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

TRI-COUNTY ELECTRIC COOPERATIVE, INC.,

and **Case 16–CA–260485**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 220.

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DECISION

INTRODUCTION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case concerns a ten-year employee discharged just weeks after he and a small group of employees contacted a union and began organizing efforts in response to "safety concerns and management's ear being turned off to us." When he was discharged the employer declined to tell him why, stating only that they were "going into a new direction" and citing "employment-at-will," an explanation nearly unprecedented—except for its use in the termination of a fellow union activist let go the same day.

The government alleged at trial that the employee was unlawfully discharged in response to his union activity. In addition, after the employer's chief operating office repeatedly opined at trial that a reason for the discharge was that the employee "stirred up" other employees regarding safety issues, the government moved to amend the complaint to allege that protected and concerted activity was another unlawful basis for the discharge.

For the reasons stated herein, I believe the government has proven its case and I find that the employee was unlawfully discharged as alleged in the complaint.

STATEMENT OF THE CASE

On May 15, 2020, the International Brotherhood of Electrical Workers, Local 220 (Union) filed an unfair labor practice charge alleging violations of the Act by Tri-County Electric Cooperative, Inc. (Employer or Respondent or Tri-County), docketed by Region 16 of the National Labor Relations Board (Board) as Case 16–CA–260485.

Based on an investigation into this charge, on October 19, 2020, the Board's General Counsel, by the Regional Director for Region 16 of the Board, issued a complaint and notice of hearing for January 11, 2021, in this case. On October 30, 2020, Tri-County filed an answer denying all alleged violations of the Act. By order issued December 18, 2020, the hearing in this case was rescheduled to January 21, 2021, and then, for good cause, to February 25, 2021.

The hearing was conducted on February 25, 2021.[1] Counsel for the Acting General Counsel (herein the General Counsel), the Respondent, and the Charging Party filed briefs in support of their positions on or before April 1, 2021.

On the entire record, I make the following findings, conclusions of law, and recommendations.[2]

JURISDICTION

At all material times, Tri-County has been a Texas corporation, with an office and place of business located in Fort Worth, Texas, with additional places of business located in Aledo, Azle, Granbury, and Seymour, Texas. At all material times, Tri-County has been a public utility engaged in the business of distributing electricity to members. It is alleged and admitted that during the past 12 months, Tri-County, in conducting its business operations, derived gross revenues in excess of $250,000. It is further alleged and admitted that during the past 12 months, Tri-County, in conducting its business operations purchased and received at its Fort Worth, Texas, facility goods valued in excess of $50,000 directly from points located outside the State of Texas. It is further alleged and admitted that at all material times, Tri County has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

Findings of Fact

Background

Tri-County is a member-owned cooperative that provides electricity to its members in about 16 counties in and west of Fort Worth, Texas. Tri-City maintains four districts named for the office it operates from in each in Keller, Granbury, Azle, and Seymour, Texas. Tri-County's chief executive officer (CEO) is Darryl Schriver. Its chief of operations (COO) is Wesley Scheets. Scheets oversees approximately nine supervisory personnel and approximately 80 employees throughout all the Tri-County districts.

Ethan Byrd was a lineman for Tri-County. Byrd was employed June 14, 2010, and worked for Tri-County until it discharged him on May 12, 2020. Byrd's discharge is the focus of the dispute in this case.

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[1]At the hearing, counsel for the General Counsel moved, over the objection of the Respondent, to amend the complaint to add paragraphs 5(c) and (d), as set forth at Tr. 52–53. I granted the motion, for the reasons set forth at Tr. 55–56.

[2]On my own motion, I correct the following errors in the transcript: Tr. 4, line 8, replace "Burns" with "Barnes"; Tr. 52, line 25, replace "*encourage*" with "*discourage*"; Tr. 108, line 21, replace "Burns" with "Byrd"; Tr. 114 at line 5, replace "Burns" with "Barnes".

Byrd began and spent most of his nearly ten years with Tri-County working as a lineman out of the Azle operations. In late 2017 or early 2018, Byrd transferred to systems operations, which was then headed by Wesley Scheets. Byrd remained there for approximately six months, at which time he returned to operations, this time to the Keller operations. At Keller, he was a 2nd class lineman and a crew chief at the time of his May 12, 2020 discharge.

Union and other protected activity

In mid-April 2020, Byrd and about 20 other employees met at a local sports park in Keller to discuss concerns they had with management. These issues included "safety concerns and management's ear being turned off to us, things like that." Toward the end of the meeting the subject of unionization came up. Byrd testified that discussing the safety issues with management "once again" seemed like it "would be unfruitful," and so "unionizing or organizing was brought up as a solution, and that we should try and see where that would lead."

Byrd and perhaps another employee called the IBEW Local 220 and expressed their interest in organizing. A Zoom meeting was set up for a Friday in late April with three union representatives. This meeting was attended by Byrd and one other employee. At the conclusion of the meeting Byrd and the other employee decided "we would talk to the rest of the crew and see what their positioning was on it." That Monday, Byrd and the other employee spoke to Keller employees, including the ones who had been at the sports park meeting a couple of weeks previously. Byrd testified that through these discussions the group of employees decided that "we were actually dedicated at that moment to trying to organize."

A second Zoom meeting was scheduled with the union in late April or early May. This meeting was attended by Byrd, the other employee, and the three union representatives who attended the previous meeting. At this meeting the group considered how to move forward with organizing. Byrd went back and talked with other Keller employees about the union, and they began reaching out to other Tri-County offices. Byrd called an employee at Azle and discussed the unionization with him.

When the unionization drive hit Azle, management quickly got wind of things. Byrd had told a lineman to contact an employee named Peterson. Byrd suspected—rightly, it turned out—that Petersen had gone to management about the union. Byrd testified that while there was some positive feedback from employees, most of the feedback was negative. Union authorization cards were distributed and some signed. But Byrd also heard from employees who wanted nothing to do with the union. In particular, an employee named Kevin Helton, a project coordinator in the Azle office, contacted Byrd about what he called "This union bullshit," and Helton declared that "he would do anything he could to shut it down." Helton told Byrd that he had heard Byrd's "name as the ringleader of the organizing effort."

Byrd, the other employee, and a third employee, Ian Bickel, met with the union representatives on Zoom in the first part of May. They discussed that management knew about the union organizing effort and their concern for their jobs. Byrd testified that the union drive "got kind of quiet after that. . . . . [W]e had a few people that . . . thought they had contacts in other offices. They were going to reach out, but none of that really materialized before I was terminated . . . [on] May 12th."

Byrd's father-in-law, Claude Chester Barnes, worked for Tri-County for over 26 years. He resigned on October 7, 2020, after being given the choice of resigning or being terminated. Barnes was an Assistant Line superintendent when he resigned.

Barnes testified that starting sometime in April 2020, he started hearing rumors of a unionization campaign developing at Tri-County, first hearing it from a line superintendent in the Azle office, Dereck Bissette. Bissette told Barnes that a couple of employees had reported to him that "someone was calling them and trying to get them to be part of the union."

In addition, Kevin Helton—the employee who had called Byrd and told him he had heard Byrd's "name as the ringleader of the organizing effort" and said that "he would do anything he could to shut [ ] down" the union—told Barnes that he was going to make some calls, apparently to oppose the union. Barnes advised him to speak to Scheets before he began campaigning against the union.

COO Scheets testified that he first heard "rumors" that employees were discussing a union in early May 2020. He was told this by Line Superintendent Bissette and Project Coordinator Helton. Helton told Scheets that "he was not in favor of the union."

Scheets met with Barnes and Bissette to discuss the union rumors and at the meeting Scheets asked "if we knew why the employees would be disgruntled . . . or have any problems with Tri-County." In this meeting, Bissette told Scheets that he had been contacted about the union by two employees. Scheets said one was Mark Petersen. At trial, Scheets said he could not remember the name of the other employee that Bissette said had contacted him about the union. Scheets told Bissette and Barnes "that our management should stay out of union talks." As Barnes put it, Scheets said, that "if an employee came to us, we were to listen but never to give our opinion one way or another."[3]

The next day, Helton again approached Scheets about the union and told Scheets directly the names of employees who had been discussing the union. Scheets testified that in this conversation, Helton mentioned that Byrd was involved with the union. Helton was the employee who had said he had heard Byrd was the "ringleader" of the union drive and who had called Byrd about "[t]his union bullshit" and said "he would do anything he could to shut it down."

When Scheets learned from Helton that Byrd was involved in the union "talks," he called Barnes—Byrd's father-in-law—and "told him that he really needed to watch what he was doing." As noted, when Scheets met with Barnes and Bissette the previous day, Scheets had told Barnes and Bissette not to discuss the union with employees, but only to listen. Upon learning of Byrd's involvement, Scheets reiterated to Barnes that "those rules apply even at home."

Barnes testified that during this period of "union rumors," Scheets approached Barnes and told him that "I'm sorry, but your—Ethan's name keeps coming up." Barnes understood this to mean that "in his investigation of the union, that Ethan's name kept coming up." Barnes called Byrd and warned him "to be careful because his name kept coming up."[4]

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[3]I credit Barnes' testimony. His demeanor throughout his testimony was matter-of-fact and seemed trustworthy. I note that Scheets testified but did not deny or address this conversation. However, more generally, Scheets corroborated that Tri-County advised supervisors not to convey opinions about unionization to the employees.

[4]Scheets testified twice, before and after Barnes testified. He did not address Barnes' claim. I credit Barnes' testimony on this point. Barnes understood Scheets' comment to mean that "in his investigation of the union, that Ethan's name kept coming up." I find that this is an implicit reference to the union drive and Byrd's participation in it. It is likely to the point of near certainty. Scheets had already called Barnes once about Byrd and the union. No alternative explanation for this comment was proposed by Scheets.

In addition to being reported to management as being involved in efforts to bring a union to Tri-County, in the months before May 2020, Byrd came to management's attention because of his involvement in—as Scheets put it—"stirring up" employees who were seeking a change to some of the safety rules to which Tri-County employees were required to adhere.

Scheets was referring to Byrd and Bickel's involvement in "pushing back" on a number of safety and dress and grooming protocols. Bickel was the Keller employee's representative on the employer's safety committee. The safety committee was an employer-created committee composed of ten hourly workers, and a management employee. Bickel appeared before the committee on behalf of other employees, including Byrd, and presented proposals to alter these safety and dress standards. Sheets viewed Bickel as Byrd's "mouthpiece at the Safety Committee."

In addition, these issues also came up in the "L10" meetings. These were meetings initiated by Tri-County as "a way to open up communications from the bottom to the top and from the top to the bottom," as Scheets explained it. Scheets met with his staff in L10 meetings. In each department supervisors met with line superintendents and then "mini L10's" were conducted to communicate to the crew leaders below them. Byrd attended these as a crew leader and used the opportunity to bring these dress and safety protocol concerns expressed by employees to management. He also raised these issues at smaller informal meetings that supervisors sometimes called for employees.

There were several specific issues raised in this regard. For one, there was the issue of wearing silicone or rubber rings. The safety rules prohibited employees from wearing any jewelry, including silicone rings, but some of the employees wanted that prohibition lifted. The matter was brought to the safety committee twice but rejected.

Scheets testified that on the silicone ring issue he learned from Byrd's supervisor, Line Superintendent Herridge, that Byrd "continuously went to Carl [Herridge] and was giving him a hard time about wearing the rubber rings." Scheets also testified that Byrd "was reaching out to Mr. Bickel because Mr. Bickel was the Safety Representative, and wanted his voice to be heard at the Safety Committee." However, as Scheets testified:

> The actual ring to the Committee was not the issue. The issue was the individual then took that information and went back out into the workforce and continuously stirred up with other Linemen trying to—I don't know what they were trying to do, but they basically just continued to stir ill will out on the line.

Another protocol that Byrd and Bickel were working to change was the rule that prohibited linemen from wearing beards. This was prohibited by Tri-County in order that the self-contained breathing apparatuses needed for rescues from manholes could be properly fitted. According to Scheets, under prior management beards were permitted, or at least, tolerated, and only the one individual designated as the "rescue guy" was required to be clean-shaven. However, in Scheets' view

> [t]hat does not work in our industry. We have over 500 manholes just in Keller alone. You cannot rely on one person to be the safety rescue guy to go down there in those holes. You have to train each employee in that rescue equipment. . . . You cannot have a beard in order to do that.

Scheets described how Byrd and Bickel made an effort to raise the issue of beards to management, something that Scheets testified "was causing unrest throughout the rest of the

crew, because not only were the bringing it up to management, but they would get out amongst the crew and try to get them to lower their safety standards." The issue was brought to the safety committee and a change rejected. Scheets said that

> the bringing of the issue [to the safety committee] is not the issue. The issue is going back into the field and continuing to get your co-workers upset about it, because now you have moved your focus from your job and keeping people safe to a focus turmoil, and you cannot do that in our industry. You cannot be in turmoil That will cost somebody their life.

There was also an issue with boots. Some of the linemen, "especially in the Keller district," according to Scheets, wanted to be allowed to wear low cut shoes that lacked the required ankle height. Complaints about this were also something Scheets associated with Byrd and Bickel. According to Scheets, "[t]hey were pushing on inappropriate footwear." The matter was brought to the safety committee and any change rejected.

Finally, in his testimony, Scheets raised the issue of clothing layers. In order to protect employees from the risk of an arc flash, a certain thickness—"14-Cal"—of shirt apparel was required for employees working in the vicinity of live electricity. This required employees to wear an outer layer of shirt in addition to an undershirt. It was hot and uncomfortable and employees wanted to dispense with the undershirt. The safety committee maintained the layering standard. Scheets testified that Byrd and Bickel were part of repeated requests to make changes on this issue.

While Scheets at one point in his testimony suggested vaguely that there were incidents where Byrd "was not following protocols and risking getting people hurt," no more detail than that was ever introduced. Indeed, Scheets agreed that he had no evidence of Byrd or Bickel instructing other employees to disregard the safety standards, or evidence that they personally disregarded the standards. The issue for Scheets was that Byrd and Bickel agitated among employees for a change in the standards and continued to do so even after the matter had been considered by the safety committee. As Scheets explained, "they were . . . saying that this was wrong, and that they should be able to grow their beards, that they should be able to wear rubber rings, they should be able to wear their shoes, and all of those goes against our safety policy."

Schriver testified that there was a lot of discussion in the safety committee meetings about these issues, but he mentioned, disapprovingly, "after the meeting, you would see people take what was said in there and try to . . . change it or stir it up. So, we had to keep those topics in the safety meeting to keep addressing what was not leaking out to a lot of Linemen, or why it was."

In his testimony, Byrd confirmed his involvement and concern with discussing with others and seeking to have changes made to the employer's safety rules with regard to the silicone rings, the undershirts, and beards. Byrd testified that he was aware that others wanted to wear lower-cut boots than allowed but said that he was not part of those discussions.

Byrd's termination

The morning of May 12, Byrd arrived at work and learned that management, including COO Wesley Scheets, wanted to meet with him. Byrd assumed the meeting was for his annual evaluation, which was due about this time. Assistant Line Superintendent Eddie Stevens, who was in the office when he arrived also told him that he assumed this was the purpose of the meeting. Byrd's last annual evaluation in May 2019, had been excellent and full of praise for Byrd on every score. See General Counsel Exhibit 6.

Byrd was ushered into an office that was through the Keller warehouse, outside the main offices. Present at the meeting were Eddie Stevens, and COO Wesley Scheets. In addition, Tri-County's CEO Darryl Schriver, and the Director of HR, Melony Block, were in the meeting room waiting for him.

Scheets told Byrd that Tri-County was "changing direction," and "that they were probably going to have to let me go." Byrd said something along the lines of, "After ten years, this is it?" and asked the reason. Scheets told Byrd "that in Texas that they had the right to hire or fire me for no reason, and that they were utilizing that right." According to Schriver, Scheets led the meeting and said that he was going to terminate Byrd "at-will."

No other explanation was provided. There was no mention of previous disciplinary history, or driving infractions. There was no mention of insubordination, or any other explanation.

Scheets offered Byrd the opportunity to resign rather than be terminated and suggested that if he resigned Scheets "could help me on the backside with maybe finding another job." Byrd told Scheets he "would like time to think about it, that I was going to go clean out my truck, and then I would let him know." Scheets said, "We are here now. I need you to make a decision now." But Byrd reiterated that he was going to go clean out his truck "and I will give you my decision in a moment." There was silence and then Stevens said "Wow. This is unexpected." Byrd then left the meeting to clean out his truck.

On his way, Byrd ran into a couple of employees and also entered Line Superintendent Herridge's office. Herridge was there and expressed surprise over the firing when Byrd told him, and professed that he "had no idea."

Byrd spent about 30–40 minutes clearing his truck and brought the things he was returning to the main office. Then he returned to office where he had been terminated. The door was closed. Byrd testified that through the closed door he heard Schriver yelling at Ian Bickel, who it turned out, was in the midst of choosing to resign after also being given the choice of resigning or being terminated.[5]

Byrd knocked on the door and Schriver answered. Bird stepped into the doorway and Schriver told him that he would "be with you in a moment." Byrd blocked the door with his hand when Schriver tried to close it . There was a confrontation between Schriver and Byrd, with Byrd demanding the sheets attesting that he had returned the company property from his truck. Byrd, cognizant of having been terminated, told Schriver "You have no power over me." Schriver told Byrd "I will call the cops." Byrd said something like "Do what you got to do," and walked off saying "I need this paper" and "Screw you." Later in the afternoon Byrd returned, bringing some more company shirts and pants that he had at his house, and met with Stevens to return them.

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[5]Schriver confirmed in his testimony that he met with Bickel after meeting with Byrd, although he denied yelling at Bickel at any time during the meeting. I do not reach any conclusion on that, but Scheets admitted that Bickel resigned in lieu of termination "[a]lmost at the same time" as Byrd's termination. Asked about the circumstances of Bickel's resignation, Sheets testified that,

> Basically, I was changing direction. As I said, I was evaluating Keller, and he—the direction that Keller was going, there were safety protocols and issues that were going on at Keller, and the individuals that were , you know, kind of pushing back in lowering the safety standards. Mr. Bickel was part of that.

Stevens again expressed surprise at Byrd's termination. When Byrd asked Stevens what happened, Stevens told him, "I have no idea. This was really unexpected." Byrd left.[6]

That same day, just after the Byrd termination, Schriver had meetings with his supervisors. First, along with Scheets, Schriver met with Stevens. At trial, Schriver explained his meeting with Stevens as follows.

> We just talked a little bit about with him that we have a lot going on, and we need to make sure that we keep everybody focused, and you know, [ ]You need to be careful. We need to investigate; we need to talk about the lack of communication that had gone on here, here, and I am going to try to be at y'all's next L10 meeting so that we can talk a little bit about communications. It is apparent that there are certain things you are not getting all the way down over here, as they are—are in other divisions or other branch offices.

There was an obfuscatory quality to Schriver's account. Stevens did not testify, and Scheets did not testify about the meeting, so we have no other account to explain the substance of this meeting occurring immediately after Byrd (and Bickel's) termination/resignation meetings. Asked directly by Tri-County's attorney, Schriver denied that he was asking Stevens to investigate the union or rumors about the union.

The same day, after meeting with Stevens, Schriver and Scheets drove from the Keller office to Azle and convened a meeting with Azle Supervisors Derek Bissette and Chester Barnes.

Barnes testified about this meeting. Barnes agreed that in the meeting Schriver and Scheets suggested that he knew about Byrd and his union activities and should have told them about it. Schriver told Barnes, "I can't believe you hadn't put a stop to this." Schriver told Barnes, "that we were going to be doing a full-on investigation, and that he was not done yet." According to Barnes:

> Mr. Schriver had stated to me how disappointed he was and offended . . . how Ethan had acted, and he looked at me and said that I was not in a very good position at this time, and I asked why. He said, "Guilty by association."

Barnes admitted that Schriver never used the word "union," but that is the inference that Barnes took.[7]

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[6]This account of the termination meeting is based largely on Byrd's credibly-offered testimony. Both Scheets and Schriver testified but neither challenged or even directly addressed most of the substance of what was said at the meeting. The exception was that Scheets agreed that Byrd was not given an reason for his termination other than "changing direction." On cross-examination Schriver agreed that Scheets told Byrd he was being terminated at-will, and testified that at the meeting "it was a . . . termination to go a different direction" and that he heard Scheets say at the meeting that "he was making changes in the Keller office." All of this essentially was in accord with Byrd's testimony and Schriver offered no more specifics than that. Stevens did not testify. I credit Byrd's unrebutted (and in parts corroborated) account.

[7]It is also an inference that I make. I do not see what else, reasonably, this could have referred to—it was an implicit but nevertheless obvious reference to Byrd's union activity. Schriver was upset about Byrd's "disrespect" during the firing process, but that would not be something that Barnes could have told Schriver about previously, or "put a stop to," or that Schriver was not done yet investigating. Those were references to Byrd's union activity. In

The meeting went on for 30–40 minutes. Schriver did not tell Barnes directly that Byrd had just that afternoon been terminated, but complained that Byrd was "rude and disrespectful" and Schriver said "that he had never been disrespected in that way."[8]

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addition, on this record, Schriver's threat to Barnes that he was "guilty by association" is hard to construe any other way than as an assertion that Barnes shared guilt for the union activity based on his association with Byrd. As a result, Barnes was "not in a very good position" with Schriver. I note that no alternative explanation for the comments—which are not denied having been made—is proposed by the Respondent.

[8]Schriver testified about the meeting, but his account was cryptic. He testified:

> I did sit down and say that I just couldn't believe how—how—how Ethan was acting, and I was very upset that he—that he had twisted off so tight. It was—there was a lot of anger in the meeting there, and I was concerned about that, and I—I did the same thing.
>
> So we needed a full-blown investigation to make sure we—the communication were getting to people, and we need to make sure that we were following the L10 structure in the departmental meetings, and this is important, and—Chester would probably unlock Eddie, and Dereck too, and Eddie and Carl. They weren't quite—they were starting to get it, but they really didn't understand how important it is to get that information down through the organization

These snippets of Schriver's testimony are illustrative. Schriver's testimony was consistently garrulous, weaving, and rambling, and seemed purposefully so. Here's another short example, when Schriver was asked if he told Barnes in their post-Byrd-discharge meeting that he was disappointed in Barnes. Schriver's answer, admitting he did, raised more questions than it answered:

> Yes, I was disappointed in him and [other supervisors] Dereck and Carl and Eddie, because the information was obviously not getting to a lot of the Linemen, and when they don't have it, they are stirring rumors and innuendos, and things like that. It is just not productive for the organization. We had a lot going on at the time, and still do right now, and it was -- it was just not the time to be doing that.

There was never any explanation of exactly what he was talking about—what information were the lineman not getting that made Schriver so disappointed in his Keller and Azle supervisors? What were the "rumors and innuendos" that were "stirring" in the absence of this information in the very sites where union activity had been reported? What if anything did any of this have to do with Byrd, who was fired immediately before Schriver called this meeting of his supervisors? Was Schriver going out of his way to avoid stating that his meetings with the supervisors immediately after Byrd's discharge and his frustration with his supervisors was all about his disappointment that some employees were interested in unionization? Schriver's cryptic account of events cannot and is not credited when there is a conflict with other more credible witnesses such as Barnes.

Analysis

The General Counsel alleges that the Respondent unlawfully discharged Byrd (1) in violation of Section 8(a)(3) of the Act because of his union activities and, independently, (2) in violation of Section 8(a)(1) because Byrd engaged in protected and concerted activities in an effort to gain changes to safety guidelines related to dress and grooming. The Union concurs, contending "[t]his is a classic nip-in-the-bud case," where an employer, upon learning of union activity among the workforce, moves quickly eliminate a "ringleader" before "the problem" grows. The Respondent denies that union or protected activity had anything to do with Byrd's discharge.

1. The *Wright Line* test for cases turning on employer motivation

Section 8(a)(3) of the Act provides, in relevant part, that "it shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). The prohibition on encouraging or discouraging "membership in any labor organization" has long been held to include, more generally, encouraging or discouraging participation in concerted or union activities. *Radio Officers' Union v. NLRB*, 347 U.S. 17, 39–40 (1954); *NLRB v. Erie Resistor*, 373 U.S. 221, 233 (1963). "The termination of an employee that is motivated by union activities is archetypal unlawful discrimination under Section 8(a)(3)." *Terex*, 366 NLRB No. 162, slip op. at 36 (2018). Further, as conduct found to be a violation of Section 8(a)(3) would also discourage employees' Section 7 rights, a violation of Section 8(a)(3) is also a derivative violation of Section 8(a)(1). *Bemis Co.*, 370 NLRB No. 7, slip op. at 1 fn. 3 (2020).

Section 8(a)(1) provides, in relevant part, that "it shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [of this Act]." 29 U.S.C. § 158(a)(1). Section 7 of the Act provides that "Employees shall have the right . . . to engage in [ ] concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. An employer violates Section 8(a)(1) of the Act when it discharges an employee for engaging in activity protected by Section 7 of the Act. *Nestle USA, Inc.*, 370 NLRB No. 53, slip op. at 10 (2020).

The Supreme Court-approved standard for cases turning on employer motivation—whether 8(a)(3) or 8(a)(1) cases—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. *Wright Line*, supra at 1089. (adopting the test of causality set forth in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274).[9]

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[9]As the Board explained in *Wright Line*, 251 NLRB at 1089 fn. 14:

> we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that "cause" was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act.

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.[10]

When the General Counsel satisfies his initial *Wright Line* burden, such showing proves a violation of the Act subject to the following affirmative defense: the employer, even if it fails to meet or neutralize the General Counsel's showing of unlawful motivation, can avoid the finding that it violated the Act by "demonstrat[ing] that the same action would have taken place in the absence of the protected conduct." *Wright Line*, supra at 1089. 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, 747 (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 other words, the issue is not whether the employer "could have" taken action against the employee, but whether it "would have" absent the employee's protected activity. *Carpenter Technology Corp.*, 346 NLRB 766, 773 (2006).

Notably, evidence that an employer's rationale for adverse action is pretextual can itself add to or create an inference in support of the General Counsel's prima facie case of discrimination.[11]

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[10]*Tschiggfrie Properties*, 368 NLRB No. 120, slip op. at 1 (2019) ("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'") (quoting *Wright Line*, supra at 1089); *Brink's, Inc*., 360 NLRB 1206, 1206 fn. 3 (2014); *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. 184 Fed. Appx. 476 (6th Cir. 2006). Circumstantial evidence is used frequently to establish knowledge and animus because an employer is unlikely to acknowledge improper motives in discipline and termination. *NLRB v. Health Care Logistics*, 784 F.2d 232, 236 (6th Cir. 1986), enf'g. in part 273 NLRB 822 (1984). "The Board has long recognized that direct evidence, i.e., the proverbial smoking gun, is seldom obtainable. Hence, an unlawful motive may be inferred from all of the surrounding circumstances." *Overnite Transportation Co.*, 335 NLRB 372, 375 (2001).

[11]See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) ("If [a trier of fact] finds that the stated motive for a discharge is false, he can certainly infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive--at least where . . . the surrounding facts tend to reinforce that inference."). See *Approved Electric Corp.*, 356 NLRB 238, 240 (2010) ("evidence that [an] employer's purported reasons for [an] action were pretextual—that is, either false or not in fact relied upon"—supports a finding that the action at issue was discriminatorily motivated); *Rood Trucking Co*., 342 NLRB 895, 897–898 (2004), citing *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) ("When the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual . . . . the factfinder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal–an unlawful motive") (internal quotation omitted); *Western Plant Services*, 322 NLRB 183, 194 (1996) ("False defenses become a two-edged sword in that they may serve to support an ultimate inference of unlawful motive").

Moreover, where "the evidence establishes that the proffered reasons for the employer's action are pretextual—i.e., either false or not actually relied upon—the employer fails by definition to show that it would have taken the same action for those reasons, regardless of the protected conduct."[12]

The framework established by the Board in *Wright Line* is inherently a causation test. See *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.

2. Application of Wright Line

A. The 8(a)(3) allegation of discharge for union activity

Applying *Wright Line*, supra, first, Byrd's union activity is clear from the record. He was one of the instigators of the union drive, one of two employees involved in contacting and meeting with the union, and he reported back to a larger group of employees about the contact with the union. He spoke with numerous employees about the union, so much so that some employees opposed to the union contacted him to complain, and one employee said he heard Byrd was "the ringleader."

Second, the employer was aware of Byrd's union activity. Indeed, COO Sheets, who claimed direct responsibility for the decision to terminate Byrd, directly knew about it. Employee Helton—the same employee who called Byrd directly and told him he had heard Byrd's "name as the ringleader of the organizing effort" and "would do anything he could to shut [ ] down" the "union bullshit," told Tri-County's COO Scheets that Byrd had been one of the employees involved in discussing the union. Scheets noted it, enough that he called Barnes—Byrd's father-in-law—and "told him that he really needed to watch what he was doing." In addition, during the time period "of the union rumors," Scheets approached Barnes and told him that "I'm sorry, but your—Ethan's name keeps coming up." As I have found, this was a reference by Scheets to the union drive. The Respondent—knew of Byrd's union activity.

Finally, there is the issue of whether antiunion animus was a motivating factor in Byrd's termination. The evidence strongly supports the finding that antiunion animus motivated the discharge.

First, there is direct evidence. As soon as Byrd was fired Scheets and Schriver met with Barnes and upbraided him with regard to Byrd's union activity. Schriver and Scheets suggested that Barnes knew about Byrd and his union activities and should have told them about it. Schriver told Barnes, "I can't believe you hadn't put a stop to this." Schriver told Barnes "that we

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[12]*David Saxe Productions*, 364 NLRB No. 100, slip op. at 4 (2016); *Rood Trucking*, 342 NLRB at 898, quoting *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Frank Black Mechanical Services, Inc.*, 271 NLRB 1302, 1302 fn. 2 (1984) (noting that "a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel"). "In other words, a successful *Wright Line* defense cannot possibly be based on a stated reason that wasn't relied on or was simply made up." *Circus Circus Las Vegas*, 370 NLRB No. 108, slip op. at 4 (concurring opinion of Member Ring).

were going to be doing a full-on investigation, and that he was not done yet." Schriver then threatened Barnes, telling him he "was not in a very good position at this time" because he was "[g]uilty by association." As I have found, this was a reference to Barnes' failure to stop Byrd's participation in the union drive, and a threat to Barnes—he was guilty of the union activity based on his association with Byrd, and because of Byrd's union activity, Barnes, "was not in a very good position." This is direct evidence of animus toward Byrd's union activity, and, given that Schriver fired Byrd for unstated reasons and then immediately launched into an attack on Barnes for Byrd's union activity, it is direct evidence of an antiunion motive for Byrd's discharge.

Second, there is direct evidence of animus found in Scheets repeated admissions at trial that Byrd's termination was motivated in part by Byrd's work with and on behalf of other employees to change the existing safety and dress and grooming protocols on several issues. Scheets repeatedly raised this as an issue motivating Byrd's termination—at one point he testified that Byrd's efforts to address safety standards in the work place "was the last straw, to be truthful" (Tr. 28). He agreed that Byrd's effort to bring the silicone ring issue to the safety committee "[a]bsolutely, it factored in" to the decision to terminate Byrd. (Tr. 32.) Scheets also agreed that Bickel and Byrd's work together about the beards, the rubber rings, and shoes "factored in" to his decision to terminate Byrd. (Tr. 34.) See also, Tr. 50–51 ("It did weigh in, but it was not the only factor"). Scheets contended not only that Bickel (who Scheets agreed was Byrd's "mouthpiece" at the safety committee) and Byrd working together to raise the issue of lineman being able to have beards "factored into" his decision to terminate Byrd, "but also what they were doing was causing unrest throughout the rest of the crew" over the issue. Even after the safety committee had rejected their request, "they basically just continued to stir ill will out on the line" by raising these issues among the workforce. Instead of accepting the safety committee's decisions, Byrd continued to go "back out into the workforce and continuously stirred up with other Linemen." Scheets believed this set a bad example: "When you take a rule or a decision and then you go out in the field and you start telling guys, 'This is a dumb rule, blah, blah, blah, blah,' then you are changing their focus, and the are no longer focused on their safety."[13]

There can be no serious doubt but that Bickel and Byrd's agitation over the safety and dress code standards, working together, through the safety committee, and among the workforce, constituted protected and concerted activity. Indeed, the Respondent does not dispute it.[14]

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[13]Scheets vaguely suggested at several points that he was concerned that Byrd was not adhering to safety standards with regard to these issues (beards, boots, rings, and shirts) but no evidence of that was ever produced. If there was concrete evidence of this, it would have been presented. I do not believe Scheets' comments in this regard. Similarly, when Scheets hinted that Byrd may have been telling junior lineman not to follow protocol as to beards, boots, shirts, or rings, he quickly backtracked when confronted by counsel on the issue and admitted that he "never heard them directly myself say that" and admitted that what he was describing was Byrd discussing these safety and dress protocols with other employees. (Tr. 73–74.)

[14]"To be protected under Section 7 of the Act employee conduct must be both 'concerted' and engaged in for the purpose of "mutual aid and protection.'" *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 152 (2014). As the Supreme Court has recognized, Congress designed Section 7 to protect concerted activities not just "for the narrower purposes of 'self-organization' and 'collective bargaining' but also "for the somewhat broader purpose of "mutual aid or protection.'" *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Here, the subject of changing the employer's safety protocols and dress code requirements are employee work conditions that fall squarely within the ambit of Section 7 protection. *St. Bernard Hospital & Health Care Center*, 360 NLRB 53, 61 (2013) ("The Board has held that an employee who raises safety issues with his employer is engaged in concerted activity that is protected by Section 7 of the Act."); see also

Scheets repeatedly admitted that this activity was a motivating factor, at least in part, for Byrd's discharge. As discussed below, this motive for Byrd's discharge establishes an independent violation of the Act. However, the important point here is that this admitted unlawful "factor"—firing Byrd in part for his protected activity under the Act—is direct evidence of animus, and does not detract from the conclusion that Byrd was also fired for his union activity. To the contrary, it provides support for it. It is well settled that contemporaneous unfair labor practices by an employer provide evidence of antiunion animus. *Bates Paving & Sealing, Inc.*, 364 NLRB No. 46, slip op. at 3 (2016) (contemporaneous unfair labor practices evidence of animus); *Lucky Cab Co.*, 360 NLRB 271, 274 (2014).

This is doubly and uniquely true here, as the record suggests that Byrd's and other employees' concerns over the safety protocols were inextricably bound together with and motivated their union agitation. It was precisely management's "ear being turned off to us" on "safety concerns" that led Byrd and other employees to meet at the Keller sports park in mid-April and decide to investigate unionization. In this case, the "stirring up" of employees over safety issues after rejection of the issues by the safety committee—conduct which Schriver admitted was a factor in Byrd's firing—is directly linked to the employees' effort to unionize. In this case, evidence of discharge for the former also provides evidence of discharge for the latter.

But there is more. In addition to the direct evidence in support of the General Counsel's prima facie case, there is also indirect and circumstantial evidence that raises an inference of discriminatory motive for the discharge.

The Respondent denies that Byrd's union activities played any role in its decision to terminate Byrd. However, the facts surrounding the termination decidedly raise an inference of discriminatory motive.

Byrd, a ten year employee, was let go on May 12, ostensibly out of the blue, without explanation, only three to four weeks after initiating the union campaign, and less than two weeks after Scheets learned of Byrd's involvement with the union. When Byrd was terminated, his discharge was not attributed to any misconduct or failings on his part. There was no restructuring that eliminated his position. Byrd was told only that Tri-County was "changing direction"—a contention for which there was and is not the slightest evidence—it seems to have been a comfortable thing to say and that is all. The further "explanation" offered the protesting Byrd was that Tri-County was utilizing its right to "fire me for no reason." Schriver said "he was going to terminate Ethan at-will."

NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962); *Unique Personnel Consultants, Inc.*, 364 NLRB No. 112, slip op. at 4 (employee concerns over application of dress code is protected activity as dress code is "a policy applicable to [employee's] co-workers"). There is also no question, based on the description of his activities in the record, but that Byrd's agitation over the safety standards and dress requirements was concerted. "In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 268 NLRB 493, 498 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985); *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).
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This "at-will" explanation was, essentially, a non-explanation. It was a refusal to provide Byrd with the explanation for his termination. The Respondent points out that "there is no requirement under Texas law or federal law for an employer to explain why it is letting an employee go." (R. Br. at 12.) This is true, as far as it goes. But in this case, the Respondent did not simply refuse to tell Byrd why it was discharging him, but in addition, it appears that with regard to Byrd (and Bickel's) discharges, Tri-County made no record at all stating what the reasons were for the discharges.

I take as my premise—and it should be an uncontroversial one—that Byrd (and Bickel's) terminations were not arbitrary or random. The discharges were not prompted by an arbitrary purposeless desire of Tri-County to exercise an at-will power to fire employees. There was a reason for their discharges.

One can imagine—dimly and vaguely—an employer that routinely does not document the reasons for discharge. But that is not this employer. This Respondent produced a list of all discharges and resignations that occurred in 2019 and 2020, and it was entered into evidence as General Counsel's Exhibit 2. Counsel represented at the hearing that this document was created by the Respondent's HR Director who went through the company files and prepared it based on those files. According to GC Exhibit 2, there were 34 discharges and resignation during this period and in only two—Bickel's and Byrd's on May 12, 2020—was the reason for the employment action listed as "At-Will Decision." (GC Exh. 2.) Every single other employee either resigned or was terminated for a stated reason gleaned from underlying documents in the employer's files, be it "insubordination," "performance," "position dissolved," "resigned," or what have you. Only the terminations for the two union activists on May 12, Bickel and Byrd, had the "reason" for their dismissal listed with a non-explanation: "At-Will Decision."

This anomaly is unexplained and highly suspicious. It suggests that for these two discharges—and these two discharges only—the Respondent did not want to record and did not want to reveal the explanation for the discharges. Such unexplained departures from past practice in the handling of disciplinary forms is indicative of animus. *Conley Trucking*, 349 NLRB 308, 324 fn. 39 (2007), enfd. 520 F.3d 629 (6th Cir. 2008). See also *Manor Car of Easton Pa*, 356 NLRB 202, 204 (2010) (departure from disciplinary policy by relying on outdated prior warning raises inference of animus). In other words, the Respondent's treatment of Byrd and Bickel's discharges involve an atypical attempt to hide the true motivation. This unexplained departure from its normal practice is evidence of animus but also leads me to infer that there is some other motive for Byrd's discharge that Tri-County desired to conceal through its opaque "at-will decision" rationale for the discharge. If a non-explanation "at-will" rationale was standard practice for Tri-County, there might be little to be gleaned from its assignation to Byrd (and Bickel's) discharge. But it is a black box hiding the true motivation for the discharge that was only utilized with these two discharges occurring on May 12, with these two union activists. Under the circumstances, it is easy to conclude that the use of the "at-will" rationale was an attempt to hide the true motivation for the discharges, and an inference may be taken that it is an unlawful motive the employer desires to conceal. *American Wire Products, Inc.*, 313 NLRB 989, 995–996 (1994) (finding pretext where Respondent cited state's "at will" law as the reason for discharging employees). As noted above, a pretextual explanation of the employer's action can support an inference of discriminatory motivation. *El Paso Electric Co.*, supra; *All Pro Vending, Inc.*, supra; *Rood Trucking Co.*, supra. See *Approved Electric Corp.*, supra.

Finally, the timing of Byrd's discharge is obviously suspect. The Board has long recognized that in discrimination cases the unexplained timing of adverse action can be "strongly indicative" of unlawful animus.[15] Here, Byrd's termination occurred less than a month after he first contacted the union and perhaps a week or two after the Respondent learned of his union activity. This is obviously suspicious.[16]

Considering all of the factors described above, the General Counsel has amply met his initial *Wright Line* burden to demonstrate that protected employee protected union activity was a substantial or motivating factor—at least in part, if not wholly—for Byrd's discharge. Thus, the burden shifts to the Respondent to "demonstrate that the same action would have taken place in the absence of the protected conduct." *Wright Line*, supra at 1089.

Had no charges been filed over Byrd's discharge, the matter would have been recorded as an "At-Will Decision" and that would have been the end of things. However, because the union filed a charge with the federal government over Byrd's firing, and the matter proceeded to trial, the employer was effectively required to come to the hearing and explain the reasons for the discharge that its employment records hid. This proved challenging for the Respondent.

At the hearing, in addition to attributing Byrd's discharge to his efforts to change safety protocols, Scheets' explanation for Byrd's discharge encompassed all manner of alleged deficiencies over his ten year employment, allegedly culminating in on May 6, when a crew he was in charge of damaged a sidewalk. Scheets contended that this May 6 incident was "the last straw, to be honest." (Tr. 27.) However, as noted, he also testified that Byrd's effort to address safety standards in the workplace "was the last straw, to be truthful." (Tr. 28.) According to Scheets, the totality of Byrd's employment history, capped off by the May 6 incident, demonstrated to Scheets that Byrd "was not in the right frame of mind," and as a result, he was terminated. Even more vaguely, as Scheets explained it, "it was just time to change Districts, or change directions, and that is what ultimately led me to my decision."

Scheets struck me as a highly capable manager. But Scheets struggled to explain Byrd's termination and his circumlocutory account of it made a distinct impression of unreliability on this issue. Here is a taste of it:

> Q. Let's talk about what his termination was based on. Could you please explain to the Court clearly why you decided Mr. Byrd needed to be terminated?
>
> A So, you take into consideration everything you are looking at right there. In other words, if you are in an urban area and you have got several incidents that happened, you—you are building a pattern, you are building a mindset. It was becoming more and more obvious that Mr. Byrd's performance was not up to par.

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[15]*Electronic Data Systems*, 305 NLRB 219, 220 (1991), enfd. in relevant part 985 F.2d 801 (5th Cir. 1993); *North Carolina Prisoner Legal Services*, 351 NLRB 464, 468 (2007), citing *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004) (timing of employer's action in relation to protected activity provides reliable evidence of unlawful motivation); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002), enfd. mem. 71 Fed. Appx. 441 (5th Cir. 2003); *Yellow Transportation, Inc.*, 343 NLRB 43, 48 (2004); *Structural Composite Industries*, 304 NLRB 729, 729 (1991).

[16]The Respondent's position is that the proximity of Byrd's union activity and his sudden termination after ten years of service is an unrelated coincidence. But as discussed below, consideration of the Respondent's explanation for the timing of the discharge undermines this claim.

> He was taking shortcuts in order to do production. He was not taking his crew safely. When you take into account the fact that he was focusing on different safety standards, and he wasn't utilizing that time and a little bit of discord amongst the crews, changes their focus from their job and their safety to what they should be doing, and that is a high-risk situation for me.
>
> So, you take all of that and put it into—not just one incident; this is a hazard that is going on here. Each one of these incidents was discussed at the Line Superintendent levels, and in the crew rings. So it is not like this was ignored or Mr. Byrd didn't know that these were in practice.
>
> Now, was there a write-up on each and every one of them? There was not. There was a verbal discussion about each and every one of them and how we needed to clean those up, and how the risk that we were taking was not a good risk. There is—we are not in an industry that you can take these kinds of risks and survive for long. If you continue to do that you will get somebody hurt. So once we got to that level, it just wasn't changing, and—and we broke the sidewalk, and we had every opportunity to do that a different way, that was just enough for me, just like it was in the Azle District, the direction of the end. The individual was not lining up with the direction of the Company, and the direction of the Company is to take care of their members, take care of their employees, and be safe and not so much about production and about taking shortcuts. That—that ends up in a bad situation.
>
> So, you factor all of that in, and where we were going, and the discord that was going on in the District, it was just time to change Districts, or change directions, and that is what ultimately led me to my decision. It had nothing to do with union talks, it had nothing to do with union discussions, and it had nothing to do with any of that.

(Tr. 224–225).

Sheets testified that upon becoming COO in 2018, he realized that Tri-County faced numerous challenges. He needed more linemen. They needed more training. Wages were low and the vehicle fleet was aging. Employees were discontented because of perceived favoritism by supervisors and management. Scheets testified that "[p]robably the biggest thing was the performance evaluation system," which was subjectively and inconsistently applied to employees. Beginning in 2017, Scheets began working to improve the employee evaluations. Sheets testified that each year the employee evaluations got better and more accurate of gave Tri-County a better idea of how employees performed.

Sheets looked at each Tri-County district, beginning with Azle. He testified that he had to terminate some individuals as part of his review and "restructuring" of Azle.[17]

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[17]The only employee he mentioned in this regard was an apprentice lineman—I'll refer to him as TH. TH had several accidents with electricity, including one that put him in the hospital. Later, after Scheets took over as COO, TH was showing up for work out of dress code, in flip-flops and shorts, "actually drinking alcohol and that sort of stuff," and worked without gloves on energized poles. He was fired in January 2019, when he got drunk, was thrown in jail, and did not show up for work.

Scheets testified that he turned his attention to the Keller district in January 2020, where he worked to reinvigorate the internal communications "L10 process," a "way to open up communications from the bottom to the top and the top to the bottom." Byrd had transferred into the Keller district in early 2019. His May 2019 annual evaluation was exemplary, with multiple positive comments and no negative comments. (GC Exh. 6.) As noted, Scheets testified that the improvement of the accuracy of employee evaluations was a chief goal of his and that evaluation accuracy had improved each year since 2017.

By January 2020, Scheets testified that he noticed some "near miss" incidents for Byrd, but nothing that warranted discipline. He received no complaints about Byrd from supervisors.

It is worth reviewing the full employment record that the Respondent claims motivated Byrd's May 12, 2020 discharge, allegedly just coincidentally with the Respondent's learning of his union activity. Byrd had a poor driving record—he had one speeding ticket in each year from 2015 through 2019. He ran a red light in 2019. Based on his driving record, the State of Texas filed to take away his commercial driver license in 2019, and it was spared only because the court dismissed the case on appeal when the State's attorney failed to show up. He was reprimanded by Tri-County in 2016, for facetiming with his wife while driving which caused an accident. He was "written up" for tardiness in approximately 2012. He also self-filed four "incident" or "near miss" reports during 2019–2020 (R. Exh. 7), and a fifth pertaining to the May 6 cracked sidewalk. Near miss reports were not disciplinary events but self-reports encouraged by the employer to encourage "open communication" to increase safety awareness and, as Scheets explained, "[w]e do not like to try to reprimand or discipline on near-misses." Finally, the Respondent references testimony in which Byrd admitted that unofficially he "got verbal counseling a lot" for "job improvement, and things like that" when he worked at the Azle operations, meaning through the middle or fall of 2017. When he moved to Systems Operations in 2017, Byrd worked directly for Scheets. During this period he was also "talked to" "informally" once about tardiness and there were some discussion about "some gossip that was going around the office." Scheets testified that after he left Systems Operations to become COO, he heard from Systems Operations supervisors of some problems with Byrd relating mostly to his interactions with other employees. When Byrd went to the Keller operations in early 2019, he was "on probation" for 90 days and warned by Scheets that if he "was late one time while over there, that [he] would be fired." However, things went well, and Byrd's May 2019 annual evaluation was positive in all facets measured and discussed. See General Counsel Exhibit 6. Byrd testified that "I was told by my supervisors to keep up the great work." While Scheets testified that by fall of 2019 he noticed Byrd's "near miss" record developing, he agreed that he did not then or subsequently have any complaints from supervisors regarding Byrd.

According to the Respondent, the May 6 incident pushed it over into discharging Byrd. The May 6 incident occurred when Byrd's crew was setting poles on a busy city road and pulled their "digger" truck off the road to avoid traffic. This resulted in a washed out part of the sidewalk cracking under the weight of the truck. The alternative would have been to shut down a lane of traffic but Byrd testified that he had neither the cones nor the manpower to legally do that. He could have caused mats to be placed on the washed out sidewalk area, but neither Byrd, his supervisor Herridge, nor even Scheets (by his testimony) was confident that would have helped. Byrd reported the incident to his supervisor, in accord with company policy, and created a report as instructed.

There was no discipline recommended by Byrd's supervisor for the incident. Nor any meted out—the incident went unmentioned at his termination meeting and there is zero documentation suggesting that Byrd was or should have been disciplined in any way for the

incident. The incident report submitted into evidence stated that the safety policy was properly followed, and Supervisor Herridge's follow-up report stated no safety policy was violated. (GC Exh. 5, at 2.) Notably, Herridge's investigation and follow-up report were not submitted until May 18—so the Respondent's claim that it this incident was the "final straw" for Byrd's employment means he was fired before the investigation—which declared that no policy was violated—came back. This alone renders the claim that the termination was based on the May 6 incident suspect.[18]

It is notable that Byrd's supervisor, Herridge, who did not testify, appeared to have no involvement in Byrd's termination and no advance knowledge that Byrd was going to be terminated. Byrd's assistant supervisor, Stevens, who also did not testify, repeatedly professed shock and surprise at the termination. It is not believable that top management officials—specifically, the COO of the entire Tri-County operations—made the decision to terminate Byrd because of a sidewalk crack self-reported by Byrd, for which no discipline was issued, without even consulting Byrd's supervisors, and without even awaiting Supervisor Herridge's routine investigation into the incident.

Indeed, it is not believable that a ten-year employee of a major employer such as this one would be fired because of the sidewalk crack and there would be zero documentation—not one piece of paper—documenting that the incident was a basis for the discharge. Even allowing that the employer—for whatever reason—did not want to tell Byrd that the sidewalk incident was the "final straw" causing his discharge, surely, were it the reason—or even a reason—for his discharge, this would be documented, and in an effort to meet its burden at trial Tri-County would have produced this documentation. But there is no such document. The only documentation of the May 6 incident is the nondisciplinary "self report," completed by Herridge *after* Byrd's termination, and which declared that no safety policy was violated by the crew's actions.

Instead of documentation supporting the claim that the May 6 incident resulted in Byrd's discharge, the COO of the employer came into the hearing and—in decidedly free form and difficult-to-follow fashion—just orally gave us his alleged reasons for the termination. Not a single line from a single document backs him up.

And this untrustworthiness applies equally to the entire claim that Byrd's history of "near misses," tardiness, vehicle mishaps, licensure litigation, and whatever else the employer could dredge up from his ten year employment history was the cumulative cause for Byrd's discharge.

These might well provide a basis on which to discharge an employee. But the issue is not whether the employer could have discharged Byrd for these offenses, but rather, whether it proved it did so and would have even in the absence of protected activity. Not a single piece of paper was produced that documents or backs up in any way Scheets' claim that the employer discharged Byrd because of his work and discipline record. And the absence of any such evidence is even more noticeable, and significant, given that for all other employees—except for Bickel and Byrd—there is employer-created documentation citing reasons for dismissal, as summarized by the Respondent's HR director in the document she created. See GC Exhibit 2.

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[18] *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 984 fn. 40 (2007) ("Enforcement of rules against employees without sufficient prior investigation of their alleged misconduct, including withholding from the accused details of the accusation and denying them an opportunity to explain or deny their alleged misconduct, is evidence of unlawful motive"); *All Pro Vending, Inc.*, 350 NLRB 503, 514 (2007).

At a minimum, the anomalous absence of any showing at all of the reasons for Byrd's discharge—other than the unverified, unverifiable, alleged mentally internal considerations of Scheets, that he now says resulted in Byrd's discharge—constitutes a failure to prove that the Respondent would have discharged Byrd in the absence of his protected activity.

But read as part of the record as a whole, the absence of evidence for a legitimate discharge of Byrd is even more damaging to the Respondent's case. The fact is this employer was tolerant of misconduct, negligence and mishaps, Byrd's and others. TH repeatedly endangered himself and others with negligence around electricity, flouted safety rules, but was not discharged until he ended up drunk in jail and unable to show up for work because of it. Byrd had two dated disciplinary actions against him, one in 2016 for the Facetime accident, and one in about 2012 for tardiness. Neither resulted in discharge or suspension or any other tangible penalty. His multiple speeding tickets resulted in no discipline at all. The near miss reports do not reflect well on Byrd, but none were disciplinary events, they were self-reports encouraged by the employer to encourage "open communication" to increase safety awareness and as Scheets explained, "[w]e do not like to try to reprimand or discipline on near-misses." But Scheets unbelievably claims that is exactly what he did with regard to Byrd.

The Act protects both stellar and poor employees, and those in between, from unlawfully motivated discharge. What stands out from the drumbeat about Byrd's ten year history proffered by the Respondent at the hearing is that his many offenses and lapses appeared to pose no problem for his continued employment— indeed, his final evaluation in 2019 demonstrated that his work record had significantly improved—until he met with the union and became an advocate for unionization in the workforce. Then, suddenly, and, we are to believe, unrelatedly, his history became grounds for discharge, although the Respondent did not document it as such, even while it did create such documentation for every other employee terminated in 2019 and 2020 (except for co-union activist Bickel). I do not believe it.

I find that Respondent's claim at the hearing that Byrd was discharged for his disciplinary, driving, and work-related record is a pretext and an attempt to disguise the fact that antiunion animus was the true motivation for the discharge. The timing of the discharge, so sudden and close in proximity to Byrd's union activity adds further weight to the General Counsel's case. Moreover, the finding that the Respondent's asserted grounds for discharge are pretextual, not only adds further weight to General Counsel's case but, as the asserted grounds for discharge were not actually relied upon, "the employer fails by definition to show that it would have taken the same action for those reasons regardless of protected conduct." *David Saxe Productions*, supra, slip op. at 4; *Rood Trucking*, 342 NLRB at 898; *Frank Black Mechanical Services, Inc.*, 271 NLRB at 1302 fn. 2 (noting that "a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel"). "In other words, a successful *Wright Line* defense cannot possibly be based on a stated reason that wasn't relied on." *Circus Circus Las Vegas*, supra, at slip op. at 4 (concurring opinion of Member Ring). The Respondent's discharge of Byrd violated the Act as alleged.[19]

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[19]The Respondent asks on brief (R. Br. at 15): "If [Tr-County] was so motivated [to terminate Byrd for his union activity] why were no disciplinary actions of any sort taken against any of the other eighteen (18) employees who were rumored to support the union." There are many possible answers to that query, but we need not reach them. This argument is nonstarter. The Board has long-recognized that "[a]n employer's failure to discriminate against every union supporter does not disprove a conclusion that it discriminated against one of them." *Apex Linen Service, Inc.*, 370 NLRB No. 75, slip op. at 17 fn. 29 (2021), quoting *Handicabs, Inc.*, 318 NLRB

Accordingly, I find that the Respondent discharged Byrd in retaliation for his union activities, in violation of Section 8(a)(3) and, derivatively, Section 8(a)(1) of the Act.

B. The 8(a)(1) allegation of discharge for protected concerted activities

An employer violates Section 8(a)(1) of the Act when it discharges an employee for engaging in activity protected by Section 7 of the Act. *Nestle USA, Inc.*, 370 NLRB No. 53, slip op. at 10 (2020).

i. The Motion to Amend

At the hearing, the General Counsel moved to amend the complaint to add an independent allegation that Byrd was unlawfully discharged in violation of Section 8(a)(1) of the Act for engaging in protected concerted activities related to his efforts to have the employer change the safety and dress and grooming protocols. The General Counsel moved to allege this violation after completion of the testimony of the first witness in the trial, COO Scheets, who repeatedly stated in his testimony that Byrd's activities among the workforce on these safety issues "factored into" Scheets' decision to terminate Byrd. I note that the Respondent subsequently recalled Scheets as its own witness in its case-in-chief, and he continued, consistent with his testimony when initially called as an adverse witness by the General Counsel, to reiterate that Byrd's advocacy among the workforce for changes to the safety protocols was a basis for the decision to terminate Byrd.

I granted the motion to amend the complaint over the objection of the Respondent. At the time of granting the motion, I indicated that the Respondent would have the opportunity to brief my ruling in its posttrial brief, and the Respondent has availed itself of that opportunity. (R. Br. at 10–11.) And the General Counsel has also briefed the issue. (GC Br. at 9–12.) After review of the parties' additional arguments, I stand by my ruling at trial, essentially for the reasons stated at the trial (Tr. 55–56.)

Section 102.17 of the Board's Rules and Regulations permit amendment of the complaint at a hearing "upon such terms as may be deemed just." When the COO of an employer—especially one who represents that he is the decisionmaker who made the decision to discharge the employee whose discharge is at issue in the case—states on the witness stand that protected and concerted activity was one of the reasons the employee was discharged—it would be unjust to reject an early-offered motion to amend the complaint and thereby thwart an effort to make the complaint conform to the evidence presented.[20]

890, 897–898 (1995), enfd. 95 F.3d 681 (8th Cir. 1996) (internal quotations omitted); *Wendt Corp.*, 369 NLRB No. 135, slip op. at 19 (2020) (and cases cited therein).

[20]In addition, I note that while the proper course when confronted with incriminating testimony is to move to amend the complaint (as the General Counsel did here), this allegation could have been argued, considered, and found, even in the absence of a motion to amend the complaint. The existing complaint alleged that Byrd was unlawfully discharged, the trial focused on the Respondent's motivation for Byrd's discharge, and the key evidence for the violation was the testimonial admissions of the Respondent's own witness. That is to say, the finding of unlawful motivation for engaging protected concerted activity "is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989) (complaint alleging 8(a)(3) discharge sufficient to supported unpled finding that the same discharge violated Section 8(a)(4)), enfd. 920 F.2d 130 (2d Cir. 1990); *Cardinal Home Products*,

ii. The merits of the independent 8(a)(1) allegation

As discussed above, this amended allegation of the complaint is also governed by *Wright Line*, supra. I have found that Byrd engaged in protected and concerted activity in agitating for a change in the safety and dress standards, and the Respondent knew about it—Scheets made that clear in the hearing. Scheets also made clear—through testimonial admissions—that it was a factor motivating the discharge. Proof that this protected employee conduct played a role in motivating the discharge—even in part—satisfies the General Counsel's prima facie *Wright Line* case. *Wright Line*, supra at 1089.

The Respondent's rebuttal case fails. The Respondent has failed to show that the discharge would have occurred even in the absence of Byrd's protected and concerted activity. Indeed, as found above, its claims about legitimate reasons for discharging Byrd are pretextual and his disciplinary and work history were not actually relied upon as a basis to discharge Byrd. The Respondent's discharge of Byrd violated the Act as one of its admitted reasons for discharging him—his protected and concerted activity advocating to change the employer's safety and dress and grooming standards—violates Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent Tri-County Electric Cooperative, Inc., is an employer engaged in commerce within the meaning of Section 2(2) and (6) of the Act.

2. On or about May 12, 2020, the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Ethan Byrd for engaging in union activities.

3. On or about May 12, 2020, the Respondent violated Section 8(a)(1) by discharging Ethan Byrd for engaging in the protected and concerted activities of advocating for changes in the employer's safety, dress, and grooming standards.

4. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and 2(7) of the Act.

REMEDY

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

The Respondent, having unlawfully discharged Ethan Byrd, shall reinstate him to his former job or, if his position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privilege previously enjoyed. The Respondent shall make Byrd whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful discharge of him. The make whole remedy shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in

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338 NLRB 1004, 1007, (2003) (complaint alleged violation of Section 8(a)(3) and Board properly found that violation and an unpled independent 8(a)(1) violation).

New Horizons, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall compensate Byrd for search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate Byrd for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 16 a report allocating backpay to the appropriate calendar year for Byrd. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. In addition to the backpay-allocation report, the Respondent shall file with the Regional Director copies of Byrd's corresponding W-2 forms reflecting the backpay awards. *Cascades Containerboard Packing—Niagara*, 370 NLRB No. 76 (2021).

The Respondent shall also be required to remove from its files any reference to the unlawful discharge of Byrd and to notify him in writing that this has been done and that the discharge will not be used against him in any way.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Respondent's facilities in Keller and Azle, Texas, wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents.[21] In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 12, 2020. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 16 of the Board what action it will take with respect to this decision

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

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[21]Byrd worked at the Keller location at the time of his discharge. However, the discharge occurred after the union activity spread to the Azle facility, and both Byrd and the Respondent's management were in contact with Azle employees about the union activity. It is reasonably likely that employees at both Azle and Keller will be aware of Byrd's discharge and the notice should be posted coextensive with the scope of the violation. *Nob Hill General Stores Inc.*, 368 NLRB No. 63, slip op. at 1 fn. 2 (2019) (Notices should be posted at facilities "where affected employees perform their duties and would thereby have an opportunity to read it").

[22]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Respondent, Tri-County Electric Cooperative, Inc. Fort Worth, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in union activities.

(b) Discharging or otherwise retaliating against any employee because they engaged in protected concerted activities.

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

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

(a) Within 14 days from the date of this Order, offer Ethan Byrd full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Ethan Byrd whole for any loss of earnings and other benefits suffered as a result of his discharge, plus reasonable search-for-work and interim employment expenses, in the manner set forth in the remedy section of this decision.

(c) Compensate Byrd for the adverse tax consequences, if any, of receiving a lump-sum backpay award and file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(d) File with the Regional Director for Region 16 copies of Byrd's corresponding W-2 forms reflecting the backpay award.

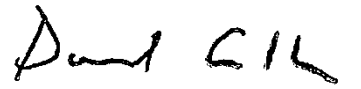
(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify Byrd in writing that this has been done and that the discharge will not be used against him in any way.

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

(g) Post at its Keller and Azle, Texas facilities copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 12, 2020.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 17, 2021



David I. Goldman
U.S. Administrative Law Judge

[23]If the facilities involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT discharge or otherwise discriminate against you for engaging in union activities.

WE WILL NOT discharge or otherwise retaliate against you for engaging in protected concerted activities.

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

WE WILL, within 14 days from the date of this Order, offer Ethan Byrd full reinstatement to his former job, or if that job no longer exists, to substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Ethan Byrd whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL make Ethan Byrd whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Ethan Byrd for the adverse tax consequences, if any, of receiving a lump-sum backpay award and WE WILL file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL file with the Regional Director for Region 16 copies of Byrd's corresponding W-2 forms reflecting the backpay award.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Ethan Byrd, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

Tri-County Electric Cooperative, Inc.
(Employer)

Dated _____ By _____
(Representative)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178
(817) 978-2921, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-260485 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (817) 978-2941.