

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.**

**MICHIGAN BELL TELEPHONE COMPANY, AND
AT&T SERVICES, INC., JOINT EMPLOYERS**

Respondents

and

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

Charging Party

**Cases 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**

**THE GENERAL COUNSEL'S BRIEF TO
THE ADMINISTRATIVE LAW JUDGE ON REMAND**

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I. Introduction

On July 17, 2020, the Board issued a Decision and Order¹ in this case adopting the ALJ's conclusion that Respondent violated Sections 8(a)(3) and (5) of the Act by unilaterally and discriminatorily assigning full-time Union representative, Brian Hooker, to perform technician work in the field (i.e., to work "in the load"). As to that 8(a)(3) violation, the Board adopted the reasons stated by the judge for the violation. *Id.* slip op. at 1. In this regard, the ALJ found:

Respondent's justification for putting Hooker back in the load was not that it needed him for workload considerations but that Mrla wanted "consistency" in his organization as far as the treatment of stewards. I find this argument flimsy in light of (1) no evidence that any stewards or union members ever complained to management that Hooker was not in the load, (2) the practice was long established that the AA was on full-time union status, and Hooker had enjoyed such status for approximately 5 years; (3) business considerations were essentially irrelevant, and the Respondent provided no cogent legitimate justification for the timing of its conduct [ALJD at 38].

Significantly, the accusations against Hooker related to *how he performed his work as a tech* and not to any allegations of gross misconduct such as violence against others, destruction of company property, malicious maligning of the Company to the public, or the like [ALJD at 39].

The ALJ also found that Respondent violated the Act by disciplining and subsequently discharging Hooker based on his work performance. In making this determination, the judge considered every adverse action taken against Hooker in the aggregate and concluded that none of Hooker's disciplines nor his discharge would have occurred had the Respondent not placed Hooker in the workload in violation of Section 8(a)(3) and (5) [ALJD at 39]. The Board disagreed with the ALJ's conclusion in this regard, stating:

¹ *Michigan Bell Telephone Services*, 369 NLRB No. 124 (2020). Chairman Ring and Member Kaplan participated in the decision. Member Emanuel is recused.

The judge's analysis was based on an assumption that each act of disciplining Hooker following his return to the load was de facto tainted by the Respondent's animus in placing him there in the first place.

We find the cases cited by the judge in support of this assumption distinguishable, and we further note that the Board has never applied these cases to confer an employee with general immunity from discipline or discharge for all future misconduct – in principle, until the employee either resigns or retires.

Id. at 5.

Based on this conclusion, the Board remanded to the ALJ the issue of “[w]hether the Respondent unlawfully disciplined and discharged [Brian] Hooker so that the judge can make the requisite credibility determinations and factual findings.” *Ibid.*

As an initial matter, the absurdity of suggesting that Hooker might be disqualified from reinstatement and backpay based on his performance² of a job that Respondent admits it did not need him to perform, and which the ALJ (and the Board) have found he was assigned to perform only in retaliation for his protected union activity, should be self-evident. Moreover, the Board's conclusion that the Judge “assumed” that Respondent's discipline and discharge of Hooker was “de facto tainted by the Respondent's animus in placing him there in the first place” is both incorrect and misses the point entirely.

The ALJ's determination that Respondent's discipline of Hooker was unlawful was not premised solely on Respondent's discriminatory decision to put him back in the load. Instead, the Judge pointed to the continued friction between Hooker and Respondent after he returned to the load and Respondent's entire course of conduct, including the following:

Additionally, certain conduct on management's part after Hooker returned to the load gives rise to an inference of continued animus. Thus, Brash's handling of the

² Respondent has made it clear that Hooker's termination was based on the progressive discipline assertedly issued for “misuse of time,” and not on the discipline related to his GPS, or for attendance infractions, or for failing to complete his union activity log. See [Respondent's Post-Hearing Brief to the Administrative Law Judge](#) at pg. 139, fn. 35 and fn. 36. As such, the focus of this brief is on the progressive discipline that resulted in his termination.

GPS investigation reflected a desire to find cause to discipline Hooker rather than have impartial fact-finding: Brash did not furnish to Vilk a document from the GPS contractor that might have lent credence to Hooker's version of the problems that he had with his GPS, and 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. Moreover, trained investigator Vilk thoroughly documented her investigation of Hooker's nonreporting GPS but offered no explanation for her failure to include her conversation with Campbell, who offered evidence that might have supported Hooker's version of his problems with the GPS. Finally, Sharp did not take into account Campbell's statement on September 22 that Hooker's mistake in diagnosing a problem on September 20 was an easy one for a tech to make [ALJD at 40].

Furthermore, the implication that Respondent's animus toward Hooker ceased once he returned to the load is ludicrous. Respondent's on-going animus is obvious from its continued application of the discriminatory change in policy. Simply put, if Respondent's animus toward Hooker for his protected activity had stopped, Respondent would not have continued to assign him to work in the load on the fabricated bases that he was needed for work purposes or that it wanted consistency in its treatment of stewards. Each time Respondent assigned Hooker to work in the load, it discriminated against him. And because Hooker was a full-time Union official, each assignment prevented him from performing his Union duties and directly interfered with his Section 7 rights.

Additionally, the evidence of Respondent's animus with regard to each instance of the progressive discipline that resulted in Hooker's termination is more than sufficient to meet the General Counsel's burden. As will be shown here, the circumstantial evidence of Respondent's discriminatory motivation abounds, including its departures from established disciplinary protocols and practices; false and shifting reasons provided for the discipline; repeated disregard of exculpatory evidence by Respondent's managers; and its disparate treatment of Hooker, including unprecedented scrutiny of his work performance.

The General Counsel agrees with the Board that an employer's unfair labor practices, no matter how egregious, do not "confer an employee with general immunity from discipline or discharge for all future misconduct – in principle, until the employee either resigns or retires." *Michigan Bell*, supra at 5. The General Counsel has never taken that position in this or any other case. Nor did the Judge make any such finding or conclusion here. Instead, the Judge specifically stated:

Significantly, the accusations against Hooker related to how he performed his work as a tech and not to any allegations of gross misconduct such as violence against others, destruction of company property, malicious maligning of the Company to the public, or the like. Accordingly, I find that any derelictions in his conduct were not egregious to the point where they severed the causal connection between the Respondent's disciplines and its original unlawful act.

The Board's statement regarding supposed "general immunity" is a variation on an argument Respondent has made throughout these proceedings:

Taken to its logical extreme, the GC effectively asserts that Mr. Hooker was immune from ever being disciplined, no matter his conduct, simply because he disagreed with Respondent's decision to place him on the work load. There's no logical or legally defensible basis for that protection. The Charging Party's recourse was for Mr. Hooker to work and grieve the issue of his placement on the load [Tr at 52].

This is, and always has been, a straw man proffered by Respondent to divert attention from its grievous unfair labor practices and its inability to meet its burden of showing that it would have disciplined and discharged Hooker absent his protected activity.

Along this same line, Respondent argues that "Hooker's continued protest over the decision to put him in the load did not license him to loaf and refuse to work. His recourse was to work and grieve." [Respondent Brief in Support of Exceptions at 66]. This argument conveniently ignores that Respondent's unfair labor practices extended to interfering with the grievance process when Respondent failed and refused to provide Hooker with information that

was relevant and necessary not only to the Union's processing of the grievance regarding his reassignment, but also to the subsequent grievances regarding his discipline and discharge. To this day, Respondent has not provided the requested information.³ Just as significantly, Respondent's specious "obey and grieve" defense also ignores that the precipitating event of Respondent's unlawful assignment of Hooker to field work was his testimony at a Board hearing – See ALJD at 37: "Thus, only one day before a scheduled NLRB hearing on charges that Hooker had filed against the Company, Mrla called Hooker and stated that he had to get Hooker a truck and tools and back in the load." *Michigan Bell Telephone Company*, slip op. at 1, fn. 6.

In sum, whether viewed in the aggregate or independently, the evidence of Respondent's unlawful motive with regard to its discipline and discharge of Hooker is compelling and more than sufficient to sustain the General Counsel's burden here. Furthermore, Respondent has not shown, and cannot show, that it would have taken the adverse actions against Hooker absent his protected activity.⁴

The right of employees to designate and be represented by agents of their own choosing is a basic statutory policy of the Act and a fundamental right guaranteed by Section 7. Where, as here, an employer endeavors to undermine and obstruct the functioning of a designated representative of its employees, it interferes with the most basic of employee rights that the Board is entrusted with protecting. For the reasons set forth below, the General Counsel

³ See Section 2(f) of ALJ's recommended Order: "Provide the Union with information that it requested that is relevant and necessary to its processing of its grievance over Brian Hooker's assignment to the load and requirement that he fill out union activity logs ..." [ALJD at 30].

⁴ In his decision, the ALJ recommended the traditional make-whole order of reinstatement and backpay [ALJD at 47]. In so recommending, the ALJ specifically addressed Respondent's argument that Hooker is barred from reinstatement and backpay notwithstanding Respondent's unlawful unilateral change [ALD at 26]. The Board did not, however, address make-whole relief with regard to the discipline and discharge in the context of the unlawful unilateral change violation. The General Counsel respectfully moves that the Administrative Law Judge clarify that the make whole remedy recommended in his original decision was intended as a remedy with regard to both the 8(a)(3) and the 8(a)(5) violations. See Section IV, below.

respectfully urges the Administrative Law ALJ to find and conclude that Respondent's discipline and discharge of Brian Hooker violated Section 8(a)(3) of the Act.

II. Summary of Events Leading Up to Respondent's Unlawful Decision to Assign Hooker to Work in the Load

Brian Hooker began working for Respondent in 1996 [ALJD at 10; Tr. at 344]. Prior to becoming a full-time Union representative, Hooker worked as a Customer Service Specialist ("CSS"), installing and repairing telephone lines [ALJD at 10; Tr. at 345]. He worked in the department known today as Technical Field Services (TFS) and was assigned to Respondent's 36th Street garage [ALJD at 9-10; Tr. at 346, 366]. Over the years, Hooker held several steward positions with the Union, both appointed and elected [ALJD at 10; Tr. at 348-349], and was frequently excused from work for grievance meetings and other Union business [ALJD at 10; Tr. at 110-111, 228]. Around October 2010, Union President Ryan Letts appointed Hooker as Administrative Assistant [ALJD at 10; Tr. at 106-107, 354]. Upon being appointed, Hooker ceased performing work as a technician and became a full-time Union official, just like all Administrative Assistants before him since at least 1994; he was removed from the work schedule and stopped bidding on the vacation schedule [ALJD at 10; Tr. at 359-360; GC 11 at 1]. As Administrative Assistant, Hooker had many varied duties [ALJD at 10-11; Tr. at 102-106]. He trained and mentored his fellow stewards, oversaw grievances at the first and second step and chaired grievance meetings with Respondent's managers [ALJD at 10-11; Tr. at 102, 167]. He was responsible for investigating grievances and making information requests [ALJD at 10-11; Tr. at 102, 353-354] and also served as the Union's liaison to state and federal agencies, including the NLRB, OSHA and MIOSHA. Hooker communicated with these agencies frequently and filed charges and complaints on behalf of the Local and its members [ALJD at 10-11; Tr. at 104-106]. He was the editor of the Union's newsletter and responsible for overseeing

its website and presence on social media [ALJD at 10-11; Tr. at 103, 353]. In addition to his duties on behalf of the Local, Hooker was also the safety coordinator for all of the District 4 locals in Michigan and a safety instructor for the International Union [ALJD at 11; Tr. at 351].

After several years as a steward, and nearly five years as administrative assistant, Hooker had a well-established reputation as an exceptionally aggressive Union representative [ALJD at 12-13, fn. 10, 36; GC 41 at 184-188, 155-156; GC 42 at 10-11; Tr. at 140, 1100, 1697, 2679]. The record is replete with evidence of Respondent's enmity toward Hooker and the manner in which he carried out his duties on behalf of the Union. Prior to their October 2015 decision to put him back "in the load," Respondent has at various times described Hooker as "patronizing" [GC 73 at 3]; "combative" [GC 41 at 156]; "harsh" [GC 41 at 161]; "antagonistic" [GC 42 at 11]; and "offensive" [Tr. at 140]; with a "proclivity for filing ULP charges ... and (making) broad, inappropriate, and overreaching requests for information" [GC 73 at 3].⁵

In January 2014, George Mrla became a director of network services in the TFS business unit [ALJD at 9; GC 1(ccc) at ¶6; Tr. at 120, 2551-2552]. TFS performs installation and repair work on Respondent's network infrastructure [J. Ex. 2]. Mrla's jurisdiction includes all TFS operations in Michigan [ALJD at 9; Tr. at 946-947, 2551-2552]. Bargaining unit employees within Mrla's jurisdiction are represented by one of approximately twelve local unions under District 4 [Tr. at 2563]. In April 2015, Ted Brash was appointed as one of several TFS area managers reporting directly to Mrla [ALJD at 9; GC 1(ccc) at ¶6; Tr. at 937, 348]. As an area

⁵ There is no evidence that Respondent ever disciplined or even counseled Hooker for misconduct while acting in his official capacity during the more than 17 years he served as a Union representative. In this regard, the Board has long recognized that "[T]he language of the shop is not the language of 'polite society,' and that tolerance of some deviation from that which might be the most desirable behavior is required." *Dreis & Krump Mfg.*, 221 NLRB 309, 315 (1975), *enfd.* 544 F.2d 320, 329 (7th Cir. 1976); see also *Success Village Apartments, Inc.*, 347 NLRB 1065, 1069 (2006); *Stanford Hotel*, 344 NLRB 558, 558-559 (2005); *Winston-Salem Journal*, 341 NLRB 124, 126-127 (2004); See also ALJD at 36-37 and cases cited therein. Notwithstanding Respondent's distaste for Hooker's aggressive style, the parties have otherwise enjoyed a mostly peaceful and productive bargaining relationship during Hooker's long tenure as a Union representative [Tr. at 54].

manager, Brash oversees the day-to-day operations of approximately eight garages, including facilities in Grand Rapids, Lansing and Howell, Michigan [ALJD at 9; Tr. at 936-937]. He directly supervises the frontline managers at each garage and approximately 100 TFS technicians [Tr. at 951-952].

- **The Flores Grievance and Information Request**

In the summer of 2015, the Union was processing a grievance on behalf of its member Ron Flores, an employee of Respondent who had received a disciplinary suspension from Ted Brash [ALJD at 12; Tr. at 370, 712; GC 37]. On May 11, Flores had a minor accident while driving his Company vehicle [ALJD at 11; Tr. at 712, 1070]. During the investigation that preceded Flores' suspension, Brash pulled Flores' cell phone and GPS records which, when used together, would have shown that on the same day as the accident, Flores had been talking on his cell phone while driving [ALJD at 11-12; Tr. at 715-716, 1070-1071, 1073].

After reviewing Flores' cell phone and GPS records, Brash conducted an investigatory interview of Flores, during which Flores admitted to Brash that he had been on his phone while driving [ALJD at 11-12; Tr. at 1070]. On May 12, Respondent issued Flores a written warning and one-day suspension for talking on his phone while he was driving [ALJD at 12; GC 36; Tr. at 1072].

While processing Flores' grievance, Hooker questioned whether Brash had violated a memorandum of agreement between the parties by not limiting his review of Flores' cell phone records and GPS information to the circumstances surrounding the accident, but instead monitoring or "looking-back" at his entire day [ALJD at 12; Tr. at 372, 375-376, 713, 717; GC 2 at 131-133]. Brash and Hooker discussed the appropriate scope of Respondent's use of technology when conducting investigations and issuing discipline, the so-called "look-back

policy” [Tr. at 375, 719]. Hooker explained to Brash his concern that employees might be less likely to report accidents or injuries if doing so resulted in Respondent conducting a broader investigation and possibly issuing discipline [Tr. at 375-376].

On August 10, 2015, for reasons that are not entirely clear, George Mrla called Hooker to discuss the “look-back policy” [ALJD at 12; Tr. at 376, 720, 2610, 2673; GC 82].⁶ Mrla and Hooker discussed the issue for nearly 45 minutes [GC 82; Tr. at 377]. The conversation did not begin well [Tr. at 378]. Mrla said: “What the hell is going on with all of this crap I’m hearing about your objections to making your members safer by making sure they’re not driving with cell phones” [ALJD at 12, 37; Tr. at 378]. Hooker told Mrla that he believed the “look-back policy” violated the parties’ contract and that it could have a “chilling effect” causing employees to fear reporting accidents [ALJD at 12; Tr. at 378]. Mrla told Hooker he was just being stubborn and accused Hooker of not caring about the safety of the employees [ALJD at 12; Tr. at 378]. Hooker testified that he told Mrla:

[T]hat if he was “so goddamn in love with keeping employees safe, he should perhaps consider instructing his managers to follow the same lifesaving behavior that the employees were following, that he insisted that they follow. Specifically, I told him I see your managers driving all over the place yakking on the phone, texting at stoplights, doing these other things. It’s very difficult for me, George, and for my stewards to – to take your policy back to them and say that it’s a rational and reasonable policy for your safety when you allow your managers to violate this policy on a continuing basis [Tr. at 379].

Mrla told Hooker he agreed and said he would instruct his managers to stop talking on their phones while driving [ALJD at 12; Tr. at 379, 720, 2673]. Surprised by Mrla’s response, Hooker thanked him and their conversation came to an end [Tr. at 379].

But Hooker was not ready to let the issue go. Three days after his conversation with Mrla, Hooker sent Respondent a substantial information request regarding Respondent’s use of

⁶ Mrla testified that Hooker initiated the telephone conversation [Tr. at 2673]. That isn’t true [GC 82].

technology to monitor the employees in Mrla's business unit [ALJD at 12; GC 38; Tr. at 278-279, 379-380, 720, 1074, 1697]. Mrla and Brash were not pleased [Tr. at 1697, 2612, 2676]. Mrla called Hooker's information request "a tactic" and "intentionally burdensome," and accused the Union of making the request "for harassment of management only" [ALJD at 37; Tr. at 2674, 2676, 1697]. The parties' dispute over the information request and the grievance continued for the next 12 months [Tr. at 1500-1501, 1565-1566, GC 37 at 2].

• September 25 – Hooker's Public Dispute with Area Manager Jarema

On the morning of September 25, 2015, Hooker became embroiled in a dispute with SD&A Area Manager Mike Jarema at Respondent's Howell, Michigan facility [ALJD at 12; Tr. at 389]. Hooker was in Howell that morning for a previously scheduled meeting to discuss safety issues with a manager [Tr. at 387; GC 71]. Hooker was also there because the previous day, Respondent had threatened to discipline Union Steward Erik Buker, an employee in the SD&A business unit [GC at 76, Tr. at 387]. Hooker was concerned that Respondent might be retaliating against Buker who had just recently been appointed as a steward [Tr. at 384; GC 71]. Hooker arrived at the Howell garage around 7:45 a.m. [Tr. at 389]. He met Buker in the parking lot and the two began talking. Soon thereafter, Buker noticed that Manager Jarema was standing in a nearby window staring at him and Hooker [Tr. at 390]. A few moments later, Jarema approached Hooker and Buker in the parking lot [Tr. at 392]. As he walked up, Jarema began shouting: "I never denied him a steward" [ALJD at 12; Tr. at 392]. Hooker turned around and said: "Mike, you know that this is improper, you shouldn't be out here. This is before work and we're not on work property" [Tr. at 392]. Jarema ignored Hooker and continued toward Buker, stating: "Eric, tell him I didn't deny you a steward" [ALJD at 12; Tr. at 392]. Buker, appearing

frightened, said: “You gave me a steward.” Jarema said to Hooker: “See?” and walked away [Tr. at 392].

Hooker and Buker went inside the garage and attended the morning meeting [Tr. at 393]. Also in attendance at the meeting were Buker’s supervisor, Don Amante, and several unit employees – both TFS and SD&A technicians [Tr. at 394]. A few minutes after the meeting began, Jarema stuck his head in the door and said: “Brian, would you mind coming down to my office for a few minutes?” Hooker replied: “Mike, I’d be happy to, but right now I’m in this meeting [ALJD at 12; Tr. at 395]. Jarema persisted. Hooker declined again, stating: “Mike, I’m in a meeting right now and have another meeting scheduled at 9:00 a.m., but if time permits, I’ll be happy to stop at your office” [Tr. at 394-395]. As Hooker and Jarema went back and forth, the meeting came to a standstill [Tr. at 395]. Manager Amante and the employees sat by quietly, as Jarema twice asked Hooker who he was meeting with at 9:00 a.m. [Tr. at 395]. Hooker declined to tell Jarema who he was meeting with, explaining that the meeting was confidential [ALJD at 12; Tr. at 395]. Hooker then said: “Do you really want to have this conversation right now in front of the troops, Mike?” [Tr. at 395]. Jarema turned and walked away “very quickly and loudly down the hallway” [Tr. at 395]. Amante attempted to continue the meeting but was interrupted again by Jarema who returned to the doorway, shook a finger at Hooker, and said: “You better not interrupt this meeting” [ALJD at 12; Tr. at 395]. Hooker said he had no intention of interrupting the meeting and Jarema walked away [Tr. at 395]. The meeting continued without further incident [Tr. at 396].

After the meeting, Hooker ran into Ted Brash [Tr. at 397]. Hooker told Brash about his confrontation with Jarema that morning and relayed to Brash that the Local was having issues with Jarema [Tr. at 397-398, 1041-1042]. Hooker continued to pursue the Buker matter by filing

an information request on October 5 [GC 39] and an unfair labor practice charge on October 6 [GC 1(a)]. Brash told Mrla about the September 25 altercation between Hooker and Jarema [Tr. at 2683]. According to Brash, it was right around this time – late September 2015 – that he and Mrla decided that Brian Hooker should return to the load [Tr. at 1012].

- **George Mrla’s October 5, 2015 Call To Brian Hooker**

Just over a week later, on October 5, Mrla called Hooker [ALJD at 12-13; GC 82; Tr. at 404-405]. When Mrla called, Hooker was gathering documents to respond to a subpoena from Respondent related to an NLRB hearing scheduled for the next day [Tr. at 404-406]. The NLRB hearing stemmed from an unfair labor practice charge Hooker filed in April 2015, alleging that Respondent violated the Act by refusing to provide the Union with information requested by Hooker [GC 40; Tr. at 119, 404]. During the October 5 call, Mrla told Hooker that he was going to need to get some training; and that Mrla was going to get him some tools and get Hooker “back in a truck (i.e., “on the load”) [ALJD at 13]. Hooker told Mrla that he did not have time to talk because he was busy gathering documents in response to the Respondent’s subpoena [Tr. at 405]. The call began to break up and Hooker asked Mrla to call back to the Union hall. But Mrla never called back [Tr. at 406].

- **The October 6, 2015 NLRB Hearing**

The next day, October 6, Hooker was the General Counsel’s sole witness at the NLRB hearing [ALJD at 13; Tr. at 119; GC 41; *Michigan Bell Telephone Company*, Case 07-CA-150005, JD-66-15, 2015 WL 7873609 (2015)]. Respondent called two witnesses at the hearing, both supervisors, each of whom testified about their negative experiences dealing with Hooker in his capacity as a Union representative [ALJD at 13]. For example, Manager Mike Ten Harmsel testified:

Q. Have you observed Mr. Hooker's treatment of new managers over the years?

A. Yeah. He tends to be really rough. Part of my job, as we do have a lot of new managers in my organization – it's a newer organization. I have new managers. And part of that really is to prep them for dealing with the grievance process in general, and it goes without saying that (Hooker's) reputation comes before him as far as being somebody who is – he likes to intimidate people, I will say push them around in a meeting, make it known who's the boss in these meetings, and then just making it very uncomfortable [GC 41 at 187-188].

• **George Mrla's October 7, 2015 Call to Union President Ryan Letts**

During the same week of the NLRB hearing, George Mrla called Ryan Letts to talk about Hooker [Tr. at 120-125, 420, 2595-2606; GC 6]. On October 7, Letts returned Mrla's call from either October 5 or 6 [ALJD at 13; Tr. at 2596]. According to Mrla, he began the conversation by telling Letts that Respondent were returning Hooker to the work schedule [Tr. at 2596]. Letts asked: "Why? Why now? Why him?" [Tr. at 121; GC 6]. Mrla replied that Hooker was the only appointed official in "(Mrla's) organization" who didn't work in the load [ALJD at 13; Tr. at 2597]. Mrla said that he was "going to treat Brian Hooker like every other appointed steward" [ALJD at 13; Tr. at 122, 232]. Letts stated that the parties' contract made no distinction between elected and appointed officials [ALJD at 13; Tr. at 122]. According to Mrla, when Letts asked whether Respondent was going to negotiate the decision to return Hooker to the load, "I (Mrla) told him, I said, we're not negotiating whether or not he's going to go in the load or not. He's going in the load ... I just kept saying, you know, him going in the load, we're not negotiating that. [Tr. at 2598, 2604].

On October 21, Hooker and Brash met at a previously scheduled grievance meeting in Lansing [ALJD at 14; Tr. at 425, 1050]. Additional Union and Company representatives were also in attendance [Tr. at 425, 1051]. At the meeting, Brash told Hooker that "he was going to be treated consistent with the rest of the organization as far as non-elected stewards go" and then

reiterated Respondent's new "expectations" of Hooker [Tr. at 425-437]. When Brash reiterated the special timesheet requirement, Hooker became heated. He told Brash that he believed that Respondent was retaliating against him for his Union activities including his participation in the NLRB hearing on October 6 [ALJD at 14; Tr. at 437]. As the meeting came to a close, Hooker told Brash:

I haven't touched a tool in years. I don't know what the hell I'm doing. I'm not familiar with their policies. I will obey and grieve, but I am following every single written rule and policy that you have because I feel that you are out to get me, and will try to fire me ... [Tr. at 442].

• **The October 23, 2015 Meeting**

Two days later, on October 23, Mrla and Brash met with Ryan Letts and Union Vice President Pam Beach [ALJD at 14; Tr. at 133]. The parties spent nearly the entire meeting arguing about Hooker and his activities on behalf of the Union [Tr. at 134-140, 1077-1100, 2615-2630].

The meeting began with a discussion of the information request Hooker sent to Respondent in August related to the Company's use of surveillance technology in the discipline process [ALJD at 14; Tr. at 134, 1082, 1697, 2611; GC 38]. The request sought a significant amount of information and Mrla remarked that he had "never seen anything like it before" [Tr. at 2675]. The parties went through the request item by item [ALJD at 14-15; Tr. at 278, 1084, 2615]. As they did, Mrla became increasingly frustrated when Letts disagreed with him regarding the relevance of the requests [Tr. at 134, 1085, 2616]. After reviewing only a few items, Mrla declared that there was no reason to continue [ALJD at 14-15; Tr. at 1085, 2616, 2676]. Mrla then accused Hooker of submitting the information request solely for the purpose of harassing management [ALJD at 15; Tr. at 1697-1698, 2679].

At that point, the conversation turned to Hooker returning to the load [ALJD at 15; Tr. at 1085, 1698, 2680]. Mrla told Letts that going forward Hooker would be required to select a work schedule, participate in vacation scheduling, and report his MXUP time [ALJD at 15; Tr. at 1086]. Letts said that Respondent's distinction between elected and appointed officials for excusing full-time Union officials was a change in policy that would adversely affect the Union [ALJD at 15; Tr. at 1086-1088, 1698, 2680]. Letts asked if Respondent's decision was non-negotiable and Mrla replied: "Right now it's non-negotiable about him going in the load" [ALJD at 15; Tr. at 1087, 2680].

Mrla then showed Letts and Beach a report he claimed indicated that Hooker had more MXUP time than other Union officials [ALJD at 15; Tr. at 1262, 1699].⁷ Letts told Mrla and Brash that if they had specific questions about Hooker's time, they should raise them for the parties to discuss [Tr. at 137]. Brash said that Respondent did not know why Hooker was at the Howell facility on September 25, the day of Hooker's altercation with Area Manager Mike Jarema [Tr. at 137]. Letts told Mrla and Brash that Hooker was at Howell on September 25 to attend a meeting set up by Engineering and Construction Director Jim Styf between Hooker and Manager Brandon Fields [Tr. at 139]. Mrla demanded to know what the meeting was about [Tr. at 139]. Letts explained that Styf had requested that Hooker meet with Fields for an "off the record conversation" about safety [Tr. at 138-139]. Mrla told Letts that there were no "off the record conversations" and said he would "fix Styf" [Tr. at 139]. Letts brought up the argument between Hooker and Jarema, and Brash replied that there was one individual in Local 4034 that was difficult to deal with [ALJD at 15; Tr. at 140]. Letts twice asked Brash who he was

⁷ As a full-time Union official with significant responsibilities in the areas of grievance processing and safety, Hooker's relatively high MXUP numbers are not at all surprising [Tr. at 353-354]. In any event, there is no contention in this case, much less any evidence, that Hooker ever inaccurately reported his MXUP or MXUU time or otherwise abused his position as a Union representative [Tr. at 789].

referring to and Brash said the “difficult to deal with” individual was Brian Hooker – that Hooker’s personality and language were “offensive” [Tr. at 140]. Affronted by Brash’s remarks,

Letts replied:

[T]hat there was individuals on their side of the fence that I – I think I used the word “real winners” that I had to deal with over the years. I would have cited some names of company representatives that I had to have dealt with in the past ... I stated that unfortunately we didn’t get to pick each other’s sides or who sat on each other’s sides [Tr. at 140].

III. The General Counsel’s Case on Remand

A. Credibility

The Board’s remand directed the Judge to make credibility resolutions regarding Respondent’s discipline and discharge of Hooker. That should not be difficult. The record is replete with the misrepresentations and prevarications of Respondent’s two main witnesses regarding Hooker’s discipline and discharge – Area Manager Ted Brash and Garage Manager Andrew Sharp.

Ted Brash gave false testimony about Respondent’s reason for putting Hooker back in the load. During its opening statement, Respondent previewed its defense as follows:

“In early 2015, Respondent informed Letts and then Hooker of its decision. In separate meetings held on October 21 and October 23, 2015, union officials asked if the decision was based on Hooker’s union activities. Brash and Mrla said no and explained the decision was made for consistency within Mrla’s organization and **because of the heavy rehab work volumes.**” [Tr. at 60].

During his direct examination, Brash testified:

Q. BY MR. SFERRA: Okay. Were there any other considerations for putting Mr. Hooker on the load?

A. We had the short rehab window. You know, it might have been, you know, a year, maybe a little more, you know, like I said, that was going to provide me better scheduling options during the week. We didn’t do rehab packages. On the weekends, the goal was to get as many of those done as possible, and **it would give me another person to help with that.** [Tr. at 1006].

But this testimony was entirely false. During cross-examination, Brash's boss, George Mrla admitted that work load considerations had nothing to do with Hooker being placed in the load:

Q. Well, what I'm trying to understand is, is the Company saying it can put him in – Mr. Hooker in the load because he's a non-elected union official, or is the Company saying that part doesn't matter, we can put him in if we need him? I'm trying to figure out what their claim –

JUDGE SANDRON: I don't think he said that they put him in because they needed him. I think he said –

A: THE WITNESS: **That had nothing to do with it.**⁸

Brash's false testimony regarding the reason Respondent placed Hooker back in the load was not a harmless stretch of the truth or mere exaggeration, this was a bald faced lie manufactured for one purpose – to deceive the Administrative Law Judge and the Board regarding the central issue in this case.

And that's just the beginning of Brash's dishonesty in this matter. During the Brash-initiated AT&T Asset Protection investigation of Hooker's alleged GPS tampering, Brash hid evidence from the investigator and lied about it [ALJD at 7, 40; CP 2; R 42]. Brash then proceeded to lie about it at the hearing in this case [Tr. at 1719-1720]. On April 19 at 11:19 a.m., Brash received an e-mail from the VTS vendor company E-Tech regarding the GPS unit in Hooker's vehicle. It stated:

The PNP GPS device 4562059615 appears to have stopped reporting on 02/28/2016. In order to ascertain that the issue is not related to the physical connection or the vehicle itself, there are a couple of steps we need to try. Can you verify that the device is securely connected to the vehicle OBD port? **Driver usage can sometimes partially dislodge the device, especially when releasing the parking brake** [CP-2, emphasis added].

⁸ Undeterred by Mrla's admission, Respondent persisted in pursuing this line of defense arguing in its Exceptions that the ALJ "ignored ... compelling evidence demonstrating that 'workload considerations' were a legitimate non-discriminatory factor in the decision to return Hooker to the load" [Respondent's Brief in Support of Exceptions at 40].

At 1:40 p.m., about two hours after this e-mail arrived in Brash's inbox, Vilk requested that Brash provide documents for the investigation, including VTS reports related to Hooker's vehicle [R-42]. At 10:19 p.m., Brash responded to Vilk's request for information. He did not provide the E-Tech e-mail he received earlier that day [ALJD at 28, 40; R 42; Tr. at 1416, 1421-1422]. Instead, Brash told Vilk:

On occasion we may receive an email from VTS asking us to investigate a non-reporting unit. I am not sure what triggers that to happen. **We have received nothing** [R 42, emphasis added].

At the hearing, Brash gave this sworn testimony:

Q. BY MR. CARLSON: Okay. And Mr. Hooker said that he knocked it out trying to push down the parking brake?

A. He said he was setting the parking brake.

Q. Setting the parking brake. Okay.

JUDGE SANDRON: And I think it's pretty clear already, but you didn't believe him?

THE WITNESS: No.

Q. BY MR. CARLSON: You were aware, though, weren't you, you became aware that was an issue sometimes with those GPS units that were installed under the dash like that ... that it sometimes would get knocked out or knocked loose when people were setting the parking brake?

A. In my experience, I had never heard of it, no. I had never seen it, never had it happen.

Q. Had you ever heard of it happening, though?

A. Not to anyone that – No. [Tr. at 1719-1720].⁹

⁹ Upon further cross-examination, Brash disclosed that the April 19 E-Tech e-mail was not the first time that he had received information that these GPS units could become dislodged when releasing the parking brake [Tr. 1785-1786].

During her testimony, Asset Protection Investigator Vilk confirmed that Brash never provided her with the e-mail from E-Tech, or otherwise told her about the parking brake issue – not even after Hooker explained to Vilk and Brash that the GPS in his vehicle became dislodged when he was using the parking brake [ALJD at 7, 40; Tr. at 2007-2008]. After hiding, and lying about, this important evidence, Brash suspended Hooker and **recommended his termination** for tampering with the GPS [Tr. at 1453-1454, 1459], thus demonstrating plainly just how far Brash was willing to go to get rid of Hooker.

Brash’s credibility is further tarnished by his contradictory testimony regarding antagonistic remarks he made about Hooker to Union President Ryan Letts when discussing Hooker’s return to the load at the October 23 meeting between the Union and Respondent [ALJD at 6]. Letts testified that during the meeting Brash said: “[T]here was one individual in our local that was difficult to deal with. I asked Mr. Brash who that was. Mr. Brash stated that I knew who he was referring to. I asked again, “Who is that individual?” Mr. Brash stated that it was Brian Hooker, that Brian Hooker’s personality and language were offensive” [Tr. at 140]. When asked about this during his direct testimony, Brash snickered and testified:

A. I may have made a comment about just his – he liked to yell a lot in grievance meetings. I said it wasn’t helpful to the procedure.

JUDGE SANDRON: Did anybody respond to your statement?

THE WITNESS: Ryan Letts said he was aware of this, of Hooker’s style in grievance meetings [Tr. at 1101].

But when asked about this during cross-examination, Brash suffered a sudden lapse of memory before contradicting his prior testimony [ALJD at 6]:

Q. And then there was also discussion in that meeting about Mr. Hooker’s behavior in grievance meetings, right? Didn’t you bring that up?

A. I don’t recall the conversation specifically.

Q. Didn't you say he yelled a lot in grievance meetings and it's not helpful, something like that?

A. I don't recall specifically, but there may have been conversation. I don't recall.

Q. Did you know that Mr. Hooker yelled a lot in grievance meetings at that point, October 23rd of 2015?

A. I don't know if I – No, I don't recall him yelling a lot [ALJD at 6; Tr. at 1699].

Brash also denied knowledge of Hooker testifying at the October 6, 2015 NLRB trial [Tr. at 1020]. His denials are unbelievable when considered in the context of surrounding events. In late September 2015, just one week before the NLRB trial, Brash spoke with Labor Relations Representative Donald Stanley about rescinding Hooker's full-time Union representative status [Tr. at 1012, 2589, 2592]. It is highly improbable that Labor Relations Representative Stanley would not be aware of an NLRB hearing taking place the following week involving Respondent and two of its managers. Moreover, it is implausible that Stanley would not have mentioned the NLRB hearing during his conversation with Brash who called him to talk about Hooker – a central figure in that case [GC 40; GC 41; GC 42]. Respondent did not have Stanley testify about his conversations with Brash in late September 2015.

The record also raises questions regarding the veracity of Brash's underling, Manager Sharp. For example, Sharp testified that when he introduced himself to Hooker as the new supervisor of the garage and laid out his goals, Hooker stated, "I will absolutely never work with anyone with the Company" or "I refuse to work with . . . anyone from the Company." According to Sharp, he did not respond to Hooker. As the Judge noted in his Decision, it is simply not believable that Hooker would have made such a statement to Sharp during their initial conversation [ALJD at 7]. Sharp's testimony is particularly troubling as it demonstrates his willingness to concoct a gratuitous falsehood just to put Hooker in a bad light. This must be

considered in assessing the credibility of Sharp's testimony regarding the numerous conversations and investigations regarding Hooker's discipline and discharge.¹⁰

B. Legal Standard for Discriminatory Discipline

The Board's standard for cases turning on employer motivation is found in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis). In *Wright Line*, the Board determined that the General Counsel carries his burden by persuading by a preponderance of the evidence that employee protected conduct was a substantial or motivating factor (in whole or in part) for the employer's adverse employment action. Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992). "More often than not, the focus in litigation under this test is whether circumstantial evidence of employer animus is 'sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision.'" *Tschiggfrie Properties*, 368 NLRB No. 120, slip op. at 1 (2019) (quoting *Wright Line*, supra at 1089); see also *Tschiggfrie* at 8 ("we emphasize that we do not hold today that the General Counsel must produce *direct* evidence of animus against an alleged discriminatee's union or other protected activity to satisfy his initial burden under *Wright Line*" (emphasis in original)). Circumstantial evidence of discriminatory motivation may include evidence of: suspicious timing; false or shifting reasons provided for the adverse employment action; failure to conduct a meaningful investigation of alleged employee misconduct; departures from past

¹⁰ Sharp's testimony regarding these events was subject to recurring memory lapses when faced with questions that undercut Respondent's account of Hooker's alleged misconduct. For example, Sharp testified that he could not remember if Hooker or Campbell said anything on September 22 along the lines that Hooker's misdiagnosis on September 20 was an error easy to make [ALJD at 7].

practices; tolerance of behavior for which the employee was allegedly fired; and/or disparate treatment of the employee. See *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 4, 8 (2019); *Medic One, Inc.*, 331 NLRB 464, 475 (2000). The evidence must be sufficient to establish that a causal relationship between the employee's protected activity and the challenged adverse employment action. The General Counsel does not *invariably* sustain his burden of proof under *Wright Line* whenever, in addition to protected activity and knowledge thereof, the record contains *any* evidence of the employer's animus or hostility toward union or other protected activity. *Id.* at 7.

When the General Counsel satisfies his initial *Wright Line* burden, such showing proves a violation of the Act unless Respondent can "demonstrate that the same action would have taken place in the absence of the protected conduct." *Wright Line*, *supra* at 1089; see also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), *enfd. mem.* 127 F.3d 34 (5th Cir. 1997). In order for the employer to meet this standard, it is not sufficient to produce a legitimate basis for the adverse employment action or merely to show that legitimate reasons factored into its decision. *T. Steele Construction, Inc.*, 348 NLRB 1173, 1184 (2006). Rather, it "must persuade that the action would have taken place absent protected conduct by a preponderance of the evidence." *Weldun Int'l*, 321 NLRB 733 (1996) (internal quotations omitted), *enfd. in relevant part* 165 F.3d 28 (6th Cir. 1998). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (approving *Wright Line* and rejecting claim that employer rebuts General Counsel's case by demonstration of a legitimate basis for the adverse employment action). In such cases, the Board does not weigh the relative quantity or force of the unlawful motive compared to the lawful motive: the violation is established if the employer fails to prove it would have taken the action in the absence of protected activity. *Wright Line*, *supra* at 1089 fn. 14.

C. Respondent's Progressive Discipline and Discharge of Hooker

1. Hooker's Return to the Load

December 13, 2015, was Brian Hooker's first day working in the load in more than five years [Tr. at 462, 1690].¹¹ Things did not start well. When Hooker arrived at work, he found that Respondent had not assigned him a truck or any work [Tr. at 464]. Hooker called the duty manager, Mike Wyant, and left a message. Wyant called Hooker back and told him to ask a dispatched co-worker, Richard Manguse, to return to the garage so Hooker could ride with him [466-467]. Hooker told Wyant that he had not been provided with any tools and did not even have basic safety gear, such as safety glasses, gloves, or rain gear. Wyant replied sarcastically, telling Hooker that maybe he should just sit in the truck [Tr. at 466]. Hooker accompanied Manguse on a single job [Tr. at 466-467]. At Wyant's direction, Manguse and Hooker spent the rest of the day putting stock away at the garage due to a lack of work [Tr. at 467].

Hooker's second day in the load, December 20, did not go much better [Tr. at 467-468]. Still without any tools or basic safety gear, Hooker again rode along with a co-worker and observed [Tr. at 469]. Hooker's immediate supervisor, Andrew Sharp, was the duty manager that day, and at one point, he stopped by Hooker's jobsite [Tr. at 468]. Hooker told Sharp that he still did not have any tools or safety gear. He also expressed to Sharp his apprehension about the effectiveness of the ride-along training given how much time had passed since he had worked in the load. [Tr. at 469]. Sharp responded with the verbal equivalent of a shrug, telling Hooker:

"I'm just a soldier [Tr. at 469-470]."¹²

¹¹ In the two years prior to becoming a full-time Union official, Hooker's duties as a chief steward kept him off the work load all but 8-12 hours per week [Tr. at 462].

¹² Around this time, Brash complained to Letts that Hooker was "not taking advantage of the opportunity" to train with Sharp, described by Brash at the hearing as one of his "most technically sound managers." [Tr. at 1154]. However, at the hearing, when asked if he did any training with Hooker when, as duty manager, he had the opportunity to do so, Sharp testified: "No. I'm not the trainer" [Tr. at 2453]. Sharp also testified that Brash never

On January 31, 2016, Hooker was assigned to work on his own for the first time in more than five years. Hooker described the experience as “an exercise in humiliation and frustration” [Tr. at 495].

I struggled with fixing things, just fixing things. I didn't know the procedures. I didn't have a good grasp of the skill ... I had to call for help just to fix what was a simple – what seemed to be a simple case of trouble. So we ended up having three technicians on the site to get one job fixed because I didn't have the tools, I didn't have an understanding. I didn't have a basic understanding of the way the new technology worked. It was frustrating. I was nervous the whole time being in the field because of the strained circumstances that placed me there [Tr. at 495-496].

Hooker's difficulties when he returned to the field should have come as a surprise to no one. He had not touched a tool in seven years [Tr. at 462-463]. He had not performed any field work whatsoever for more than five years [Tr. at 462-463]. Hooker had not been offered or taken part in any technical training in more than 10 years [Tr. at 464]. Notwithstanding the substantial gap in his experience and training, Respondent provided Hooker a mere seven days of “ride along training” before throwing him to the proverbial wolves [R 26]. The inadequacy of the training Respondent provided Hooker in 2015 seems especially peculiar in light of the significant technological changes that had taken place since he was last in the load. In this regard, Hooker testified:

Q. Now, when you went back into the load, had the work changed since you last performed it?

A. Yes.

Q. And how had it changed?

A. It had changed radically in those 6 or 7 years. We had changed technologies used to deliver internet to customers' houses. We had changed the tools that we used to maintain the telephone and internet network. We had changed meters. We had changed practices ... it seemed like almost everything had changed.

told him to be personally engaged in Hooker's training [Tr. at 2453].

Area Manager Brash corroborated Hooker on this point, testifying: **“[T]he work we were doing in 2010 is nothing close to the work we were doing in 2015”** [Tr. at 1043-1044].

Notwithstanding Hooker’s extended hiatus from performing technical work and his inexperience with new technology, there is no evidence of any complaints from his fellow techs; there is no evidence of any complaints from customers; there is no evidence of any issues raised by other managers with whom Hooker worked. Indeed, the only people who seemed to be surprised by and/or have issues with Hooker’s difficulties in the field were Manager Brash, his underling Manager Sharp, and Supervisor Osterberg who, at the direction of Sharp, hid and spied on Hooker as he worked.

As the parties’ labor dispute intensified, so did Respondent’s scrutiny and criticism of Hooker’s work performance [ALJD at 39]. Between February and October 2016, Respondent actively sought opportunities to reprimand Hooker and issue discipline for matters trifling and contrived.

2. The Written Warning Issued March 3, 2016

a. February 11

On February 11, the Company assigned Hooker to work with Training Manager Russ Jordan [ALJD at 25; Tr. at 555]. Hooker was scheduled to work from 8:00 a.m. to 4:30 p.m., that day [Tr. at 557]. The first part of the day consisted of classroom training. That afternoon, Jordan and Hooker left the 36th Street garage to continue training in the field [Tr. at 556, 1273, 2235]. Before leaving the garage, Sharp issued Hooker a new cell phone [Tr. at 558 at 1279, 2236]. Hooker and Jordan arrived at the job and began working. At approximately 3:50 p.m., Hooker contacted Sharp and advised him that he didn’t think he was going to be able to finish the job before the end of his shift and that he couldn’t work overtime [ALJD at 25; Tr. at 559].

After his call to Sharp, Hooker was closing up the job when he discovered the problem with the customer's line [Tr. at 560]. Working together with Jordan at his side, Hooker fixed the problem [Tr. at 560]. Unbeknownst to Hooker, Sharp tried unsuccessfully to reach him on his new company cell phone and then – without ever talking to Hooker – arranged to have John Root, a tech from another garage, take over the job [Tr. at 2458; ALJD at 26]. At the time Sharp tried to reach him, Hooker had not set up his voice mail and the volume on his phone was turned down causing Hooker to miss Sharp's call [Tr. at 568]. Root arrived on the job just as Hooker and Manager Jordan were finishing up [Tr. at 561]. Hooker arrived back at the garage at approximately 5:15 p.m. [ALJD at 26]. Hooker explained that the volume on the new cell phone that Sharp had just issued to him three hours earlier was turned down and he had not received Sharp's call or text [Tr. at 568].

When Sharp couldn't reach Hooker, he did not call Manager Jordan who was working right next to Hooker to let him know that Root was on his way and that Hooker could leave the jobsite [Tr. at 2460]. When asked about this at the hearing, Sharp couldn't explain his actions [Tr. at 2460]. Instead, Sharp called Brash to report that Hooker had not called him back [Tr. at 2462-2463]. Sharp clearly suspected that his failure to reach Hooker was related to the new cell phone. At 5:11 p.m., Sharp sent this e-mail to Hooker:

From: SHARP, ANDREW P
Sent: Thursday, February 11, 2016 5:11 PM
To: HOOKER, BRIAN A
Cc: SHARP, ANDREW P
Subject: IMPORTANT PHONE NUMBERS

Brian,

Here are some phone numbers you may need while in the field. The first form of communication to use while contacting our support groups is always Smart Chat. If you cannot find the appropriate support group in Smart Chat for your needs you may use these phone numbers I have provided. The app, Q (found in "apps at work"), is a great way to find any employee's phone number, simply type their name or user ID in the search box.

Lastly, please set up your voice mail box on your company phone. Please include in your greeting, your name, AT&T, and my name and number. Example= "Hello, you have reached Brian Hooker with AT&T. I am unavailable at the moment. Please leave me a message, and I will return your call as soon as possible. If this matter is urgent, please contact my manager Andrew at 616-881-2219. Thank you, and have a great day." On your company phone, call your own phone number (616-350-4520). Follow the prompts and set up your voice mail box.

If you have any questions regarding phone numbers for your company phone, how we contact our support groups, or as simple as setting up your voice mail, please feel free to ask me.

My number = 616-881-2219

Sharp sent a copy of the e-mail to Brash at 5:12 p.m. [GC 77].

With regard to working unauthorized, Respondent's Tech Expectations provide:

All overtime must be approved in advance by the supervisor. Any overtime that is not preapproved by the supervisor will be paid. However, the ***repeated*** failure to obtain preapproval ***may*** result in disciplinary action [emphasis added] [R 5 at 3].

There is no evidence that Hooker had ever worked unauthorized overtime either prior to or after February 11. There is no evidence that Respondent *ever* disciplined any employee for working "unauthorized overtime" other than Hooker.¹³ At the hearing, Sharp and Brash had no explanation for why they deviated from the established policy of issuing disciplinary action only for repeated failures to obtain preapproval to work overtime.

¹³ Hooker testified that in all his years as a steward, he had "never grieved in hundreds and hundreds of grievances, a violation for working unauthorized overtime" [Tr. at 565].

b. February 14

On the morning of February 14, Hooker was assigned to repair a BPC (Bad Plant Condition). Hooker had never performed that type of work before that morning. He was given no description of the problem and knew only that he was supposed to cure any issues or defects [Tr. at 571-573]. When he arrived at the jobsite, Hooker inspected the job but couldn't figure out what he was supposed to fix. Hooker testified: "I inspected the job from one end to the other, I walked down the block, I walked back" [Tr. at 571; ALJD at 26]. A co-worker, John Haley, stopped by the job. Hooker explained his confusion and asked Haley what he was supposed to do. Haley said, "we're just supposed to sit on them all day until some demand work (comes up)" [Tr. at 573]. After speaking with Haley, Hooker concluded that there was no work to be done on the job. He contacted Sharp at 11:03 a.m. and told him "there is nothing to do on this job. I'm confused. I don't know what it is that you want me to do here" [Tr. at 571]. Sharp told Hooker to pick up some tools and materials, take lunch and then close the job, dispatch and get another one [R-34(a); Tr. at 1290, 2250].

At the hearing, Brash and Sharp both acknowledged that sometimes techs are assigned to BPC's even though they do not require any work. Brash testified:

Q. Is it unusual that there's no work to do on a BPC?

A. No. No, we hadn't done BPC work in quite some time. So you've got tens of thousands of these that have been in there for years, some of them for literally years ... so as we started doing more and more of these, we had a lot of them where we'd show up and the work was no longer needed and the technician would close it and move on [Tr. at 1288-1289].

But there is no evidence that anyone ever informed Hooker of this prior to February 14. In sum, on Hooker's third day working on his own, Respondent assigned him a type of work he had

never performed, asked him to fix something that wasn't broken, and disciplined him essentially for not knowing that sometimes Respondent assigns techs to BPC's that have already been fixed.

c. February 21

Regarding February 21, the March 3 warning states that Hooker dispatched at 9:30 a.m. even though his shift started at 8 a.m. [GC-26]. Hooker explained to Sharp that his late dispatch was due to problems with his company-issued iPad,¹⁴ but Sharp never bothered to examine the iPad or have it examined by Respondent's tech support to determine what caused Hooker's late dispatch and possibly prevent it from happening again. The iPad would continue to be a problem for Hooker for the remainder of his employment.

Brash testified that at 9:28 a.m., on February 21, he was copied on an e-mail that Hooker sent to Sharp and to AT&T Ethics [R-34(a); Tr. at 1319-1320]. The e-mail was in reference to an e-mail that Sharp had sent to his crew on January 27, advising them that his crew was "#1 in the district for available time not dispatched" [R-35]. Sharp then gave this directive to the employees regarding using the iPad to receive jobs:

You should NEVER go to lunch, take a break, do trainings, or anything for that matter not dispatched on something.

Sharp's order that the tech's always be dispatched on a job, directly contradicted Respondent's Tech Expectations which states: "**Technicians should not be dispatched on a job during their meal period**" [R-5 at 3].

Hooker's e-mail to Sharp¹⁵ stated: "you are asking us to falsify our daily time reports in order to help achieve a management target regarding hours worked not dispatched. As you may be aware, this is a violation of the COBC (Code of Business Conduct), as is directing employees

¹⁴ Techs receive jobs by connecting to the company intranet using an iPad.

¹⁵ In the e-mail Hooker stated that he was raising his concerns in his capacity as a Union representative [R-34(a)].

to violate the COBC” [R 34]. Indeed, the COBC mandates that employees “prepare our business records and financial reports with integrity and honesty, whether they are externally reported or used internally to oversee the Company’s operations” [R 64 at 8]. The COBC further states: “no one has the authority to direct any employee to violate the law, this Code, or AT&T’s policies” [R 64 at 10]. The COBC requires employees to: “report when we observe a violation, or what reasonably appears to be a violation, of the law, this Code, or Company policies and guidelines” [R 64 at 10].

Sharp’s directive to his crew to “NEVER go to lunch, take a break, do trainings, or anything for that matter not dispatched on something” directly violated company policies (the Tech Expectations) and Hooker reasonably believed this was a violation of the COBC. As required, he reported the matter to his supervisors and to AT&T Ethics. Brash knew, or at least suspected, that Hooker wrote up his COBC report while waiting to dispatch on the morning of February 21 [Tr. at 1319-1320, 1343]. Brash testified that Hooker wasn’t disciplined for anything relating to the specific quality of his work on February 21, but for dispatching late that morning [Tr. at 1340]. There is nothing in the COBC, nor any other evidence, indicating that ethics concerns cannot or should not be raised during work time. To the contrary, it is implicit from the text of the COBC that such issues be raised immediately.

d. *Wright Line* Analysis of the March 3 Warning

The framework established by the Board in *Wright Line* is inherently a causation test. *Tschiggfrie*, supra at 1; see also *Wright Line*, supra, 251 NLRB at 1089. Common elements most often used to prove the General Counsel’s causation burden are (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) antiunion animus, or animus against protected activity, on the part of the employer.

The obvious starting point for analyzing Respondent's March 3 discipline of Hooker is its discriminatory decision to assign Hooker to work in the load. Respondent did not assign Hooker to work in the load on February 11, February 14, or February 21, because it needed him to perform work or because it "wanted" him in the load for "consistency" [ALJD at 38]. Those were lies and Respondent has offered no other reason for assigning Hooker to work in the load on the dates in question. Hooker was assigned on those days in retaliation for, and to interfere with, his union activity. The same type of activity – filing grievances and making information requests; being combative with management; filing NLRB charges – that motivated Respondent's discriminatory and unilateral change in policy continued unabated in the weeks and days leading up to Respondent issuing the March 3 warning.

- On December 15, on behalf of the Union, Hooker filed the charge in Case 07-CA-166130 alleging that Respondent violated Sections 8(a)(3) and (5) by assigning him to work in the load and requiring that he provide Respondent with a log of Union activities [GC-1(g)].
- On December 21, on behalf of the Union, Hooker filed an amended charge in Case 07-CA-165384 [GC-1(i)].
- On December 23, Hooker filed a grievance alleging that Respondent violated the parties' collective bargaining agreement by assigning him to work in the load and requiring him to provide Respondent with a log of Union activities [GC-51; ALJD at 19].
- On December 23, Hooker filed an information request for the purpose of investigating and processing the grievance regarding his discriminatory assignment [GC-52; ALJD at 19].
- On January 22, on behalf of the Union, Hooker filed an amended charge in Case 07-CA-161545 [GC-1(k)].
- On February 5, Ted Brash responded to Hooker's December 23 information request by accusing him of "harassing" management [GC-54 at 1].
- On February 18, Mrla and Brash complained to Union President Letts about what they characterized as Hooker's noncompliance with Respondent's discriminatory directives that Hooker work in the load and provide Respondent with a log of his Union activity. Mrla asked if Letts condoned Hooker's behavior, and Letts responded that he wished

every one of his members was like Hooker. Mrla said that he could see he would get no help from the Union, he now knew who Letts was, and there was no reason to continue talking. Mrla abruptly ended the meeting and walked out [ALJD at 25].

- On February 21, Hooker, as a Union official, filed an internal Ethics complaint against Supervisor Sharp, and sent copies contemporaneously to Sharp and Brash [R-34]
- On February 23, on behalf of the Union, Hooker filed an amended charge in Case 07-CA-166130 [GC 1(m)].
- On February 29, Hooker filed a grievance alleging that Respondent had reassigned work trucks for the purpose of sowing dissent among employees working at the 36th Street Garage, particularly within the Union inasmuch as Campbell, Hooker's chief steward, was very upset about the "truck swap" [GC-61; ALJD at 23].
- On February 29, on behalf of the Union, Hooker filed the charge in Case 07-CA-170664 [GC-1(q)] and another amended charge in Case 07-CA-161545 [GC-1(o)].

Respondent's continued animus toward Hooker is also shown by the facts and circumstances surrounding the March 3 written warning. In addition to the suspicious timing of its issuance – a few short days after Hooker filed another grievance and ULP charge – Respondent disregarded its own procedures in disciplining Hooker. First, Respondent's "Manager's Guide to Corrective Action" states:

Unless an employee's behavior is so severe that it warrants immediate corrective action, it is the responsibility of management to coach each employee on his or her behavior before it reaches an unacceptable level and prior to implementing corrective action.

There is nothing in Hooker's alleged behavior that can fairly be described as "so severe that it warrants immediate corrective action," certainly not working one hour of unauthorized overtime. In this regard, Respondent's policy on unauthorized overtime provides that only "repeated failures to obtain preapproval of overtime may result in disciplinary action" [emphasis added] [R 5 at 3]. Indeed, there is no evidence that Respondent has ever disciplined an employee for working unauthorized overtime prior to, or since March 3. Moreover, Manager Sharp's actions on February 11, make clear that his interest was in disciplining Hooker, not stopping

unauthorized overtime. As noted above, when Sharp couldn't reach Hooker, he did not call Manager Jordan who was working right next to Hooker to let him know that another tech was on his way and that Hooker could leave the jobsite. Instead, Sharp called Brash to report on Hooker. When asked why he didn't simply call Manager Jordan, Sharp had no explanation. Nor did Respondent explain why it waited more than three weeks to discipline Hooker for this alleged infraction.

As to February 14, Hooker's third day working on his own after returning to the load, Sharp disciplined him for taking too long to assess a "BPC" job – a type of work Hooker had never performed or received training to perform [ALJD at 26; Tr. at 570-571]. Sharp described this job as "day one work" [Tr. at 2176], the same description that he and Brash gave the job Hooker worked on with Caresian Campbell on September 20 [Tr. at 1591, 2372]. Campbell's testimony makes clear that "day one work" can present issues that might prove challenging even for an experienced tech, much less one who hasn't picked up a tool in seven years. This was the first occasion that Sharp and Brash accused Hooker of misusing time. Per the Manager's Guide to Corrective Action, it was their responsibility to coach Hooker prior to implementing corrective action.¹⁶ There is no evidence that Hooker received any such coaching. Regarding February 21, Sharp and Brash accused Hooker of misusing time for raising a good faith concern under Respondent's Code of Business Conduct regarding a directive from Sharp that, if followed, would have been a violation of Tech Expectations.

For all of these reasons, and in the full context of the Respondent's unfair labor practices directed at Hooker, a preponderance of the evidence supports a reasonable inference of a causal

¹⁶ Sharp and Brash might have coached Hooker that Respondent regularly assigns techs to fix BPC's that actually do not need to be fixed [Tr. at 1288-1289].

relationship between Hooker's Union activities and the March 3 written warning. *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at 11 (2018).

As the General Counsel has demonstrated that anti-union animus was a motivating factor for the Respondent's decision to issue the March warning, Respondent can avoid a finding that it violated the Act by demonstrating by a preponderance of the evidence that the same action would have taken place in the absence of protected conduct. *Boothwyn Fire Co., No. 1*, 363 NLRB No. 191, slip op. at 7 (2016).

Respondent did not meet its burden. The March 3 warning is premised on unprecedented discipline for working unauthorized overtime and Respondent's unexplained disregard of the Manager Guide's directive to coach employees before issuing discipline. An employer's failure to follow its own procedures and practices in disciplining or discharging an employee undercuts its attempt to meet its *Wright Line* defense burden. *Allstate Power Vac., Inc.*, 357 NLRB 344, 347 (2011). In this regard, the scant evidence of comparable discipline¹⁷ issued by Respondent further undercuts its argument that Respondent would have issued this discipline to Hooker absent his protected activity. Respondent proffered five examples of discipline issued for misuse of time [R-38]. Brash testified that this represented all of the discipline Respondent issued for techs that worked in his district for the period May 2015 through December 2016 (i.e., 20 months) [Tr. at 1350-1353]. What is immediately striking about the discipline is how little of it there is. Brash testified that there are around 100 techs in his district [Tr. at 1261]. So, for a period of time approaching nearly two years, Respondent issued discipline for misuse of time only five times. Only two of the disciplines were issued by Manager Sharp [R-38 at 1 and 6].

¹⁷ As an initial matter, it is arguable how comparable this discipline is given that there is no evidence that any of the employees disciplined in [R-38] had been out of the load for five years and hadn't picked up a tool in seven years; nor were they working pursuant to an unlawful directive made for the purpose of interfering with their rights under the Act.

This is particularly conspicuous given that during the time that Hooker was working in the load, Sharp's crew had the most available time not dispatched of any garage in the district [R-35]. As Sharp told his crew: "Available time not dispatched shows two things: THERE IS NO WORK to dispatch on or YOU ARE NOT DOING ANYTHING" (Emphasis in original) [R-35]. Indeed, Sharp testified that available time dispatched encompassed misuse of time [Tr. at 2466]. Brash described the 36th Street Garage as the lowest performing garage in his district: "They had my worst performance results for quality and efficiency" [Tr. at 957, 1690-1691]. Yet, aside from Hooker, Sharp issued discipline for misuse of time only twice in more than a year. Put another way, Sharp disciplined Hooker for misuse of time more times (three) in just over seven months (March 1 to October 13) than he issued to every other tech in the garage in the one year-plus that he was manager of the 36th Street garage.¹⁸

For an employer to meet its *Wright Line* burden it is not sufficient to produce a legitimate basis for the adverse employment action or to show that the legitimate reason factored into its decision. *T. Steel Construction, Inc.*, 348 NLRB 1173, 1184 (2006). It must persuade that the action would have taken place absent protected conduct by a preponderance of the evidence. Respondent has fallen far short of its burden here. The March 3 warning violated Section 8(a)(3).

3. May 10 Warning and Suspension¹⁹

a. April 10

¹⁸ It should also be noted that in the rare instances when Sharp did issue discipline for misuse of time to someone other than Hooker, the infraction involved deliberate misconduct – not circumstances where the employee was claiming that he did not know how to perform the work, as was often the case with Hooker [Tr. at 2620; See also 2517].

¹⁹ While this brief addresses all three constituents of the progressive discipline Respondent issued to Hooker, "[i]t is well settled that, where a respondent disciplines an employee based on prior discipline that was unlawful, any further and progressive discipline based in whole or in part thereon must itself be unlawful." *Publix Super Markets, Inc.*, 347 NLRB 1434, 1441 (2006); *Metro One Loss Prevention Services Group, Inc.*, 356 NLRB 89, 105 (2010); *Hays Corp.*, 334 NLRB 48, 50 (2001).

On April 10, Hooker was assigned to work on a BPC in the City of Wyoming, near Grand Rapids [Tr. at 576]. The tools Hooker needed that morning were locked in his truck with padlocks. Using the combination he had been given – the last four digits of the truck identification number – Hooker tried but was unable to unlock the padlock [Tr. at 577]. Hooker contacted the duty manager, Sidney Bragg, who instructed Hooker to use the last four digits of the truck number [Tr. at 577]. When that combination didn't work, Hooker contacted Bragg, who said he would contact Sharp to find out the correct combination [Tr. at 577]. A short while later, Bragg came to the jobsite and attempted to open the lock [Tr. at 578]. He was not successful and called Sharp. After reaching Sharp, Bragg was able to open the lock. Bragg explained to Hooker that the combination was not the last four digits of the truck but the middle set of four digits of the truck number [Tr. at 578; 1418-1419].²⁰

Respondent disciplined Hooker for the lock incident 30 days after it occurred. Typically, Respondent issues discipline within a week of its occurrence [See R-38]. Respondent offered no explanation for the delay.²¹ Moreover, contrary to what is stated in the May 10 final warning as to the reason for the discipline, Brash testified that he issued the discipline because Hooker was late dispatching on April 10 (four minutes); delayed in getting back in touch with Bragg to tell him the lock still was not working; and that he did not perform work on the BPC. Not one of these infractions is stated on the warning [Tr. at 1398]. Once again, Respondent offered no explanation for this discrepancy.

²⁰ Respondent did not call Manager Bragg to testify regarding these events, relying instead on the hearsay testimony of Brash and Sharp [Tr. at 2288-2289].

²¹ There is a pattern of unusually long delays in Respondent issuing discipline to Hooker [Compare GC 26-33 with R 38]. As Charging Party counsel astutely pointed out in his post-hearing brief: "Without (timely) notice, (Hooker) could not know where he stood with the company—either performance-wise or on the ladder to progressive discipline and discharge. This gave the company the opportunity to let him dig as deep a hole as possible and then spring on him [Charging Party brief at 25].

b. April 24

During the Brash-initiated Asset Protection investigation of Hooker's alleged GPS tampering, Brash hid evidence from the investigator and lied about it [CP 2; R 42]. Brash then proceeded to lie about it at the hearing in this case [Tr. at 1719-1720]. Brash also used the GPS investigation as a means of having Supervisor Jeff Osterberg spy on Hooker to find fault with his conduct entirely unrelated to the GPS matter [ALJD at 40].

On Friday, April 22, Brash called Supervisor Osterberg and informed him that he had initiated an Asset Protection investigation against Hooker regarding his GPS not reporting. Brash directed Osterberg to secretly observe Hooker as he worked on Sunday, April 24.²² On April 24, Osterberg drove to the jobsite where Hooker was working after locating it through Hooker's GPS. Osterberg arrived at the jobsite but parked 100 yards away so Hooker would not see him. Osterberg proceeded to observe in great detail everything Hooker did that morning and to record his observations. Respondent's Exhibit 43(a) shows that Osterberg's observations encompassed everything that Hooker did that day, minute-by-minute. Brash directed Osterberg to put his observations into a timeline which he sent to Vilks and Brash on April 25, along with photographs that he took inside Hooker's truck. Osterberg's lengthy and detailed observation of Hooker's actions was unprecedented. Asset Protection Investigator Vilks testified that she had never seen such a detailed report describing what an individual did during a work day.

c. Wright Line Analysis of May 10 Warning and Suspension

The General Counsel's prima facie case with regarding to the May 10 warning and suspension is easily met. Between the time of the March 10 written warning and May 10,

²² Osterberg testified that he had no reason to go to the jobsite to check if Hooker's GPS was working because he located Hooker at the jobsite through U-Dash, which is linked to the GPS. Furthermore, Osterberg admitted on cross-examination that he did not need to be at a worksite to see if Hooker's GPS was reporting; he could have checked that in his Lansing office as long as he had internet service.

Hooker continued to engage in the same protected activity that motivated Respondent's unlawful decision to unilaterally change the more than 25-year old practice of Union administrative assistants serving as full-time Union officials. Hooker continued to file grievances [GC-62; R-6] and make information requests²³ [GC-62 at 2; GC-67; ALJD at 24]; he filed another ULP charge [GC-1(s)] and continued to clash with management [See, e.g., GC-11; GC-56; GC-60; GC-67; ALJD at 20-21]. Respondent's on-going animus toward Hooker is obvious from its continued application of its discriminatory change in policy.²⁴ Simply put, if Respondent's animus toward Hooker for his protected activity had stopped, Respondent would not have assigned him to work in the load on April 10 and April 25, on the fabricated basis that he was "needed" for work purposes [See GC-74 at 1].

Respondent's unceasing animus toward Hooker leading up to the May 10 warning is further demonstrated by the conduct of Area Manager Brash. As described by the ALJ:

Brash's handling of the GPS investigation reflected a desire to find cause to discipline Hooker rather than have impartial fact-finding: Brash did not furnish to (Investigator Vilk) a document from the GPS contractor that might have lent credence to Hooker's version of the problems that he had with his GPS, and 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.

A preponderance of the evidence thus supports a finding that Hooker's union activity was a motivating factor in Hooker's May 10 warning and suspension. Respondent, therefore, must demonstrate that the same action would have taken place in the absence of Hooker's protected

²³ In an April 6, 2016 Position Statement to the Region during the investigation of these cases, Respondent again stated that Hooker was using an information request "to harass and attempt to bully and intimidate his supervisor" [GC-73 at 11-12]. The ALJ found that the information request referenced by Respondent was a legitimate exercise of his protected rights as a Union official and that Respondent violated the Act by not providing certain information sought with that request [ALJD at 43].

²⁴ On April 8, Brash denied Hooker's request for Union time – a request that Hooker had to make only because Respondent was discriminating against him – for the false reason that he was needed in the load [GC-70]

conduct. *Wright Line*, supra at 1089. Respondent did not meet its burden. First, as set forth above, Respondent gave shifting reasons for the discipline regarding April 10. *City Stationery, Inc.*, 340 NLRB 523, 524 (2003) (nondiscriminatory reasons for discharge offered at the hearing were found to be pretextual where different from those set forth in the discharge letters). Furthermore, Respondent did not establish that Hooker intentionally failed to access the tools on the truck. Hooker did not have the code to open the locks and there is no evidence that the employer gave it to him prior to the morning of April 10. Respondent initially directed Hooker to use the last four digits of the truck number which was painted on the truck. But the correct code was the middle four digits. To the extent there is any ambiguity about the correct code and what Hooker was told that morning, this falls on Respondent who failed to call Sidney Bragg, the one management witness with direct knowledge about this incident. As an agent of Respondent, Bragg may reasonably be assumed to be favorably disposed to Respondent. It is well established that an adverse inference may be drawn from a party's failure to call a potential witness, reasonably assumed to be favorably disposed to that party, with regard to any factual question on which the witness is likely to have knowledge; and it may be inferred that the witness, if called, would have testified adversely to the party on that issue. *Desert Pines Golf Club*, 334 NLRB 265, 268 (2001) citing *Electrical Workers Local 3 (Teknion, Inc.)* 329 NLRB 337, fn. 1 (1999).

Nor can Respondent meet its burden with regard to the April 24 incident. As found by the ALJ, Brash used the GPS investigation as a means of having Supervisor Jeff Osterberg spy on Hooker to find fault with his conduct entirely unrelated to the GPS matter [ALJD at 40]. It should not be forgotten that Brash initiated the Asset Protection investigation even though there was no indication, much less any evidence, that Hooker had engaged in any wrongdoing on the five or six days he utilized the vehicle while the GPS was not operating. Indeed, AT&T

Investigator Vilks testified that in her time as an investigator for Respondent she had never been asked to investigate a nonreporting GPS [Tr. at 1994]; and there is no evidence of any other Asset Protection investigation of non-working GPS. Also unprecedented was Supervisor Osterberg's surveillance of Hooker at the direction of Brash. As noted above, Vilks testified that she had never seen such a detailed report describing what an individual did during a work day [ALJD at 7]. An employer cannot meet its *Wright Line* burden with evidence of alleged wrongdoing discovered as a result of increased scrutiny. *Somerset & Valley Rehab. & Nursing Ctr.*, 358 NLRB 1361, 1389 (2012).

Respondent also ignored potentially exculpatory evidence with regard to the events of April 24. In Osterberg's final report to Brash, he noted:

We need to at some time interview Richard Manguse to clarify the time line between 10:19 and 11:45 to find out in more detail what time Brian got all the equipment needed to do the job, but I do not think this should be done till after Brian's interview so that the union does not tip him of the investigation [R-43(a)].

But Respondent never spoke with Manguse regarding this significant period of time for which Brash ultimately suspended Hooker for "misusing" [Tr. at 2023]. An employer does not meet its *Wright Line* burden where the evidence shows a partial or selective investigation into alleged employee misconduct. *Alstyle Apparel*, 351 NLRB 1287, 1287-1288 (2007).

As stated previously, for an employer to meet its *Wright Line* burden it is not sufficient to present a legitimate basis for the adverse action or to show that the legitimate reason factored into its decision. It must persuade by a preponderance of the evidence that the action would have taken place absent protected conduct. Respondent has fallen far short of its burden here. The May 10 warning and suspension were unlawful.

4. October 13 Discipline and Discharge

a. September 20

Hooker requested to be off work for Union business September 20 and 21. Brash denied the request [Tr. at 1579, 1617; R 56]. On September 20, Hooker dispatched on a POTS job, restoring dial tone service. He ran into several roadblocks that prevented him from fixing the problem [ALJD at 32; Tr. at 592]. That afternoon, Caresian Campbell joined Hooker at the jobsite. Hooker explained to Campbell that he had isolated the F1 cable pair and changed it but still had no dial tone. Campbell and Hooker worked on it together until the end of Hooker's shift [ALJD at 32; Tr. at 592]. Hooker could not work overtime so Sharp directed Campbell to take over the job. Campbell concluded that the pair that had been assigned was not correct, and he changed the pair [ALJD at 32; Tr. at 2729-2730]. There was still no dial tone, and he realized that the trouble was on the OE, managed by the central office [ALJD at 32; Tr. at 2729-2730].

Sharp accused Hooker of misusing time on September 20, and he conducted an investigatory interview with Hooker and Campbell about the POTS job they worked on together. Campbell told Sharp that Hooker's misdiagnosis of the problem was an easy one to make because of the nature of the problem [ALJD at 33; Tr. at 2732].

At the hearing, Campbell testified that Hooker's diagnosis that the F1 was bad rather than the OE was an easy one for a tech to make because problems with OE were less common. Campbell further testified that Hooker had isolated the trouble fairly well aside from the OE issue [Tr. at 2732]. Sharp, on the other hand, could not recall if Hooker or Campbell said anything along those lines, and therefore did not deny Campbell's account, and Sharp's notes of the meeting say at the end, "spotty notes." [R 62 at 2].

b. September 21

On September 21, Hooker again ran into a series of roadblocks including further issues with his iPad, connecting to VPN, and a workplace injury. Hooker kept Sharp apprised of his

status throughout the day in a series of communications, by email, text, or phone [GC 79 and 80]. Ultimately, Hooker's day was cut short when Sharp directed him to seek medical treatment for the injury. Significantly, Supervisor Sharp who investigated and testified at length about Hooker's alleged misconduct on this day, conceded that he was unable to cite any instance when Hooker was not truthful about the obstacles he encountered on the job [Tr. at 2501].

c. September 23 and October 3

The alleged misconduct for September 23 and October 3, involved training hours. All technicians that work in the load have required monthly trainings or courses that they take on the mLearning app on their iPads [ALJD at 34]. Brash testified that Sharp provided Hooker with paid time on September 23 to complete training, and that Hooker reported 2.75 hours for training on his time card but completed no training that day [Tr. at 1621]. Brash further testified that Sharp provided Hooker further training time on October 3, and that Hooker reported 3 hours for training but completed no courses that day [Tr. at 1622].

Respondent's claims regarding misuse of training time are not supported by the evidence. First, Brash claimed that Hooker reported 2.75 hours of training time for September 23. In support, Brash pointed to a summary he created [R-26] assertedly from Hooker's time records [R-27; Tr. at 1218; 1222; 1643]. But Brash's summary does not accurately reflect the time records. On the summary, Brash entered 2.75 hours for training for September 23 [R-26 at 21]. But Respondent's payroll records show that Hooker did not enter any hours for training on September 23 [R-27 at 9].²⁵

²⁵ This is not the only discrepancy between Brash's summary and the time records. For September 6, Brash entered 5.5 hours for training [R-26 at 21]. But the underlying payroll records that Brash claimed to be the source of the information in R-26 shows that Hooker did not enter any hours for training for September 6 [R-27 at 9].

Brash also falsely testified that Respondent's Exhibit 58 showed the number of hours Hooker spent training on various courses [Tr. at 1576-1577]. Under cross-examination, Brash was forced to concede that the "training hours" entries on R-58 do not accurately show time spent training [Tr. at 1630-1635]. Instead, Brash admitted that if a tech leaves the training application open on his/her iPad, accrued time continues to be recorded even if the tech is not actually taking the training [Tr. at 1632]. If the tech goes into the app on more than one day, time accumulates. Indeed, on October 4, Hooker completed all of the training for August and September, as well as two other courses, when he was on MXUU (unpaid time) [Tr. at 1625; R-60; R-58; ALJD at 34]. In the end, Respondent offered no evidence of the actual time Hooker spent on any training task – only the day a training was completed and the time that a training program was open.²⁶

d. Wright Line Analysis of October 13 Discharge

Following Hooker's May 10 suspension, the parties' dispute regarding Respondent's discriminatory assignment to work in the load escalated. Hooker's protected activity – the same type of activity that motivated Respondent's discriminatory decision to unilaterally change the more than 25-year old practice of Union administrative assistants serving as full-time Union officials – continued, as did Respondent's animus toward that activity. Hooker continued to file grievances [R-8; R-10; R-12; R-14; R-16-18] and battle with Brash over information requests [ALJD at 24]. Hooker filed several additional ULP charges [GC-1(u); GC-1(w); GC-1(y); GC-1(aa); GC-1(cc); GC-1(ee); GC-1(gg)] and the parties' clashes regarding Respondent's unlawful

²⁶ Brash also gave conflicting testimony regarding whether Hooker ran into any issues that interfered with the training. Initially, Brash testified that Hooker reported having VPN issues [Tr. at 1638; see also 1624]. He subsequently testified that Hooker did not report any issues to Supervisor Sharp [Tr. at 1645]. Sharp was not asked and did not testify about Hooker's training on September 23 or October 4, or about any investigation he may have done regarding those two days.

interference with Hooker's activities on behalf of the Union intensified [ALJD at 21-22; Tr. at 303, 305-306, 449; 1538; GC 10; GC 11; GC 20; GC 52; GC 74].

Respondent's on-going animus toward Hooker is incontrovertibly demonstrated by the continued application of its discriminatory change in policy. It cannot be pointed out too often: if Respondent's animus toward Hooker for his protected activity had stopped, Respondent would not have assigned him to work in the load on the days pertaining to his October 11 suspension and October 13 termination. Significantly, Hooker requested to be off work for Union business on September 20 and 21. Brash denied the request [Tr. at 1579, 1617; R 56] for the false reason that Hooker was "needed" or "wanted" in the load for legitimate business reasons.

Respondent's animus underlying Hooker's termination is also demonstrated by the surrounding circumstances. As the ALJ has already found, Manager Sharp did not take into account Caresian Campbell's statement on September 22, that Hooker's mistake in diagnosing a problem on September 20 was an easy one for a tech to make [ALJD at 40]. There are two significant ramifications of this testimony. First, it shows once again Respondent's disregard of exculpatory evidence regarding Hooker's alleged misuse of time. Second, Campbell's testimony seriously undermines Sharp and Brash's description of the September 20 job – and, for that matter, the September 21 job – as "day-one work" [Tr. at 1591, 2372, 2407].²⁷ Campbell's testimony regarding the relative difficulty of the work is particularly valuable given that both Sharp and Brash considered Campbell to be the most qualified tech in the 36th Street garage [Tr. at 1378, 2279-2280].

Respondent's animus is further demonstrated by the evidence Respondent offered at trial regarding its accusations that Hooker misused his training time on September 23 and October 3.

²⁷ With regard to the September 20 job, Campbell also testified that Hooker had isolated the trouble fairly well aside from the OE issue.

As noted above, Brash created a summary that he purported showed that Hooker entered 2.75 hours for training on September 23 [R-26 at 21]. But Respondent's actual payroll records show that Hooker did not enter any hours for training on September 23 [R-27 at 9]. Brash also attempted to mislead the ALJ by falsely testifying that Respondent's Exhibit 58 showed the number of hours Hooker spent training on various courses [Tr. at 1576-1577] before conceding that the "training hours" entries on R-58 do not accurately show time spent training [Tr. at 1630-1635]. Terminating Hooker, in part, for misusing training time was either pretextual or the result of an extremely sloppy investigation.

Respondent's unlawful motive regarding the termination is further demonstrated by its disparate treatment of Hooker. Among the few comparable instances of discipline that Respondent did produce, is a five-day suspension to employee Peter Hobart [R-38 at 2]. The paperwork for that discipline indicates that Hobart left work and went to his residence on no less than 10 occasions.²⁸ Even if all of Respondent's accusations regarding occasions Hooker misused time were true, it does not add up to 10 separate violations. But Respondent did not terminate Hobart for what is quite clearly a more serious and deliberate misuse of time violation. Unlawful employer motivation may be established by evidence of disparate treatment of discriminatee. *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999); *Roadway Express*, 327 NLRB 25, 26 (1998).

Based on the foregoing, the General Counsel has shown by a preponderance of the evidence that Hooker's union activity was a motivating factor in his termination. The burden thus shifts to Respondent to show that it would have terminated Hooker even in the absence of his activity. Again, Respondent cannot meet its burden. Manager Sharp, without explanation,

²⁸ The discipline references nine occasions in the month of April 2015, but also references "previous disciplinary action for going to your residence during the day without permission" [R-38 at 2].

disregarded critical exculpatory evidence from Caresian Campbell regarding Hooker's work on September 20. Regarding the alleged misuse of training time, Respondent offered no evidence of the actual time Hooker spent on any training task – only the day a training was completed and the time that a training program was open – and its records do not support its claims regarding the time Hooker entered for training on September 23. Finally, the evidence shows that on the rare occasions that Respondent has issued discipline for misuse of time, it has done so in response to what was clearly intentional conduct by the employee (e.g., being at one's home instead of at a work site; not performing work and lying about it to a supervisor) [R-38 at 1; Tr. at 2517; Tr. at 2520]. Moreover, as noted above, it has treated other employees with more lenience. Indeed, there is no evidence that Respondent has ever terminated anyone for misuse of time.

As such, Respondent has not met its burden of showing that it would have terminated Hooker in the absence of his protected activity. Hooker's termination violated Section 8(a)(3) and the Judge should recommend that he be made whole.

5. Disciplining and Discharging an Employee for Failing to Comply With an Order That Interferes With Protected Activity is Unlawful

Even if Hooker had engaged in misuse of time as Respondent claims, the discipline it issued to him and the termination of his employment was still unlawful under established Board law. The Board has long held that a discharge is unlawful if it resulted from a refusal to comply with an order which interfered with an employee's Section 7 rights. *Air Contact Transport, Inc.*, 340 NLRB 688, 689 (2003) (persistent refusal to comply with unlawful order does not constitute insubordination). In *Air Contact*, the Board cited as precedent its decision in *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844 (2001) which "addressed the analytical framework for cases where employees suffer adverse consequences as a result of refusing to obey orders that

are in the violation of the Act.” *Air Contact* at 689, In *Kolkka*, the Board held that a “refusal to comply once with an unlawful order to cease engaging in Section 7 activity is not transformed into insubordination simply because the refusal is repeated each time the unlawful order is reiterated.” *Id.* at 849.

Applying the *Kolkka* framework to the instant matter, because the Board has found that Respondent’s order that Hooker work in the load violated the Act, each day that Respondent assigned Hooker (a full-time Union official) to work in the load constituted an unlawful order to cease engaging in Union activity. Respondent clearly viewed Hooker’s “misuse of time” as insubordination (See Brash’s testimony that he decided to terminate Hooker because: “In the end, I didn’t think that he was going to give up the fight” [Tr. at 1650; ALJD at 31]). The only difference between the unlawful orders in *Kolkka* and *Air Contact* and the instant case, is that Respondent’s unlawful orders that Hooker cease engaging in Union activity occurred repeatedly for nearly a year. Any argument that Hooker should receive less protection from the Act because of Respondent’s persistence in violating his Section 7 rights is, quite frankly, absurd and repugnant to the Act.

The Board has found violations of Section 8(a)(3) under similar circumstances in more recent cases. In *United States Postal Service*, 367 NLRB No. 142, slip op. (2019) (Members McFerren, Kaplan and Emanuel), the respondent discharged an employee for his conduct at an evaluation meeting initiated in retaliation for the employee’s protected activity. *Id.* at 1. The Board found that the respondent did not meet its burden of showing that it would have discharged the employee even absent his protected activity. In this regard, the Board concluded:

Although the record establishes that Pretlow was loud and argumentative at the meeting, and that this conduct prevented completion of the evaluation, it also establishes that Pretlow would not have been at that meeting but for the Respondent’s unlawful actions—specifically, ordering the evaluation as retaliation

for Pretlow's protected activity. Accordingly, the Respondent here "created its own barrier to satisfying its burden of proof." *Id.* at 2.

Just as the Board found in *United States Postal Service*, Respondent's discriminatory motive in the instant case is "inherent in the entire course of Respondent's conduct," including Hooker's discipline and discharge. *Id.* at 2, fn. 9. Moreover, Respondent has similarly "created its own barrier to satisfying its burden of proof" – and not only by its unlawful decision to place Hooker back in the load. In the instant case, it is a settled matter that Respondent's claims that it needed Hooker in the load for work load reasons and/or wanted him in the load for "consistency reasons" were false. Respondent simply cannot show that it would have legitimately discharged Hooker for poorly performing work that Respondent neither needed nor wanted him to perform. See also, *AdvancePierre Foods, Inc.*, 366 NLRB No. 133, slip op. at 1, fn. 4, 27 (2018).

(Employer "created its own barrier to satisfying its burden of proof" where employee was suspended for failing to provide employer with documents to verify her identity and immigration status, which the employer unlawfully demanded in retaliation for her union activity).

Grand Rapids Die Casting, 279 NLRB 662, 667 (1986), cited by the Respondent, is distinguishable. In that case, a union steward engaged in processing a grievance refused an order from his supervisor to return to work. The judge found that the steward's refusal was insubordinate. The judge's conclusion was based on his finding that there was insufficient evidence to establish that the steward was not really needed back on the job. *Id.* at fn. 22. In other words, the employer in that case met its burden of proving that the order to return to work was legitimate. In the instant case, the Board has adopted the ALJ's finding that Respondent did not order Hooker to work in the load for legitimate reasons but in retaliation for his past Union

activity and for the purpose of interfering with his future activity. *Michigan Bell Telephone Co.*, supra at 1; ALJD at 38].²⁹

In sum, whether this case is analyzed under *Wright Line* or under the *Kolkka Tables* framework, the evidence is clear that Respondent's progressive discipline and discharge of Hooker violated Section 8(a)(3).

IV. The 8(a)(5) Remedial Issue and Motion for Clarification

As noted at the outset of this brief, the Board's Decision did not address all remedial aspects regarding its conclusion that the Respondent violated Section 8(a)(5) and (1) by unilaterally assigning full-time Union official Brian Hooker to perform work in the field without providing the Union with notice or an opportunity to bargain. Specifically, the Board did not address make-whole relief to remedy the unlawful unilateral change violation.

In his decision, the ALJ recommended the traditional make-whole order of reinstatement and backpay [ALJD at 47]. In so recommending, the ALJ specifically addressed Respondent's argument that Hooker is barred from reinstatement and backpay notwithstanding Respondent's unlawful unilateral change [ALD at 26].

... in particular, the Respondent relies on *Anheuser-Busch, Inc.*, 351 NLRB 644, 644 (2007) as holding that reinstatement is barred by Section 10(c) where an employee engages in misconduct, even if that misconduct is connected to a unilateral change. However, the employees in that case were disciplined as a result of unilaterally-installed security cameras detecting their misconduct; the unilateral change had discovered but not caused or contributed to any misconduct, contrary to the situation here.

As to the make-whole remedy, the Board stated only that "[a]ny remedy for the complaint allegation that the Respondent violated Sec. 8(a)(3) and (1) by disciplining and

²⁹ *Grand Rapids Die Casting* is also distinguishable because the General Counsel is not arguing that Hooker's alleged insubordination was privileged because he was engaged in protected activity on the days for which he received "misuse of time" discipline.

discharging employee Brian Hooker, other than for the August 12, 2016, verbal written warning, will be determined upon remand.” *Id.*, slip op at 1, fn. 5.

The Board made no mention of a make-whole remedy for the unlawful unilateral change violation, beyond noting: “[g]iven the remand, we shall also amend the judge’s remedy to order the Respondent to rescind the unlawful unilateral changes made to the terms and conditions of the employee serving as the Union’s administrative assistant generally, rather than of Hooker specifically.” *Id.*

Where employees suffer loss of pay or employment as a result of an employer’s unilateral implementation of a policy or working condition in violation of its duty to bargain under Section 8(a)(5), the Board’s well established policy is to issue a make whole remedy, including reinstatement and back pay, to restore the status quo ante. *Great Western Produce*, 299 NLRB 1004, 1005-1007 and fn. 10 (1990), overruled on other grounds by *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007); *Ozburn-Hessey Logistics, LLC.*, 366 NLRB No. 173 at fn. 8; (2018); *San Miguel Hosp. Corp.*, 355 NLRB 265, 272 (2010) (“if [management’s] unlawfully imposed rules or policies were a factor in the discipline or discharge, then the discipline or discharge violates Section 8(a)(5)”); *Kysor Industrial Corp.*, 307 NLRB 598 (1992) (employer required to reinstate and make whole employees that refused to take drug test under unilaterally implemented drug testing policy).

In *Great Western Produce*, the Board set out the following test for analyzing discharges and other discipline alleged to violate Section 8(a)(5): “If the Respondent’s unlawfully imposed rules or policies were **a factor** in the discipline or discharge, then the discipline or discharge violates Section 8(a)(5).” (Emphasis added.) The Board reasoned as follows:

An employer that refuses to bargain by unilaterally changing its employees’ terms and conditions of employment damages the union’s status as bargaining

representative of the unit employees. That status is further damaged with each application of the unlawfully changed term or condition of employment. **No otherwise valid reason asserted to justify discharging the employee can repair the damage suffered by the bargaining representative as a result of the application of the changed term or condition.** (Emphasis added).

Thus, the focus of the analysis of a discharge in which a refusal to bargain in violation of Section 8(a)(5) is a factor must be on the injury to the union's status as bargaining representative.

Respondent's refusal to bargain is most certainly a factor here. Not one of Hooker's alleged failures to comply with the rules and regulations applicable to employees working in the field exist independently of Respondent's assignment of Hooker to work in the load made in derogation of its bargaining obligation.

This is precisely how the Board addressed the unlawful warning Respondent issued to Hooker based on another unilateral change in policy – the unlawful requirement that Hooker provide it with logs of his Union activity. In this regard, the Board stated:

As the judge found, the written verbal warning issued to Hooker on August 12, 2016, was the direct result of Hooker's failure to submit activity logs.³⁰ Given that we find the Respondent's unilateral decision to require the submission of activity logs violated Sec. 8(a)(5) and (1), we will order the Respondent to expunge this discipline from its files and to notify Hooker that this has been done and that the discipline will not be used against him in any way. The complaint alleges that the August 12, 2016 discipline of Hooker violated Sec. 8(a)(3). Assuming we were to find the violation as alleged, the affirmative remedy would be the same as we are ordering here: expungement. Because an 8(a)(3) finding for the August 12 discipline would not materially affect the remedy, we find it unnecessary to pass on the allegation and exclude it from the scope of the remand.

Michigan Bell Telephone Services, slip op. at fn. 12

Just like the unilateral change in policy with regard to reporting Union activity, Respondent's unilateral change in the long-standing policy that Administrative Assistants work

³⁰ The Judge's finding on the August 12 verbal written warning included his conclusion that: "Absent the Respondent's unlawful removal of Hooker from full time union status and placing him in the load, the matter of activity logs would never have materialized" [ALJD at 38].

as full-time Union officials resulted in Hooker receiving the misuse of time disciplines ultimately resulting in his discharge. Just like the discipline for not completing his union log, Respondent issued the misuse of time discipline several months after it first implemented the requirement that Hooker work in the load.

In *Orchids Paper Products*, 367 NLRB No. 67 (2018) (Members McFerren, Kaplan and Emanuel), the Board ordered make whole relief for an employee disciplined for failing to comply with a unilaterally implemented flame-resistant clothing policy. *Id.* at 1, fn. 5, and pages 6-7. The Board adopted the ALJ's finding of an 8(a)(5) violation with regard to the discipline which stated:

Under clearly established Board law, if an employer's unilaterally imposed rule was a factor in the discipline or discharge of an employee, the discipline and discharge violates Section 8(a)(5) and (1) of the Act. *Consec Security*, 328 NLRB 1201 (1999); *Behnke, Inc.*, 313 NLRB 1132, 1139 (1994); *Equitable Gas Co.*, 303 NLRB 925, 931 fn. 29 (1991). Since there is no dispute that Respondent suspended Besley on May 15, 2017 because he failed to comply with the unilaterally implemented FRC policy requiring that maintenance employees wear their FR clothing at all times during their shift, that suspension violates Section 8(a)(5) and (1) of the Act. The same holds true for the portion of the May 23, 2017 warning Respondent issued to Besley for failing to comply with this unilaterally implemented rule. Based on my findings that these disciplines made pursuant the unlawfully implemented broader FRC policy violated Section 8(a)(5) of the Act, I need not consider the General Counsel's Section 8(a)(3) theory regarding those actions.

The same result is warranted in the instant matter with regard to Hooker's discipline and discharge because Respondent believed that Hooker's poor performance reflected an intentional failure to comply with its unilateral change in policy regarding Administrative Assistants working in the load.

In its post-hearing brief to the ALJ, and again in its exceptions to the Board, Respondent argued that Hooker should be denied a make-whole remedy because, it says, there is an "insufficient nexus" given the passage of time between its initial unfair labor practices and

Hooker's subsequent discipline and discharge (approximately one year) [Respondent Brief in Support of Exceptions at 67]. But this ignores the scope and impact of Respondent's violations. Just as the Board found in *Great Western Produce*, each time Hooker was assigned to work in the field, Respondent's status as bargaining representative was damaged. So too was the functioning of the Union. Respondent's unfair labor practices precluded Hooker from fully performing his significant responsibilities to the employee/members; responsibilities which included grievance processing; information requests, arbitrations; training stewards; and addressing health and safety issues. Thus, Respondent's unfair labor practices directly harmed every single member of the bargaining unit.

In sum, to remedy the effects of an unfair labor practice, the Board should restore the parties, to the extent practicable, to the situation that would have existed but for the employer's unfair labor practices. *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168, 188-189 (1973). Accordingly, the General Counsel respectfully asks the Administrative Law Judge to clarify that the make whole remedy recommended in his original decision was intended as a remedy for the unlawful discipline and discharge arising from both the 8(a)(3) and the 8(a)(5) violations.

V. Conclusion

For the reasons set forth herein, the General Counsel respectfully urges the Administrative Law Judge to find and conclude that Respondent's discipline and discharge of Brian Hooker violated Section 8(a)(3) of the Act, and to recommend an appropriate make whole order.

Respectfully submitted,

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