These cases were submitted for advice as to whether CARDS NEO, LLC (CNL) violated Section 8(a)(1) of the Act by discharging an employee (Employee 1) for whom a 911 call was made after becoming ill on the job. We conclude that Employee 1 did not engage in protected concerted activity involving the 911 call and that CNL would not have violated Section 8(a)(1) if it had discharged Employee 1 believing made that call. Instead, we conclude that CNL violated Sections 8(a)(3) and (1) by discharging Employee 1 in retaliation for union activity. The Region should also continue investigating and assessing whether other discharged employees of CNL (Employees 2, 3, and 4) were discriminated against because of their union activity.

**FACTS**

The charges initiating these cases were filed by Teamsters Local 823 (Union) on behalf of Employees 1, 2, 3, and 4, all of whom were employed by CNL between \( b \) \( b \) \( b \) \( c \), CNL is a waste management company headquartered in Tontitown, Arkansas. On 2020, it purchased a waste management facility in Fairland, Oklahoma, buying all the assets at that facility then owned by Bernice Sanitation (Bernice). Employees 1, 2, and 3 were employed by Bernice before the
purchase and, along with Employee 4, became employed with CNL after the facility was sold to CNL.

Employees 1 and 3 had commercial drivers’ licenses and drove rear-loading waste-collection trucks. Employees 2 and 4 were “slingers” who rode with the drivers and manually loaded waste into the trucks, guided the drivers when backing up, and assisted with emptying dumpsters. Employee 1 began working for Bernice in [ ] and Employee 3 was hired in [ ] of that year. Employee 2 worked for Bernice between [ ] and [ ] 2020 and returned [ ] before the sale to CNL. Employee 4 was hired by CNL in [ ] of [ ].

Employee 1 became dissatisfied with the wages Bernice was paying. In March 2020, and the slinger on truck approached their manager, Supervisor 1, and proposed raises for each of $0.50/hour. After their proposal was rejected, Employee 1 decided in May 2020 to inquire into how the Fairland facility could be unionized. contacted the Union, received advice on how to proceed with soliciting authorization cards, and began an organizational campaign. On 2020, after collecting almost enough cards to file an election petition, Employee 1 disclosed the campaign to Supervisor 1. Seemingly indifferent to the news, Supervisor 1 told Employee 1 the next day that Bernice had sold the Fairland facility to CNL and that everyone might receive raises as a result.

On , CNL asked the Bernice employees at the Fairland facility to become its employees. Employees 1, 2, and 3 agreed, as did most (if not all) of the others working there. Supervisor 1 also became employed with CNL at the same time and continued as the facility’s manager. Among the documents CNL asked everyone to sign was an employee handbook which contained, inter alia, CNL’s policies on attendance, emergency procedures, and disciplinary measures.

On , 2020, CNL arranged for a mobile unit to visit the Fairland facility to conduct DOT-mandated drug tests. When the drivers and slingers left the facility early that morning, Supervisor 1 told them to suspend their routes and return at 11:00 a.m. for drug testing. Because the truck Employee 1 normally drove needed repairs, was assigned another truck. Also, because usual slinger was absent, Employee 2 was instructed to ride with

The truck given Employees 1 and 2 had a broken air-conditioner. The high temperatures that day and the heat from the truck’s engine combined to make the cab unusually hot. Around 10:00 a.m., Employee 1 felt dizzy and had difficulty controlling the truck. Employee 2 called Supervisor 1 to report Employee 1’s condition. Supervisor 1’s instructions were to return to the facility immediately without calling an ambulance. Due to Employee 2’s lack of a commercial license, Employee 1 had to keep driving. On the way back, condition worsened to the
point where Employee 2 had to grab the wheel, apply the brakes, and bring the truck to a stop along the roadside. Because Employee 2 perceived Employee 1’s condition to be a medical emergency, they called 911. An ambulance arrived shortly thereafter and rushed Employee 1 to a nearby hospital where they was treated.

The emergency room doctor wrote Employee 1 a physician’s note recommending absence from work through .

While off work, Employee 1 stayed in contact with Supervisor 1. On , they texted them an image of the note from the emergency room physician. On , they texted again saying that they didn’t feel well enough to return to work and would be visiting their own doctor for a follow-up examination. The next day, Supervisor 1 called Employee 1 and suggested they ask their doctor to approve a blood test which would include a drug screen capable of substituting for the drug test they had missed on .

When Employee 1 saw their doctor on , they recommended an extended absence from work until and ordered the blood test they requested. They appeared at the lab later that day and asked for the test to include a drug screen. They was told, however, that CNL would have to submit a written request for such a screening. They notified Supervisor 1 of that requirement in a text message that afternoon.

On , because Supervisor 1 never replied to them, Employee 1 called CNL’s human resources director (HR Director), who had visited the Fairland facility on and who Supervisor 1 had identified as CNL’s contact person for personnel matters. In reply to Employee 1’s question about the payment of medical expenses and lost wages stemming from the incident on , the HR Director informed Employee 1 that CNL would not be covering those items because they had called 911 contrary to CNL’s emergency procedures. When Employee 1 responded that Employee 2 had made that call, the HR Director paused for a moment and then said they would have to get back to Employee 1. In a follow-up conversation on , the HR Director explained that none of Employee 1’s medical expenses or lost wages would be paid by CNL because they had failed to submit to a drug test. Furthermore, they disclosed that Employee 1’s employment with CNL was terminated immediately for the same reason. In a follow-up letter, the HR Director confirmed that Employee 1’s discharge had resulted from failure to submit to a drug test. The letter mentioned nothing about any violation of CNL’s emergency procedures based on Employer 2’s 911 call; nor was Employee 2 ever notified that the call constituted a violation of those procedures.

Employee 5, another Bernice/CNL employee, assumed responsibility for the organizational campaign at CNL’s Fairland facility following Employee 1’s discharge. They convinced Employee 2 and others to sign authorization cards.
Employee 3 persuaded Employee 4 to sign a card after the latter became employed with CNL in [b][b][b][b](b)(7)(C) Once enough signed cards were obtained, the Union filed a representation petition on September 23, 2020.1

After the petition’s filing but before the election, Employee 5 was interrogated by Supervisor 2 about the campaign. Supervisor 2 performed certain managerial tasks at the Fairland facility and had temporarily managed the facility between Supervisor 1’s departure on [b][b][b][b](b)(6), (b)(7)(C) 2020 and Supervisor 3’s arrival on [b][b][b][b](b)(6), (b)(7)(C) 2020. Supervisor 2 asked Employee 5 about the identity of the CNL employee who had resumed the campaign following Employee 1’s discharge. When Employee 5 feigned ignorance, Supervisor 2 proceeded to malign both the campaign and the Union. Supervisor 3 made a similar inquiry of Employee 5’s slinger. Around this same time, Supervisors 2 and 3 also conducted frequent surveillance of Employees 2, 3, and 4.

On [b][b][b](b)(6), (b)(7)(C) 2020, Employee 2 was discharged for violating CNL’s attendance rules, which used a point system to address absences and tardiness. Whenever a late arrival or a failure to appear for work occurred, points would be assessed against the offending employee based on the nature and severity of the infraction. Tardiness preceded by notice to a supervisor would be assessed a specific number of points, whereas a similar occurrence without notice received a higher assessment. Absences were treated similarly. If an employee’s aggregate number of points during a 12-month period ever exceeded the amounts specified in the policy’s graduated scale, discipline ranging from a write-up to a discharge could be imposed. No points were assessed, though, if a supervisor excused an employee’s absence or tardiness. Employee 2 had been absent from work on [b][b][b][b](b)(6), (b)(7)(C) 2020. All of those concerned had accompanying notes for urgent [b](b)(6), (b)(7)(C) and had a physician’s note and gave advanced notice for each absence. Despite doing so, none of those absences were excused. Furthermore, none of the paid time off [b][b][b][b](b)(6), (b)(7)(C) had earned was applied to cover the absences.

On [b][b][b](b)(6), (b)(7)(C) 2020, the CEO visited the Fairland facility and fired Employee 3 for violating CNL’s rule on cell phone usage. The rule prohibited any use of a cell phone while driving a waste collection truck. A substitute slinger from one of CNL’s Arkansas facilities had reported Employee 3 using a cell phone while backing up to a dumpster. To Employee 3’s knowledge, no one had ever before been fired for such

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1 Although not evidence upon which we would rely, it is notable that following the Region’s notification to CNL that an R-case petition had been filed, its CEO asked for a showing of interest check, and, upon being told the showing was sufficient, remarked that perhaps the Fairland facility should be closed in order to avoid an election.
an infraction. When managing the Fairland facility between \[ \text{(b)(5), (b)(6)} \] and \[ \text{(b)(7)(C)} \] 2020, Supervisor 1 routinely called drivers on their cell phones and never enforced the cell phone rule. Even CNL’s safety director had been seen using a cell phone while driving one of the trucks.

On \[ \text{(b)(5), (b)(7)(C)} \] 2020, Employee 4 was discharged under CNL’s attendance policy. \[ \text{[Redacted]} \] was accused of leaving work early on \[ \text{(b)(6), (b)(7)(C)} \] and was assessed points for each infraction. On \[ \text{(b)(6), (b)(7)(C)} \], became sick at work and was instructed by Supervisor 3 to get tested for the COVID virus and then recuperate at home. \[ \text{[Redacted]} \] was absent the remainder of the week. Although \[ \text{[Redacted]} \] returned to work on \[ \text{(b)(6), (b)(7)(C)} \], Supervisor 3 fired \[ \text{[Redacted]} \] the next day for exceeding the maximum points allowable, despite the fact that \[ \text{[Redacted]} \] had been instructed to remain at home until \[ \text{[Redacted]} \] had recuperated. Employees 2 and 4 were the only CNL employees at the Fairland facility who were fired for “pointing out.”

CNL’s employee handbook contained a progressive disciplinary policy. The policy was most evident in the enforcement of the attendance rules. Although CNL reserved the right to terminate anyone’s employment at any time for any reason, it professed to discipline an employee’s first offense by issuing a written notice. A second offense was followed by an initial written warning, and a third offense triggered a final written warning. Termination of employment occurred upon the commission of a fourth offense. CNL never observed this policy in discharging Employees 1, 2, 3, and 4. None of them received an initial written notice or any subsequent written warnings. Each was discharged immediately after first being notified of the infraction they had supposedly committed.

**ACTION**

The Region should issue a Section 8(a)(3) and (1) complaint, absent settlement, alleging CNL discharged Employee 1 in retaliation for \[ \text{[Redacted]} \] union activity but not because of the 911 call. The Region should continue to investigate and assess whether the discharges of Employees 2, 3, and 4 were unlawful, paying particular attention to whether CNL was aware of their union activity.

**I. The 911 Call Did Not Involve Protected Concerted Activity.**

The 911 call was made by Employee 2 alone and for Employee 1’s exclusive benefit. The call’s purpose was to obtain emergency medical assistance, which only Employee 1 needed, and nothing else. As such, the call and the events surrounding

\[ \text{[Redacted]} \] 2 Employee 5 was absent from work due to illness during the week of \[ \text{(b)(6), (b)(7)(C)} \] 2020, but that absence was excused.
it are precluded from being concerted action for mutual aid or protection. Without that, no violation of Section 8(a)(1) of the Act could occur.³

II. CNL Discharged Employee 1 in Retaliation for Union Activity.

Whenever an employer’s motive for acting adversely against an employee is disputed, Wright Line⁴ controls the analysis of whether the adverse action was an unfair labor practice.⁵ To prove that any such action violated Sections 8(a)(3) and (1) of the Act, the General Counsel must make an initial showing that union or other protected activity was a motivating factor in the employer’s decision to impose the action.⁶ The elements of proof required to support such a showing are (i) union or other protected activity by an employee, (ii) the employer’s knowledge of that activity, and (iii) antiunion animus motivating the employer’s adverse action against the employee.⁷ The third element is met only if a causal relationship is shown to exist between the adverse action and the protected activity.⁸ Assuming the General Counsel satisfies each such element by a preponderance of evidence,⁹ the employer then bears the burden of rebutting the General Counsel’s initial showing by demonstrating its adverse action was taken for permissible reasons that would have led to the action being imposed even in the absence of the protected

³ See Montgomery Hospital, 233 NLRB 752, 754-55 (1977). Additionally, CNL never asserted that Employee 1 was discharged for failing to drive the truck back to the facility, so we need not determine whether that constituted protected concerted activity.


⁷ Mondelez Global, LLC, 369 NLRB No. 46, slip op. at 2 (2020); WMUR-TV, 253 NLRB 697, 703 (1980).

⁸ Tschiggfrie Properties, Ltd., 368 NLRB No. 120, slip op. at 1, 5, 8-11 (2019).

⁹ WXGI, Inc. v. NLRB, 243 F.3d 833, 840 (4th Cir. 2001), enforcing 330 NLRB 695 (2000); WMUR-TV, 253 NLRB at 703.
activity. If the employer satisfies that burden by a preponderance of evidence, no
unfair labor practice will have occurred. However, if the reasons proffered for the
adverse action are shown to be pretextual—i.e., either false or not relied upon—the
employer’s rebuttal necessarily fails and the GC’s initial showing stands.

A. Employee 1 Engaged in Union Activity.

Employee 1 began the organizational campaign at the Fairland facility in
May 2020. obtained authorization cards from the Union, solicited signatures on
those cards, signed a card discussed the advantages of unionization with
co-workers, and disclosed union sympathies to CNL’s management. Both
individually and collectively, those actions constituted union activity protected
under Section 7 of the Act. Concerning Employee 1, therefore, Wright Line’s first
element of analysis is satisfied.

B. CNL Knew of Employee 1’s Union Activity.

Wright Line’s second element is satisfied by proving that an employer knew
of union or other protected activity by the employee against whom adverse action
was taken. Knowledge of that kind acquired by an employer’s supervisors or other
agents is imputable to the employer. Here, Supervisor 1 became aware of
Employee 1’s involvement in the union campaign when Employee 1 disclosed the

10 Wright Line, 251 NLRB at 1089.

1118, 1119 (1993), enforced, 70 F.3d 863 (6th Cir. 1995); Roure Bertrand Dupont,
Inc., 271 NLRB at 443.


368 NLRB No. 120, slip op. at 5; Whitesville Mill Serv., 307 NLRB 937, 938 (1992);

14 Lucky Cab Co., 360 NLRB 271, 274 (2014); Keller Mfg., 237 NLRB 712, 719
(1978), enforced mem. in part, 622 F.2d 592 (7th Cir. 1980).

15 Wright Line, 251 NLRB at 1090. Accord Mondalez Global, LLC, 369 NLRB No.
46, slip op. at 2; General Motors LLC, 369 NLRB No. 127, slip op. at 2 (2020).

16 E.g., Stoody Co., 312 NLRB 1175, 1182 (1993).
campaign to [redacted] on [redacted] 2020, while [redacted] was still employed by Bernice and not yet an agent of CNL. The Board has imputed a supervisor's knowledge of union activity to a successor employer even when the supervisor attained that knowledge while employed with a predecessor employer.\textsuperscript{17}

Accordingly, it can be justifiably inferred that CNL knew of Employee 1's involvement in the campaign as early as the date on which it retained Supervisor 1 as its Fairland facility manager—[redacted] 2020—thereby satisfying Wright Line's second element as to Employee 1.

C. Employee 1’s Discharge Was Motivated by CNL’s Antiunion Animus.

Employee 1's tenure with CNL was short-lived. [redacted] was hired on [redacted] along with others at the Fairland facility and was fired on [redacted] after only [redacted] on the job during that [redacted] period. Although [redacted] supervisors openly expressed no animosity toward union activity, two instances of adverse action against Employee 1 are indicative of CNL's antiunion animus toward him. On [redacted] 2020, the HR Director informed Employee 1 of CNL's refusal to pay [redacted] medical expenses and lost wages (i.e., statutory workers' compensation benefits) after having suffered from [redacted]. Then, [redacted] was discharged for allegedly evading a DOT-mandated drug test.

Because an employer's antiunion animus is usually proven through circumstantial rather than direct evidence,\textsuperscript{18} the Board has recognized several

\textsuperscript{17} Galloway School Lines, Inc., 321 NLRB 1422, 1424 (1996) (knowledge of applicants' union status with predecessor employer imputed to successor where successor's terminal manager held same position with predecessor), overruled on other grounds, Ridgewood Health Care Ctr., 367 NLRB No. 110, slip op. at 8-10 (2019). Accord Commercial Forgings Co., 315 NLRB 162, 166 (1994), enforced, 77 F.3d 482 (6th Cir. 1996) (knowledge of predecessor's president concerning unfair labor practice imputed to successor upon president's joining successor); Bell Glass Co., 293 NLRB 700, 708 (1989), enforced, 983 F.2d 1073 (7th Cir. 1992) (knowledge of unfair labor practice acquired by predecessor's two supervisors imputed to successor upon their becoming successor's supervisors); Thomas Engine Corp., 179 NLRB 1029, 1042 (1970), enforced sub nom. UAW v. NLRB, 442 F.2d 1180 (9th Cir. 1971) (knowledge of predecessor's plant superintendent concerning unfair labor practice imputed to successor upon assumption of same capacity with successor).

\textsuperscript{18} WMUR-TV, 253 NLRB at 703 (quoting Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966), enforcing 151 NLRB 1328 (1965)).
indicia from which animus of that sort may be inferred. First, whenever scrutiny exposes the implausibility of the proffered reasons for adverse action, inferences of antiunion animus are warranted. Here, CNL initially asserted that its refusal to pay Employee 1’s medical expenses and lost wages was based on calling 911 contrary to its emergency procedures. The next day, however, it justified that decision by claiming had evaded the DOT drug test. The latter reason was also given as the basis for discharge. These proffered reasons for CNL’s adverse action against Employee 1 were factually flawed. never made the 911 call and was ready to submit to a blood test if only CNL had requested a drug screen to be part of that test. Those flaws render CNL’s proffered reasons for its adverse action implausible and support the inference that such action was motivated by antiunion animus.

Second, antiunion animus may also be inferred from an employer’s failure to meaningfully investigate the reasons for its adverse action and from its denial of any opportunity for the affected employee to refute those reasons. Again, CNL’s initial justification for refusing to pay Employee 1’s medical expenses and lost wages was alleged placement of the 911 call. But it never meaningfully investigated the events surrounding that call or allowed Employee 1 to explain what happened. Had it done so, CNL would have discovered that Employee 2 placed the call—not Employee 1. The same is true of Employee 1’s discharge. The HR Director notified on that employment was terminated for evading the DOT drug test. Once again, because no meaningful investigation was performed and no rebuttal opportunity given, the HR Director never learned that Employee 1 had arranged for an alternative blood test at Supervisor 1’s suggestion and that the test would have included a drug screen if only CNL had granted its written consent. These lapses support the inference that CNL harbored antiunion animus toward Employee 1’s union activity.

Third, an employer’s shifting reasons for adverse action are also indicative of antiunion animus toward an employee who has engaged in union activity. Here

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20 BS&B Safety Sys., 370 NLRB No. 90, slip op. at 1 (2021); Mondelez Global, LLC, 369 NLRB No. 46, slip op. at 3; Airgas USA, LLC, 366 NLRB No. 104, slip op. at 3 n.12 (2018), enforced, 916 F.3d 555 (6th Cir. 2019); New Orleans Cold Storage Co., 326 NLRB 1471, 1477 (1998), enforced, 201 F.3d 592 (5th Cir. 2000).

21 BS&B Safety Sys., 370 NLRB No. 90, slip op. at 1, 2; Tschiggfrie Properties Ltd., 368 NLRB No. 120, slip op. at 4; Lucky Cab Co., 360 NLRB at 274; WXGI, Inc., 330 NLRB at 710; WMUR-TV, 253 NLRB at 704.
too, CNL’s refusal to pay Employee 1’s medical expenses and lost wages exposes its antiunion animus. The initial reason given for that refusal was Employee 1’s alleged making of the 911 call. But once the HR Director was forced to acknowledge Employee 2’s placement of that call, the reason for the refusal shifted to Employee 1’s purported evasion of the drug test.

Fourth, an employer’s antiunion animus may be inferred through the timing of the adverse action imposed on an employee engaged in union activity.22 Employee 1 had worked for Bernice more than a year prior to CNL’s takeover of the Fairland facility. For [Employee 1] to be discharged within two weeks of disclosing the organizational campaign to Supervisor 1 and after [Employee 1] had worked [b] (6) since becoming a CNL employee was suspicious and precipitous, which are attributes of adverse action that have been held sufficient to justify inferences of antiunion animus.23 Furthermore, the timing of the adverse action against Employee 1 in close proximity to [Employee 1] disclosure of the union campaign at the Fairland facility lends credence to a causal relationship existing between that action and CNL’s antiunion animus.24

Fifth, and finally, because CNL’s proffered reasons for discharging Employee 1 and refusing to pay [Employee 1] medical expenses and lost wages are possible pretexts, there exists yet another basis on which CNL’s antiunion animus may be inferred.25 The failure to meaningfully investigate an employer’s proffered reasons for adverse

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22 *Lucky Cab Co.*, 360 NLRB at 274; *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), review denied, 70 F.3d 863 (6th Cir. 1995), enforced mem., 99 F.3d 1139 (6th Cir. 1996); *Whitesville Mill Serv. Co.*, 307 NLRB at 945; *Wright Line*, 251 NLRB at 1090.

23 *NLRB v. Link-Belt Co.*, 311 U.S. 584, 589 (1941) (employee firing one day after soliciting authorization cards was precipitous); *Birch Run Welding & Fabricating, Inc.*, 269 NLRB 756, 765-66 (1984), enforced, 761 F.2d 1175 (6th Cir. 1985) (layoff of union sympathizers was suspicious based on subsequent hiring of new workers).


25 If CNL’s proffered reasons for its adverse action against Employee 1 are proven to be pretexts, an additional benefit will have accrued to the General Counsel’s case besides another avenue for demonstrating CNL’s antiunion animus. CNL would also be precluded from rebutting the General Counsel’s initial showing of a violation of Sections 8(a)(3) and (1) of the Act. See note 12 *supra* and its accompanying text.
action and allow for their rebuttal,26 the shifting character of those reasons,27 and the suspicious timing of adverse action28 have all been held to be sufficient grounds for concluding that the proffered reasons for an employer's adverse action are pretextual. From the existence of a pretext, antiunion animus may be inferred provided the surrounding facts reinforce such an inference.29

The existing record in these cases reinforces the likelihood that CNL's proffered reasons for its adverse action against Employee 1 were false or not relied upon—i.e., were pretexts—and that those reasons concealed an unlawful motive for CNL's acting in that fashion. Barely 2020 and firing on 2020. Moreover, worked a mere during that time before succumbing to. Because disclosed to Supervisor 1 the organizational campaign at the Fairland facility on 2020, probably informed CNL of that effort soon thereafter.30 Given that probability, the existence of a permissible rationale for CNL's summary treatment of Employee 1 strains credulity. The more likely prospect is that CNL bore animus toward Employee 1 for leading the effort to unionize its newly acquired facility and retaliated against for doing so.31


27 GATX Logistics, 323 NLRB 328, 335 (1997).

28 Abbey's Transp. Serv., 284 NLRB at 700.

29 BS&B Safety Sys., 370 NLRB No. 90, slip op. at 1; Electrolux Home Prods., 368 NLRB No. 34, slip op. at 3 (2019); Lucky Cab Co., 360 NLRB at 274.

30 Supervisor 2’s inquiry of Employee 5 in September 2020 about the identity of the CNL employee who had resumed the campaign after Employee 1’s discharge had to depend on someone informing CNL’s management of Employee 1’s union activity.

31 Also contained in the record is Supervisor 1’s disclosure to Employee 1 that would not have a slinger assigned to truck upon returning to work. Although persuaded Supervisor 1 to postpone that change, the fact that CNL decided to onerously alter Employee 1’s working conditions immediately after recovery from is suggestive of a hostile disposition toward.
III. Proving That CNL’s Discharges of Employees 2, 3, and 4 Were in Retaliation for Their Union Activity Requires Further Investigation and Restoration of Prior Precedent.

A. The Union Activity of Employees 2, 3, and 4 May Have Been Imperceptible and Hence Unknown to CNL.

An employee’s union activity can occasionally be so subtle that their employer is unlikely to perceive that activity or be motivated to discriminate against them because of it. Discussions about an organizational campaign, without more, have been found to be minimal union activity unlikely to come to an employer’s attention or to move that employer to take adverse action against a participating employee.32 The same is true of such discussions when accompanied by nothing more than the wearing of union insignia33 or the signing of an authorization card.34

Currently, scant evidence exists in the record concerning the involvement of Employees 2, 3, and 4 in the organizational campaign at CNL’s Fairland facility. Employee 3 signed an authorization card and solicited Employee 4 to do likewise. Employee 4 attended a union meeting in addition to signing a card. Employee 2 signed a card and discussed the pros and cons of union representation with co-workers. Nothing else is presently known about their union activity. If it has not already done so, the Region should further investigate that activity to ascertain whether the actions of Employees 2, 3, and 4 were so minimal as to allow CNL to successfully argue that such activity was imperceptible and hence unknown to it.

That said, the cases presented here may be distinguishable from those in which the Board has found employees to have engaged in only minimal union activity. The Union filed a representation petition in September 2020, and the Region scheduled a representation election two months later. During such a critical period, CNL may have been motivated to search for employees at the Fairland facility who sympathized with the Union to the slightest extent and to attempt to assure those individuals never became eligible to vote in the upcoming election. If

32 Hotel & Restaurant Employees Int’l Union Local 26, 344 NLRB 567, 572 (2005), enforced, 446 F.3d 200 (1st Cir. 2006); Custom Cut, Inc., 340 NLRB 120, 121 (2003); WMUR-TV, 253 NLRB at 698.


34 Keller Mfg., 237 NLRB at 721-22.
further investigation by the Region confirms such a possibility or others like it, Wright Line’s first two elements could be satisfied with respect to Employees 2, 3, and 4.

B. CNL’s Discharge of Employees 2, 3, and 4 May Have Been Motivated by CNL’s Antiunion Animus.

Evidence in the record which indirectly supports the inference that CNL’s discharge of Employees 2, 3, and 4 was motivated by antiunion animus involves the disparate manner in which they were disciplined in comparison to their co-workers. Employees 2 and 4 were apparently the only Fairland employees of CNL who were fired for accumulating too many points under the attendance policy. Employee 5, for instance, had missed work enough times such that [redacted] would have “pointed out” under that policy were it not for those absences being excused by [redacted] supervisor. Likewise, Employee 3 seems to have been the only Fairland worker who was the object of CNL’s enforcement of its cell phone rule. And the progressive disciplinary policy was not observed with respect to any of them. The Board has long recognized that disparate treatment in the exercise of disciplinary measures is a ground for inferring antiunion animus as a motivating factor for adverse action. Because the current evidence of those disparities is sparse, however, the Region will have to expand on that evidence before being able to rely on such a strategy.

Other evidence, though, bears the potential of directly proving that antiunion animus motivated CNL’s discharges of Employees 2, 3, and 4. Following the Union’s filing of a representation petition, Supervisor 2 interrogated Employee 5 concerning the organizational campaign, asking [redacted] about the identity of the CNL employee at the Fairland facility who assumed responsibility for the campaign after Employee 1’s discharge. When [redacted] received no substantive reply, Supervisor 2 made disparaging remarks about the campaign and the Union. Also troubling, though not evidence upon which we would rely, is the conversation between our Field Examiner and CNL’s CEO, wherein the latter contemplated closing the Fairland facility to avoid a representation election.

Finally, and in the event upon the further investigation and consideration referred to above the Region determines to issue complaint on the discharges of Employees 2, 3 and/or 4, it should rely on Supervisor 2’s remarks above as evidence of anti-union animus notwithstanding that they may not independently violate Section 8(a)(1). Before 2020, the Board had consistently held for more than 50 years that antiunion statements could be evidence of employer animus even if the

35 NLRB v. Transp. Mgmt. Corp., 462 U.S. at 396-97, 404; Stoody Co., 312 NLRB at 1178, 1182-83; Farm Fresh, Inc., 301 NLRB at 908; Wright Line, 251 NLRB at 1090-91.
statements did not independently violate the Act and were protected by Section 8(c). That section provides that “[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.” Recently, however, the Board changed position in United Site Services, overruling its earlier decisions and siding with those courts that have held Section 8(c) contains a “clear statutory command” precluding the use of noncoercive statements as evidence of antiunion animus.

The Region should urge the Board to overrule United Site Services and return to its earlier and long-standing position that lawful speech under Section 8(c) can be

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36 Overnite Transportation Co., 335 NLRB 372, 375 n.15 (2001) (lawful employee handbook was further indicative of animus); Mediplex of Stamford, 334 NLRB 903, 903 (2001) (“well-established Board precedent hold[s] that while protected speech, such as an employer’s expression of its views or opinions against a union, cannot be deemed a violation in and of itself, it can nonetheless be used as background evidence of antiunion animus on the part of the employer); Affiliated Foods, Inc., 328 NLRB 1107, 1107 (1999) (language about unions in employee handbook, “although alone not rising to the level of unfair labor practices, may still be used to show animus”); Stoody Co., 312 NLRB at 1182 (“policy statement on unions may fairly be considered as antiunion animus supporting a finding of discriminatory motivation”); Gencorp, 294 NLRB 717, 717 n.1 (1989) (rejecting employer’s contention that statements protected by Section 8(c) cannot be used to support background antiunion animus since “the Board has consistently held that conduct that may not be found violative of the Act may still be used to show antiunion animus”); General Battery Corp., 241 NLRB 1166, 1169 (1979) (animus established, in part, based on meetings where employer presented slides and newspaper clippings depicting union corruption and violence); Sun Hardware Co., 173 NLRB 973, 973 (1968) (while “remark of the [employer’s] president . . . to the effect that he did not want a union in the plant, did not violate Section 8(a)(1) of the Act . . . such comment does show antiunion animosity”), enforced, 422 F.2d 1296 (9th Cir. 1970).

37 29 U.S.C. §158(c) (West 2021) (emphasis added).

38 369 NLRB No. 137, slip op. at 14 n.68 (2020).

39 Sasol N. Am. Inc. v. NLRB, 275 F.3d 1106, 1112 (D.C. Cir. 2002); Medeco Sec. Locks, Inc. v. NLRB, 142 F.3d 733 (4th Cir. 1998); BE & K Constr. v. NLRB, 133 F.3d 1372 (11th Cir. 1997) (per curiam); and Holo-Krome Co. v. NLRB, 907 F.2d 1343 (2d Cir. 1990).
indicative of antiunion animus. To that end, it should first be argued that relying on speech protected under Section 8(c) does not treat that speech as “evidence of an unfair labor practice.” Such reliance simply assists the Board in assessing an employer’s motivation, which is only one element necessary to proving an unfair labor practice.\(^{40}\) In this regard, it is significant that \textit{Wright Line} does not describe the required element of antiunion animus as capable of being proven solely through \textit{unlawful} or \textit{coercive} acts or statements. Quite the contrary, in \textit{Wright Line} the Board found that the employer displayed animus toward the employee against whom adverse action was taken based in part on the “tone of the [employer’s antiunion] campaign.”\(^{41}\)

Next, it should be argued that taking lawful speech into account in assessing an employer’s motivation is consistent with the Board’s reliance on other employer actions that are not unlawful in and of themselves to infer antiunion motivation—\textit{e.g.}, the timing of adverse action, disparate treatment, shifting defenses, and the pretextual nature of an employer’s proffered reasons for adverse action.\(^{42}\) Requiring statements expressive of antiunion animus to be independent violations of Section 8(a)(1) before they can be used to prove such animus amounts to treating them differently than all other types of evidence probative of antiunion animus,\(^{43}\) which cannot be justified under the Act.

Lastly, it should be argued that the Board is not bound to follow those courts of appeal that have disagreed with its prior approach, especially given that Section 8(c)’s meaning is ambiguous and open to differing interpretations.\(^{44}\) Indeed, other

\(^{40}\) \textit{Wright Line}, 251 NLRB at 1087.

\(^{41}\) \textit{Id.} at 1090.

\(^{42}\) See section II,C of this memorandum, \textit{supra}.


\(^{44}\) White, 53 Ohio St. L.J. at 18-25 (arguing that Section 8(c) does not reflect clear and unambiguous congressional intent and that the Board’s prior approach was a permissible construction of the statute).
circuits have agreed with the Board’s consideration of uncoercive expressions of antiunion sentiment as evidence of antiunion animus.\textsuperscript{45}

**CONCLUSION**

Sufficient evidence exists in the record to issue complaint against CNL alleging that it violated Sections 8(a)(3) and (1) of the Act by discharging Employee 1 in retaliation for union activity. The 911 call made on behalf was not protected concerted activity and therefore should not be relied upon as the basis for a Section 8(a)(1) violation. Additionally, if further investigation reveals that CNL knew about union activity on the part of Employees 2, 3, and 4, complaint should also issue against CNL for discharging those individuals. To prove that CNL harbored antiunion animus against them, it should be argued that prior precedent of the Board must be restored so that antiunion statements can once again be admitted as evidence of employer animus even if those statements are protected under Section 8(c) and do not constitute independent violations of the Act.

/s/
R.A.B.

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\textsuperscript{45} *NLRB v. Vemco Inc.*, 989 F.2d 1468, 1473-75, 1477 (6th Cir. 1993) (rejecting other circuit courts’ reading of the “plain meaning of [Section 8(c)] filtered through a narrow, but plausible, reading of the legislative history” and concluding that protected speech may be relied upon “as background in our determination of animus” in the context of a discriminatory layoff); *Orchard Corp. of Am. v. NLRB*, 408 F.2d 341, 342 (8th Cir. 1969) (per curiam) (“An employer’s background of ‘strong anti-union posture’ may properly be considered to determine the probable effects on employees of particular acts of the employer.”); *Hendrix Mfg. v. NLRB*, 321 F.2d 100, 103 (5th Cir. 1963) (lawful pre-election speech in which employer “made no bones about its opposition to the [u]nion . . . is properly ‘background’ against which to measure statements, conduct, and the like made by other management spokesmen”).