash 1624). Without discussing the issue with his supervisor, Hooker completed his required trainings at the Union hall on October 4. He entered into GCAS that he spent two hours of working time to complete the trainings. (R 58; R 26, p. 22). Thus, Hooker claimed (and was paid) 7 hours and 45 minutes to complete training that should have taken less than 2 hours.

J. Brash's Decision to Terminate Hooker

The Manager's Guide provides that a third violation of Non-Management Expectations should result in a Suspension Pending Dismissal. (R 32, p. 10). Hooker was Suspended Pending Dismissal on October 10 based on his repeated violations of Tech Expectations and continued pattern of work avoidance, and after prior progressive discipline. The Company terminated Hooker October 13, for repeatedly violating Tech Expectations by continuing to engage in a pattern of work avoidance, despite prior progressive discipline for very similar misconduct.

III. LAW AND ARGUMENT

Based on facts credited in the ALJ Decision and undisputed facts not addressed in the decision, there is no probative evidence of discriminatory animus for Hooker's disciplines and termination. The Company's progressive discipline of Hooker and its decision to discharge him were for just cause and based on legitimate, non-discriminatory reasons. The Company disciplined and terminated Hooker based on his misconduct and not his union activities.

The ALJ Decision acknowledged Hooker's repeated incidents of misusing time and avoiding work and largely credited the Company's evidence proving its legitimate bases for Hooker's disciplines and termination. From February 1 through October 5, 2016, Hooker actually worked in the load for *only 21 shifts* (including February 11), totaling 135.5 scheduled hours. Of those 21 days, Hooker violated Tech Expectations by misusing time on *eight separate occasions* – and engaged in similar misconduct for which he was not disciplined on other dates. The bizarre excuses he offered for avoiding work prove a deliberate and calculated protest and not a lack of qualifications or training, to wit:

- Unable to find his vehicle registration (February 7)
- Unable to use a flip phone (February 11)
- “Inadequate truck” (February 21)

- Inadequate tools and equipment (multiple dates)
- Unable to find his phone charger (April 10)
- Unable to open locks for tool bins on his truck (April 10)
- Lack of familiarity with “BPC Protocols” that do not exist (multiple dates)
- Inability to trim a bush without a raincoat (August 13)
- Unable to find his iPad charger (September 21)
- Unwilling to leave the garage during a thunderstorm (September 21)

Hooker’s indisputable misconduct plainly violated work rules for TFS technicians and warranted discipline. The ALJ Decision acknowledged Hooker’s continual and inappropriate misuse of time. Hooker ignored Company written work rules, disciplinary guidelines, and comparable discipline issued for similar misconduct.

There is no dispute that Hooker was an active Union representative who engaged in union activities. His protected conduct, however, did not license him to continually refuse to engage in productive work in violation of Company policy. As the Board expressly stated in its Decision, even if the Company violated the Act in placing Hooker in the load, Hooker did not have “general immunity from discipline or discharge for all future misconduct.” (Decision at 5). As a matter of law, Hooker did not have carte blanche to violate work rules, disobey reasonable instructions, and refuse to perform his job duties indefinitely. If he or the Union disagreed with the Company’s decision to put him in the load, their recourse was to “work and grieve” until the matter was resolved. He did neither and was therefore subject to appropriate discipline for his misconduct in violation of Company policy. For all of these reasons, the progressive discipline and discharge of Hooker were not motivated by his union activities and would have occurred in any event absent

those activities, and thus did not violate section 8(a)(3), under *Wright Line*, 251 NLRB 1083 (1980), *enfm. granted*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

A. THE COMPANY’S PROGRESSIVE DISCIPLINE AND TERMINATION OF BRIAN HOOKER WAS BASED ON LEGITIMATE, NON-DISCRIMINATORY REASONS AND DID NOT VIOLATE SECTIONS 8(a)(1) OR 8(a)(3) OF THE ACT.

The Company’s progressive discipline of Brian Hooker, culminating in his termination, was based on legitimate, non-discriminatory reasons and did not violate Sections 8(a)(1) or (3) of the Act. The following facts prove the Company’s decision to terminate Hooker was based on his repeated and intentional incidents of misusing work time occurring over an eight-month period:

- On February 18, 2016, the Company solicited the Union’s help in correcting Hooker’s behavior before it escalated to discipline, which efforts the Union rebuffed.
- Hooker received a Written Warning on March 3, 2016, based on three separate incidents of misuse of time, any one of which justified a Written Warning standing alone, to wit: February 11 (working overtime without approval and insubordination); February 14 (wasting three hours with no work before contacting his manager); and February 21 (leaving the garage more than 90 minutes after the start of his shift).
- Hooker received a Final Written Warning and 3-Day Suspension on May 10, 2016, based on two additional incidents of misuse of time, occurring on April 10 (five hours of no productive work, based on a false claim of being unable to open locks on his truck), and April 24 (multiple periods of misuse of time observed by Duty Manager on the day Hooker disconnected the GPS device in his vehicle, with no jobs completed.)⁸
- Hooker was Suspended Pending Dismissal on October 10, 2016, based on four separate incidents of misusing time: September 20 (leaving garage 90 minutes after start of his shift and failing to complete any work); September 21 (leaving garage more than two hours after start of his shift, claiming an inability to find an iPad charger that was in his truck); and September 23 and October 3 (charging 5.75 hours

⁸ Hooker received a separate Final Written Warning/3-Day Suspension on May 10 for tampering with his vehicle’s GPS device on February 28 and April 24. As discussed in Section C, *infra*, although that discipline also was based on legitimate, non-discriminatory reasons, *it was not a basis for Brash’s decision to terminate Hooker.*

and failing to complete any of four training modules, with an aggregate expected duration of one hour, 45 minutes).⁹

- Throughout 2016, the Company accommodated Hooker's extensive MXUU time and paid MXUP time, despite his consistent refusal to account for it, and unexcused absences, and was exceedingly patient in imposing progressive discipline. The Company's restraint and leniency disproves any claim of a discriminatory motive.
- The General Counsel presented no evidence of disparate treatment. To the contrary, Company witnesses corroborated Respondent Exhibit 38, that TFS managers under Brash have issued comparable discipline for less egregious cases of misusing work time.

Hooker's indisputable misconduct plainly violated the Company's work rules for TFS technicians and warranted discipline under Company policy. There is no dispute Hooker was an active Union representative who engaged in union activities. His protected conduct, however, did not license him to continually fail to engage in productive work in violation of Company policy.

Hooker fired himself. He and the Union objected from the outset to the Company's decision to place him on the work schedule. He then undertook – with Union blessing – an orchestrated campaign of work avoidance that is stunning for its scope, consistency and creativeness. After repeated discussions by Brash and Mrla with Hooker and his Union leadership, significant patience and accommodations by management, and progressive discipline, Hooker's steadfast refusal to engage in productive work spanning 8+ months left the Company no choice but to issue progressive discipline and then terminate his employment. The Company's patient, progressive discipline and eventual discharge of Hooker were not motivated by his union activities and would have occurred in any event absent those activities, and thus did not violate Section 8(a)(3), under the *Wright Line* standard.

⁹ Hooker also received a verbal warning on August 12, for failing to turn in his completed Activity Sheet, and, on September 6, two non-disciplinary counseling notices (for an absence on June 6 and a tardy on June 9) and a verbal warning (for an absence on June 18). None of these were a basis for the termination decision. The Union filed grievances regarding all of the discipline and counseling warnings referenced in the Complaint. (R 6, 7, 8, 9, 10, 12, 13, 14, 15 and 16)

The Board already has rejected the assumption underlying the ALJ's Decision that "each act of disciplining Hooker following his return to the load was de facto tainted by the [Company's] animus in placing him there in the first place." (Decision at 5). Through this conclusion, the Board also rejected the General Counsel's theory of liability which rests precipitously on the flawed theory that Hooker was somehow "privileged" to refuse to work simply because the Company's decision to place Hooker in the work load may have violated the Act. Section 10(c) of the Act precludes these conclusions and arguments. Hooker and Letts conceded at trial that Hooker was accountable to work in compliance with Company policy and obligated to "work and grieve." Rather than grieve and arbitrate the propriety of being assigned to the load, Hooker chose a path of misusing time and avoiding work, and baiting the Company to discipline him. At any point on that course, Hooker could have opted to comply with management's work directives and challenge his placement in the load through the contractual grievance and arbitration process, thus protecting his job. Once returned to the load, however, Hooker was not immune from working in accordance with management directives and Company policy.

The GC's baseless claim that Hooker did not purposefully avoid work but was "unqualified" to complete assigned tasks is irrelevant. Brash explained that the Company only assigned Hooker basic work tasks commensurate with his skill level, generally only "day one" POTS jobs and simple BPCs. Brash and Sharp corroborated that Hooker was qualified to perform all work assigned to him. More substantively, none of Hooker's disciplines were issued for poor quality or workmanship, or for failure to complete assigned work properly. Hooker received discipline for wasting time, stalling and concocting myriad excuses in an effort to *avoid working*. Virtually all of his misconduct consisted of not even attempting to engage in productive technician

work. There also is ample evidence of Hooker demonstrating he knew what he was doing, but simply refused to complete the tasks at hand.

For all of these reasons, the GC did not carry its burden to prove the Company's discipline and discharge of Hooker violated Sections 8(a)(1) and (3) of the Act. Accordingly, Paragraph 10 of the Complaint must be dismissed in its entirety.

1. Governing Legal Standard

To prove unlawful discrimination under 8(a)(3), the Board requires General Counsel to prove by a preponderance of the evidence that the employer adversely altered the employee's position, compensation, or working conditions, and was motivated by the employee's protected, concerted activities. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfm. granted*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (upholding *Wright Line* test). The General Counsel must make a *prima facie* showing to support the inference that protected conduct was the motivating factor in the employer's decision. To establish a *prima facie* case, the General Counsel must produce evidence showing: (1) the alleged discriminatee engaged in union activity; (2) the employer had knowledge of these activities; (3) the employer's actions were motivated by union anti-animus; and (4) the discrimination has the effect of encouraging or discouraging union membership. *Downtown Toyota*, 276 NLRB 999, 1014 (1985). If that showing is made, then the burden shifts to the employer to show the action would have occurred in the absence of protected conduct. *Northshore Sheet Metal, Inc.*, 2013 NLRB LEXIS 534, *42 (July 25, 2013); *Hospice Compassus*, 2013 NLRB LEXIS 532, *24-25 (July 23, 2013). The employer does not violate Sections 8(a)(1) and 8(a)(3) where the termination "rested on an employee's unprotected conduct as well and that the employee would have [been discharged] in any event." *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 399-400 (1983) (applying *Wright Line*).

The Act does not insulate an employee from discharge. The ultimate question in any Section 8(a)(3) case is the employer's motivation. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 401 (1983); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). "[E]ven when the record raises 'substantial suspicions' regarding employee discharges, the General Counsel is not relieved of 'the burden of proving that Respondent acted with an illegal motive.'" *Yusuf Mohamed Excavation*, 283 NLRB 961, 962-64 (1979). The GC has not proven illegal motive.

The Company's decisions to progressively discipline and then terminate Hooker were not taken rashly or without investigation, deliberation, and compelling business reasons. Credible evidence substantiates the Company's sole motivation was Hooker's continual misuse of time to avoid work, in clear violation of established work rules for TFS technicians.

Undisputed facts further prove that Hooker's disciplines and discharge were wholly unrelated to his Union activities and would have occurred in any event irrespective of such activities. Each incident culminating in Hooker's termination occurred while he was on working time and assigned to be engaged in work activities. Hooker's termination plainly resulted from his calculated and unmistakable pattern of work avoidance during times in which he should have been working. *See Grand Rapids Die Casting*, 279 NLRB 662, 667 (1986)(employer lawfully issued discipline to a union steward who refused to obey the employer's directive to return to work, even though the steward was in a grievance meeting and processing a grievance); *Mead Corp.*, 311 NLRB 509, 513 (2000) (finding no violation where employer threatened to discipline steward for advising employee to disobey management's directives); *B.C. Lawson Drayage*, 299 NLRB 810, 810 n. 1 (1990) (finding no violation where employer discharged union steward because of his adamant, recurring defiance of management's order that he check in with the dispatcher; this was unprotected insubordination notwithstanding the steward's view that the new rule was an

improper unilateral change); *Jos. Schlitz Brewing Company*, 240 NLRB 710, 713-14 (1978) (Board adopted administrative law judge's decision that employer did not unlawfully discharge a shop steward who refused to work an assigned shift).

2. The Written Warning Issued to Hooker on March 3, 2016 was Based on Legitimate, Non-Discriminatory Reasons and Did Not Violate Sections 8(a)(1) or (3) of the Act

Hooker's March 3, 2016 Written Warning was based on legitimate, non-discriminatory reasons and did not violate Sections 8(a)(1) or (3). Hooker received that modest discipline based on three separate incidents of misusing work time:

- **February 11:** After informing Sharp he could not work overtime, requiring another technician to finish the job, Hooker did not return Sharp's call or text messages, stayed on the job and incurred an hour of overtime without approval, and later claimed he didn't use his flip phone because he "had not read the instructions.";
- **February 14:** Hooker wasted three hours on a simple BPC job that did not require any work and failed to call the Duty Manager (Sharp) until 11:03 am, three hours after his shift started.; and
- **February 21:** Hooker failed to leave the garage until more than 90 minutes after the start of his shift, despite the clear expectation to depart the garage within 20 minutes of his start time.

The ALJ Decision credited Sharp's account of the February 11, 14 and 21 events, and of his investigatory interview with Hooker on February 22. Your Honor did not credit Hooker's testimony regarding the events on those days. (D 25-26; D 27:3-5). In the interview, Hooker told Sharp he did not respond to Sharp's phone calls or text messages on February 11 because he did not know how to use the flip phone and "had not yet read the instructions." (D 27:5-6). Regarding

what he did for three hours on February 14 while supposedly repairing a pedestal, Hooker stated he could not remember. (D 27:6-7). When Sharp asked why Hooker failed to leave the garage until 9:30 am on February 21 when his shift started at 8:00 am, Hooker responded he did not want to do his assigned work so he stayed at the garage to get stock and supplies. (D 27:7-10).

Hooker's misconduct on these days plainly violated TFS Technician Expectations and justified the Written Warning. Under the Manager's Guide, Brash and Sharp reasonably could have issued separate discipline for each violation or combined them to escalate to a Suspension and/or Final Written Warning. (Brash 1272-73, 1350-52; Sharp 2261-62; R 32, p. 10). Brash gave Hooker the benefit of doubt with a Written Warning for three separate instances of work avoidance.

The comparable discipline issued by Brash's managers to other TFS technicians for lesser forms of misconduct further refutes any discriminatory animus. In each of the following instances, TFS technicians working in Brash's jurisdiction received comparable discipline for a *single* violation of Technician Expectations involving misuse of time:

- *November 5, 2015*: Jim Smith received a Written Warning/1-Day Suspension from Sidney Bragg for one incident of misuse of work time, for failing to contact and not being dispatched for five hours (R 38, p. 3).
- *December 16, 2015*: Scott Stewart (Lansing garage) received a Written Warning/1-Day Suspension for violating Tech Expectations (misuse of time) when he took a lunch break that was "almost an hour" when he should only have taken 30 minutes. (R 38, p. 5; Osterberg 2096).
- *April 13, 2016*: Dave Lucchese received a Final Written Warning/3-Day Suspension from Andrew Sharp, for misusing approximately three (3) hours of working time on his first job on April 6, 2016 (R 38, p. 1; Sharp 2414-15).
- *December 15, 2016*: Sharp issued a Written Warning to Durwin Johnson after discovering Johnson had misused 30 minutes to an hour of work time. (R 38, p. 6; Sharp 2416).¹⁰

¹⁰ In addition, on *May 11, 2015*, TFS technician Peter Hobart received a 5-Day Suspension from Manager Michael Wyant for violating Tech Expectations by being "out of route" during the work day (stopping at his residence). This was Hobart's second violation for similar conduct. (R. 38, p. 2)

Because Hooker's March 3, 2016, Written Warning did not violate Sections 8(a)(1) or (3) of the Act, this element of Paragraph 10 of the Complaint should be dismissed.

3. The Final Written Warning/3-Day Suspension Issued to Hooker on May 10, 2016 was Based on Legitimate, Non-Discriminatory Reasons and Did Not Violate Sections 8(a)(1) or (3) of the Act

The Final Written Warning/3-Day Suspension issued to Hooker on May 10, 2016, arising from his violations of Tech Expectations on April 10 and 24, also was based on legitimate business reasons and did not violate Sections 8(a)(1) or (3) of the Act. (R 7). Here, too, the ALJ Decision specifically discredited Hooker's account of his misconduct on April 10 and credited Company managers in all relevant respects. (D 5:8-10). The ALJ Decision credited Brash's account of April 10 and of his investigatory interview on May 10. (D 30:27-31, 44-45). The ALJ Decision also credited Jeff Osterberg's account with respect to Hooker's work avoidance on April 24. The relevant facts proving Hooker's misuse of time on those dates are simple and undisputed:

- On Sunday, **April 10**, Hooker spent the first five (5) hours of his work day doing no work whatsoever because he claimed he was unable to open the lock on his work truck (to unlock his tool bins). The combination was the last 4 digits of the truck number – the same combination for every vehicle in the Grand Rapids fleet for as long as anyone can remember. (Brash 1393-1398; Sharp 2288). Hooker's antics forced the on-call Duty Manager, Sydney Bragg, to leave church and drive to the work site to open the lock. Naturally, he did so using the last 4 digits of the truck number. Worse, Hooker avoided accountability that day by claiming he lost his cell phone charger and turned off the phone to "save battery." (R 40).
- On Sunday, **April 24** (the day he disconnected his GPS device), Hooker misused time throughout the day and did not complete a single job. Duty Manager Osterberg observed Hooker sitting in and walking around his truck for 30 minutes in the morning, and sitting idly for another 30 minutes in the afternoon. Also, he worked for 8 hours and failed to complete his only job, a simple pedestal replacement. Hooker understood the tasks needed to be completed, but failed to do them, and returned the job at the end of the day. (Osterberg 2087).

The gravity of these incidents is best illustrated in the context of Hooker's infrequent work schedule. For April, Hooker bid a Sunday – Thursday "off shift" schedule. He was scheduled to

work in the load only one day a week and *only three work days during that month* (all Sundays): April 10, 17 and 24. He completed no jobs on April 10 and 24. Through his time wasting antics, Hooker managed to avoid work on two of the three days he was scheduled that month!¹¹

The magnitude of this misconduct is further manifested by the Company's accommodation of Hooker's Union time that month. Hooker worked for the Local on MXUU time every single week day from April 4-26 and also amassed significant MXUP hours:

- Week April 4-8: 27 MXUU hours; 11.75 MXUP hours
- Week April 11-14: 27.5 MXUU hours; 2.75 MXUP hours
- Week April 18-21: 31 MXUU hours
- Week April 25-26: 8.75 MXUU hours; 6.5 MXUP hours¹²

On May 10, Brash questioned Hooker about these incidents, and *the ALJ Decision credited Brash's account of that meeting*, as follows:

- Hooker offered no explanation for his misuse of work time on April 10.
- Brash reviewed Osterberg's timeline with Hooker. Hooker provided no explanation for wasting time throughout the day on April 24.
- Brash warned Hooker that if his behavior continued, he could be terminated.
- Brash again directed that Hooker needed to request MXUP time off in advance.
- Hooker threatened to "suspend" all of the Local's stewards and to be the only Union representative to file and sit in on grievance meetings, so he would not be available to work in the load.
- Hooker had selected a Monday-Friday late shift (10:00 am-6:30 pm) and said he would only work from 4:30-6:30, but Brash said that was unacceptable and that Hooker needed to work at least four hours of those shifts.

¹¹ Brash determined that Hooker also misused time on Sunday, April 17. He did not consider that date in his decision to issue the Final Written Warning, however. (Brash 1463).

¹² Hooker was suspended pending investigation on April 27.

Brash reasonably concluded Hooker was again simply misusing time and avoiding work, warranting progressive discipline for violating Tech Expectations. The conclusion in the ALJ Decision that such discipline was unlawfully motivated does not align with its factual findings. Plainly, Hooker's discipline was not a "direct consequence" of the decision to place him in the load but of his own recurring misconduct.

4. The Two Counseling Notices and Verbal Warning Issued to Hooker on September 6, 2016 were Based on Legitimate, Non-Discriminatory Reasons and Did Not Violate Sections 8(a)(1) or (3) of the Act

It is undisputed Brash and Sharp expressly instructed Hooker to be at work as scheduled on June 6, 10, and 18, and that he failed to comply. Without considering these facts or providing any analysis, the ALJ Decision erroneously concluded that the Company violated 8(a)(3) by issuing two *non-disciplinary* counseling notices and Verbal Warning to Hooker on September 6 for those absences. (R 15).

Despite his instruction to Hooker to be at work on June 6 and 10, Brash decided not to issue discipline for insubordination or to consider those absences "no call/no show." Demonstrating leniency, Brash issued non-disciplinary counseling for "incidental absences," even though a verbal warning was justified under the Manager's Guide. (R 32, p. 8). All of these facts belie any finding of unlawful motivation.

This finding in the ALJ Decision relied entirely on the flawed "fruit of the poisonous tree" theory that the Board has rejected. (D 39:40-41). However, the ALJ Decision *specifically found that Hooker was not excused from work on June 6, 10, and 18*, and that management had unambiguously instructed him to report to work those days. (D 21:18-23). Thus, it is undisputed that Hooker received the two counseling notices and verbal warning based on his absences and in accordance with the progressive discipline guidelines. The conclusion in the ALJ Decision that

Hooker was privileged to refuse to come to work based on his continued disagreement with the decision to put him in the load is insupportable.

5. Hooker’s Suspension Pending Dismissal on October 10, 2016 was Based on Legitimate, Non-Discriminatory Reasons and Did Not Violate Sections 8(a)(1) or (3) of the Act

Hooker’s Suspension Pending Dismissal on October 10 and termination on October 13, arising from his continued and repeated violations of Tech Expectations on September 20, 21, 23, and October 3, were based on legitimate business reasons and did not violate Sections 8(a)(1) or (3). (GC 33, 34). The ALJ Decision affirmatively discredited Hooker’s testimony regarding the events of September 20, noting “Hooker’s testimony about the chronology of events was confusing and contradictory,” and that his “descriptions of his communications with Sharp were sketchy and lacking in detail.” (D 31-32). The ALJ Decision also noted that Hooker *offered no testimony* regarding the events of September 21, 23, or October 3, or regarding his investigatory interviews with Sharp on September 22 and October 3, notwithstanding that his misconduct on those specific days resulted in termination. Conversely, the ALJ Decision expressly credited Sharp’s testimony regarding the events of September 20 and 21, and credited Brash’s testimony regarding the events of September 23 and October 3. (D 32:5-6, 33-35; 34:5-6). By crediting Sharp and Brash’s testimony, the ALJ Decision conceded that Hooker misused time on those days and violated Tech Expectations. Nonetheless, the ALJ Decision extrapolates an inference of unlawful motivation based on the decision made over a year earlier! In addition to lacking legal support, this conclusion in the ALJ Decision is irreconcilable with the credited testimony of Sharp and Brash.

The relevant facts of Hooker’s persistent misuse of time on these dates demonstrate his pattern of work avoidance continued to be orchestrated and purposeful, resulting in termination:

- **September 20:** Hooker left the garage nearly 90 minutes after the start of his shift, falsely claiming difficulty connecting to the VPN; spent six hours attempting to

diagnose trouble on a POTS repair; and completing no work on the job before Caresian Campbell was called in to complete the job;

- **September 21:** Without notifying a manager, Hooker left the garage more than two hours after the start of his shift, claiming he was unable to find his iPad charger and that thunderstorms in the area delayed his departure; and failing to complete any work that day, claiming he was unable to diagnose the cable trouble;
- **September 23 and October 3:** Hooker was given a total of 5.75 hours to complete four training modules, with a total expected duration of 1 hour, 45 minutes, but failed to complete any of the training on those two days.

(Brash 1621-24; R 26, p. 21-22; R 29).

In addition to crediting Brash's and Sharp's accounts of these incidents, the ALJ Decision found Union Steward Caresian Campbell's testimony credible regarding September 20. Campbell's testimony was neither substantive nor exculpatory, however, as he conceded having no knowledge of Hooker's misuse of time throughout the day on September 20. (Campbell 2747-48). Further, while the ALJ Decision noted Campbell testified at hearing that Hooker's mistake in diagnosing a problem on September 20 "was an easy one for a tech to make," it also held that "there is no evidence that he said this" at the September 22 meeting with Sharp and Hooker. (D 40:14-16). Also, Sharp (a top craft technician for 14 years) fully understood the assigned job on September 20 and believed Hooker was qualified to perform it. (Sharp 2393). Irrespective of the job's ease or complexity, it did not justify Hooker leaving the garage 90 minutes late that morning or wasting six hours diagnosing a problem on a POTS repair and completing no productive work.

Finally, the ALJ Decision understated the extent of Hooker's misuse of time on September 23 and October 3. For those days, Hooker claimed to have spent 5.75 hours doing online training

on four modules that had an *aggregate* estimated duration of 1 hour and 45 minutes. The ALJ Decision erroneously stated: “However, the following day, he did complete them, as well as two other courses, when he was on MXUU (unpaid time) (see R. Exh. 58).” (D 34: 13-15). This is incorrect. Hooker requested MXUU on October 4, and then indicated on his timesheet that he was training for two hours and on MXUU for the rest of the day. (R 26, p.22). Thus, Hooker was paid for the two hours of training time on October 4, in addition to the 5.75 hours he wasted on September 23 and October 3. In total, Hooker spent *7.75 hours on training modules that only take 1 hour and 45 minutes.*

The egregiousness of Hooker’s misconduct is further shown by his infrequent work schedule in September 2016. September 20 and 21 were two of *only three days* Hooker worked that month! Although only scheduled to work three days that month, Hooker continued his protest and avoided work on two of them. That the Company had previously denied Hooker’s requests to be off for Union business on September 20 and 21 also supports a reasonable inference that his actions those days were a calculated protest of that denial. (R. 56).

Despite having already received a Written Warning (March 3) and Final Written Warning/3-Day Suspension (May 10) for misuse of time, Hooker persisted in the same pattern of wasting time and avoiding work. Even after Brash’s blunt final warning on May 10 that he risked termination for continued refusals to work, Hooker did not relent. Thus, the ALJ Decision credited Brash’s testimony that he decided to terminate Hooker “because he did not believe that Hooker would change his attitude of fighting the Company despite repeated warnings.” (D 31: 31-33).

From February 1 through October 7, 2016, **Hooker worked in the load on only 21 days.** He misused time in violation of Tech Expectations on at least *nine (9)* of those 21 shifts – a truly remarkable achievement of non-performance. Under the Manager’s Guide, termination is

appropriate after just three violations of Tech Expectations. (R 32, p. 10). The ALJ Decision made an inference of unlawful motivation that cannot be rationally drawn from the facts the ALJ credited and based entirely on a debunked legal theory.

6. The General Counsel's Evidence of the Company's Alleged Anti-Union Animus is Unpersuasive, and Hooker's Misconduct Warranted Termination Regardless of His Union Activities

General Counsel set forth the false narrative that "Respondents" held discriminatory animus towards Hooker, without regard to whether the *decision makers* held animus towards Hooker, whether the alleged animus was because of his Union activity, or motivated their decisions. It is undisputed that only Brash made the decisions to discipline and terminate Hooker. (D 25: 17-18). Evidence of alleged animus by anyone other than Brash is irrelevant to this case. See *Sociedad Española de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458, 463 (2004)(dismissing 8(a)(3) allegation because GC failed to prove animus by the decision maker, despite evidence of animus by others); *Shamrock Foods Company*, 366 NLRB No. 115 (2018)(dismissing Complaint because GC failed to establish decision maker was aware of protected activity and therefore could not have held animus); *Reynolds Electric*, 342 NLRB 156, 157 (2004)(decision maker cannot discriminate against employee for engaging in protected concerted activities because he was unaware of the activity); *Vae Nortrak North America Inc.*, 344 NLRB No. 12 (2005)(affirming dismissal of 8(a)(3) allegation because there was no evidence of animus by decision maker).

Further, General Counsel must prove the alleged animus is based on union or protected activity. Generalized personal animus cannot support a Section 8(a)(3) allegation. *Bosk Paint and Sandblast Co.*, 266 NLRB 1033 (1983)(dismissing complaint and finding reference to former employee as a "troublemaker" was not based on protected activity, but rather on personal animus); *In re Tell City Chair Co.*, 257 NLRB 374 (1981)(finding decision maker's personal animus

towards employee did not equate to union animus); *Pro-Tec Fire Services Ltd.*, 351 NLRB 52 (2007)(dismissing Complaint because GC failed to prove decision maker "independently bore animus at all toward [former employee] for his prior union activity").

The alleged “animus” from which the ALJ Decision inferred unlawful motive for Hooker’s disciplines and termination was exceedingly sparse and lacked temporal or probative support. The record is replete with evidence showing that at all material times Brash and Sharp made Herculean efforts to accommodate Hooker’s schedule and permit him to continue working for the Local on a regular basis. From January through September 2016, Hooker worked on the load for only 21 shifts, and took Union leave on 137 shifts. Hooker’s total MXUU time (unpaid time off for Union business) for 2016 was only marginally less than the comparable 2015 period:

	MXUU Hours
2015	713.5
2016	630.25

The “friction” that concededly occurred following Hooker’s return to work was entirely self-induced by Hooker’s continued resistance of management directives and incessant failure to work when scheduled. The ALJ Decision expressly acknowledged that, from the outset, Hooker escalated the conflict by fighting with management over scheduling work and training; failing to request MXUP time off in advance; failing to submit the activity log; and engaging in a continuous course of wasting time and concocting myriad excuses to *avoid work*. As discussed above, the ALJ Decision credited Brash’s and Sharp’s testimony with respect to Hooker’s misconduct relative to virtually every separate discipline issued. Plainly, any “friction” that ensued after Hooker’s return to work was not a function of animus but of Hooker’s recalcitrance.

The ALJ Decision also opined that “certain conduct of management” occurring well after Hooker returned to the load “gives rise to an inference of continued animus.” (D 40: 4-5). Here,

too, the referenced conduct does not reasonably support an inference of unlawful motive for the disciplines directly triggered by Hooker's own insubordination and refusals to work.

Importantly, the ALJ Decision based this specious inference, in part, on a "fact" it expressly held was *not* in the record. As purported evidence of "continued animus" after Hooker returned to work, the ALJ opinion cites: "Sharp did not take into account Cardesian's [sic] [Campbell's] statement on September 20 that Hooker's mistake in diagnosing a problem on September 20 was an easy one for a tech to make." (D 40: 14-16). In its earlier reciting of the facts, however, the ALJ Decision notes that while Campbell testified to that at hearing, "there is no evidence that he said this" at the September 22 meeting with Sharp and Hooker. (D 33: 28-29).

The other three incidents cited in the ALJ Decision – all arising from the Company's AP investigation of Hooker's GPS tampering – are easily dismissed as immaterial and irrelevant.¹³ This is principally because the Final Written Warning and 3-day suspension issued to Hooker on May 10, 2016 for GPS tampering was *not part of the progressive discipline that resulted on his termination*. The unfounded suspicions reflected in the ALJ Decision about the AP investigation do not support an inference of unlawful motive for unrelated discipline directly and causally linked to different misconduct.

Otherwise, the ALJ Decision drew unwarranted conclusions based on the AP investigation. That Brash did not give Vilk the email contained in CP 2 is meaningless. That boilerplate email did not support Hooker's claims. The email stated a GPS unit could become "partially dislodged" when a driver *releases* the parking brake. Hooker admitted he twice completely knocked out the

¹³ The ALJ Decision erroneously finds evidence of animus because (1) "Brash did not furnish to Vilik [sic] a document from the GPS contractor that might have lent credence to Hooker's version of the problems that he had with his GPS;" (2) "Brash used the GPS investigation as a means of having Osterberg spend a good part of a day observing Hooker to find fault with his conduct wholly unrelated to the GPS matter;" and (3) Vilk's "failure to include her conversation with Cardesian" [sic] Campbell in the AP report." (D 40:5-14).

GPS unit while *setting* the parking brake. That Brash did not give this email to Vilks is irrelevant because “Brash was the decision-maker in all of the disciplines that Hooker received.” (D 25:17-18). Vilks did not make any decisions on Hooker’s disciplines. Importantly, *Brash* knew of the ETech email and “definitely considered it” when making his decision to issue the final warning and suspension for GPS tampering. (Brash 1792). Indeed, the ALJ Decision credited Brash’s explanation for not believing Hooker’s excuses about the GPS tampering. (D 30:1-6).

The conclusion in the ALJ Decision that “Brash used the GPS investigation as a means of having Osterberg spend a good part of a day observing Hooker to find fault with his conduct wholly unrelated to the GPS matter” also lacks factual support or relevance. (D 40:8-10). The assertion is untrue, and the ALJ Decision cites no testimony to support it. It also is irrelevant. Hooker’s pattern of work avoidance for several months would have warranted Brash instructing Osterberg to monitor Hooker throughout the day -- but Brash did not do that. It is undisputed in the record that Osterberg acted on his own in personally observing Hooker on April 24, 2016.¹⁴

The ALJ also erroneously found Vilks’s “failure to include her conversation with Cardesian [sic]” Campbell in the AP report as evidence of animus. (D 40:11-14). First, there is no evidence Vilks was even aware of any of Hooker’s protected activity. She merely conducted an investigation and had no role or input into disciplinary decisions. Further, Campbell did not “offer evidence that might have supported Hooker’s version” of the GPS tampering. Campbell testified he specifically told Vilks the GPS unit in his former truck never fell out of the bracket, even though he had bumped it. (Campbell 2737). The ALJ Decision even acknowledged that Campbell’s statement did not support Hooker’s version of events. (D 5:19-21).

¹⁴ Vilks and Brash testified that they did not ask Osterberg to visually observe Hooker throughout the day. (Vilks 1998; Brash 1429). Osterberg also explained that Brash did not give instructions on how to observe Hooker. (Osterberg 2056, 2097). Once Hooker’s GPS stopped reporting, however, it was necessary for Osterberg to go to Hooker’s work site to visually verify that the GPS unit had been removed from its cradle in Hooker’s vehicle.

In sum, Hooker's disciplines and termination were based solely on his intentional misconduct, not anti-Union animus.

B. BECAUSE HOOKER WAS TERMINATED FOR CAUSE, SECTION 10(c) OF THE ACT PROHIBITS REINSTATEMENT AND BACK PAY

The Board unambiguously rejected the ALJ Decision's "but for" test, and the GC's invalid "fruit of the poisonous tree" legal theory. Each is based on the rejected assumption that Hooker's disciplines and discharge were de facto tainted because the Company's decision to place Hooker in the load in October 2015 was found unlawful. Extant Board law applying Section 10(c) of the Act supports the Board's decision to invalidate those flawed legal theories.

Section 10(c) of the Act provides

No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

Because Hooker indisputably was terminated for cause, Section 10(c) prohibits reinstatement or back pay remedies. Those remedies are precluded as a matter of law notwithstanding that the Company was found to have violated the Act by not bargaining over returning Hooker to the load.

Section 10(c) prohibits the Board from granting a make-whole remedy to employees disciplined "for cause." In *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007), the Board explained:

Cause, in the context of Sec. 10(c), effectively means the absence of a prohibited reason. For under our Act: "Management can discharge for good cause, bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which [the Act] forbids." *Id.* at 647; citing *Taracorp Industries*, 273 NLRB [221,] at 222 fn. 8 [(1984) (quoting *NLRB v. Columbus Marble Works*, 233 F.2d 406, 413 (5th Cir. 1956))].

The Supreme Court discussed the purpose of Section 10(c) in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 217 (1964), finding "[t]he legislative history of [Section 10(c)] indicates that it was designed to preclude the Board from reinstating an individual who had been

discharged because of misconduct.” The Court in *Fibreboard* quoted at length from that legislative history (id. at 217 fn. 11), which, almost prophetically, addressed the impropriety of employees engaging in work avoidance following an unrelated unfair labor practice:

The House Report states that [Section 10(c)] was “intended to put an end to the belief, now widely held and certainly justified by the Board’s decisions, that engaging in union activities carries with it a ***license to loaf, wander about the plants, refuse to work, waste time, break rules***, and engage in incivilities and other disorders and misconduct. “ H.R. Rep. No. 245, 80th Cong., 1st Sess., 42 (1947). (emphasis added).

More recently, the Board has found that reinstatement is barred by Section 10(c) where an employee engages in misconduct, even if that misconduct is connected to a unilateral change. In *Anheuser-Busch, Inc.*, the employer installed surveillance cameras without notifying or bargaining with the union, and then disciplined 16 employees for misconduct detected by the hidden cameras. 351 NLRB at 644. Although the Board found the employer violated Sections 8(a)(1) and (5) by unilaterally installing the cameras, it denied a make-whole remedy for the 16 disciplined employees. The Board held that because the discipline was based on misconduct, a make-whole remedy would be “inconsistent with the policies of the Act, and public policy generally, [and would] reward parties who engaged in unprotected conduct.” 362 NLRB at 644.

Similarly, in *Taracorp Industries*, the employer discharged an employee for misconduct based on information obtained during an investigatory interview in which the employer unlawfully denied the employee’s request for union assistance. 273 NLRB 221, 222 (1984). The Board nevertheless denied a make-whole remedy to the discharged employee because there was an insufficient nexus between the unfair labor practice committed (denial of representation at an investigatory interview) and the reason for the discharge (perceived misconduct).

Likewise, here, the Company indisputably terminated Hooker for cause based on his repeated and defiant incidents of misusing work time over an eight month period. Hooker was

terminated after repeatedly violating legitimate, uniformly enforced work rules, and nearly a year after he was returned to the workload. Even if the Company violated the Act by failing to bargain over its decision to place Hooker on the work load, that did not confer upon him “general immunity from discipline or discharge for all future misconduct” occurring over the next eight months. (Decision at 5) Because Hooker’s termination was for cause and based on his own misconduct, a make-whole remedy would be “inconsistent with the policies of the Act, and public policy generally, [and would] reward parties who engaged in unprotected conduct.” Carried to its logical extreme, reinstatement essentially would mean that Hooker could not have been disciplined or terminated for *any* misconduct arising from non-performance of his job duties as a technician – in principle until he either resigned or retired. Such a standard would directly contradict the purpose, spirit, and letter of Section 10(c), and was squarely rejected by the Board’s Decision.

If Hooker or the Union believed the Company had violated the CBA, a local agreement, or past practice by putting him in the load, the proper recourse was to continue working and grieve the matter under the contractual grievance and arbitration process. Rather than grieve and arbitrate the propriety of being assigned to the load, Hooker instead chose a path of purposefully avoiding work and baiting the Company to discipline him. Hooker refused to obey his managers’ clear, direct and repeated directives and did so at his peril. Irrespective of any bargaining violation, Hooker was not immune from working in accordance with management directives and Company policy. Because the Company terminated Hooker for cause, Section 10(c) of the Act prohibits reinstatement and back pay remedies as a matter of law.

C. HOOKER'S MAY 10, 2016, FINAL WRITTEN WARNING/3-DAY SUSPENSION FOR TAMPERING WITH HIS GPS DEVICE DID NOT VIOLATE SECTIONS 8(a)(1) OR (3) OF THE ACT AND WAS NOT A BASIS FOR HIS TERMINATION

The ALJ Decision credited the testimony of Vilks, Brash and Osterberg regarding all *material* facts proving the Company's legitimate reasons for the Final Written Warning/3-Day Suspension issued to Hooker on May 10, 2016, for tampering with the GPS device. (D 27-30). The Decision erred, however, in relying on that discipline to support an inference of unlawful motive for Hooker's termination for misuse of time. This is because the Final Written Warning/3-day suspension issued to Hooker for GPS tampering was *not part of the progressive discipline that resulted on his termination*. Hooker was terminated for misusing time and avoiding work, in violation of Technician Expectations, and following progressive discipline for similar misconduct. The Company's issuance of the *separate* Final Warning/Suspension for Hooker's GPS tampering is powerful proof of its *lack* of discriminatory motive. Brash was lenient in issuing separate disciplines for the misuse of time and GPS tampering violations rather than combine them and impose a termination. Rather, for the GPS tampering incidents Brash imposed the same Final Written Warning/Three-day suspension that was commensurate with comparable discipline issued to two other Midwest bargaining unit employees who had engaged in similar misconduct. (Brash 1454). The credited testimony and these undisputed facts refute the ALJ Decision's inference this discipline was motivated by Hooker's union activities.

Importantly, the ALJ Decision did not credit any portion of Hooker's testimony with respect to the GPS tampering. And it *did not find* that Hooker's GPS device was innocently or accidentally removed on February 28 and April 24.

Ultimately, the ALJ Decision credited Brash's explanation as to why he believed Hooker tampered with the GPS device and did not believe Hooker's account of accidentally disconnecting the GPS device on those days (D 30:8-13), for the following reasons (Brash 1747):

- Hooker falsely claimed he had reported to Sharp in February the GPS was disconnected and that Sharp directed him to submit a work ticket.
- On April 17, when Bigelow told Hooker the GPS had not been reporting since February, Hooker never mentioned to Bigelow he knocked it out. Hooker submitted a repair ticket at 3:27 pm that day regarding the "strange device."
- Hooker admitted to Vilks he had learned on April 12 the device was a GPS device, yet submitted a work ticket on April 17 claiming a "strange device" in the truck.
- On April 24, after Hooker removed the device for the second time, Hooker failed to report it to Osterberg, even when Osterberg visited him at the work site. Nor did Hooker report the disconnected GPS to Sharp on the morning of April 25.
- Hooker claimed he disconnected the unit when he was *setting* the parking brake, but it stopped reporting when he left the worksite (at 10:19 am). He would not have been *setting* the parking brake when he was leaving, but releasing it.
- Hooker claimed he used his right foot to set the parking brake, which caused him to knock out the GPS. When he demonstrated how the GPS was removed, he crossed his right foot over his left and stepped down like he would be able to get his foot past his left leg and try and kick across to set it.

The overwhelming weight of the evidence demonstrated that Hooker intentionally removed the GPS device – twice. He was dishonest throughout the investigation and twice failed to report knocking out the GPS. Hooker's misconduct violated the COBC and Tech Expectations and warranted discipline. (R 5, p. 4; R 64, p. 3-4; R 32, p. 10). Hooker's own egregious misconduct severed any possible causal connection to the initial decision to put him in the load.

IV. CONCLUSION

Neither Hooker's engagement in union activities nor his protest of the Company's decision to return him to the workload privileged him to consistently and repeatedly misuse time over a period of 8+ months in egregious violation of Company policy. If the Union or Hooker believed

the Company's decision to put him on the work load violated a purported "local agreement" or "past practice," his obligation was to "work and grieve," i.e., work in compliance with Company policy and grieve and arbitrate the alleged breach. Although the Union grieved every discipline at issue in this case, Hooker chose a path of defiantly avoiding work and baiting the Company to discipline him – all with the Union's blessing.

Hooker's continued lack of accountability at trial provides additional evidence of the propriety of Brash's decision to terminate. Rather than take any ownership for his sustained acts of misconduct, Hooker and the Union instead offered more excuses and denials.

For all of the reasons exhaustively detailed in Respondents' Post-Hearing Brief and above, the Company's progressive discipline and termination of Hooker plainly were not motivated by his union activities and would have occurred in any event, and thus did not violate Section 8(a)(3), under *Wright Line*. Moreover, because Hooker indisputably was terminated for cause, Section 10(c) prohibits reinstatement or back pay remedies. Accordingly, the Complaint allegations are without merit and must be dismissed in their entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2020, a copy of the foregoing was served
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