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Johnston Fire Services, LLC *and* United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO, Local Union 669 Road Sprinkler Fitters. Cases 10–CA–254411 10–CA–264181 10–CA–264549 10–CA–266413 10–CA–267062, and 10–CA–270230

January 27, 2022

DECISION AND ORDER

BY MEMBERS RING, WILCOX, AND PROUTY

On July 7, 2021, Administrative Law Judge Michael A. Rosas issued the attached decision. The Charging Party Union filed exceptions and a supporting brief, and the Respondent filed an answering brief. The Respondent filed cross-exceptions and a supporting brief, and the General Counsel and the Charging Party each filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

This case arises from an organizing campaign at the Respondent's sprinkler fitter business. The judge found, and the Respondent does not dispute, that in response it committed multiple and serious unfair labor practices. These included firing the two lead prounion employees, David Reason and Chris Goodman, days after a representation election was held, and the Respondent's coowner David Johnston thereafter vandalizing Reason's personal automobile while he was on strike against the Respondent, for which Johnston pled guilty to criminal charges.[3] The Union excepts to the judge's finding that the Respondent made Reason and Goodman a valid offer of reinstatement in January 2020. We find merit in the Union's exception and find that a valid offer was not made until May 2020.

Following Reason's return to work, he and employee James Cobb went on strike. The Respondent cross-excepts to the judge's finding that it violated Section 8(a)(3) and (1) of the Act by unlawfully refusing to reinstate Reason upon his unconditional offer to return to work from the strike, and thereafter by unlawfully discharging him a second time. We agree with the judge's findings, for the reasons set forth in his decision as further discussed below.

Finally, we find that the Respondent's serious and widespread unfair labor practices warrant a notice-reading remedy. We address these issues in turn below.

1. The Respondent's January offers of reinstatement to David Reason and Chris Goodman were insufficient to toll backpay

Reason and Goodman were on the organizing committee for the employees' unionization campaign. Reason was especially active, speaking with all of his coworkers and wearing union Tshirts and hats to work. The representation election was held on January 3, 2020, and the vote was 3–2 against representation.[4] The Respondent, with stunningly obvious timing, discharged both Reason and Goodman 4 days later, on the assumption that they, as the two known union supporters, had cast the two votes in favor of representation. The Respondent does not except to the judge's findings that these discharges violated Section 8(a)(3) and (1) of the Act.

The Respondent made Reason and Goodman several offers of work in January following their discharge, culminating in what the judge found to be a valid offer of reinstatement made on January 17. As explained below, we find, contrary to the judge, that the Respondent did not make a valid offer of reinstatement until May 28.

"A reinstatement offer to a discriminatee must be specific, unequivocal, and unconditional in order to toll backpay. It is the employer's burden to establish that it made a valid offer of reinstatement to the discriminatees. For a reinstatement offer to be valid, it must have sufficient specificity to apprise the discriminatee that the employer is offering unconditional and full reinstatement to the employee's former or a substantially equivalent position." *Adsco Mfg. Corp.*, 322 NLRB 217, 218

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have amended the remedy and modified the judge's recommended Order consistent with our legal conclusions herein and to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

[3] The Respondent does not except to the judge's findings that it violated Sec. 8(a)(3) and (1) of the Act by discharging Reason and Goodman on January 7, 2020, and violated Sec. 8(a)(1) by vandalizing Reason's car on September 15, 2020. The Respondent also does not except to the judge's additional findings that it violated Sec. 8(a)(1) on December 17, 2019, by soliciting employee grievances and promising increased benefits if employees were to forgo union representation; on the same day, by telling employees they were being disloyal and hurtful and were slapping the employer in the face if they supported the Union; on April 2, 2020, by conditioning the hire of employee James Cobb on his remaining antiunion; and on August 11, 2020, by accusing Cobb of being disloyal and stabbing the Respondent in the back by supporting the Union. No party excepts to the judge's dismissal of complaint allegations that the Respondent additionally violated Sec. 8(a)(1) by interrogating employees about the Union or by threatening employees with job loss or other reprisals for supporting the Union.

[4] All dates are in 2020 unless otherwise noted.

(1996) (internal citations omitted). Accord *D.L. Baker, Inc.*, 351 NLRB 515, 558 (2007). The Board looks at the face of the offer to determine whether it satisfies the test for a valid offer of full reinstatement. "If, and only if, an offer of reinstatement is fully valid on its face, then an examination of a discriminatee's reasons for declining the offer must be undertaken." *Consolidated Freightways*, 290 NLRB 771, 772–773 (1988), affd. 892 F.2d 1052 (D.C. Cir. 1989), cert. denied 498 U.S. 817 (1990).[5]

The Respondent's January offers do not satisfy these established standards because they lack, on their face, "sufficient specificity" to apprise the discriminatees that the Respondent was offering them full reinstatement to their former jobs or substantially equivalent positions.

First, on January 10 David Johnston asked Goodman, via text message, to repair a leak that evening at the McCracken Juvenile Detention Center. Goodman asked, "[I]s this just a one time thing or am I coming back to work next week?" Johnston replied: "So you are not available for tonight. Do I need to get someone else for tonight? I'm working on work for you next week." The January 10 text message clearly is not a valid reinstatement offer because the Respondent was simply offering work for that single evening. The offer does not specifically encompass a full return to Goodman's former job (or a substantially equivalent position), which was not on a day labor basis but rather involved regular employment as an installer. The Respondent's installers worked for significant periods of time with occasional and recurring layoffs when work slowed.[6]

The Respondent's two subsequent January offers similarly do not meet the Board's established standard for a valid offer of reinstatement. On January 14, Johnston texted Goodman that he had "work for tomorrow are you available." Goodman replied: "I can return to work but I should be paid for the time I was off. I should have been working since last Tuesday so that is 6 days of pay I missed." The January 14 offer is invalid because it does not specifically offer a return to Goodman's full former job, but on its face only offers work "for tomorrow." Like the January 10 offer, the January 14 exchange fails to make clear that the Respondent was not merely offering one day's work.

Finally, on January 17, Johnston texted Goodman and Reason that "I have work on Monday 1–20–2020 at the Bus Garage can you be there? Please advise." Both replied: "David, The Union's attorney seems to be close to resolving this. Once a resolution is reached, I will be back to work." The January 17 text does not specifically include an offer to return to their former full-time work. Like the other text messages, it does not on its face offer more than 1 day's work.

The January offers on their face fail to meet the specificity standard required to establish a valid offer of full reinstatement. None of the purported offers mentions returning the discriminatees to their former "job" or "position" or uses language that would apprise the discriminatees that the Respondent is offering them full reinstatement.[7] As the Board has explained, "we are not requiring 'magic words': we are simply, consistent with Board and court precedent, requiring words that are specific and unequivocal and that offer reinstatement without conditions attached." *Tony Roma's Restaurant*, supra, 325 NLRB at 853.[8]

No party disputes that the Respondent made valid offers of reinstatement to Reason and Goodman on May 28 to return to work on June 1. Those offers expressly provide that the Respondent is "offering [them] full and unconditional reinstatement of your position with the company."[9] The face of the May 28 offers satisfies the longstanding requirement that a valid reinstatement offer must be specific, unequivocal, and unconditional in order to toll backpay. We shall accordingly amend the judge's remedy to provide that the Respondent's May 28 offer

[5] See also *Tony Roma's Restaurant*, 325 NLRB 851, 852 (1998) ("[T]he Board does not evaluate a discriminatee's reply to a reinstatement offer until the respondent proves that the offer is a valid one . . . .") (citing *CleanSoils, Inc.*, 317 NLRB 99, 110 (1995), and *Consolidated Freightways*, supra, 290 NLRB at 773 ("[A] reinstatement offer invalid on its face obviates the obligations on the part of a discriminatee to respond and . . . a discriminatee's refusal of the offer, on whatever ground, will not relieve the respondent employer of its obligation to make a valid offer in order to toll the running of backpay.")); *A.P. Painting & Improvements, Inc.*, 339 NLRB 1206, 1208–1209 (2003).

[6] The judge found that Reason and Goodman worked mostly full time immediately prior to their unlawful discharge on January 7, including the weeks ending December 4, 11, 18 and 25, 2019, and January 1 and 8.

[7] The Respondent, in unlawfully discharging Reason and Goodman on January 7, took away their company truck and tools. The purported January offers also fail to encompass these aspects of full reinstatement. Member Ring would not rely on the lack of a reference to a company truck and tools in finding the January offers legally insufficient.

[8] The judge, in finding the January 17 text message to be a valid offer of reinstatement, neither analyzed the face of the offer nor applied the Board's established "specific, unequivocal, and unconditional" standard. Rather, the judge relied on his findings that the discriminatees "refused David Johnston's offer to return to full-time work," and his resolution to discredit Goodman's testimony that "the work offered to him and Reason between January 10 and 14, did not amount to an offer to return to work." But, as noted above, "the Board does not evaluate a discriminatee's reply to a reinstatement offer until the respondent proves that the offer is a valid one." *Tony Roma's Restaurant*, supra at 852. Because we find Johnston's January offers insufficient on their face, we need not evaluate Reason's or Goodman's motives for refusing them, nor do we reach or rely on the judge's credibility resolution with respect to Goodman's subjective impression of the offers' scope.

Member Ring agrees with the standard set forth in *Tony Roma's Restaurant* for determining the sufficiency of an offer of reinstatement, and he also agrees that the Respondent's January offers were insufficient. He expresses no view as to whether the Board in *Tony Roma's Restaurant* applied that standard correctly or reached the right result.

[9] The offers further provide that "to be clear, the offer of reinstatement is not in any way conditioned upon you waiving any claim to back pay nor is it conditioned upon you withdrawing the unfair labor practice charge pending before the NLRB."

tolled backpay and other monetary remedies to Reason and Goodman effective June 1.

2. The Respondent unlawfully discharges David Reason a second time

Reason accepted the Respondent's May 28 valid offer of reinstatement and returned to work on June 8.[10] He was thereafter assigned installation work at the Lone Oak Middle School project. David Johnston was in charge of quality control at Lone Oak and regularly checked on his employees' work there, as did David Irvine, the Respondent's employee who regularly performed job inspections. Neither Johnston nor Irvine found any problems with installation at Lone Oak, and the Respondent expressed no dissatisfaction with Reason's work performance there—that is, until Reason, along with fellow employee James Cobb, went on strike on September 1.

Their strike was precipitated in part by an incident at the Lone Oak project on August 11 in which David Johnston wielded a knife at Reason and Cobb in an aggressive manner.[11] Heated argument ensued. Johnston then accused Reason of intentionally damaging a pipe and sent Reason home for the day. The Respondent placed a note in Reason's personnel file concerning the pipe incident.

On August 20, the Respondent's coowner Gina Johnston met with Reason and issued him "a final disciplinary warning" for his alleged violation of the Respondent's policies concerning lunch, break, and daily operation hours. Although Gina Johnston discussed the August 11 pipe incident with Reason, that incident was not mentioned in the final disciplinary warning.[12] No prospect of further discipline for that incident was discussed or mentioned at the meeting, and there is no evidence that the Respondent at that time was considering additional discipline of Reason for the August 11 incident.

On September 1, Reason and Cobb went on strike to protest the Respondent's unfair labor practices. They picketed the Respondent's jobsites and in front of its office. On September 15, while Reason was picketing, David Johnston vandalized Reason's personal automobile with paint.[13]

On September 17, Reason and Cobb, through union counsel, unconditionally offered to return to work from their strike. On September 18, the Respondent's counsel responded, accepting Cobb's offer but rejecting Reason's, stating that Reason was not to report to work pending an investigation into asserted misconduct. This purported misconduct included two allegedly "purposeful and intentional" incidents of "sabotage and misuse of company property": (1) alleged defective installation work at the Lone Oak Middle School project, and (2) "dropping pipe in order to damage the threads" during the August 11 knife-and-pipe altercation. The Respondent's counsel further claimed that Reason had been insubordinate. On September 30, the Respondent sent Reason a letter notifying him that he was terminated and citing these three reasons for the termination.

We agree with the judge, as set forth in his decision and as further discussed below, that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate Reason and by subsequently terminating him. The Respondent cross-excepts, arguing that it satisfied its *Wright Line*[14] defense burden of showing that it would have terminated Reason absent his union activity, and reiterating its three asserted bases for his termination. We find no merit to the Respondent's defenses.

1. The Lone Oak installation work. First, the record fully supports the judge's finding that the Respondent did not conduct a bona fide investigation of Reason's allegedly defective work at Lone Oak. The Respondent did not have its experienced employee who usually performed inspections, David Irvine, perform the investigation. Instead, coowner Gina Johnston conducted the investigation exclusively through employees Tim Brown and Jamie Kortz, who were relatively inexperienced in the trade, and who primarily worked on underground pipe rather than the overhead installations at issue. Gina Johnston admitted that she knew that Brown and Kortz both disliked Reason. And the Respondent never asked Reason for a statement.

Moreover, while Brown supplied Gina Johnston with photographs of supposed defective installation at Lone Oak, claimed to be Reason's work, the judge correctly found that David Johnston could not definitively tie the photographs of damage to Reason's work. In fact, several other employees aside from Reason performed installation at Lone Oak, including employee David Council, who worked in the same areas of Lone Oak as Reason. Council was later discharged by the Respondent for improper installation. As the judge found, the Respondent admitted it was unable to prove that the allegedly defective work was performed by Reason.

Finally, prior to the Lone Oak project, Johnston never disciplined Reason for substandard work. Indeed, no deficiencies in Reason's work at Lone Oak were found before Reason went on strike on September 1, despite

[10] Chris Goodman declined the May 28 offer of reinstatement.

[11] The Union had advised Johnston only days before that Cobb was a "new voluntary union organizer."

[12] The final written warning issued to Reason was for his "unacceptable pattern of insubordination regarding Lunch Hour/Breaks and daily operation hours" and concluded that "[n]ot adhering to the set schedule Johnston Fire Services results in your actions being unacceptable and will not be tolerated. Arguing/Debating with the Supervisor/Owner is considered insubordination."

[13] Johnston's attack on Reason's property resulted in $15,000 worth of damage. Five thousand dollars in criminal restitution was ordered, and the automobile was deemed totaled. Johnston attempted to cover up the crime for some months before finally confessing and then pleading guilty. In confessing, Johnston vented his frustration with and animosity towards Reason, the Union, and the unfair labor practice charges filed against the Respondent.

[14] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

owner David Johnston and his inspector Irvine regularly checking on progress in July and August. The Respondent did not begin its investigation until after Reason went on strike, and Reason was only informed of the investigation after he made his unconditional offer to return to work.[15]

The Respondent argues that the judge erred by failing to find that it met its *Wright Line* defense burden because it had a reasonable belief that Reason's work on the Lone Oak project was intentionally defective. On the facts recited above, we disagree. "In order to meet its [defense] burden under *Wright Line*, an employer need not prove that the disciplined employee had committed the misconduct alleged. Rather, it need only show that it had a reasonable belief that the employee had committed the alleged offense, and that it acted on that belief when it took the disciplinary action against the employee." *DTR Industries*, 350 NLRB 1132, 1135 (2007), enfd. 297 Fed.Appx. 487 (6th Cir. 2008). The belief must be held in good faith. See *McKesson Drug Co.*, supra, 337 NLRB at 937 fn. 7.

The Respondent has not met its burden of establishing a reasonable-belief defense in light of the clear evidence that it did not conduct a bona fide investigation.[16] Establishing a reasonable-belief defense encompasses showing a "careful elimination of other bases to explain the . . . errors." *DTR Industries,* supra, 350 NLRB at 1136 fn. 29. Here, the Respondent took no steps, careful or otherwise, to eliminate the possibility that another or others beside Reason were responsible for the allegedly defective work. David Johnston testified he was in charge at Lone Oak and responsible for quality control on the project. He should have reasonably been aware that others, such as employee Council—whom the Respondent later fired for defective work—worked in the same areas as Reason, and he did not take steps to eliminate the possibility that the others were or could have been responsible for any defective work. The Respondent did not take these reasonable steps. Compare *DTR Industries*, supra at 1135 (employer "fully investigat[ed] the various other causes for the errors and eliminat[ed] them as a basis"). We accordingly reject the Respondent's reasonable-belief defense.[17]

In sum, the Respondent has failed to carry its burden of showing that it would have refused Reason reinstatement and discharged him for defective installation at the Lone Oak project absent his protected activity.[18]

2. The August 11 incident. The Respondent also argues that it met its *Wright Line* defense burden by showing it discharged Reason for intentionally damaging pipe on August 11. This alleged action is part of the incident in which Johnston aggressively wielded his knife at Reason. The record clearly belies the Respondent's defense that it considered Reason's involvement in the August 11 knife-and-pipe altercation to be a dischargeable offense. Critically, although it placed a note in Reason's file following the incident, the Respondent did not mention the pipe incident in the final written disciplinary warning it issued to Reason on August 20. The Respondent did nothing to discipline Reason, let alone discharge him for the pipe incident, for some five weeks following August 11. The Respondent certainly had the opportunity to discipline Reason for the incident when coowner Gina Johnston met one-on-one with Reason and gave him a final written warning on August 20. The written warning pointedly does not mention the August 11 pipe incident.

For several weeks following the August 20 disciplinary meeting, the Respondent gave no indication that Reason would be subject to discipline, let alone discharge, over the August 11 incident. It was not until September 18, and only in response to Reason's offer to return to work on September 17, that the Respondent revivified the pipe incident as grounds for discharge. The Respondent's abrupt change of course—from no formal discipline (or consideration thereof) to discharge—is entirely unexplained. The Respondent has failed to meet its burden of showing that it would have discharged Reason for the pipe incident absent his protected activity.

The Respondent excepts to the judge's credibility-based finding that Reason did not purposely damage pipe on August 11, arguing that the judge erred by failing to address certain testimony from employees Jamie Kortz and Tim Brown.[19] But the judge specifically discussed

[15] See *McKesson Drug Co.*, 337 NLRB 935, 936 (2002) (rejecting *Wright Line* defense partly because employer failed to adequately explain its delay in investigating and taking action against employee for alleged breach of drug-free workplace policy until after learning of employee's protected activity).

[16] See, e.g., *Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1005 (2004) (failure to conduct fair investigation and give employee an opportunity to explain her actions before imposing discipline defeated employer's claim of reasonable belief of misconduct), enfd. 198 Fed.Appx. 752 (10th Cir. 2006). Member Ring expresses no view as to whether the Board in *Midnight Rose Hotel & Casino* correctly found that the employer failed to establish a reasonable-belief defense.

[17] We also note that the record fully supports the judge's finding that no credible evidence established that Reason *intentionally* performed defective work at Lone Oak (i.e., sabotage). The judge credited Reason's testimony that he did not deliberately sabotage installations at Lone Oak over David Johnston's testimony that the defective work appeared to be intentional. The judge found that David Johnston was an "inherently unreliable witness" based on his criminal act against Reason's property and Johnston's efforts to cover up his crime. The Respondent does not except to the judge's finding that it opened the door to such character evidence. Substantial additional evidence strongly aligns with the judge's credibility resolution.

[18] We note that the Respondent's letter of termination to Reason also accused him of purposeful defective installation at its Dollar Tree project and its KU/Kevil project. The Respondent has provided no evidence substantiating these assertions.

[19] Kortz testified:

> Q: Did you observe Mr. Reason dropping or pitching pipe?
>
> A: Oh yeah. He would take it in the room and—and throw it down or—or just kind of pitched it down.

other aspects of Brown's and Kortz' testimony about the August 11 incident, and he ultimately concluded that no credible evidence refuted Reason's testimony that he did not purposely damage pipe threads. We accordingly find that the judge implicitly discredited Brown and Kortz to the extent their testimony could be construed to contradict Reason's credited denial of the conduct alleged.[20] Ultimately though, the overarching defect in the Respondent's defense here is its failure to show that it considered Reason's role in the August 11 incident to warrant discharge until after Reason went on strike and later offered to return to work.

3. Insubordinate behavior. Finally, we find meritless the Respondent's third asserted defense: that it terminated Reason for his alleged insubordinate behavior. The judge discredited Gina Johnston's testimony that Reason told her he would not follow David Johnston's orders. Indeed, the Respondent never cited or disciplined Reason for such behavior. Rather, as noted above, the Respondent's final disciplinary warning issued to Reason on August 20 cited Reason's alleged insubordination regarding lunch hours, breaks, and daily operation hours. The Respondent has not pointed to any evidence of any further such infractions thereafter.[21] The Respondent thus did not consider Reason's conduct to constitute a dischargeable offense on August 20, and absent any subsequent misconduct, the Respondent has failed to show it would have discharged him for insubordination absent his protected activity.

The Respondent's August 20 discipline of Reason also asserted that "arguing or debating with the Supervisor/Owner is considered insubordination." The record shows Reason spoke up in favor of unionization at the Respondent's captive audience meeting, and thereafter raised concerns to the Johnstons regarding required breaktimes, Covid concerns, and other aspects of the employees' terms and conditions of employment. The Respondent does not contend that Reason's activity was unprotected, and the Respondent's characterization of that behavior as violating its insubordination policy does not privilege it to discharge him for conduct protected by the Act.[22]

For all of these reasons, we find that the Respondent failed to prove that it would have refused to reinstate or discharge Reason absent his protected activity. Accordingly, we affirm the judge's findings that the refusal-to-reinstate and discharge each violated Section 8(a)(3) and (1) of the Act.

AMENDED REMEDY

Having found that the Respondent unlawfully discharged Reason and Goodman on January 7, 2020, and did not make a valid offer of reinstatement until May 28, 2020, for a return to work on June 1, 2020, we amend the remedy provided in the judge's decision to require the Respondent to make Reason and Goodman whole for the period from January 7 until June 1, 2020. We also amend the judge's remedy to require the Respondent to file copies of each backpay recipient's W-2 forms with the Regional Director consistent with our decision in *Cascades Containerboard Packaging–Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021).

In addition to the remedies recommended by the judge, we find that the Respondent's serious and widespread unfair labor practices to thwart the protected union or-

Brown testified:

Q: Did you—did you observe Mr. Reason doing anything with the pipe?

A: Yeah. He was swinging the pipe around, damaging the threads, which it caused a problem later on when we get ready to install pipe. It's hard to thread them, get them started.

[20] See *American Coal Co.*, 337 NLRB 1044, 1044 & fn. 2 (2002) ("It is well established that explicit credibility findings are unnecessary when a judge has 'implicitly resolved conflicts in the testimony by accepting and relying on the testimony of [one party's] witnesses.'") (quoting *Electri-Flex Co. v. NLRB*, 570 F.2d 1327, 1330 (7th Cir. 1978)); *Walker's*, 159 NLRB 1159, 1161 (1966) (failure to detail all conflicts in testimony does not mean that such conflicting testimony was not considered).

In any event, neither Kortz' nor Brown's testimony, even if credited, would clearly establish that Reason *purposefully* sought to damage the pipes on August 11. Accordingly, we find that the clear preponderance of the evidence does not support reversing the judge's determination to credit Reason's testimony. See *A.P.A. Warehouses*, 291 NLRB 627, 627 fn. 1 (1988) (weighing competing evidence and affirming credibility resolution under *Standard Dry Wall*), enfd. mem. 907 F.2d 145 (2d Cir. 1990).

[21] Reason remained at work for the Respondent for 10 additional days following the August 20 meeting prior to going on strike on September 1.

[22] See *Consumers Power Co.*, 282 NLRB 130, 132 fn. 15 (1986) (respondent's disciplinary policy cannot justify discharge violative of the Act). Accord *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) ("[W]here, as here, the [insubordination] charges directly relate to and implicate the employees' exercise of [a] Section 7 right . . ., the Respondent cannot apply its policy without reference to Board law."), enfd. 263 F.3d 345 (4th Cir. 2001).

Member Ring observes that merely raising concerns about break times, COVID, and other terms and conditions of employment is not insubordination and cannot be reasonably characterized as such. Accordingly, he finds it unnecessary to decide whether Reason was engaging in concerted activity protected by Sec. 7 of the Act when he raised those concerns.

The Respondent also asserts that Reason engaged in verbally abusive behavior toward David Johnston, relying in part on comments Reason allegedly made at the disciplinary meeting with Gina Johnston on August 20 following the knife-and-pipe incident. Reason at the hearing denied such misconduct. In any case, the Respondent did not raise Reason's assertedly verbally abusive behavior as a basis for discipline, let alone discharge, at the August 20 meeting or at any time thereafter, prior to his September 30 discharge. Accordingly, to whatever extent the record suggests that Reason's verbal conduct towards David Johnston *could have* warranted discipline, the Respondent has not carried its burden of establishing that it *would have* disciplined Reason on that basis absent his protected activity. See, e.g., *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at 2 (2018) ("'[A]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity.'") (quoting *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007), enfd. 577 F.3d 467 (2d Cir. 2009)).

ganizing campaign fully warrant having the attached notice to employees read aloud to the employees during worktime. Public reading of the notice to employees is a remedial measure that ensures that the employees "will fully perceive that the Respondent and its managers are bound by the requirements of the Act." See *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), affd. 400 F.3d 920, 929-930 (D.C. Cir. 2005). This is appropriate here because the Respondent's unlawful conduct, which began as soon as it became aware of the union organizing campaign, was both severe, including criminal destruction of property motivated by antiunion animus, and widespread, as most of the Respondent's independent violations of Section 8(a)(1) were committed at a captive-audience meeting and thus directly affected every unit employee. Public reading of the notice will "dissipate as much as possible any lingering effects" of the unfair labor practices committed by the Respondent. *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007), enfd. mem. 273 Fed.Appx. 32 (2d Cir. 2008).

The Respondent's serious unlawful conduct has been well documented. The Respondent reacted to the filing of the representation petition by quickly convening a mandatory meeting of its employees, at which it committed violations of Section 8(a)(1) of the Act. The Respondent unlawfully discharged the two lead union activists, David Reason and Chris Goodman, days after the election. The Respondent then persisted in its unlawful postelection conduct, conditioning the hire of a new employee on his remaining antiunion, and berating him for failing to do so. It then unlawfully discharged David Reason a second time, but only after criminally vandalizing his car and refusing him reinstatement from a lawful strike. These serious unfair labor practices implicated the entire employee complement and were widespread in their effect on the Respondent's small single-digit work force.

And all the unlawful conduct was committed by the Respondent's most senior managers: its owners. Reassurance to employees that the Respondent will not violate their rights under the Act is particularly important because its management structure has not changed. See, e.g., *North Memorial Health Care*, 364 NLRB No. 61, slip op. at 1 (2016) (notice reading appropriate due to participation of high-ranking management officials in unfair labor practices), enfd. in relevant part 860 F.3d 639 (8th Cir. 2017). As the Board has long held, the "public reading of the notice is an 'effective but moderate way to let in a warming wind of information and, more important, reassurance.'" *United States Service Industries*, 319 NLRB 231, 232 (1995) (quoting *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969)), enfd. 107 F.3d 923 (D.C. Cir. 1997). We shall accordingly order the Respondent to hold a meeting or meetings during work time at its Paducah, Kentucky facility, scheduled to ensure the widest possible attendance of employees, at which the remedial notice is to be read to employees by a high-ranking manager in the presence of a Board agent and a union representative if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of management and, if the Union so desires, a union representative.[23]

ORDER

The National Labor Relations Board orders that the Respondent, Johnston Fire Services, LLC, Paducah, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for supporting the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO, Local Union 669 Road Sprinkler Fitters (the Union) or any other labor organization.

(b) Telling employees that they are disloyal or bringing harm to the Respondent if they support the Union or any other labor organization.

(c) Soliciting grievances from employees and impliedly promising to remedy them or promising improved benefits in order to discourage employees from selecting union representation.

(d) Vandalizing employees' property because they engage in activities on behalf of the Union or other protected concerted activities.

(e) Refusing to reinstate employees who offer unconditionally to return to work after engaging in a lawful work stoppage because they engage in activities on behalf of the Union or other protected concerted activities.

(f) Conditioning employees' hiring on their opposition to the Union or any other labor organization.

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

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

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

(b) Make Chris Goodman and David Reason whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

[23] Member Prouty agrees with his colleagues that a notice-reading remedy is fully warranted here. The Board's administrative experience demonstrates the greater efficacy of notice reading in achieving the remedial objectives of the Act. Effective vindication of the rights guaranteed by the Act is fundamental to national labor policy in every case before the Board. Member Prouty would accordingly consider in a future appropriate proceeding expanding the scope of cases in which remedial relief encompasses notice reading.

(c) Compensate Chris Goodman and David Reason for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) File with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Chris Goodman's and David Reason'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 discharges of Chris Goodman and David Reason, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

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

(g) Post at its facility in Paducah, Kentucky, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notice is not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 17, 2019.

(h) Hold a meeting or meetings during worktime at its facility in Paducah, Kentucky, scheduled to ensure the widest possible attendance of employees, at which the attached notice marked "Appendix" will be read to employees[24] by a high-ranking management official of the Respondent in the presence of a Board Agent and an agent of the Union if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of a high-ranking management official of the Respondent and, if the Union so desires, the presence of an agent of the Union.[25]

(i) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

IT IS FURTHER ORDERED that the consolidated complaints are dismissed insofar as they allege violations of the Act not specifically found.

Dated, Washington, D.C. January 27, 2022

John F. Ring Member

Gwynne A. Wilcox, Member

David M.Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[24] Member Prouty would additionally require that a copy of the attached notice be distributed to each employee present at the opening of this meeting or meetings, before the notice is read aloud by management or by the Board agent. Such a requirement would facilitate employee comprehension of the notice and enhance the remedial objectives of the notice reading set forth in the Amended Remedy portion of this Decision. For these reasons, Member Prouty would make the distribution to employees of copies of the notice at meetings where it is to be read a requirement in all instances where the Board orders a notice-reading remedy.

[25] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted and read within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted and read 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."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post, read, 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 supporting the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO, Local Union 669 Road Sprinkler Fitters (the Union) or any other labor organization.

WE WILL NOT tell you that you are disloyal or bring harm to Johnston Fire Services if you support the Union or any other labor organization.

WE WILL NOT solicit your grievances, impliedly promise to remedy them, or promise improved benefits in order to discourage you from selecting union representation.

WE WILL NOT vandalize your property because you engage in activities on behalf of the Union or other protected concerted activities.

WE WILL NOT refuse to reinstate you if you offer unconditionally to return to work after engaging in a lawful work stoppage because you engage in activities on behalf of the Union or other protected concerted activities.

WE WILL NOT condition your hiring on your opposition to the Union or any other labor organization.

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 the Board's Order, offer David Reason full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Chris Goodman and David Reason whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest, and WE WILL also make them whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Chris Goodman and David Reason for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 10, 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 affected employee.

WE WILL file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, copies of Chris Goodman's and David Reason's corresponding W-2 forms reflecting the backpay awards.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Chris Goodman and David Reason, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

JOHNSTON FIRE SERVICES, LLC

The Board's decision can be found at https://www.nlrb.gov/case/10-CA-254411 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.

Meagan B. Dolleris and *Katherine Miller, Esqs.,* for the General Counsel.

David L. Kelly, Esq. (Keuler, Kelly, Hutchins, Blankenship & Sigler, LLP), of Paducah, Kentucky, for the Respondent.

David O'Brien Suetholz and *K. Grace Stranch, Esqs. (Branstetter, Stranch & Jennings, PLLC),* of Nashville, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was heard remotely by Zoom virtual technology on April 26 to 29, 2021. The complaint alleges that Johnston Fire Services, LLC (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act[1] by soliciting employee complaints and grievances, promising increased benefits and improved terms and conditions of employment if employees were to forego union representation, interrogated employees about their union activities and sympathies, as well as those of other employees, implied that employees were disloyal because they supported the United Association of Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO, Local Union 669 Road Sprinkler Fitters (the Union), and conditioning employment an employee being and remaining antiunion. Additionally, the Respondent allegedly violated Section 8(a)(3) and (1) by discharging employees

[1] 29 USC §§ 151–169.

David Reason and Chris Goodman because they formed, joined, and assisted the Union and engaged in concerted activities [2]

The Respondent denies the alleged violations and asserts that Reason and Goodman were laid off due to the lack of work, then failed to communicate with the Respondent on their availability or willingness to return to work and, finally, refused offers to return to work.

On the entire record, including my observation of the demeanor of the witnesses, and after considering briefs filed by the General Counsel, Charging Party and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability company, is engaged in installing and servicing sprinklers at its facility in Paducah, Kentucky, where it annually purchases and receives goods valued over $50,000 directly from points outside Kentucky. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Parties

The Respondent installs fire suppression systems. David Johnston, formerly a member of the Union as a journeyman sprinkler fitter, formed the business in 1984.[3] He now runs it with his wife, Gina Johnston. David Johnston manages the field work, while Gina Johnston handles office operations and scheduling. The Respondent typically employs about seven employees.

The two discriminatees, Chris Goodman and David Reason, were employed by the Respondent as overhead sprinkler fitters. Goodman, an experienced sprinkler fitter, was hired in the fall of 2018. On his recommendation, the Respondent hired Reason, a family friend, in the summer of 2019 to work alongside him. In contrast, coworkers Jamie Kortz and Tim Brown performed the underground work.

In the weeks ending December 4, 11, 18, and 25, and January 1 and 8, the Respondent's employees, including Goodman and Reason, consistently worked full weeks.[4]

Prior to January, Goodman and Reason rarely performed mechanical, underground or shop work.[5] On rare occasions, when there was no installation work available, Reason and Goodman performed "shop" work, consisting of equipment cleaning, maintenance, or preparation. In several instances, Reason also performed work on company time for the Johnston's at their home.[6]

B. The December 17th Employee Meeting

During fall 2019, the Union began an organizing campaign with the support of Reason and Goodman. Reason was especially active, having spoken to coworkers about the benefits of unionization and encouraged support of the Union. Both subsequently became part of the organizing committee. The initial organizing effort culminated with the Union filing a petition on December 13 to represent the Respondent's sprinkler fitters and sprinkler fitter helpers.

Reason soon took on a leadership role. Throughout December and leading up the election on January 3, he regularly wore Union paraphernalia, including hats and shirts to work. Goodman did not wear Union clothing until much later, although he was a supporter. Reason also handed out pamphlets about the Union and was the Union observer for the election. Reason spoke with anyone who would listen about the benefits of union membership, even discussing the training he would receive through the Union with David Johnston.[7]

Upon learning of the organizing effort, David and Gina Johnston convened a mandatory employee meeting on December 17 to inform the employees that they opposed unionization. The discussion was secretly taped by Reason.[8] The Johnstons asked if there were "complaints that we can do better." (pp. 5–6) Gina Johnston suggested that employees "just pick up the phone and call me" because ". . . I would do anything for you . . .this is a huge slap in our face." (pp. 10–11). She added, "of course it's not our desire to go union. And it makes me very—it's very hurtful." (p. 13.)

Reason was the first employee to speak. Projecting his life 20 years into the future, he did not see how he would be able to save any money working for the Respondent, exposure to asbestos, the physical toll on his body, and missing tools (pp. 6–9). Referring to workers' exposure to an exposure to lead based paint and asbestos at "Irving Cobb," he insisted the Union "would have shut that son of a bitch down." Gina Johnston acknowledged Reason's concern but asked why employees did not bring it to her attention. (pp. 14, 16.)

Jamie Kortz complained that he was asked to get a doctor's note when he fell ill from influenza but was unable to do that because he had no health insurance. He added that he wanted health insurance because he was in dire need of chiropractic

[2] All dates are between December 2019 and September 2020 unless otherwise indicated.

[3] In hearings before the National Labor Relations Board (the Board), an employer's past membership in a labor organization is often mentioned, as it was here, as character evidence that a manager or supervisor lacked animus toward union or other protected employee activities. Having laid out David Johnston's accomplishments in the trade and attributed them in part to his union affiliation, the Respondent opened the door to evidence of his prior bad or criminal acts indicating unlawful motive against those who would seek to follow his original path to success. See *Overnite Transportation Co*., 336 NLRB 387, 387–388, 391 (2001) ("Where a party presents its corporate character as a defense to an allegation of illegal conduct, it is not erroneous for a judge to reject that defense based on character evidence."); *Kenworth Trucks of Philadelphia*, 236 (1978), enfd. mem. 595 F.2d 1213 (3d Cir. 1979) ("[FRE] Rule 404 does not bar use of prior violations for other purposes, such as showing an unlawful motive for an employee's discharge.")

[4] GC Exh. 21 at 1–33.

[5] The evidence presented at trial established they did not perform any mechanical work, underground work, or shop work except for only two instances relating to changing out tools and equipment from a conversion van to a new truck provided by the Respondent as well as installing a toolbox on the new truck. (Tr. 81–82, 399, 524.)

[6] Goodman confirmed in a defiant text to Gina Johnston that he did not perform mechanical work, although Reason did a limited amount of non-installation work. (GC Exh. 3-4, 12-13; R. Exh. 2; Tr. 60, 123–127, 143, 191, 209, 212–216, 280.)

[7] The union activities undertaken by Goodman and Reason are not disputed.

[8] The recording was received as GC Exh. 16. The undisputed transcription of the recorded statements at the meeting was received as GC Exh. 17. References in the text are to the applicable pages in the latter.

treatment, a benefit that he had when he had coverage through a union. Gina Johnston replied that the Respondent was willing to improving employee benefits and health insurance coverage was "something we can definitely look into." But she added "this is very hurtful. I thought you were happy. (pp. 17–20.) She lamented that employees did not come to her first with such concerns and characterized the failure to do so as a lack of loyalty." (Pp. 26–27.)

Gina Johnston said it was the first time she heard of the asbestos problem but stated that "we'll make . . . that change." (p. 27.) She was "devastated" and "shocked" that she "didn't see it coming. But I'm glad you brought up these things. They're very helpful for me . . . And I will definitely start the new year off with these as my top priority." (p. 35.)

C. Notification that Reason was a Union Organizer

December 19, Jeremy McDaniel, a Union organizer, emailed the Respondent an "official organizing letter" informing that Reason was an "additional voluntary union organizer" employed by the Respondent:

> This letter is to provide you formal notification that the United Association Local 669 (Union) is currently engaged in an organizing campaign with the employees of your Company, Johnston Fire Service. The Union has been speaking to your employees about the benefits of Union representation and many employees have authorized the Union to act as their collective bargaining representative. Several of your Company's employees are actively participating in the organizing campaign, and the following employee is assisting the Union in this effort:
>
> DAVID REASON
>
> Mr. Reason's organizing activities will not interfere with the Company's work and he will engage in these activities on his own time, including during non-work hours. Federal law gives the employees and the Union the right to organize and engage in other concerted activities for collective bargaining or other mutual aid or protection, free from employer interference, restraint or coercion. The Union will take immediate action to protect the rights of all employees who are discriminated against because of their activity in support of this Union.
>
> We urge you to respect your employees' rights as they will respect yours. If you have any questions, please contact the undersigned.

After December 19, Reason began wearing Union tee shirts and hats to work, often seeing Johnston while wearing them. That did not sit well with the Johnstons.

D. Goodman is Thrust into the Controversy

Sometime toward the latter part of December, David Johnston held another mandatory meeting with employees. This time, he split them into two groups to speak with an attorney about the union election process. Reason, Goodman, and Tim Brown attended one meeting where the attorney spoke by telephone. After that meeting, David Johnston pulled Goodman aside to speak with him privately. During this conversation, Johnston asked Goodman if he could complete the jobs he and Reason were working on without Reason's assistance, explaining that he wanted to downsize by laying off Reason. Goodman replied that he needed Reason's assistance in completing the outstanding jobs and Johnston dropped the matter.[9]

Unbeknownst to Respondent during that conversation, Goodman was also a union supporter. On January 2, McDaniel emailed David Johnston the identical letter informing that Goodman was an "additional voluntary union organizer." From this point on, Goodman also wore union tee shirts and hats to work.

E. Reason and Goodman are Laid Off

The election was held on January 3. The employees voted against unionization by a vote of three to two, with one challenged ballot. David Johnston assumed that Goodman and Reason, the two known union supporters, were the only votes in favor of representation. The Union subsequently filed objections to the election. Following a hearing on the objections, the Hearing Officer's Report on Objections recommended the election be set aside and a new election conducted. No exceptions were filed. A new election, however, was never held. Instead, the Union continued its organizing campaign which has been ongoing for nearly 2 years.

On January 7, Goodman and Reason finished working on the MacCracken County Bus Garage Project. At that point, David Johnston informed them they were laid off because there was no other installation work to be performed at that time. Goodman asked David Johnston if he and Reason were being laid off because they supported the Union. David Johnston denied that was the case, explaining that he had "layoff slips for everybody." That was false; no one else was laid off in or around January.

Johnston also asked Goodman to return his truck and Reason to return his Sammy driver, a tool very specific to hanging pipe. Johnston never asked employees who were temporarily laid off to return their trucks or tools. Johnston told them that the truck needed maintenance. However, Goodman observed Tim Brown and Willie McDowell driving the same truck the next day.[10]

David Johnston insisted, however, they would be recalled "as soon as the phone rings and – or one of the superintendents say, hey, I need you over here."[11] Although Goodman had been laid off for periods of time in the past when work slowed, he was skeptical of Johnston's motives: "I mean, after that shit last week went down and you know, we had a vote and the vote went your way and you know, fuck, I could take my fucking whipping and go on. I don't have to fucking sit and cry about it."[12]

The encounter ended with a discussion on the status of the Respondent's other projects. David Johnston stated that the First Community Bank and the KU Kevil projects remained at the footer construction stage.[13] Timesheets for the months that

[9] This finding is based on the credible and undisputed testimony of Goodman and Reason. (Tr. 45–47, 135–137.)

[10] David Johnston testified that he did not recall telling Goodman and Reason that others were also being laid off, but the recording confirms that did say that to them. Despite this statement, no other employees were laid off. Moreover, the credible evidence revealed that there was overhead work to be done, work that could have been done by Goodman and Reason. (GC Exh. 18–19; Tr. 50–51, 54–56, 68–69, 141–142, 437, 454, 477–479, 487, 493–494.)

[11] GC Exh. 18, 19 at 3–4.

[12] Id. at 5–6.

[13] David Johnston's assertion that the KU/Kevil project was not yet at the installation point is corroborated by Reason's installation of the overhead sprinklers there when he returned to work in June. (Tr. GC

followed, however, revealed that there was overhead installation work performed. The other projects included the Comfort Suites, Commonwealth Events Center, Lone Oak Middle School, and the American German Bank.[14]

F. Respondent's Offer of Work

The following week, David Johnston offered to return Goodman and Reason to work. On January 10, David Johnston asked Goodman to return to repair a leak that evening at the McCracken Juvenile Detention Center. Goodman asked, "is this just a one time thing or am I coming back to work next week?" David Johnston replied: "So you are not available for tonight. Do I need to get someone else for tonight? I'm working on work for you next week." Goodman did not reply.[15]

On January 14, David Johnston again informed Goodman that he had sprinkler fitter work available and offered him the opportunity to return to work the next day. Goodman replied that he was willing to return to work but insisted he "be paid for the time I was off. I should have been working since last Tuesday so that is 6 days of pay I missed." David Johnston asked again whether Goodman was willing to report to work at 7:30 a.m. the following day. Goodman replied: David, as you know we picketed to protest laying us off last week. If you pay for the days we were off we will end our strike and report to work. Will you make us whole? David Johnston asked if the answer was no. Goodman said the answer was "Yes, if you make us whole for illegally laying us off because we supported the Union."[16] Goodman reiterated his position the following day: "Dave, I can return to work but I should be paid for the time I was off. I should have been working since last Tuesday so that is 6 days of pay I missed."[17]

On January 17, David Johnston text messaged Goodman and Reason with an offer to return to perform sprinkler fitter work at the MacCracken County Bus Garage on January 20. Both replied: "David The Union's attorney seems to be close to resolving this. Once a resolution is reached, I will be back to work."

Starting the week after the Respondent laid off Goodman and Reason and continuing until the Respondent again offered reinstatement on May 28, the Respondent's timesheets indicated that the remaining employees worked regularly, oftentimes performing the installation labor that was done by Goodman and Reason.[18]

G. The Hiring of New Employees

James Cobb applied to work for the Respondent on January 2.[19] David Johnston told Cobb that he was dealing with the Union and needed to resolve those issues before hiring him. Cobb called frequently about the job, but it was not until April 2 when the Gina Johnston called with a conditional offer of employment. First, however, she needed Cobb's assurance that he was not in favor of the Union. Gina Johnston told Cobb that the Respondent "wanted to make sure [Cobb] wasn't for the Union before they hired [him]" because "they had an election coming up, and they didn't want [Cobb] to interfere with the election."[20] After Cobb provided that assurance, even volunteering that he would be the Respondent's "eyes and ears" on the project site, David Johnston hired him on April 16.[21]

Due to the increase in sprinkler installation work, the Respondent also hired Clyde King and David Council in May.[22]

H. Reason's Reinstatement

On May 28, the Respondent offered Goodman and Reason the opportunity a return to work:

> As you know, you were laid off by Johnston Fire Services, LLC ("Johnston Fire") on or about January 8, 2020 following the substantial completion of the McCracken County Bus Garage Project. Since that time, you were offered employment opportunities with the company, which you rejected. In your last text message communication dated January 17, 2020, you advised that the Union's attorney was close to a resolution of this matter and that once a resolution was reached, you would get back to us. To date, we have not heard anything from you or your attorney on getting anything resolved or your return to work.
>
> Please accept this letter as an offer of full and unconditional reinstatement of your position with the company. You may return to work as soon as Monday, June 1, 2020. If for whatever reason, this date is too soon because of other commitments, please let us know and we will be flexible in adjusting the time to return.
>
> By making this offer, Johnston Fire does not admit that the lay-off was unlawful and to that end, the company is not willing to pay you back wages. However, to be clear, the offer of reinstatement is not in any way conditioned upon you waiving any claim to back pay nor is it conditioned upon you withdrawing the unfair labor practice charge pending before the NLRB.
>
> Please respond in writing whether you are willing to accept this offer of reinstatement as well as the date you would be available to return to work.

Reason accepted the offer and returned to work on June 8. Goodman declined reinstatement.

Exh. 18, 19 at 7–8; Tr. 196–197.) As noted, however, the Respondent had other work available.

[14] Goodman testified that some parts of the Comfort Suites project were available and could have been installed. He conceded, however, that there were parts still on order and the work could not be done "due to the scheduling of the job and other trades." (R. Exh. 7 ; Tr. 55-56, 284, 287-89.)

[15] Jt. Exh. 1.

[16] In light of Goodman's reliance on a settlement of his backpay claim, his testimony that the work offered to him and Reason between January 10 and 14, did not amount to an offer to return to work, is not credible. (Tr. 92, 221.) It is pure speculation that the offers were for an insignificant amount of work. (Jt. Exh. Exh. 1–2.) Moreover, the argument that they were not offers to return to work permanently is baseless since Goodman's tenure with the Respondent established that he was laid off on several occasions prior to 2020 and, thus, there was no such thing as permanent work.

[17] Jt. Exh. 2.

[18] GC Exh. 21 at 34–35, 38–39, 41–42, 44–45, 47–48, 50–51, 54–60, 69, 71–83, 85–89, 91–96, 98–99, 101–107, 109–132.

[19] GC Exh. 7.

[20] At the time, a second election was pending after Region 10 issued the Hearing Officer's Report on Objections on March 20. (Tr. 321–322.)

[21] I based this finding on Cobb's credible testimony regarding the statements by David and Gina Johnston about the Union. David Johnston's vague and tentative testimony confirmed that he informed Cobb about his issues with the Union in order to elicit the latter's sentiments towards the Union. Cobbs' statement that he did not support the Union was not volunteered. (Tr. 248–251, 439–440, 495–496; Jt. Exh. 3.)

[22] Jt. Exh. 4.

I. The August 11th Incidents

Cobb eventually changed his mind about the Union after speaking to Reason about the benefits of union membership. On August 5, McDaniel informed David Johnston, by letter sent via text message, that Cobb was a "new voluntary union organizer."[23] At that point, Cobb began to carry a concealed recorder for his protection.[24]

David Johnston was not pleased with the turn of events. Less than one week later, on August 11, he took his frustration out on Reason and Cobb. While on the Lone Oak Middle School, he ordered Reason to move pipe and became annoyed Reason was reading the plans and then looking for a knife to cut bundles of pipes. Johnston pulled out a knife and lunged forward to cut the bundles. At this point, Reason became upset and told Johnston that he "needed to be fucking careful." Hearing the argument, Brown and Kortz left a nearby room where they were working and went to see what the argument was about. Reason then followed the standard procedure of lowering the pipe to his foot, stalling it on his foot, and lowering it to the ground. David Johnston started yelling at Reason for dropping the pipe. Reason denied dropping the pipe.[25] The argument continued until David Johnston told Reason to leave the job site.[26]

David Johnston was not yet finished wielding his knife. Later that day, Johnston pulled his knife out again and showed it to Cobb. He asked Cobb if the knife was his. After Cobb said no, Johnston said, "Well, that's the one I pulled out of my back." Cobb laughed.[27] Cobb reported the incident to Gina Johnston, who conducted a sham investigation, getting statements from everyone present during the incident, except for Cobb.[28]

J. August 20 Disciplinary Meeting

On August 20, Reason and David Council were issued final written warnings for leaving the Lone Oak Middle School project early without notifying the office and leaving Cobb alone on site.[29] During Gina Johnston's meeting with Reason in which she issued him the warning, she also discussed the incident of August 11. At the conclusion, she presented Reason with a final written warning for his "unacceptable pattern of insubordination regarding lunch hour/breaks and daily operation hours. The memorandum recapped four written policies regarding hours of operation, breaks and lunch hours. However, it did not specify Reason's violations of those policies. It concluded that "[n]ot adhering to the set schedule . . . results in your actions being unacceptable and will not be tolerated. Arguing/Debating with the Supervisor/Owner is considered insubordination."

Reason refused to sign and acknowledge the final warning without review by his attorney, so Gina Johnston noted on the memorandum that she would "write details of our conversation." However, the written details only mentioned that Reason bore animosity towards David Johnston, called him a coward for not meeting with him, and made Gina Johnston "very nervous, not someone you want to be alone with!"[30]

K. The Strike

On September 1, Reason and Cobb walked off the job in a strike to protest the Respondent's alleged unfair labor practices, mistreatment, and hostility. They picketed at various locations where the Respondent's employees worked.

In a letter emailed by David O'Brien Suetholz, the Union's attorney, to David Kelly, the Respondent's attorney, they recited the reasons for striking and conditions for ending it:

> I am writing on behalf of Johnston Fire employees David Reason and James Cobb who met last night to discuss the unacceptable treatment they have been subjected to by David Johnston. Mr. Reason and Mr. Cobb believe David Johnston's discriminatory treatment of both of them due to their open desire to form a Union with the Sprinkler Fitters Local 669. They both agree the way that David Johnston singles them out is unacceptable. As such, they collectively decided to exercise their right to protest the mistreatment that they are subjected to by commencing a strike effective this morning.
>
> Specifically, David Reason and James Cobb demand that David Johnston rescind the "final warning" issued to David Reason (when he has never received prior warnings) for conduct deemed acceptable by other employees who feign opposition to the Union. Furthermore, Mr. Reason and Mr. Cobb demand a statement in writing that they will not be subjected to belittling or demeaning comments, screaming or threats by David Johnston or any other supervisory agent of Johnston Fire Services.
>
> If those concerns are met, Mr. Reason and Mr. Cobb are open to discontinuing their work stoppage. If your client has any concerns during the strike, my client the Sprinkler Fitters Local 669 will be assisting Mr. Reason and Mr. Cobb and as such, I am available to help answer and resolve the concern if appropriate. . . .[31]

L. Johnston Vandalizes Reason's Vehicle

On September 15, while Reason and Cobb were on strike, David Johnston saw Reason's car in a Paducah grocery store parking lot. He went home, called a friend, Greg Hunt, and returned to the parking lot in Hunt's truck. Johnston used Hunt's truck so that "[his] truck or vehicle wouldn't be noticed." Johnston got out and used a syringe to squirt house paint on Reason's vehicle. They left. Shortly thereafter, Reason reported the damage to the police.

A security camera recorded the incident, and local police were eventually able to identify Hunt. The police questioned

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[23] GC Exh. 9.

[24] No tapes evidencing Cobb's mistreatment were offered in evidence. (Tr. 227, 554–555.) In fact, David Johnston agreed to loan him money both before and after he became a union supporter. (Tr. 263.)

[25] Since David Johnston was an inherently unreliable witness, there was no credible evidence to refute Reason's testimony that he did not purposefully damaged the pipe threads.

[26] While I credit the testimony of Brown and Kortz that they heard a commotion nearby, neither refuted Reason's credible testimony that David Johnston swiped his knife in an aggressive manner toward Reason. However, it is also evident that Johnston did not actually attempt to stab Reason, but the offensive gesture did cause Reason to become angry and verbally abusive. (Tr. 152–154, 347–348, 404, 470, 508–509, 526–527.)

[27] David Johnston admitted making the statements to Cobb and attributed them to frustration over Cobb's conversion from anti-union to union organizer. (Tr. 256–257, 411, 467.)

[28] The investigation conducted by Gina Johnston was incomplete because she did not get a statement from Cobb. (Tr. 373.)

[29] R. Exh. 10–11.

[30] Gina Johnston's testimony that Reason said that he would not follow David Johnston's orders was absent from the form and, thus, not credible. (Tr. 297–298.)

[31] GC Exh. 10.

him for a several months, but he refused to identify the passenger in his vehicle. Johnston finally came forward and confessed. During his confession, Johnston mentioned the Union eight times. He vented his frustration with and animosity towards Reason, the Union, and the unfair labor practices filed against the Respondent.

David Johnston was charged with the commission of a felony, but eventually pled guilty to criminal mischief, a misdemeanor. Although the repair estimate placed the damage at $14,976.50, the plea conditions only required Johnston pay Reason $5,000 in restitution based on the depreciated value of the vehicle.[32]

M. The Loan Oak Middle School Project

The Respondent's assault on Reason's property during the strike was not enough. At some point, Gina Johnston instructed Brown and Kortz to inspect the areas where Goodman and Reason installed overhead pipe at Lone Oak. After inspecting the installations, Brown provided Gina Johnston with photographs. He reported problems with the pipe installations on the second floor of the northwest side at Lone Oak. The problem was corrected on September 14.[33]

On September 17, Suetholz emailed Kelly with an unconditional offer to return to work by Reason and Cobb:

> On behalf of Johnston Fire Services employees David Reason and James Cobb, who have been on strike, Mr. Reason and Mr. Cobb and Sprinkler Fitters Local 669 make an unconditional offer to return to work. Mr. Reason and Mr. Cobb have been engaged in an unfair labor practice strike since September 1, 2020 under the National Labor Relations Act and should be returned to work on Monday, September 21, 2020 without retaliation or any other adverse action. This unconditional offer is effective immediately.[34]

On September 18, Kelly informed Suetholz that Cobb was to return to work on September 21 at the Lone Oak Middle School project. However, he rejected Reason's offer:

> Mr. Reason is NOT to report to work on Monday, September 21, 2020 pending the company's completion of an investigation that Mr. Reason has engaged in purposeful and intentional sabotage and misuse of company property. The company has in the past suspected that Mr. Reason has engaged in such conduct which has forced the company to expend significant time and resources in re-doing his installation work. As you know, he was recently disciplined on August 11, 2020 for purposefully dropping pipe in order to damage the threads. The company has now discovered that sections of his installation work at the Lone Oak Middle School project appear to be intentionally installed in a purposefully defective manner.[35] When the company concludes its investigation, it will notify Mr. Reason of the status of his employment.
>
> In the meantime, please instruct Mr. Reason to stay away from any company property, project or personnel pending resolution of this most serious matter. The company believes Mr. Reason's recent behavior has been nothing short of erratic and insubordinate for which he has been counseled. The company is committed to maintaining a safe work environment for its employees. If Mr. Reason is permitted to return to his employment, the company will continue to expect a safe work environment for all.[36]

Upon returning to work, Cobb spoke with Brown regarding the Loan Oak project and whether there had been any problems while he was on strike. Brown told Cobb that no problems had been encountered. Unbeknownst to Brown, Cobb recorded their conversation.[37]

N. Reason's Termination

On September 30, the Respondent terminated Reason for a slew of reasons, some new, some old:

> By letter dated September 18, 2020 from Johnston Fire Services LLC's counsel to your counsel, David Suetholz, you were notified not to return to work pending the company's investigation that you have aged in purposeful and intentional sabotage and misuse of company property.
>
> The company has long suspected that you have purposefully installed pipe In a defective manner which has caused the company to expend considerable time and money fixing and repairing your work. This has included projects at the Dollar Tree in Hopkinsville and the KU/Kevil job. The company most recently discovered that your installation work at the Lone Oak Middle School was installed in a manner that appeared to be purposely defective.
>
> On August 11, 2020 you were sent home early for purposefully dropping pipe in order to damage the threads. You have

[32] The Respondent seeks to mitigate the significance of Johnston's crime by attributing it to frustration over Reason's job performance. The significance here is that David Johnston tried to cover up a crime and only admitted wrongdoing when pressured by the police. (GC Exh. 6, 11–12, 15; Tr. 163, 383, 415, 471–472, 490.)

[33] I credit the testimony of Reason that he did not deliberately sabotage pipe installations at Loan Oak over David Johnston's opinion that the defective work appeared to be intentional. The evidence is clear that Brown, the Respondent's election observer, was instructed to find something the Johnstons could pin on Reason. In addition to his concession to Cobb that there had been no problems on the Loan Oak project, Brown provided conflicting testimony regarding the photographs. He testified initially that he "[t]ook the pictures just to show what was going on – no one told me to take the pictures." But then he conceded that Kortz told him to take the photographs. He also conceded that there was no issue with the fact that Goodman used super dope on the McCracken project. (Tr.302;406-08, 468, 530; R. Exh. 14–15.).

[34] Jt. Exh. 5.

[35] The credible evidence revealed that the Respondent did not know who installed any defective pipe or who caused any leaks in systems installed by the Respondent. (Tr. 501–507.) Several employees worked on each of the areas that Reason allegedly sabotaged (Tr. 376–377), and no one saw him install pipe defectively or incorrectly. Furthermore, the Respondent acknowledged that it had a rotating cast of "leads" or "foremen" at Lone Oak (Tr. 485–486) and acknowledged that Reason, who was hired as a helper (Tr. 452), did not have near the same experience as Goodman. Not only was Johnston unable to tie Reason to the defective work, the Respondent provided no evidence that any mistakes in the pipe installation were intentional. In fact, Johnston did not recall finding any issues with any work in July and August when he inspected the work of people who were newer to the trade. (Tr. 499–500.)

[36] Jt. Exh. 6.

[37] I credit Cobb's testimony, as corroborated by the tape recording, over Brown's denial, that Brown told him there had been no problems on the project. (CP Exh. 1; Tr. 441, 445, 447, 555–556.) On cross-examination, Cobb conceded that he heard, while on strike, from two workers – "Josh Pennilton and a guy named Lucas"— that "there was probably going to have to be some rework." However, that vague hearsay hardly established that the work related to installations performed, much less sabotage, by Reason. (Tr. 555–556.)

previously received counseling reports that included discipline for insubordinate and abusive behavior.

Please accept this letter as notice of your termination from Johnston Fire Services LLC for all the reasons set forth above.[38]

Legal Analysis

I. THE JOHNSTON'S COERCIVE ANTIUNION CONDUCT

A. The December 17 Meeting

As the Board held in *Maple Grove Health Care Ctr.*, 330 NLRB 775, 775 (2000), the solicitation of grievances during a union campaign "inherently constitutes an implied promise to remedy the grievances." And even though the Respondent did not do more than promise to look into making changes to appease its employees, that fact "does not abrogate the anticipation of improved conditions expectable for the employees involved." Id.

On December 17, 4 days after the Union filed a petition to represent the Respondent's employees, David Johnston summoned all employees to a meeting. He expressed his "wish" that employees forego union representation and asked whether there was anything the company needed to do better or had complaints about. Stating it differently, he then asked what caused someone to try to organize the employees. Gina Johnston followed by imploring the employees to forego representation and call her with any concerns. Addressing a concern raised about the lack of health insurance benefits, Gina Johnston said that was "something we can definitely look into." Similarly, she addressed a health and safety concern about being exposed to asbestos on the work site by assuring the employees that "we'll make . . . that change." Lastly, Gina Johnston also addressed the employees' materials and salary concerns by assuring them that she would do "everything I can to get it, … as well as the pay."

During the same meeting, Gina Johnston coupled the solicitation for grievances with deep, bitter expressions of displeasure depicting union activities as a lack of loyalty because some employees chose that route instead of coming to her first. Referring to the gall of employees who chose to engage in such activities, she branded the union campaign as "a huge slap in our face" and "very hurtful."

In most circles, one who hurts or slaps another in the face can reasonably expect some sort of reprisal. In the context of this captive audience meeting, however, the message was that it was not too late to be forgiven for the mistake: relent, walk away from the Union, or suffer the consequences. That was the coercive message conveyed by Gina Johnston. See *Print Fulfillment Services*, 361 NLRB 1243, 1243-44 (2014) (expression of "disappointment" was coercive because a reasonable employee would fear that his supervisor's stated "disappointment" could manifest itself in subsequent reprisals); *Sea Breeze Health Care Center*, 331 NLRB 1131, 1132 (2000) (manager unlawfully questioned employee's loyalty and told her that he was "highly disappointed" in her for not telling him about her union sympathies); *Liberty Natural Products,* 314 NLRB 630, 630 (1994) ("angry" statement to employees that signing a petition was "very stupid" and that they "should know better than that" would cause employees to "fear future reprisal"); Cf. *Oklahoma Installation Co.*, 309 NLRB 776, 776 (1994), enf. denied 27 F.3d 567 (6th Cir. 1994) (supervisors may express "purely personal opinions" that are critical of protected activity) (statements do not constitute mere personal opinion when they explicitly or implicitly link disapprobation to the employment relationship).

Each of these statements at the December 17 meeting violated Section 8(a)(1). On the other hand, the circumstances do not support the conclusion that the Johnstons' statements also constituted unlawful interrogation. In determining whether the questioning of an employee constitutes unlawful interrogation, the Board considers the totality of the circumstances, including whether the employee is an open and active union supporter, whether there is a history of employer antiunion hostility or discrimination, the nature of the information sought (especially if it could result in action against individual employees), the position of the questioner in the company hierarchy, and the place and method of interrogation. *Bozzuto's, Inc.*, 365 NLRB No. 146 (2017), citing to *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Relco Locomotives*, 359 NLRB 1145, 1156 (2013), affd. and incorporated by reference at 361 NLRB No. 96 (2014); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000); *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964).

Considering the totality of the circumstances, the Johnstons' remarks clearly sought to elicit information about employee concerns that would cause them to join the Union. At no point, however, did they ask who initiated the organizing drive or otherwise supported the Union. David Johnston opened by referring to the notice he received about the representation petition. However, the questions that followed seeking to elicit concerns in "an open floor" was addressed to all employees, regardless of their position for or against representation. To suggest otherwise is to exclude employees who may have expressed concerns *and* not have ultimately been in favor of the Union. Kortz, for example.

Reason, clearly an outspoken and fearless individual, volunteered that "We're not trying to extort you guys. We're not trying to extort more money out of you or … anything like that. We . . . I don't feel like safety concerns are being addressed properly." However, there is no indication that the Johnstons focused on Reason in particular, looked at him when speaking or did anything specific to flush him out as a union supporter.

B. The December 20th Effort to Terminate Reason

The complaint alleges the commission of an additional Section 8(a)(1) violation when David Johnston told Goodman on December 20 that he wanted to downsize. He then proceeded to ask if Goodman if he could do the job alone if he laid off Reason. The evidence established that Goodman said he could not, and Reason was spared. Moreover, Reason was standing nearby and overheard the conversation.

The General Counsel contends that David Johnston's question could be viewed as asking for Goodman's help in violating Reason's right to assist the Union, threatening Reason's job, or threatening Goodman with what may happen if he should de-

[38] The purported investigation was conclusory and bogus. (Jt. Exh. 7.) Goodman conceded that super doping sprinkler heads is not appropriate because the heads cannot be removed without damaging them. (Tr. 37, 431.) However, besides the fact that the concerns mentioned occurred months earlier, the Respondent admitted it was unable to prove that the allegedly defective work was performed by Reason. (Tr. 230–231, 367–368, 375, 444–451.)

cide to join the Union. Any of these interpretations, she posits, violates Section 8(a)(1) of the Act. I disagree.

An employer's threat of job loss for participation in protected concerted activities constitutes a violation of Section 8(a)(1) of the Act. *Spectrum Juvenile Justice Services*, 368 NLRB No. 102 (2019); *Baddour, Inc.*, 303 NLRB 275 (1991); *Bahama Joe's*, 270 NLRB 1377 (1984). As previously discussed, David Johnston harbored union animus when he asked Goodman if he could work alone if Reason were laid off on December 20. However, those words alone did not rise to the level of a Section 8(a)(1) violation. While Johnston's motives may have been clear, the fact remains that Johnston posed a question to Goodman that merely related to a desire to downsize. It did not mention union activity. Most importantly, Goodman said he could not perform the work alone and Johnston accepted his response.

C. Statements to Cobb

The complaint also alleged additional coercive statements by the Johnston to Cobb. The first occurred after Cobb applied to work for the Respondent. While his application was pending, Cobb spoke with Gina Johnston. She told Cobb on April 2 that they wanted to make sure he was not for the Union before hiring him. Cobb agreed to be and remain antiunion. Shortly thereafter, he was hired.

The Respondent's statement conditioning its hiring decision employment on Cobb's union sentiments violated Section 8(a)(1). See *Consol. Casino Corp.*, 266 NLRB 988, 994 (1983) (supervisor unlawfully told employee during a union organizing drive that company wanted to hire anti-union employees); *Oldfield Tire Sales*, 221 NLRB 1275, 1276 (1975) (supervisor unlawfully conditioning job on employee's agreement to refrain from union activities); *Duroyd Mfg.*, 276 NLRB 144, 156–157 (1985) (employer's agent unlawfully conditioned future employment on employee's agreement to oppose unionization).

The Respondent again violated Section 8(a)(1) on August 11 when he accused Cobb of the proverbial stab in the back because Cobb changed his mind and decided to support the Union. The comment equated unionization with disloyalty and contained a veiled threat of reprisal in retaliation for union activity.

C. The Attack on Reason's Vehicle

On September 15, fed up with Reason and the union activity, David Johnston decided to surreptitiously vandalize Reason's vehicle by splattering paint on it. Johnston then evaded responsibility for the crime by letting a friend bear the brunt of the ensuing police investigation for several months until he finally came forward. In the course of confessing to criminal mischief, Johnston attributed his conduct to the union activities. Unsurprisingly, David Johnston's gesture was a clear Section 8(a)(1) violation since it sought to stymie Reason picketing and union activity. See *Livernois Moving & Storage*, 269 NLRB 299, 306 (1984) (employer agent damaged striking employee's vehicle by hurling rocks at it).

II. THE ALLEGED SECTION 8(A)(3) VIOLATIONS

A. The January Layoffs

The initial Section 8(a)(3) allegation is that David Johnston terminated Goodman and Reason on January 7, two days after the election, because it was obvious that they were the only known union supporters. David Johnston allegedly based on the decision on the lack of overhead installation work. He also maintained, falsely, that he was laying off the rest of the workforce as well. The evidence established otherwise. While shop work was either minimal or infrequently performed by Goodman and Reason, steady work was documented over the course of the following weeks and months including the overhead installations that would have been performed by Goodman and Reason. In addition, the Respondent also made Goodman and Reason leave their company vehicle and equipment, a move consistent with a discharge.

In order to establish that an employee was terminated in retaliation for his protected concerted or union activities, the General Counsel must present enough evidence to support an inference that the employee's protected concerted or union activities were a motivating factor in the employer's decision to terminate his employment. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). In order to establish a prima facie case, the General Counsel must demonstrate the following: (1) the employee was engaged in protected concerted and/or union activity, (2) the employer had knowledge of that activity, and (3) the employer had anti-union animus. *Integrated Electrical Services*, 345 NLRB 1187, 1199 (2005); *Wal-Mart Stores*, 340 NLRB 220, 221 (2003). The burden then shifts to the employer to show that it would have taken the same action even if the employee had not been engaged in union activity. *Wright Line*, 251 NLRB at 1089; *Integrated Electrical Services*, 345 NLRB at 1187, fn 5; *KFMB Stations*, 343 NLRB 748, 751 (2004). The General Counsel's prima facie case is not rebutted when an employer's reason for its actions is shown to be false or non-existent. *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981). An employer's motive may be inferred from the total circumstances provided and from the record as a whole. *Coastal Insulation Corp.*, 354 NLRB 495, 514 (2009); *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). Evidence of suspicious timing, failure to adequately investigate alleged misconduct, departures from past practices, past tolerance of behavior for which the discriminatees suffered adverse action, disparate treatment of the discriminatees, and false reasons given in defense all support inferences of discriminatory motivation. *Coastal Insulation Corp.*, 354 NLRB; *Adco Electric*, *301* NLRB 1113, 1123 (1992); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Banta Catalog Group*, 342 NLRB 1311 (2004).

Between the suspicious timing of Goodman's and Reason's discharge and the statements made at the December 17 captive audience meeting, the unsuccessful appeal to Goodman to discharge Reason, the Respondent had its fair share of anti-union animus.

As required under *Wright Line*, the General Counsel demonstrated that Goodman and Reason engaged in union activities, which the Respondent knew about and harbored animus toward. Since the Respondent failed to show that it would have taken the same action regardless of union activity, their discharges on January 7 violated Section 8(a)(3) and (1) of the Act. However, Goodman and Reason capped backpay on January 20 when they refused David Johnston's offer to return to full-time work.

B. Respondent's Refusal to Reinstate Reason after the Strike and Later Terminating Him

The General Counsel was also able to prove a prima facie case under *Wright Line* that Reason was not reinstated after his September 1 strike and was later terminated due to his protected concerted or union activities. Once again, Respondent was unable to prove its burden that it would have taken the same action against Reason barring his Union activity. The evidence that Reason was involved in any sabotage was scarce at best. Brown and Kortz only testified generally about seeing Reason working in the north end of the building. None of Reason's timesheets indicating work at Lone Oak Middle School tie him to any of the specific areas where Respondent later discovered issues. Neither superintendent David Irvine nor David Johnston, who were at the Lone Oak Middle School site regularly checking on progress, found any issues with installation until Reason was out on strike. It was only then that employees started looking for and documenting incorrectly installed pipe. Further, it is undisputed that Reason worked mainly with Cobb and David Council after he returned to work in June and did not work alone.

Further, the Respondent was aggravated with the "drama" Reason created by challenging rules and standing up for his coworkers about things like COVID-19 safety. Again, there was no evidence that Reason intentionally installed pipes incorrectly in order to sabotage any of the projects. Johnston testified that he saw Reason make some mistakes at the Lone Oak Middle School job but never them to Reason's attention.

The Respondent had the burden and was not able to prove that it would not have reinstated Reason or would not have terminated him absent his Union activities. Not one witness was able to testify that Reason sabotaged any work or even inadvertently incorrectly installed pipe. The Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate Reason on September 18 and by terminating him on September 30.

CONCLUSIONS OF LAW

1. The Respondent, Johnston Fire Services, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The United Association of Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO, Local Union 669 Road Sprinkler Fitters is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by: (a) soliciting employee grievances and promising increased benefits and improved terms and conditions of employment if employees were to forego union representation during a union organizing campaign on December 17, 2019; (b) telling employees on December 17, 2019 they were being disloyal, hurtful and slapping the employer in the face if they supported the Union; (c) telling Cobb on April 2, 2020 that the Respondent conditioned his hiring on his remaining anti-union; (d) accusing Cobb of being disloyal and stabbing him in the back on August 11 because Cobb changed his mind and decided to support the Union; and (e) vandalizing Reason's vehicle on September 15 because he engaged in union picketing.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by: (a) discharging Goodman and Reason on January 7 because they supported the Union; and (b) refusing to reinstate Reason on September 18 after he unconditionally offered to return to work from his lawful strike, and subsequently terminating him on September 30, 2020, because he supported the Union.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not violated the Act in any other respect alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including the posting of a notice at its facility.

The Respondent, having discriminatorily discharged Goodman and Reason on January 7, 2020, offered them reinstatement on January 20, 2020, but they declined. Reason ultimately accepted reinstatement on May 28, 2020, but Goodman declined again. After going on a lawful strike, Reason was discriminatorily denied reinstatement on September 18, 2020 and discharged on September 30, 2020. The Respondent must offer Reason reinstatement and must make Goodman and Reason whole for any loss of earnings and other benefits as the result of such discrimination. For both Goodman and Reason, the compensable period of loss is January 7 to 20, 2020. For Reason only, his loss of earnings and benefits also runs from September 18, 2020 to the present. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate laid-off employees for their reasonable search-for-work and interim employment expenses, if any, regardless of whether those expenses exceed 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.

Additionally, we shall order the Respondent to compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), and file with the Regional Director for Region 10, 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 for each affected employee in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016).

The Respondent shall also be required to submit backpay-allocation reports to the Regional Director for transmission to the Social Security Administration at the appropriate time and in the appropriate manner. Additionally, at the General Counsel's request, the Respondent shall be required to file with the Regional Director a copy of each backpay recipient's appropriate W-2 forms.

On these findings of fact and conclusions of law and on the

entire record, I issue the following recommended[39]

ORDER

The Respondent, Johnston Fire Services, LLC, Paducah, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting the United Association of Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO, Local Union 669 Road Sprinkler Fitters or any other union.

(b) Telling employees that they are disloyal or bringing harm to the Respondent if they support a union.

(c) Coercively threatening any employee about union support or union activities.

(d) Soliciting employee grievances or making promises of increased benefits relating to terms and conditions of employment during a union organizing campaign.

(e) Committing physical acts of violence against employees or their property because they engage union picketing or other union activities.

(f) Laying off, discharging, refusing to hire or reinstate employees because they engage in union activities.

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

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

(a) Within 14 days from the date of the Board's Order, offer Chris Goodman and David Reason full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Chris Goodman and David Reason whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) The Respondent shall be required to submit backpay-allocation reports to the Regional Director for transmission to the Social Security Administration at the appropriate time and in the appropriate manner. Additionally, at the General Counsel's request, the Respondent shall be required to file with the Regional Director a copy of each backpay recipient's appropriate W-2 forms.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges or layoffs, and within 3 days thereafter notify the [employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) 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.

(f) Within 14 days after service by the Region, post at its facility in Paducah, Kentucky copies of the attached notice marked "Appendix."[40] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 17, 2019.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., July 7, 2021

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 interfere with, restrain, or coerce you in the exercise of the above rights.

[39] 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.

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

WE WILL NOT lay you off because you support a union.

WE WILL NOT promise you new or better benefits to discourage you from supporting a union.

WE WILL NOT ask you about your complaints and grievances and imply that we will fix them in order to discourage you from supporting a union.

WE WILL NOT tell you that you are disloyal because you support a union.

WE WILL NOT promise you improved terms and conditions of employment to discourage you from supporting a union.

WE WILL NOT tell you that we will only hire you if you are anti-Union and they you have to remain anti-union, or you will be discharged.

WE WILL NOT vandalize your vehicle or possessions to discourage you from supporting a union.

WE WILL NOT fail to bring you back to work if you make an unconditional offer to return to work after a lawful strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise

of your rights under the National Labor Relations Act.

WE HAVE offered Chris Goodman and David Reason immediate and full reinstatement to their former jobs without prejudice to their seniority or any other rights and privileges previously enjoyed. Chris Goodman declined reinstatement.

WE WILL pay Chris Goodman and David Reason, with interest, for the wages and other benefits they lost because we laid them off.

WE WILL compensate Chris Goodman and David Reason for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than one year.

JOHNSTON FIRE SERVICES, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/or by using 10-CA-254411or 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.