Spike Enterprise, Inc. *and* International Union of Operating Engineers, Local 150, AFL–CIO. Cases 13–CA–282513, 13–RC–281169, and 14–CA–281652

April 10, 2024

DECISION, ORDER, AND DIRECTION

BY MEMBERS KAPLAN, PROUTY, AND WILCOX

On May 16, 2022, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party International Union of Operating Engineers, Local 150, AFL–CIO (the Union) filed answering briefs, and the Respondent filed reply briefs. The General Counsel and the Union each filed cross-exceptions and a supporting brief, the Respondent filed answering briefs, and the General Counsel filed a reply brief.

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

The Board has considered the decision[1] and the record in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions for the reasons set forth in the judge's decision, to the extent consistent with this Decision, Order, and Direction, and to adopt the judge's recommended Order as modified and set forth in full below.[4]

A. Factual Background

The Respondent is an industrial cleaner for three petroleum refineries in three towns outside Chicago, Illinois: an ExxonMobil refinery in Channahon; a Valero terminal in Blue Island; and a Citgo Petroleum refinery in Lemont. On August 11, 2021,[5] the Union filed a petition with Region 13 for a Board-conducted election to obtain certification as the collective-bargaining representative of the Respondent's full-time and regular part-time heavy equipment and vacuum truck operators, techs, and laborers. The Union also submitted with the petition signed union authorization cards from 14 of the approximately 23 bargaining unit employees expressing their support for the Union to represent them. However, on August 11, in serving the petition on the Respondent, the Union accidentally emailed the Respondent a link from which it could access copies of the employees' signed authorization cards, thereby providing the Respondent on that date with actual notice of which employees supported the Union.[6]

B. The Respondent's Unfair Labor Practices

1. The Respondent's Extensive Antiunion Campaign

Over the course of the following week, from August 12 through August 18, the Respondent engaged in an extensive antiunion campaign of threats and intimidation to coerce employees into abandoning their support for the Union and nipping in the bud their organizing drive. Specifically, for the reasons stated in his decision, we agree with the judge that, on August 12, the Respondent violated Section 8(a)(3) and (1) by discharging employee Robert Rossey for his union activity, including earlier that day wearing a union shirt to work for the very first time, and not because of any alleged safety infractions

[1] After the issuance of the judge's decision, the United States District Court for the Northern District of Illinois granted the Board's petition for injunctive relief filed pursuant to Sec. 10(j) of the National Labor Relations Act (the Act). *Hitterman v. Spike Enterprise, Inc.*, Civil No. 22-cv-00460 (N.D. Ill. May 26, 2022).

[2] In the absence of exceptions, we adopt the judge's findings that the Respondent violated Sec. 8(a)(1) by: 1) Respondent Project Manager David Allen creating the impression of surveillance of employees' union activity when he told employee Steve Selby that he knew which of the employees had signed union authorization cards; and 2) Respondent Labor Consultant Amed Santana telling employees that the Respondent was working on a petition that would make a union election unnecessary. Our Order herein includes remedies for these violations found by the judge. No party excepted to the judge's dismissal of the allegation that Santana told employees they would have to sign a petition denouncing the Union, to the judge's overruling of Union Objections 17, 19, 27, and 28, to the judge's resolution of the challenged ballots, or to the judge's remedy providing for the Respondent to offer unfair labor practice strikers immediate reinstatement if they have made or make an unconditional offer to return to work.

[3] 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.

[4] We have amended the judge's conclusions of law consistent with our findings herein. We have also amended the remedy and modified the judge's recommended Order consistent with our legal conclusions herein, and in accordance with *Thryv, Inc.*, 372 NLRB No. 22 (2022), *Paragon Systems*, *Inc.*, 371 NLRB No. 104 (2022), and *Cascades Containerboard Packaging–Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021). We shall substitute a new notice to conform to the Order as modified.

[5] All dates hereinafter are in 2021 unless otherwise indicated.

[6] The judge discredited the Respondent's claim that its agents did not see the authorization cards until August 13, as "a self-serving and transparent attempt to get around the timing issue regarding Rossey's discharge on August 12." The judge found it "wholly implausible" that Respondent Project Manager Allen, who received the email with the link to the signed authorization cards, "would not have immediately opened it, or at the very least done so within a very short time of its receipt, and then immediately forwarded the petition and authorization cards to the Hills."

that occurred that day.[7] Also in agreement with the judge, we find that, on August 16, the Respondent violated Section 8(a)(1) when Project Manager Allen, while giving a PowerPoint presentation at a mandatory group meeting of employees at the ExxonMobil refinery, threatened employees that: 1) they would receive a pay cut if they chose the Union as their bargaining representative;[8] and 2) if they walked out because of Rossey's firing, and the firing was not found to be an unfair labor practice, he would not have to take them back.[9] Likewise, we agree with the judge that, on August 17, the Respondent violated Section 8(a)(1) when Allen, while meeting individually with employee Steve Selby who

[7] The judge credited the testimony of employee Selby that, on August 17, 5 days after Rossey's discharge, Allen told Selby, "I didn't fire Rossey because of his safety violation. I fired him because he was a prick . . . [b]ecause of his attitude . . . cocky . . . trying to show his support towards the [U]nion." In light of this credited testimony, the General Counsel presented direct evidence of the Respondent's unlawful motive for terminating Rossey, which by itself is sufficient to find the violation without employing a mixed-motive analysis under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See *Tito Contractors, Inc.*, 366 NLRB No. 47, slip op. at 4 fn. 11 (2018) ("Given the [r]espondent's statements to its employees, the violation may be found here without a *Wright Line* analysis. Where an employer takes adverse action against employees for the explicit purpose of retaliating against their protected activity, further analysis of its motive for the action is unnecessary."), enfd. 774 Fed. Appx. 4 (D.C. Cir. 2019). Moreover, although unnecessary because of Selby's credited testimony, we agree with the judge's *Wright Line* disparate-treatment analysis, which serves as an additional basis for finding the violation. We note, however, that the judge misspoke by stating that Rossey testified "without contradiction that he, Allen, and Selby had [H2S] meter hits right before lunch on August 10." An H2S meter hit occurs when an employee's H2S meter detects a threshold level of dangerous hydrogen sulfide gas, which requires the employee to immediately leave the area and notify a supervisor. Allen testified that there were no reported meter hits on August 10 and the only unreported meter hit occurred on August 12. Nonetheless, the judge explicitly credited Rossey's testimony where it diverged from Allen's, and the record demonstrates that employees previously had H2S meter hits that were not immediately reported to the Respondent.

In addition, the judge remarked that he did not need to address whether Allen's statement to Selby that he fired Rossey for supporting the Union was an independent 8(a)(1) violation because it was encompassed by the issue over whether the discharge itself was unlawful. We do not pass on the lawfulness of Allen's statement solely because it was not alleged as a violation in the complaint. We note, however, that the Board has found an independent 8(a)(1) violation where an employer tells employees that another employee was discharged for engaging in union activity. See *Extreme Building Services Corp.*, 349 NLRB 914, 914 & fn. 3 (2007).

[8] See *Southern Pride Catfish*, 331 NLRB 618, 618 (2000) (employer unlawfully threatened to reduce wages if employees unionized), affd. 265 F.3d 1064 (11th Cir. 2001).

Our dissenting colleague contends that, because any such statements made by Allen during the meeting were "clearly meant to demonstrate to employees" that the Respondent would not be able to accommodate additional labor costs, employees would reasonably understand that Allen was merely seeking to explain to employees the realities of the Respondent's financial situation and not to threaten their pay if they unionized. We disagree that what Allen might have meant by his statement directly linking unionization with reduced pay, in the circumstances here, had any bearing on how employees would have reasonably understood it. The judge recognized, as evidenced by his description of Allen's statement as an axiomatic violation, that employees would have reasonably understood Allen's comment about cutting their pay as a threat. Moreover, there was no reason for Allen to have been so sure that employees would suffer a pay cut when negotiations with the Union about pay—or any other subject for that matter—had not even begun. In surmising out loud to employees that their pay would be cut if they unionized, Allen was making a threat, and we believe that employees would have reasonably understood it as such. We note that *High Point Construction Group, LLC*, 342 NLRB 406, 406–407 (2004), enfd. sub nom. *Mid-Atlantic Regional Council of Carpenters v. NLRB*, 135 Fed. Appx. 598 (4th Cir. 2005), cited by our dissenting colleague, is inapposite. There, the Board dismissed an alleged threat of wage loss to employees when the employer described and showed employees the (lower than existing) wage rates contained in the "residential agreement" that the union had recently proffered to the employer, where the union specifically pointed out a "very attractive [lower wage] rate," in an effort to persuade the employer to recognize the union without an election. Id. By contrast, here Allen's claim that employees would receive a pay cut if they unionized was not remotely based on anything the Union had told the Respondent about the wage rates it would seek if it represented the employees. At most, it was based on Allen's unfounded speculation that a pay cut would be necessitated because of the Respondent's financial arrangements with ExxonMobil, without knowing what the Respondent's labor costs would be following collective bargaining with the Union. The fact, as our dissenting colleague points out, that Allen's statements may have been informed by his knowledge of the Respondent's labor costs under its current contract with ExxonMobil does not detract from the objectively threatening nature of his speculation about future pay cuts for employees if they were to unionize.

[9] By making this statement, the Respondent unlawfully threatened employees with termination if they participated in an economic strike. See generally *Emerson Electric Co.*, 287 NLRB 1065, 1066 (1988) (finding employer's statement that it "did not have to take back strikers" as "an unlawful threat of job loss"). Even though the Respondent did not have to fully describe to employees their rights under *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970), the Respondent was not permitted to threaten that, as a result of a strike, employees would be deprived of their rights in a manner inconsistent with *Laidlaw*. See *Eagle Comtronics, Inc.*, 263 NLRB 515, 516 (1982). Here, the judge properly pointed out that the Respondent's statement was not consistent with the reinstatement rights of economic strikers under *Laidlaw*. In excepting to the judge's finding, the Respondent asserts that the judge mischaracterized Allen's testimony as stating that employees "would be" terminated for engaging in an economic strike rather than that they "could be." As the judge noted, Allen testified that he told the employees that "we could replace the employees if they went on strike for economic reasons, but we could not replace them if they went on strike for ULP reasons." Notably, the judge explicitly credited employee Nikolas Holland's testimony recounting what Allen had said over Allen's testimony, and Holland testified that Allen said that "if we walked out for Rob Rossey being fired and it wasn't found to be an unfair labor practice, that he didn't have to take us back." However, even if Allen had told employees that they "could be" terminated for engaging in an economic strike, employees would reasonably understand Allen's statement as a threat of termination if they were to participate in an economic strike.

had missed the previous day's mandatory group meeting, threatened him that: 1) if employees went on strike for unfair labor practices, he could not get rid of them but that he would terminate them if they went on strike for anything else;[10] 2) if employees unionize then they could no longer have one-on-one conversations with him and that he had to "go by the book" and strictly follow the rules; and 3) it would be futile for employees to unionize because ExxonMobil would never agree to a union and that the Respondent would never sign a contract with the Union.[11]

However, the judge also found that the Respondent violated Section 8(a)(1) when Allen harassed employee Nikolas Holland the morning of August 16 by telling him to remove a union sticker that Allen falsely alleged was on Holland's company truck. On this issue, we reverse the judge. The complaint alleged only that this incident unlawfully created the impression of surveillance of employees' union activity. The judge dismissed that allegation because Holland's company truck was in a public area, clearly visible to Allen, so that Allen's statement to Holland could not have implied any kind of surveillance. No party excepted to the judge's dismissal of this allegation. Because the complaint did not allege that Allen's statement to Holland about a union sticker on his company truck constituted unlawful harassment and that theory was not fully litigated, we decline to find this violation.

2. The Respondent's Unlawful Discharge of Cody Franzen

We agree with the judge that, on August 18, the Respondent also violated Section 8(a)(3) and (1) under *Wright Line* by discharging employee Cody Franzen, who had signed a union authorization card, which Allen had knowledge of on August 11, because of his union activity. Franzen started working for the Respondent on July 15 at the ExxonMobil refinery. On August 16, upon arriving for work, Franzen was unable to enter the refinery. Although the judge did not mention this in his decision, Franzen testified that a security guard informed him that his badge had been deactivated because he had not yet taken the New To Site Test (NTST) required by ExxonMobil for all new Respondent employees within their first 30 days of employment. According to Franzen, he called his front-line supervisor Piotr Jesiolowski and told him that ExxonMobil had extended his date to take the NTST to August 18.

It is undisputed, as the judge found, that the Respondent's practice in recent years (with the limited exception of two employees several years earlier, in 2014 and 2015) was for Jesiolowski to administer the NTST. Importantly, Jesiolowski admitted to providing employees considerable assistance in administering the NTST. Jesiolowski testified to going over a checklist of questions with employees immediately before they began the NTST and then, while taking it, Jesiolowski continued to help them correctly answer questions they were stumped on. This substantial support by Jesiolowski ensured that, despite administering the NTST to on average five employees each year, no employee had failed the NTST when administered by him.[12] However, in the week that employees went public with their organizing drive, for the first time, Allen had himself instead of Jesiolowski administer the NTST to an employee, specifically Franzen. Allen did not offer Franzen the same assistance that Jesiolowski had provided to Franzen's coworkers when taking the NTST. Franzen consequently failed the NTST, the first Respondent employee to ever fail the NTST, and this directly resulted in his discharge.

The General Counsel Met Her Initial Wright Line Burden

As the judge explained, under *Wright Line*, the General Counsel bears the burden of making an initial showing sufficient to support the inference that an employee's union or other protected concerted activity was a motivating factor for the employer's adverse employment action against the employee. 251 NLRB at 1089. This is commonly done by showing that the employee engaged in union or protected activity, the employer knew of that activity, and the employer harbored animus against that union or protected activity. See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064, 1065–1066 (2007), enfd. 577 F.3d 467 (2d Cir. 2009).

We agree with the judge that the General Counsel has met her initial burden to prove that employees' union activity was a motivating factor in Franzen's discharge. Here, as recounted above, the Respondent, and Allen specifically, had actual notice that Franzen had signed a

[10] We find that the remedy for this violation is subsumed within the remedy for Allen's unlawful statement on August 16 in which he threatened employees with termination if they participated in an economic strike.

[11] In finding the violation, we rely on Selby's testimony that Allen "said he would never agree to the [U]nion for a contract." Although the judge did not mention this testimony in the facts section of his decision, he explicitly credited Selby's recount of his meeting with Allen.

[12] Our dissenting colleague takes issue with the judge's description of the extent of assistance that Jesiolowski provided the Respondent's employees in administering the NTST, focusing solely on Jesiolowski's assertion that he did not provide any answers to employees. Regardless of whether Jesiolowski implicitly (as Jesiolowski would have it) or explicitly (as the employee test takers saw it) provided the correct answers, the point is the same: Jesiolowski's actions ensured that all employees passed the NTST when he administered it and, in fact, no employees prior to Franzen ever failed the test.

union authorization card because the Union accidentally emailed Allen a link from which the Respondent could access copies of employees' signed union authorization cards when the Union served the representation petition on the Respondent.[13] In addition, there is more than sufficient evidence of the Respondent's animus towards employees' union activity, including Franzen's, to infer that such animus was a motivating factor for the Respondent's sudden change to its practice in administering the NTST.

First, as we found above, in response to employees' organizing drive, Allen—the very person who replaced Jesiolowski in administering the NTST to Franzen—discharged Rossey for his union activity and threatened employees about unionizing as a group and individually to employee Selby, telling Selby that he fired Rossey "because he was a prick . . . because of his attitude . . . cocky . . . trying to show his support towards the union." Second, as the judge recognized, the suspicious timing of the Respondent's change to its practice of who administered the NTST and how it was administered also supports the inference that the Respondent acted based on an unlawful motive. See *Healthy Minds, Inc.*, 371 NLRB No. 6, slip op. at 5–6 (2021) (timing of adverse action shortly after employee engaged in protected activity raises a strong inference of discriminatory motive).[14] It was not until the week that it learned that employees, including Franzen, had engaged in union activity that Allen, for the first time, administered the NTST to an employee and did so differently by not providing Franzen with the same assistance afforded to his coworkers, which directly resulted in his discharge.

The Respondent Failed To Satisfy Its Wright Line Defense Burden

Once the General Counsel has satisfied her initial showing, the Respondent could still prevail under *Wright Line*, as the judge pointed out, if it establishes that the same action would have taken place even in the absence of the union or protected activity. 251 NLRB at 1089. We agree with the judge that the Respondent has not met its burden. The Respondent failed to demonstrate that, even if Franzen and his coworkers had not engaged in union activity, it still would have had someone other than Jesiolowski administer the NTST to Franzen. We reject the Respondent's asserted defense that Allen, instead of Jesiolowski, administered the NTST to Franzen only because of a coincidence of timing, as Franzen had to immediately take the NTST because of its pending deactivation. Although the Respondent cites its payroll records as support for its claim that Jesiolowski was unavailable from August 16 through 18 so that Allen had to be the one to administer the NTST to Franzen, the Respondent's payroll records actually reveal that Jesiolowski was working around that time and Jesiolowski testified to having attended Allen's August 16 PowerPoint presentation. In sum, besides a vague claim of Jesiolowski being unavailable, the Respondent failed to demonstrate that Jesiolowski was, in fact, unavailable or that it would have deviated, for the first time, from its practice in who administered and how it administered the NTST anyway, even if it had not just learned earlier that week of employees' participation in the Union's organizing drive.

Response to the Dissent Regarding Franzen's Discharge

The dissent's defense of the lawfulness of the Franzen discharge collapses completely when, applying *Wright Line*, we consider the Respondent's conduct in the context of the substantive evidence of indisputable union animus in which it occurred. The Respondent's sudden departure from its lenient administration of the NTST to

[13] Although mentioned by the judge, we decline to rely on the resume Franzen presented to Allen at his job interview listing as a career objective "[t]o get started on the right path to becoming an operating engineer" as additional evidence that the Respondent knew of Franzen's support for the Union. Moreover, in excepting to the judge's 8(a)(3) violation for firing Franzen, the Respondent does not dispute that it knew of Franzen's union activity.

[14] The dissent, focusing on the "intervening event not controlled by the Respondent (the deadline for Franzen to complete the NTST)," argues that this deadline "set in motion the events leading to Franzen's discharge." But the dissent ignores two other intervening—and unprecedented—events that occurred immediately after the Respondent learned of the Union organizing drive. First, Allen, for the first time, administered the NTST to an employee. Second, an employee, for the first time, failed the NTST. The dissent chalks up this timing to "mere coincidence." In support, the dissent cites to *Neptco, Inc.* where the Board found "nothing suspect about the timing of [two] discharges" shortly after one of the employees had a brief conversation with a supervisor about a union organizing campaign. 346 NLRB 18, 19–20 (2005). Instructively, the Board in *Neptco* found that the timing of the discharges was not dispositive because there was no evidence that the employer harbored union animus. Id. at 20 & fn. 11. In *Volvo Group North America*, also cited by the dissent, the Board found that timing alone was inconclusive to support a finding of animus because an employee's discharge occurred just 3 days after a flagrant safety violation and, importantly, there was no other evidence of the employer exhibiting animus. 372 NLRB No. 27, slip op. at 3 (2022). Here, however, there is extensive evidence of the Respondent's union animus. In these circumstances, where the Respondent openly demonstrated its desire to stifle employees' union activity, and did so swiftly upon learning of it, we are not willing to simply assume that the timing of the Respondent's adverse action against Franzen was mere coincidence. Finally, the dissent distinguishes *Healthy Minds* from this case because the discharge there occurred on the same day as the protected activity, whereas here the Respondent's adverse action was only in the same week. We think such a short turnaround of a week (during which the Respondent was committing other violations) from when the Respondent learned of employees' union activity to its adverse action against Franzen supports the inference of discriminatory motive.

a more onerous administration by Allen himself resulted in Franzen's failure and, thus, led directly and foreseeably to his discharge.

To begin, our dissenting colleague is incorrect that we have not "adhere[d] to the violation alleged in the complaint." We agree that the issue here—as alleged in the complaint—is whether the Respondent discharged Franzen because he and his coworkers supported the Union and engaged in union activities. Franzen's unlawful discharge was enacted through, and was the culmination of, the Respondent's abrupt change in how it administered the NTST. That change directly resulted in Franzen being the first Respondent employee to ever fail the NTST and, consequently, being the first Respondent employee ever terminated for failing it. Our dissenting colleague's unwillingness to consider the Respondent's change in administration of the NTST in its context, and not just in isolation, is an approach we reject.[15] Our dissenting colleague contends that in our view (and in the view of the General Counsel and the judge) "the question to be answered is whether the Respondent discriminatorily decided to have a manager administer ExxonMobil's mandatory safety test." The evidence does show that the Respondent discriminatorily decided to administer the NTST to Franzen in a manner different from all previous administrations of the test. But the dissent is wrong to suggest that we believe that is the whole story. It certainly was not for Franzen. After all, the Respondent did not administer the NTST in a vacuum. The unprecedented manner in which the Respondent administered the NTST to Franzen directly controlled whether he would retain his employment with the Respondent. We cannot give the Respondent a free pass to discriminate so brazenly in response to employees' union activity by ignoring the immediate and ultimate impact on Franzen—his discharge—that resulted from the Respondent's disparate administration of the NTST to him.[16]

As noted above, contrary to the dissent's assertion, there is more than ample evidence to support the General Counsel's allegation that the Respondent treated Franzen differently for an insidious and unlawful reason. Specifically, that reason for differential treatment was the Respondent's overt union animus that it manifested through its other unlawful conduct, including the unlawful termination of one of Franzen's coworkers, in the week after the Respondent learned of its employees' union activity. We are not—as the dissent claims—inferring "malicious intent from a neutral fact," specifically the pending deactivation of Franzen's badge. Instead, our finding that the General Counsel met her initial *Wright Line* burden is premised on the Respondent's extensive unlawful campaign to stifle employees' nascent union drive, which began just days before the discrimination against Franzen, whom the Respondent knew to be a union supporter.[17] Similarly, the sudden and unprecedented timing of the change to administration of the NTST that had to be passed to avoid discharge, occurring the same week that the Respondent learned of the union campaign and initiated extensive and unlawful countermeasures, was suspect given the lack of explanation for it combined with the evidence of union animus on this record.[18]

[15] Our dissenting colleague asserts that "Allen did not *cause* Franzen to fail the test." However, that is only true if one disregards that the manner in which Allen administered the NTST to Franzen, without the same assistance that other employees had received prior to the Union organizing drive, did cause Franzen to fail.

[16] For this reason, the dissent misses the point by asserting that the General Counsel could not rely on the timing of the discharge to infer discrimination to meet her initial burden because the timing of the discharge resulted from the deactivation of Franzen's badge on August 16, instead of union animus, even though union animus has been found to have caused the change in NTST procedure, which then resulted in the discharge. The August 16 deactivation and subsequent discharge occurred *because* Franzen had yet to pass the test. Franzen's failure of the test was the result of discriminatory change in the administration of the test and the timing of that change in process led directly to Franzen's discharge.

[17] In challenging our reliance on the Respondent's extensive antiunion campaign and unlawful discharge of Rossey as evidence of union animus in discharging Franzen, the dissent claims that "the Board does not automatically infer bad intent in one action based on bad intent in another action." However, it is a longstanding and by now unremarkable principle for the Board to find union animus based on other violations of the Act. See, e.g., *Austal USA, LLC*, 356 NLRB 363, 364 (2010) ("The [r]espondent's antiunion animus was also shown by the other 8(a)(1) violations found in this case . . . ."). The dissent mistakenly asserts that "if that were the case, you could never have a case where the Board found one 8(a)(3) discriminatory discharge and dismissed another." This contention, of course, completely ignores a respondent's *Wright Line* defense burden, which enables a respondent to avoid liability by showing that, despite a discriminatory motive, it would have taken the same action even in the absence of the employees' protected activity. As we have explained, the Respondent has failed to meet its *Wright Line* defense burden here with respect to Franzen. But there is no doubt that an inference of unlawful motivation for its unprecedented treatment of Franzen may be based on its multiple proven acts of "bad intent" occurring that same week.

[18] Moreover, the suspect timing is not countered, i.e., the Respondent has failed to prove that it would have happened in the absence of the employees' protected activity. The Respondent, for instance, could have, but does not demonstrate why the Respondent failed to administer the NTST to Franzen prior to August 16. Nor does it account for the Respondent's abrupt change from its practice of having Jesiolowski administer the test in a manner that ensured that every employee passed to having the undeniably animus-laden Allen administer the test without the test assistance previously provided to employees. In fact, the dissent rightly points out that the Respondent did not put forth *any* evidence regarding Franzen not having taken the NTST by the deadline.

The dissent also vigorously contends—even going so far as to call our analysis on this point "tortured and contorted"—that there is no evidence that Allen knew that it would disadvantage Franzen to have Allen, instead of Jesiolowski, administer the NTST to Franzen because it has not been shown that Allen knew that Jesiolowski provided test answers when he administered the NTST or that Franzen would fail the NTST without Jesiolowski's assistance. Given the disparate treatment of Franzen, and its foreseeable results, the inference that Allen intended to treat him differently for unlawful reasons is appropriately found based on the substantial evidence of animus and unexplained timing for the change in the record. None of it is explained by the Respondent. However, we further note that, even indulging the dissent's assumption, arguendo, that Allen initially gave Franzen the test without knowing of Jesiolowski's lenient administration of the test, when Allen told Franzen that he had failed the NTST the second time, Franzen credibly testified to having pointedly asked Allen why he had been treated differently than all of the other employees who had their NTST administered to them by Jesiolowski, who would help them in taking the test. Far from being surprised, Allen merely stated that he had no control over how other employees were tested by Jesiolowski, disregarding his own role in taking the unprecedented step of administering the NTST himself, instead of Jesiolowski. At that point, regardless of whether he was aware that the Respondent had always made sure that employees passed the NTST prior to the Union organizing drive, Allen could have treated Franzen the same as his coworkers when they had the NTST administered to them. Allen might not have had control over other employees' testing by Jesiolowski, but he did have control over Franzen's at that moment. Yet Allen took no such action.[19] Given the contemporaneous, direct evidence of union animus—by the Respondent, including by and through Allen—the inference is well grounded that Allen was motivated to maintain what he now undeniably knew was disparate treatment of Franzen and would lead to his discharge, because of union animus.[20]

Moreover, our dissenting colleague's claim that Allen could not have known in advance that Franzen would ultimately fail the test and, therefore, provide the Respondent with a seemingly legitimate basis for terminating him, does nothing to undermine the General Counsel's case. After all, the Respondent's aim—as demonstrated by its other unlawful conduct—was to communicate to its employees the negative repercussions of their union activity on their working conditions, including that assistance they used to rely on would no longer be available. If Franzen had passed the NTST, the Respondent's message would still have been delivered. That Franzen failed the NTST and the Respondent terminated him because of it only emphasized and made more severe the Respondent's unlawful antiunion message.[21]

[19] The dissent speculates that Allen may have been unable to assist Franzen at this point because, having failed the test twice, Franzen could not come on the site for 6 months. However, the record does not support the claim that Allen failed to ensure that Franzen was treated like all other employees—even once Allen indisputably knew that Franzen had been tested differently than the other employees—because Allen had no discretion under an ExxonMobil policy. Instead of telling Franzen that his hands were tied by an ExxonMobil policy, Allen only said that he had no control over how other employees were tested with Jesiolowski and simply dismissed Franzen's protest about his disparate treatment, even though this was uncharted territory for the Respondent. Indeed, the situation had never before arisen because, due to Jesiolowski's assistance, no one had previously failed the test, even once.

[20] The dissent chalks up Allen's response to Franzen's protest as being comparable to a complaint to a referee or teacher that other referees or teachers are more lenient. Of course, the record demonstrably shows that Jesiolowski's administering of the NTST was wholly different than Allen's. Nonetheless, if the Respondent wanted to take a different tack in how it administered the NTST, or even make it easier for some employees to pass the NTST than others, that would have been its prerogative, so long as the change was not because of employees' union or other protected activity.

[21] Our dissenting colleague claims that it could not have been the Respondent's aim to have Franzen fail the test because Allen still provided him with "significant and substantial assistance." Without trying to quantify the extent of Allen's assistance, it was undeniably qualitatively different from Jesiolowski's. For instance, when Franzen tried to ask Allen a question while taking the NTST, Allen flat out told Franzen that he could not help him out. The record amply supports the inference that this would not have been Jesiolowski's response. The impact of that different level of assistance is the crux of this issue: Jesiolowski would have ensured that Franzen—like all of the other employees to whom Jesiolowski administered the NTST—did not fail. This different treatment because of employees' union activity is precisely what makes the Respondent's conduct discriminatory. Moreover, the dissent argues that no other employees were aware of Allen administering the NTST to Franzen instead of Jesiolowski. The record does not specify that Franzen told any other employee that it was Allen who administered the NTST to him, but it does show that employee Holland knew that Franzen was terminated for failing the NTST, an unprecedented occurrence. Moreover, after being terminated, Franzen participated in a strike with other employees, which was partly in protest of his termination. At the very least, employees clearly knew of Franzen's termination for failing the NTST, in addition to Rossey's termination, during the week that immediately followed their announcement of the Union organizing drive. The dissent also points out that other employees who had already passed the NTST—as they had taken it with Jesiolowski—would not be troubled by a change in how the NTST was administered. While a change in the NTST may not have meant much by itself, it signaled the Respondent's willingness to retaliate against employees for their union activity—and that they could be next. For that reason, we cannot agree with the dissent's dismissiveness as to how employees who are economically dependent on their employer and who are fearful of taking actions that would risk their livelihood would have reasonably reacted to the Respondent's sudden willingness to terminate multiple employees. The manner in which the Respondent treated Franzen for

Once the General Counsel meets her initial *Wright Line* burden, it is the Respondent's burden to prove that it would have taken the same action against the employee in the absence of the employee's union activity. That might include proof by the Respondent that Allen's administration of the test, and his more demanding procedure in doing so, was a legitimate and nondiscriminatory decision that would have occurred even in the absence of union activity—but the burden, or onus, is the Respondent's and it failed to meet that burden.

Unlike the dissent, we find that the Respondent's proffered explanation for why it administered the NTST to Franzen differently than his coworkers wholly inadequate to meet its burden. This is not just about applying a "common sense interpretation" of the facts, as the dissent puts it, but about only allowing the facts as presented in the record to determine the outcome. We see no basis for reflexively assuming that the Respondent—especially in the context of its fierce contemporaneous campaign to rid itself of the Union—had no unlawful intent when it failed to provide key details into the record to explain why it took unprecedented steps to treat Franzen differently. We could certainly speculate about what lawful reasons it might have had—our dissenting colleague has done so. But the Respondent had every opportunity to introduce such evidence at the hearing to make such speculation unnecessary. Nonetheless, the Respondent provided no additional details or explanation as to why Jesiolowski did not administer the NTST to Franzen in accordance with its practice over recent years of him being the one and only person to administer the NTST. In addition, the Respondent's purported attempt to transfer Franzen to the Citgo refinery rather than discharge him did not show that it acted based on a legitimate and nondiscriminatory reason. The Respondent's claim that it sought to find other work for Franzen but failed because there was no need for him at Citgo as work was supposedly slow was undercut by the Respondent having hired two job applicants to fill open positions there later that same month.

Because the Respondent failed to put forth an adequate defense, the dissent speculates that Allen administered the NTST to Franzen because of Allen's supposed involvement in having the expiration date for Franzen's badge extended.[22] First, even if we were to accept Allen's testimony, as the dissent does, the record is silent on whether any of the numerous employees to whom Jesiolowski had administered the NTST needed to have a badge expiration date extended because the Respondent failed to administer the NTST to that employee within the first 30 days of employment. The record does not show that there were any such employees, but it also does not show that there were not.

Second, even if this were the reason for Allen to administer the NTST, the Respondent never made this argument. The Respondent only asserted that time was of the essence and that Jesiolowski was, for some reason unsubstantiated in the record, unavailable. It does not explain why the Respondent did not have Franzen take the NTST within his first 30 days of employment or what made Jesiolowski unavailable for the 2 days for which the expiration date for Franzen's badge was extended. Hence, there is no reason to assume that Allen's supposed involvement in having the expiration date for Franzen's badge extended was the Respondent's actual reason for having Allen administer the NTST to Franzen, much less that it would have taken this step in the absence of the employees' union activity. It is certainly unproven, and the Respondent does not even make the argument.

Third, even if we were to accept the dissent's explanation about the deactivation of Franzen's badge at face value, it still does not answer why Allen instead of Jesiolowski administered the NTST to Franzen. The continued mystery as to why Allen did so is the very reason that the Respondent failed to meet its *Wright Line* defense burden. The dissent's response is that the Respondent said Jesiolowski was unavailable. Although the Respondent's payroll records show that Jesiolowski was working during the 2 days in question, the dissent points out that Jesiolowski could have been working on a time-sensitive project or been far away from the testing site. The dissent further argues that we are resorting to our imagination by questioning the Respondent's unproven assertions and not just uncritically accepting the Respondent's explanation because it is, in fact, the General Counsel—not the Respondent—who bore the burden of proving Jesiolowski's availability to demonstrate discriminatory conduct.

On this last point, we profoundly disagree with the dissent. Under *Wright Line*, the Respondent has the burden

his and his coworkers' union activity is precisely the type of conduct that the Act prohibits.

[22] As noted above, Franzen testified that he had told Jesiolowski about his badge deactivation and that ExxonMobil provided the extension on the morning of August 16 so that he could go to work that day. Although Allen testified to having contacted ExxonMobil on August 16 to avert Franzen's badge from being deactivated, the judge generally credited Franzen's testimony over Allen's. The dissent quibbles with the judge's credibility findings, including the extent to which they were based on witnesses' demeanor. Nonetheless, we see nothing in the record to make us believe that we would be better at assessing the witnesses' credibility than the judge who had the advantage of being able to observe the witnesses testify, especially in resolving any differences between Franzen's testimony and Allen's.

of showing that, even in the absence of protected activity, it would have taken the same action, which in this case was to have Allen administer the NTST to Franzen and do so differently than Jesiolowski. The dissent's conjectures about Jesiolowski's whereabouts on the days Franzen was administered the NTST are just that and nothing more. It could be, as the dissent postulates, that the Respondent's concern about the deactivation of Franzen's badge or having the NTST administered in a manner that does not condone cheating was the Respondent's true and lawful motive. All that the Respondent said—without needlessly speculating—was that, for some unknown reason, Jesiolowski was unavailable. It was this change in its administration of the NTST that unquestionably resulted in Franzen's discharge, as no other employee had ever before failed the NTST and been terminated as a result.[23]

The Respondent cannot simply assert that it had a legitimate and nondiscriminatory reason and be taken at its word; the Respondent had to substantiate that claim to satisfy its *Wright Line* defense burden. It had the opportunity at the hearing to do so. It did not. Because the Respondent has failed to prove that, for legitimate and nondiscriminatory reasons, it would have treated Franzen's testing in the same manner, even in the absence of his and his coworkers' union activity, the Respondent's defense fails.

Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging Franzen.

C. The Union's Strike and the Representation Election

Two days after Franzen's discharge, on August 20, the Union called a strike to protest the Respondent's unfair labor practices, in particular the discharges of Rossey and Franzen.[24]

On October 8, the Acting Regional Director for Region 13 issued a Decision and Direction of Election directing a mail-ballot election and requiring that completed ballots be received by the Region by November 22. The Decision and Direction of Election scheduled the opening and counting of the ballots for the morning of November 23. The tally of ballots issued on November 23 showed five votes for the Union, eight against, and eight challenged ballots, out of approximately 23 eligible voters.

The Union filed numerous objections to the election. Objections 15 and 16 were to the Region not counting the ballots of employees Holland and Cody O'Neal, respectively, which were not received by the Region prior to the November 23 opening and counting of the ballots.[25] In sustaining those two union objections, the judge ordered that the ballots of O'Neal and Holland be opened and counted by the Region because both credibly testified that they mailed back their ballots and sought to have them counted. The Respondent excepts. We agree with the Respondent and reverse the judge on this issue. Under well-established precedent, "the Board does not count mail ballots that arrive after the tally, even if those votes are determinative." *CenTrio Energy South LLC*, 371 NLRB No. 94, slip op. at 1 (2022); see also *Classic Valet Parking*, 363 NLRB 249, 249 (2015).

The Union's Objection 18 and Objections 20 through 26, however, are based on the Respondent's conduct that, as described above, constituted unfair labor practices. We therefore adopt the judge's recommendation to sustain those objections.

D. Gissel Bargaining Order

Notwithstanding the pending results of the election once the determinative challenged ballots are opened and counted, having found that the Respondent violated the Act by, among other things, unlawfully terminating Rossey and Franzen and making unlawful threats to the bargaining unit employees after the filing of the representation petition, the judge found that the Board's traditional remedies were insufficient to erase the coercive effects of the Respondent's unlawful conduct, and that a *Gissel* bargaining order was therefore necessary. We agree.[26]

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court identified two categories of employer misconduct that warrant imposition of a bargaining order. The first is category I cases that are "exceptional" and "marked by 'outrageous' and 'pervasive' unfair labor practices." Id. at 613. The second is category II cases that are "less extraordinary" and "marked by less perva-

[23] The dissent further argues that ExxonMobil barring Franzen from the site clearly constitutes a nondiscriminatory basis for Franzen's discharge. However, that is putting the cart before the horse. The reason that Franzen was barred from the site was precisely because of the Respondent's disparate treatment of Franzen in administering the NTST, which resulted in him being the first Respondent employee to ever fail it.

[24] As the judge noted in his decision, the Union's strike continued through the close of the hearing in February 2022.

[25] Holland testified that, on November 16, he placed his ballot in the mail drop box at a post office in Braidwood, Illinois. O'Neal testified that, on November 9, he placed his ballot in his mailbox and raised the red flag on the side of the mailbox so that his mailperson would pick it up and mail it back to the Region.

[26] Because the General Counsel did not allege or argue that the Respondent violated Sec. 8(a)(5), we do not consider whether a bargaining order is warranted in this case under the standard announced in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130, slip op. at 35 (2023) ("[A] bargaining order under the new standard" can issue "only as a remedy for an employer's violation of Sec[.] 8(a)(5) by refusal to bargain with a union.").

sive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." Id. at 614. In category II cases, the "possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and . . . employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." Id. at 614–615.

In assessing the appropriateness of a *Gissel* bargaining order in a particular case, the Board examines factors such as "the seriousness of the violations and their pervasiveness, the size of the unit, the number of affected employees, the extent of dissemination, and the position of the persons committing the violations." *Bristol Industrial Corp. & C.O. Sabino Corp.*, 366 NLRB No. 101, slip op. at 3 (2018). In addition, the Board considers "the inadequacy of the Board's traditional remedies," "the Section 7 rights of all employees involved," and whether an affirmative bargaining order "serves the policies of the Act." Id., slip op. at 3–4. Consideration of all of these factors allows the Board to balance "(1) the employees' § 7 rights [to a representative of their own choosing]; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." See *Rav Truck & Trailer Repairs v. NLRB*, 997 F.3d 314, 330 (D.C. Cir. 2021) (quoting *Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 826–827 (D.C. Cir. 2001) (alteration in original)); *Traction Wholesale Center Co. v. NLRB*, 216 F.3d 92, 107 (D.C. Cir. 2000).

The judge recommended a *Gissel* bargaining order in this case after first noting that, at the time the petition was filed, a majority of bargaining unit employees had already expressed their desire for union representation through signed authorization cards. The judge then properly considered the seriousness of the violations, including the discharges of two employees and the independent 8(a)(1) violations by Allen, the Respondent's only on-site supervisor at the ExxonMobil refinery, at a group meeting and individually with Selby. The judge also recognized the impact of the timing of the unfair labor practices on employees, occurring within a week of the Union's filing of the representation petition, and that knowledge of the Respondent's unlawful conduct was widespread among the approximately 23 unit employees as the Union called an unfair labor practice strike to protest the discharges. The judge concluded that a *Gissel* bargaining order was necessary because the Respondent's unfair labor practices had "the tendency to undermine majority strength and impede the election process."

We agree with the judge that a *Gissel* bargaining order is necessary here.[27] Importantly, a *Gissel* bargaining order will protect employees' Section 7 right to choose their bargaining representative because a majority of bargaining unit employees had signed authorization cards expressing their support for the Union prior to the Respondent's unlawful conduct. See *Rav Truck & Trailer Repairs*, 997 F.3d at 330 (a showing that employees signed union authorization cards weighs in favor of a bargaining order). In addition, as discussed further below, no other purposes of the Act necessitate overriding employees' right to choose their bargaining representative. Furthermore, and critically here, alternative remedies will not sufficiently rectify the Respondent's violations of the Act to enable a fair rerun election. The Respondent's unfair labor practices have impeded the election process by causing employees to fear retaliation if they were to engage in union activity or the Union were to prevail in an election. For that reason, employees' previously signed authorization cards are now a more reliable indicator of the Union's majority support. On balance, the signed authorization cards better express employee sentiment than a rerun election would, as the possibility of the Board's traditional remedies erasing the harmful effects of the Respondent's unfair labor practices on employees—which would be critical for holding a fair rerun election—is slight.

As the judge noted, the Respondent engaged in an extensive campaign of illegal conduct in the week immediately following the Union's filing of its representation petition to nip in the bud the employees' organizing drive. In particular, the Respondent committed "hallmark" 8(a)(3) violations by terminating Rossey and Franzen. The Board has repeatedly recognized the discharge of union supporters as a "hallmark" violation that may justify the issuance of a *Gissel* bargaining order because the impact on the remaining employees is likely to be more pervasive. E.g., *Adam Wholesalers, Inc.*, 322 NLRB 313, 314 (1996) ("Threats of discharge and the discharge of union adherents have long been considered by the Board and the courts to be 'hallmark' violations justifying the issuance of bargaining orders."). Accentuating the harmful effects of the unlawful discharges on the Respondent's employees, during that very same week, Allen, the Respondent's highest-ranking official at

[27] We find it unnecessary to pass on the Union's cross-exception to the judge's recommendation for a category II instead of a category I *Gissel* bargaining order. Because a majority of the bargaining unit employees had already expressed their support for the Union through signed authorization cards prior to the Respondent's unfair labor practices, the issuance of a category I instead of a category II *Gissel* bargaining order would not affect the remedy.

the ExxonMobil refinery, made multiple 8(a)(1) threats about the Union to employees that would have reasonably coerced them into curtailing their union activity to forestall any adverse consequences to their employment. See *Evergreen America Corp.*, 348 NLRB 178, 181 (2006) ("The coercive and lasting effect of the [r]espondent's unlawful conduct was magnified by the fact that many of the violations were committed by high management officials, a point that has consistently been emphasized by the Board as supporting the issuance of a bargaining order."), enfd. 531 F.3d 321 (4th Cir. 2008); *Michael's Painting, Inc.*, 337 NLRB 860, 861 (2002) ("When the highest level of management conveys the employer's antiunion stance by its direct involvement in unfair labor practices, it is especially coercive of Section 7 rights and the employees witnessing these events are unlikely to forget them."), enfd. 85 Fed. Appx. 614 (9th Cir. 2004).

It is also unlikely that the Board's traditional remedies would be able to erase the lingering effects of the Respondent's unfair labor practices. The Respondent's unlawful conduct communicated to employees that the Respondent would not tolerate their union activity and was willing to engage in unlawful conduct—including discharges—to prevent the organizing effort from succeeding. In a unit of only 23 employees, and with the Respondent's unfair labor practices culminating in an employee strike, employees would reasonably understand that the discharges of Rossey and Franzen were connected to the union organizing drive, not for purported legitimate reasons. In fact, after this unlawful conduct by the Respondent, several employees who had previously signed authorization cards signed a decertification petition, and only 5 of the 13 nonchallenged ballots included in the tally from the election were for the Union. Although some employees testified that they stopped supporting the Union for reasons unrelated to the Respondent's unlawful conduct, this does not negate that the Respondent's discharges of Rossey and Franzen (and its additional threats) would have reasonably influenced their sentiment towards the Union. As a result, the Board's traditional remedies cannot erase the lingering coercive effects of the Respondent's substantial unfair labor practices on its employees. Rossey's and Franzen's reinstatement and the accompanying backpay and notice are not sufficient to dispel the coercive atmosphere created by the Respondent's conduct that demonstrated its zeal to nip in the bud the employees' organizing drive. Thus, a rerun election would not accurately gauge whether a majority of employees would have supported the Union in an environment free of the Respondent's unlawful conduct.

In addition, the duration of the *Gissel* bargaining order is limited. This ensures that the rights of employees who oppose the Union are still protected pursuant to the decertification procedures under Section 9(c)(1) of the Act once a reasonable period of time has lapsed to afford the collective-bargaining relationship an opportunity to succeed. *Bristol Industrial*, supra, 366 NLRB No. 101, slip op. at 3–4 ("The duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violations. It is only by requiring the [r]espondent[] to bargain with the [u]nion for a reasonable period of time that the employees will be able to fairly assess the [u]nion's effectiveness as a bargaining representative in an atmosphere free of the [r]espondent's unlawful conduct. The employees can then determine whether continued representation by the [u]nion is in their best interest."). Moreover, the *Gissel* bargaining order also "serves the policies of the Act" by not only protecting employees' right to select a bargaining representative of their choice but also "by fostering meaningful collective bargaining and industrial peace," particularly in light of the strike prompted by the Respondent's unfair labor practices. Id., slip op. at 4. Under these circumstances, the holding of a fair election in the future would be unlikely and that the "employees' wishes are better gauged by an old card majority than by a new election." *General Fabrications Corp.*, 328 NLRB 1114, 1114 (1999) (quoting *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1078 (D.C. Cir. 1996)). Accordingly, we agree with the judge that a *Gissel* bargaining order is warranted.[28]

[28] Our dissenting colleague cites two prior cases in which the Board did not award a *Gissel* bargaining order, despite both cases involving the unlawful discharges of two union supporters. First, these cases do not stand for the proposition that the Board has not or cannot issue a *Gissel* bargaining order where two union supporters are discharged, only that in the circumstances of those cases the Board found such a remedy unwarranted. Second, as just one notable difference between those cases and this one, both of those cases involved substantially larger units that would cause the effect of the employer's "hallmark" violations to be less impactful on the entire bargaining unit. For instance, in *Pyramid Management Group*, cited by the dissent, the Board declined to issue a *Gissel* bargaining order where the discharges of two employees did "not directly affect a significant portion of the 69-employee unit." 318 NLRB 607, 609 (1995), enfd. mem. 101 F.3d 681 (2d Cir. 1996). In the other case cited by the dissent, *Philips Industries*, the Board was even more direct, specifically declining to award a *Gissel* bargaining order because of "the size of the unit (i.e., the effect of violations is more diluted and more easily dissipated in a larger unit)." 295 NLRB 717, 718–719 (1989).

In a third case cited by the dissent, involving the layoff of two employees in a small unit of only 11 employees, the Board also did not issue a *Gissel* bargaining order, but relied on mitigating facts that lessened the impact of the employer's unlawful conduct on the remaining employees. *Desert Aggregates*, 340 NLRB 289, 294 (2003). The Board noted that a decline in business was a colorable explanation for the layoffs from the perspective of other employees, especially in the

AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law 4(d) and renumber the subsequent paragraphs.

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order the following remedies in addition to those recommended by the judge.

As an initial matter, the General Counsel cross-excepts to the judge not recommending a broad cease-and-desist order, subjecting the Respondent to contempt proceedings if, in the future, it violates the Act "in any other manner," not just "in any like or related manner" to the violations in this case. We agree with the General Counsel that a broad cease-and-desist order is warranted here. The Respondent's numerous unfair labor practices—including unlawfully discharging two employees and making several threats to employees in connection with their union activities—constituted "such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357, 1357 (1979). Over the course of the week after the Union filed the representation petition, the Respondent demonstrated in a very short time span a pattern of hostility towards Section 7 rights that continued until its violations effectively extinguished the employees' organizing drive. The breadth of the Respondent's unlawful conduct was substantial, as it was directed at most, if not all, of the Respondent's employees to diminish the chance that the Union would prevail in an election. A broad cease-and-desist provision is therefore appropriate to deter future violations by the Respondent that erode employee union support while ensuring the efficacy of the Board's Order. See *Roma Baking Co.*, 263 NLRB 24, 24 fn. 2 (1982) (ordering a broad cease-and-desist provision where employer unlawfully laid off three employees and committed other 8(a)(1) violations during union organizing drive).[29]

Moreover, in *Noah's Ark Processors, LLC d/b/a WR Reserve*, the Board recently laid out a nonexhaustive list of potential remedies that the Board would consider ordering where an employer has engaged in unlawful conduct warranting a broad cease-and-desist order. 372 NLRB No. 80, slip op. at 4 (2023).[30] The General Counsel's cross-exceptions touch upon several of these remedies. For the reasons discussed below, we find the following additional remedies appropriate here.[31]

First, in *Noah's Ark Processors*, the Board recognized the value, in cases where a broad cease-and-desist order is issued, of having the notice to employees signed by a person who bears significant responsibility within a respondent's organization. Id., slip op. at 7–8. We find it appropriate here to require the Respondent's owner, president, and CEO Jeff Hill to sign the notice. Despite his awareness of his employees' organizing drive, Hill failed to ensure that Allen, his highest-ranking official at the ExxonMobil refinery, lawfully responded to it. Hill also demonstrated to employees his own commitment to defeating their union activity by entering the room and

context of lawful layoffs the employer instituted less than a year earlier, and that the employer attempted to recall both laid off employees as soon as its business improved. Id.

Here, on the other hand, the discharges of Rossey and Franzen had an appreciable effect on the entire unit, comprised of approximately 23 employees, making a free and fair election no longer possible as the lingering and deep-seated coercive effect of the Respondent's unlawful conduct subsists in the workplace. Furthermore, the participation of a fraction of the unit in an unfair labor practice strike did not, as the dissent contends, strengthen the Union, or otherwise cause the effect of the Respondent's unlawful conduct to dissipate. To the contrary, it had the exact opposite effect. As employee Holland explained, after he joined the unfair labor practice strike, employees who used to support the Union "eventually they stopped answering my phone calls, stopped answering my text messages, wouldn't respond to my voicemails and some of them have gone as far as blocking me on Facebook, deleting me off everything. They won't talk to me at all."

[29] Our dissenting colleague asserts that the Respondent's discharge of two employees in a unit of only 23, and unlawful statements to most, if not all, of its employees at a captive audience meeting in the week immediately after the filing of a representation petition, is not the sort of unlawful conduct that demonstrates a general disregard for employees' fundamental statutory rights. On this point, we simply disagree. The Respondent clearly engaged in its campaign of unlawful conduct to stymie employees' union activity and to intimidate its employees into no longer exercising their statutory rights. The Respondent was bent on defeating the employees' organizing efforts and demonstrated a general disregard for employees' statutory rights through its campaign to accomplish that objective. It is incumbent on the Board to utilize its remedial authority under Sec. 10 of the Act to ensure that the Respondent's employees know and understand that the Respondent's conduct was illegal, that it will be remedied, and, just as importantly, that—despite the Respondent's hostility to their organizing—it is their choice alone as to whether they choose to be represented by the Union.

[30] To the extent our dissenting colleague reiterates his positions from *Noah's Ark Processors* against awarding certain remedies, we rely on the Board's responses in *Noah's Ark Processors* for rejecting the dissent's claims.

[31] Far from overkill, as the dissent characterizes it, these remedial measures are designed to ensure that the Board is not complacent in the face of numerous and egregious violations of the Act. We are mindful of the highly disruptive impact that unlawful conduct has on employees who seek to engage in protected activity. The Respondent's illegal discharges and threats leave an enduring impression on employees who reasonably question whether the risks of exercising their statutory rights remain worth it. Restoring the status quo ante to the workplace is neither simple nor easy. But it is our obligation to use all of the tools available to us to erase, as much as possible, the lingering effects of unlawful conduct. If we were derelict in doing so, it would, indeed, be punitive – not to the Respondent, but to its employees, who would be harmed for doing something as innocent as exercising their statutorily protected rights.

smiling when his Labor Relations Consultant Santana unlawfully suggested to employees that the Respondent was involved with the circulation of a decertification petition. The Respondent's employees know that Hill is the owner and leader of the Respondent. They know that he is not only the person ultimately responsible for the Respondent's conduct but also that he is the one who makes the major decisions about the Respondent. Hill's signature on the notice would provide them with some reassurance that the Respondent is now serious about respecting their rights under the Act.

Second, the General Counsel requests that, in addition to having the notice posted at the Respondent's facilities, the Board order the Respondent to mail the notice to current and former employees. We agree. In *Noah's Ark Processors*, the Board recognized that distribution of the notice to current and former employees through the mail would further ensure that employees who want to take the time to read the notice are able to do so without interference or threat of retribution. Id., slip op. at 7. This is certainly the case here. Mailing the notice would help ensure that its content is shared with employees who do not see the posted notice or are unable to attend the notice reading.[32] Employees would be free to privately review the notice for as long as they need—from the time they receive the mailed notice and for however long they decide to keep it—without potential scrutiny from the Respondent or coworkers. Importantly, this promotes employees' right to decide on their own whether they want to familiarize themselves with the notice and their rights under the Act without the fear of retaliation for being seen standing before the posted notice at the workplace. The Respondent's extensive campaign of unlawful tactics to defeat its employees' union organizing underscores how critical it is that every employee have access to the information in the notice. Mailing a document is one of the easiest and most basic ways of sharing information. Accordingly, it is only reasonable for the Board to employ this time-honored method for disseminating information to the Respondent's current and former employees, in addition to ordering the Respondent to provide the notice to employees in all the ways the Respondent customarily communicates with its employees. We shall require the Respondent to mail copies of the signed notice to each employee who was employed in the unit at any time since August 12, 2021 (the date it committed its first unfair labor practice), within the time set forth in our Order.

Third, we shall require that the Respondent's supervisors and managers, in particular Allen, attend the reading of the notice to employees. In *Noah's Ark Processors*, the Board pointed out the significant role that supervisors and managers have in ensuring that a respondent complies with the Act. Id., slip op. at 7. This case exemplifies how true that is. Here, it was a manager for the Respondent, Allen, who committed most of the Respondent's unfair labor practices. Allen was the one who unlawfully terminated two of the Respondent's employees and made unlawful threats to an individual employee and to a group of employees at a mandatory meeting. In addition, employees frequently have direct contact with Allen during their workday and know that Allen has the authority to directly (and negatively) affect their terms and conditions of employment. To fully remedy the Respondent's unlawful conduct, it is critical that Allen be aware, in no uncertain terms, of what he cannot do, specifically infringe on employees' Section 7 rights, and for employees to see Allen and the Respondent's other supervisors and managers at the meeting to have increased confidence that they will all respect those rights going forward.

Fourth, we shall also require that a hard copy of the notice be distributed to all employees, supervisors, and managers in attendance at the notice reading. The General Counsel specifically requested that the notice be distributed to supervisors and managers. In *Noah's Ark Processors*, the Board provided for distribution of the notice to employees at a notice reading where a broad cease-and-desist order is issued. Id., slip op. at 6–7. Distribution of the notice to everyone at the notice reading—employees, supervisors, and managers alike—will allow those, who desire, to follow along to themselves as it is being read aloud and will serve to facilitate their comprehension of the important information communicated in the document. The Respondent must maintain and make available for inspection proofs of mailings and receipts in connection with this mailing obligation.

Fifth, we shall order the Respondent, along with the notice, to sign, post, mail, distribute, and read aloud in the same meeting or meetings an explanation of rights to employees. The Board in *Noah's Ark Processors* noted that, in cases of egregious and pervasive unfair labor practices, a detailed explanation of rights can ensure that employees are fully informed of their rights, mitigate the chilling effect of past unlawful conduct, and help prevent

[32] The Respondent did not except to the judge's recommended remedy that the notice be read aloud on worktime in the presence of a Board agent at the Respondent's three Illinois facilities or, alternatively, having a Board Agent read the notice to employees during worktime in the presence of Jeff Hill, Allen, and Santana. Nonetheless, we agree that a notice reading is appropriate here because of the seriousness of the Respondent's unlawful conduct and that it would "not only alert employees to their rights but also impress upon them that, as a matter of law, their employer . . . must and will respect those rights in the future." Id., slip op. at 6.

further unlawful conduct. Id., slip op. at 5–6. The Respondent's substantial unlawful conduct, immediately after the filing of the representation petition, successfully stifled employees' organizing drive and communicated to employees that they could not engage in conduct fundamentally protected under the Act, specifically, supporting the Union and encouraging their coworkers to do the same. In the face of the Respondent's flagrant actions that prevented employees from exercising their statutory rights under Section 7, we find that an explanation of rights is necessary to make employees whole by mitigating the chilling effects of the Respondent's unfair labor practices on them and to ensure that they are fully informed of their rights under the Act.[33]

Sixth, in accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), the Respondent shall also compensate Rossey and Franzen for any direct or foreseeable pecuniary harms incurred as a result of their unlawful discharges, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, 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).

Seventh, in a cross-exception, the Union seeks reimbursement for the economic assistance it provided employees who participated in the unfair labor practice strike. We agree that such a remedy is necessary to restore the status quo and make the Union whole as a result of the Respondent's unlawful conduct. In *Alwin Manufacturing Co.*, the Board awarded a union the costs and expenses it incurred in connection with an unfair labor practice strike, including any picketing costs, strike benefits, and other assistance paid to striking employees during the strike, "to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo at the bargaining table." 326 NLRB 646, 647 & fn. 5 (1998) (quoting *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995)), enfd. 192 F.3d 133 (D.C. Cir. 1999).

We agree with the Board in *Alwin Manufacturing* that, in certain circumstances, a union is entitled to be made whole for the economic assistance it provides to employees in support of an unfair labor practice strike. This is one of those cases. The Respondent—as the perpetrator of the unfair labor practices that prompted the strike—should reimburse the Union for the costs the Union suffered as a result of the unfair labor practice strike, including the economic assistance the Union provided striking employees. It is undisputed that the Respondent's conduct that we found above to constitute unfair labor practices—in particular, the Respondent's unlawful discharge of Rossey—motivated the employees to go out on strike. The strike was the Union's means of influencing the Respondent into correcting, as soon as possible, its unlawful actions by reinstating Rossey and Franzen and not committing any further violations. Under the circumstances here, where the Respondent's unfair labor practices were the motivation for the strike, the Union should not have to bear the economic costs of exercising a statutorily protected and justifiable tactic to urge the Respondent to abandon its unlawful campaign and abide by the Act.[34]

[33] In the circumstances of this case, we believe that the meetings where the notice and explanation of rights are read aloud and distributed should be sufficient to satisfy the General Counsel's broad request in her cross-exceptions for a training of the Respondent's employees, including its supervisors and managers, both current and new, on employees' rights under the Act and the Respondent's obligations to comply with the Board's Order.

[34] The Respondent argues that reimbursement to the Union is tantamount to awarding consequential damages. We disagree. We are only awarding the Union make-whole relief pursuant to our authority under Sec. 10(c) to place it, as much as possible, in the position it would have been in but for the Respondent's unlawful conduct. Importantly, the economic assistance the Union provided the unfair labor practice strikers was a direct and a foreseeable pecuniary harm that the Union suffered as a result of the Respondent's unlawful conduct for which the Union should be reimbursed to fully effectuate the make-whole purposes of the Act. See *Thryv, Inc.*, 372 NLRB No. 22, slip op. at 7 ("Upon careful consideration of our remedial authority and our history of addressing the effects of unfair labor practices, we find that standardizing our make-whole relief to expressly include the direct or foreseeable pecuniary harms suffered by affected employees is necessary to more fully effectuate the make-whole purposes of the Act."). We also find inapposite the Respondent's reliance on cases involving economic strikes because those strikes—unlike the unfair labor practice strike in this case—were not precipitated by unlawful conduct. In an economic strike, a union seeks to apply pressure on an employer that has abided by its legal obligations. Here, the Union was not acting in response to the Respondent's lawful conduct, but to its substantial violations of the Act. After all, if the Respondent had not unlawfully terminated Rossey, there would not have been an unfair labor practice strike, and the Union would not have suffered the economic harm for which it is now seeking reimbursement. The dissent correctly points out that the Union voluntarily decided to make the economic assistance payments to its members participating in the unfair labor practice strike. Of course, the employees would not have needed the payments and the Union would not have had to choose to make those payments in the first place if the Respondent had not unlawfully fired Rossey and Franzen, thereby provoking the strike over those specific unfair labor practices. Having to choose between whether the Respondent or the Union should bear the costs of the Respondent's unlawful conduct, we find it only reasonable for the wrongdoer to be the one to foot the bill. See *Ferrell-Hicks Chevrolet, Inc.*, 160 NLRB 1692, 1695 (1966) ("[N]o equitable consideration outweighs the ordinary remedy which most completely effectuates the policies of the Act by seeking a restoration of the *status quo ante* and placing any resulting financial burdens on the wrongdoer who created the situation.").

Eighth, because unfair labor practice strikers[35] are entitled to special remedial provisions, even if there is no allegation of any denial of reinstatement, we shall order the Respondent to offer the strikers, on their unconditional offer to return to work, immediate and full reinstatement to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements hired after the onset of the strike. The Respondent shall make the strikers whole for any loss of earnings and other benefits resulting from any failure to reinstate them within 5 days of their unconditional offer to return to work, backpay to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.[36] Any such employees for whom employment is not immediately available shall be placed on a preferential hiring list for employment as positions become available and before other persons are hired for the work. Priority for placement on such a list shall be determined by seniority or some other nondiscriminatory test. See *Grondorf, Field, Black & Co.*, 318 NLRB 996, 997 & fn. 3 (1995), enfd. in relevant part 107 F.3d 882 (D.C. Cir. 1997); *Central Management Co.*, 314 NLRB 763, 773 (1994).

However, we decline to grant all of the additional remedies sought by the General Counsel. The General Counsel cross-excepts to the judge's failure to recommend that the Respondent be required to mail Rossey and Franzen a letter of apology. The judge found such a remedy to be superfluous, and we agree that a letter of apology is neither appropriate nor necessary to remedy the Respondent's unfair labor practices. Furthermore, we dismiss the General Counsel's cross-exception to have a Board agent be provided access to the Respondent's facilities to monitor compliance with the Board's Order, as no extended notice period is ordered and there are no unique circumstances that require monitoring the Respondent's compliance.[37] In addition, we find it unnecessary to pass on the General Counsel's cross-exception that the Union be allowed to choose qualified applicants to replace Rossey and Franzen if they are unable to return to work. According to the Respondent's answering brief and as acknowledged by the General Counsel's reply brief, both Rossey and Franzen have returned to work pursuant to the 10(j) injunction, so this issue is essentially moot because such a remedy would serve no practical purpose. We also find it unnecessary to pass on the General Counsel's cross-exception for the Union to be provided with equal access to the Respondent's facilities to respond to any address made by the Respondent regarding union representation. The *Gissel* bargaining order we are issuing already requires the Respondent to recognize and bargain with the Union, thereby negating the need for a rerun election. As a result, the Union has no need for the equal access remedy requested by the General Counsel, which is designed to help ensure a fair election by enabling the Union to respond to assertions the Respondent might make to its employees in a campaign preceding a rerun election after a previous election has been set aside due to the Respondent's unfair labor practices and/or objectionable conduct.

The dissent notes that the employer in *Alwin Manufacturing* did not except to the judge's reimbursement order. While that is true, it is well settled that the Board may address remedial issues sua sponte, and the Board in *Alwin Manufacturing* explicitly affirmed the award and found it "well tailored to fit the nature and extent of the violations committed by the [r]espondent. Thus, we agree, for the reasons set forth in his decision, with the judge's award of . . . unfair labor practice strike costs to the [u]nion." 326 NLRB at 646. We make the same finding here that awarding the unfair labor practice strike reimbursement costs sought by the Union is well tailored to remedy the Respondent's violations.

[35] The judge found that seven employees went on strike on August 20. The Union contends that nine employees were striking as of the time of the hearing. We leave to the compliance the determination of the number and identity of the unfair labor practice strikers. Cf. *Freezer Queen Foods, Inc.*, 249 NLRB 330, 332 fn. 9 (1980) (deferring to the compliance stage "a determination as to the identity and correct number" of employees to whom the remedy and recommended order shall apply).

[36] The Board has found that the 5-day period is a reasonable accommodation between the interests of the employees in returning to work as quickly as possible and the employer's need to effectuate that return in an orderly manner. See *Drug Package Co.,* 228 NLRB 108, 113 (1977), modified on other grounds 570 F.2d 1340 (8th Cir. 1978). Accordingly, if the Respondent here ignores or rejects, or has already rejected, any unconditional offer to return to work, unduly delays its response to such an offer, or attaches unlawful conditions to its offer of reinstatement, the 5-day period serves no useful purpose, and backpay will commence as of the unconditional offer to return to work. *Newport News Shipbuilding,* 236 NLRB 1637, 1638 (1978), enfd. 602 F.2d 73 (4th Cir. 1979).

[37] Member Prouty would grant the General Counsel's request for a visitation clause granting a Board agent access to the Respondent's facilities to monitor the Respondent's compliance with the Board's Order. Through its substantial unfair labor practices, the Respondent has demonstrated its willingness to violate the Act to stymie its employees' unionizing, its general indifference to employees' statutory rights, and its potential motivation to take actions inconsistent with the Board's Order to avoid its bargaining obligations. Providing a Board agent with limited access to the Respondent's facilities would appropriately place the burden on the Board, instead of the Respondent's employees, to monitor the Respondent's compliance with the Board's Order—which is essential to remedying the Respondent's unlawful conduct—while imposing only a minimal burden on the Respondent.

ORDER

The National Labor Relations Board orders that the Respondent, Spike Enterprise, Inc., Oklahoma City, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for supporting the International Union of Operating Engineers, Local 150, AFL–CIO (the Union) or any other labor organization.

(b) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(c) Threatening employees with loss of pay if they select the Union as their bargaining representative.

(d) Threatening employees with termination if they engage in protected concerted activities, including participating in an economic strike.

(e) Threatening employees with stricter enforcement of its work rules if they select the Union as their bargaining representative.

(f) Threatening employees that selecting the Union as their bargaining representative would be futile.

(g) Telling employees that it is working on a petition that would make a union election unnecessary.

(h) In any other 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) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time operators, techs and laborers employed by the Respondent at the following locations: Citgo Petroleum located at 135 & New Avenue in Lemont, Illinois 60439; Exxon-Mobil, Arsenal Rd & I-55, Channahon, Illinois 60410; and Citgo Petroleum 12815 South Homan, Blue Island, Illinois 60406; excluding all salaried managers, temporary employees, other contracted employees, office clerical employees, confidential employees, professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days from the date of this Order, offer Robert Rossey and Cody Franzen full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Rossey and Franzen whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of the unlawful discharges, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Compensate Rossey and Franzen for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 13, 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.

(e) File with the Regional Director for Region 13, 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 Rossey's and Franzen's corresponding W-2 forms reflecting their backpay award.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Rossey and Franzen, 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.

(g) Reimburse the Union for its costs and expenses incurred in connection with the unfair labor practice strike which began on August 20, 2021, including any picketing costs, strike benefits, and other assistance paid by the Union to the Respondent's striking employees during the strike and after the unconditional offer to return to work, until it offers its striking employees full and proper reinstatement. Upon receipt of a verified statement of costs and expenses from the Union, the Respondent promptly shall submit a reimbursement payment, in the amount of those costs and expenses, to the compliance officer for Region 13 of the National Labor Relations Board, who will document receipt and forward the payment to the Union.

(h) Accord all striking employees, from the date of the strike, the rights and privileges of unfair labor practice strikers, including, on their application, offering strikers immediate and full reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements hired after the start of the strike, and make the employees whole, with interest in the manner set forth in the amended remedy section of this Decision for any loss of earnings or other benefits resulting from any failure to reinstate them on unconditional request.

(i) Preserve and, within 14 days of a request or such additional time as the Regional Director for Region 13 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.

(j) Post at its Lemont, Channahon, and Blue Island, Illinois facilities, copies of the attached notice and explanation of rights marked "Appendix A" and "Appendix B."[38] Copies of the notice and the explanation of rights, on forms provided by the Regional Director for Region 13, after being personally signed by owner, president, and CEO Jeff Hill, 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 to ensure that the notices are not altered, defaced, or covered by any other material.

(k) Within 14 days after service by the Region, duplicate and mail, at its own expense, after being personally signed by Hill, copies of the attached notice marked "Appendix A" and the attached explanation of rights marked "Appendix B" to the last known home addresses of all current and former bargaining unit employees employed by the Respondent at its Lemont, Channahon, and Blue Island, Illinois facilities at any time since August 12, 2021. The Respondent shall maintain proofs of mailings as set forth in the Amended Remedy section of this Decision.

(l) Hold meetings during work time at its Lemont, Channahon, and Blue Island, Illinois facilities, scheduled to ensure the widest possible attendance of bargaining unit employees, at which the attached notice to employees marked "Appendix A" and the attached explanation of rights marked "Appendix B" will be read to employees by a high-ranking management official of the Respondent in the presence of a Board Agent, the Respondent's owner, president, and CEO Jeff Hill, the Respondent's supervisors and managers, and, if the Union so desires, a union representative, or, at the Respondent's option, by a Board agent in the presence of Hill, the Respondent's supervisors and managers, and, if the Union so desires, a union representative. A copy of the notice and the explanation of rights will be distributed by a Board agent during these meetings to each bargaining unit employee, supervisor, and manager in attendance before the notice is read.

(m) Within 21 days after service by the Region, file with the Regional Director for Region 13 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 alleged violations of the Act not specifically found.

IT IS FURTHER ORDERED that Case 13–RC–281169 is severed from Cases 14–CA–281652 and 13–CA–282513 and remanded to the Regional Director for Region 13 for action consistent with the Direction below.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 13 shall, within 14 days from the date of this Decision, Order, and Direction, open and count the challenged ballots of Robert Rossey, Cody Franzen, Piotr Jesiolowski, Quinn Johnson, Jeff Lundberg, Robert Weathersby, Chris Woodward, and Jordan Darnell and issue a revised tally. If the revised tally of ballots shows that the Union received a majority of the eligible votes cast, the Regional Director shall issue a certification of representative. This certification of representative shall be in addition to the bargaining order. Alternatively, if the revised tally shows that the Union has not received a majority of the valid ballots cast, the Regional Director shall set aside the election, dismiss the petition, vacate the proceedings in Case 13–RC–281169, and the bargaining order alone shall take effect. See *Concrete Form Walls, Inc.*, 346 NLRB 831, 840 (2006), enfd. 225 Fed. Appx. (D.C. Cir. 2007) (per curiam).

[38] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted, Read, and Mailed by Order of the National Labor Relations Board" shall read "Posted, Read, and Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. April 10, 2024

_____
David M. Prouty, Member

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Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, concurring in part and dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(1) by threatening employees with discharge if they went on economic strike, by informing employee Steve Selby that it would more strictly enforce rules because of the organizing campaign, and by suggesting to Selby that it would be futile for employees to select the Union because the Respondent's contractor would never agree to a Union.[1] I also agree that the Respondent violated Section 8(a)(3) and (1) by discharging employee Robert Rossey.[2]

For the reasons below, however, I do not join my colleagues in finding that the Respondent violated the Act by discharging employee Cody Franzen or by allegedly threatening employees with pay cuts if they voted for the Union. I also disagree with my colleagues regarding the appropriate remedies for the violations found. Rather than crafting a remedy intended to address the misconduct at issue in this case, my colleagues have ordered numerous extraordinary remedies that can be described, at best, as overkill. And this is especially so when one considers that my colleagues are also adopting the judge's bargaining order remedy, which is the Board's most powerful remedial tool. I am concerned that the excessive remedies ordered by my colleagues, which are far beyond what is necessary to remedy the violations found, could be viewed as punitive.

The Respondent did not violate Section 8(a)(3) when it discharged employee Cody Franzen for failing to pass ExxonMobil's mandatory Safety Test

It is difficult to know where to begin in addressing all the problems with the General Counsel's theory of the case, the judge's analysis, and my colleagues' various unsupported rationales for finding the violation here. But two fundamental facts are at the heart of all the confusion.

First, the General Counsel, the judge, and my colleagues all err by failing to adhere to the violation alleged in the complaint in this matter. In their view, the question to be answered is whether the Respondent discriminatorily decided to have a manager administer ExxonMobil's mandatory safety test. The complaint, however, does not allege that the Respondent's decision to have Allen administer the test violated Section 8(a)(3) and (1); the judge did not find that having Allen administer the test was an adverse action in violation of Section 8(a)(3) and (1); and no party filed an objection to the

[1] I agree with my colleagues that the Respondent's statements constituted threats because employees would reasonably believe that the Respondent would terminate them if they engaged in an economic strike. However, I disagree with my colleagues to the extent they rely on the Respondent's failure to provide employees a full explanation of their rights to reinstatement under *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969). *Laidlaw Corp.* requires that strikers who have been replaced by permanent replacements remain entitled to full reinstatement upon the departure of those replacements, but there is no requirement that an employer fully describe for employees their rights under *Laidlaw* any time an economic strike is discussed. The Board has recognized that such a requirement "would place an undue burden on an employer to explicate all the possible consequences of being an economic striker." *Eagle Comtronics, Inc.*, 263 NLRB 515, 516 (1982).

I also agree with my colleagues that the Respondent did not violate Sec. 8(a)(1) when David Allen, the Respondent's project manager, told employee Nikolas Holland to remove a union sticker from his work truck. Unlike my colleagues, however, I would dismiss this allegation on the merits rather than on procedural grounds. I note that, in finding this violation, the judge cited the Board's decision in *Miklin Enterprises*, 361 NLRB 283, 290 (2014), enfd. in rel. part 861 F.3d 812 (8th Cir. 2017), in which the Board found that the Respondent harassed a prounion employee by posting his phone number and encouraging other employees to call and harass the employee for his prounion views. Allen's instruction to Holland was not comparable to the harassment in *Miklin*. No other employees observed the interaction, let alone were encouraged to harass Holland. Further, I disagree with the judge's conclusion that the fact no sticker was found on the truck "strongly suggests" improper motive. Allen's apology suggests that Allen was simply mistaken in what he saw.

[2] In finding this violation, I rely solely on Allen's statement to Selby that he fired Rossey because he showed support for the Union. I agree with my colleagues that, because of Allen's admission, this is not a dual-motive case that requires the application of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Accordingly, I do not rely on my colleagues' disparate-treatment analysis which, as my colleagues recognize, is "unnecessary."

Unlike my colleagues, I would require the Respondent to compensate Rossey for other pecuniary harms only insofar as the losses were directly caused by the unlawful discharge, or indirectly caused by the unlawful action where the causal link between the loss and the unfair labor practice is sufficiently clear, consistent with my partial dissent in *Thryv, Inc.*, 372 NLRB No. 22 (2022).

Further, I acknowledge and apply *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022), as Board precedent, although I expressed disagreement there with the Board's approach and would have adhered to the position the Board adopted in *Danbury Ambulance*, 369 NLRB No. 68 (2020).

judge's failure to find that violation.[3] Instead, the complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by *discharging* Franzen. Accordingly, there are two questions to be answered: Did the General Counsel establish that the Respondent's *decision to discharge Franzen* was motivated by antiunion animus and, if so, did the Respondent meet its burden to establish that it would have *discharged* Franzen even in the absence of antiunion animus. It is clear from the record evidence in this case that, even if the General Counsel had established the required prima facie case—and as discussed below, she did not—the Respondent met its rebuttal burden.

The second fundamental problem with my colleagues' decision today is that, simply put, it is not supported by record evidence. Indeed, my colleagues' theory of the case relies upon a mélange of unsupported speculation, baseless assumptions, common-sense defying interpretations of the record facts, and disregard for the record facts that do not support their view of the case.[4] My colleagues' error is most obvious with regard to the fundamental premise upon which their entire theory rests: that Allen was aware of the manner in which Jesiolowski had been administering the NTST. The record, however, does not contain a single piece of evidence that supports that finding.[5] Although I will address the other befuddling aspects of my colleagues' decision below, this single fact alone establishes that my colleagues' finding of a violation here is clearly erroneous.

FACTS

Given the dangerous nature of the work performed at the site, ExxonMobil requires the Respondent and its employees to adhere to ExxonMobil's safety standards and requirements. These requirements mandate that employees complete safety training before they begin working at the site and pass a New to Site Test (NTST) no later than their 13 day working at the refinery.[6] In order to pass the NTST, ExxonMobil requires employees to score 100 percent on the test.[7] If an employee fails to pass the NTST within the first 30 days of employment, ExxonMobil deactivates the employee's badge and bars the employee from working at the site. Employees are given two attempts to pass the NTST; if an employee fails to pass after two attempts, they cannot retake the test for 6 months.

On July 15, Franzen began work at the site. Although Franzen had successfully completed the training required prior to beginning work at the site, Franzen failed to complete his NTST within the required 30 days.[8] As a result, when Franzen reported for work on August 16, he discovered that his badge had been deactivated.[9] After learning of the deactivation of Franzen's badge, Allen proactively contacted ExxonMobil's contractor safety committee and asked for an extension for Franzen to complete the NTST. ExxonMobil temporarily reactivated his badge for two additional days.[10]

On August 17, Allen approached Franzen and informed him he would be taking the NTST immediately after lunch; Allen later administered the test to Franzen.[11]

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[3] If the General Counsel had alleged this as a violation, I would dismiss the allegation. The General Counsel failed to establish that the decision to have Allen administer the test was an adverse action or any causal connection between antiunion animus and the decision to have Allen administer the test.

My colleagues' confusion regarding the actual violation alleged in the complaint explains why, inexplicably, they state that it is the Respondent's burden to prove "it would have taken the same action, which in this case was to have Allen administer the NTST to Franzen and do so differently than Jesiolowski." The Respondent had no such burden in this case. In the event, that the *Wright Line* analysis shifted to the Respondent here—and I do not believe that it did—the Respondent's burden pertained to the *discharge* decision alone.

[4] One cannot help but question whether, if the facts surrounding this allegation indeed establish a violation of the Act, why such a tortured and contorted analysis is necessary. One might even question whether my colleagues' analysis could be considered "arbitrary and capricious" under the Act.

[5] And my colleagues do not dispute that the General Counsel had the burden to establish such knowledge.

[6] The judge's decision indicates that employees are required to take the NTST "after 30 days" onsite. Of course, if that were correct, Franzen's badge would not have been automatically deactivated after he had worked on site for 30 days.

[7] The fact that ExxonMobil disqualifies any employee who misses a question on this safety test suggests that ExxonMobil expects employees working on the site to demonstrate a full understanding of the safety requirements.

[8] As discussed later, even though the record does not contain *any evidence* regarding Franzen's failure to take the test by the deadline, my colleagues nevertheless suggest that the delay in and of itself supports finding that the General Counsel met her burden to establish animus.

[9] The record does not establish what entity was responsible for deactivating Franzen's badge. The record establishes, however, that Allen was able to obtain a 2-day extension—in other words, temporary reactivation of the badge—by contacting ExxonMobil.

[10] My colleagues note that the judge did not make any specific findings about this 2-day extension, that Franzen testified he told Jesiolowski about the deactivation and ExxonMobil reactivated his badge, and that Franzen's testimony was generally credited over Allen's. My colleagues, however, fail to recognize that Franzen's and Allen's testimony on the badge deactivation are not conflicting and do not need to be specifically credited. Nothing in Franzen's testimony contradicts Allen's testimony that Allen contacted ExxonMobil to obtain an extension for Franzen to take the NTST. Furthermore, regarding Allen's credibility, it is a basic tenet that a witness may be found partially credible and the fact that a witness is discredited on one point does not automatically mean he or she must be entirely discredited. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970).

[11] The judge's decision notes that he credited Franzen's testimony regarding the events of what occurred, "as follows." The judge did not, however, state that his decision to credit Franzen's testimony over Allen's was based on the witnesses' demeanor. In fact, the judge specifically indicated that, in determining credibility, he would be making

The next day, Allen told Franzen that he had gotten three answers wrong. When Franzen asked to see what answers he got wrong, Allen complied, reviewing the correct answers with Franzen shortly before he retook the test. Despite this review, Allen found that Franzen had again failed to answer certain questions correctly—including questions they had discussed immediately prior to Franzen re-taking the test. Rather than failing Franzen at that point, Allen put question marks by answers that were missed and gave Franzen another opportunity to answer those questions before Allen formally graded the test. Despite this substantial assistance from Allen, Franzen failed the test for a second time. At that point, Allen was unsure what would happen next because he was unaware of any employees who had failed to pass the NTST.

Later that evening, after reviewing ExxonMobil's policies, Allen called Franzen and informed him that Franzen could not come on site for 6 months. As the judge found, Franzen, in response, "asked why he was being treated differently from other people who were tested and received helped by [Piotr] Jesiolowski. Allen replied that he had no control over how other people tested with Jesiolowski."[12] After his conversation with Franzen, Allen called the supervisor at the Respondent's Citgo location to see if "he could use an extra hand." However, Allen was told that they did not need help at the Citgo location because work was "slow." Thereafter, the Respondent discharged Franzen.

ANALYSIS

Any common-sense interpretation of the facts in this case establishes that the Respondent discharged Franzen for nondiscriminatory reasons. After Franzen failed—for unknown reasons—to pass the NTST within the time period mandated by ExxonMobil, his badge was deactivated. As a result, he was barred by ExxonMobil from the site. The Respondent, however, did not decide to discharge Franzen. To the contrary, Allen proactively obtained an extension to have his badge reactivated in order to give him the opportunity to pass the NTST and have his badge reinstated by ExxonMobil. After Franzen twice failed to pass the NTST—again, a test required *by* ExxonMobil rather than the Respondent, in order to continue working on the site—the Respondent's hands were tied. ExxonMobil would not allow Franzen to work on site until he had passed the NTST, ExxonMobil would not allow Franzen to retake the test for another 6 months, and the Respondent's effort to find Franzen work at a different site was unsuccessful. The uncontroverted fact that ExxonMobil had barred Franzen from the site clearly constitutes a nondiscriminatory basis for Franzen's discharge.

For the reasons discussed below, the General Counsel failed to establish that antiunion animus played any role in Franzen's discharge. But, given the record facts, I would find that, even if the General Counsel had established a prima facie case that animus was a motivating factor in Franzen's discharge, the Respondent clearly met its burden to establish that it discharged Franzen for legitimate, nondiscriminatory reasons.

I. THE GENERAL COUNSEL FAILED TO ESTABLISH HER PRIMA FACIE CASE

The record evidence does not support a finding that the General Counsel established that antiunion animus was a motivating factor in the decision to discharge Franzen, and each of the rationales proffered in support of that finding by my colleagues is easily dismissed.

A. Timing does not support finding that animus was a motivating factor

Although my colleagues characterize the timing of Franzen's discharge as "suspicious," I think the lawful reason explaining the timing of Franzen's discharge could not be more clear.[13] The record establishes that the timing of Franzen's discharge was a direct result of ExxonMobil's automatic deactivation of Franzen's badge on August 16, which was the 13 day of Franzen's tenure at the site, as well as the 2-day extension that Allen personally obtained for Franzen. Those dates arose from Franzen's dates of employment, not his union activity. Accordingly, it is clear that the timing of the discharge was

some credibility determinations "not based on observations of witnesses' testimonial demeanor" but rather based on "the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." Given that the Board only owes deference to demeanor-based credibility determinations, and given that the judge does not explain whether or not he credited Franzen's testimony of these events based on demeanor, it is not clear which of the judge's credibility determinations—if any—are entitled deference. Nevertheless, because I would not find a violation even under Franzen's version of events, I find it unnecessary to consider whether my credibility determinations might differ from those made by the judge.

[12] I note that, although the majority identifies Jesiolowski as a "frontline supervisor," Jesiolowski was an employee, not a supervisor, under Sec. 2(11) of the Act.

[13] My colleagues also repeatedly refer to the timing as "unexplained," noting that they are talking about the "timing for the change" in the way the NTST had been administered rather than the timing of Franzen's discharge. This position ignores the fact that the General Counsel did not allege that the supposed "change" in the administration of the NTST violated the Act; she alleged that the Respondent's decision to discharge Franzen violated the Act. That is the unfair labor practice before us.

entirely based upon the date of hire, and therefore does not support a finding of animus.[14]

B. Franzen's failure to take the test by August 16 does not establish antiunion animus

My colleagues insinuate that Franzen's failure to take the NTST by the required date must have been the result of the Respondent's antiunion animus. Specifically, my colleagues write:

> [T]he dissent misses the point by asserting that the General Counsel could not rely on the timing of the discharge to infer discrimination to meet her initial burden because the timing of the discharge resulted from the deactivation of Franzen's badge on August 16, instead of union animus, even though union animus has been found to have caused the change in NTST procedure, which then result in the discharge. The August 16 deactivation occurred *because* Franzen had yet to pass the test. Franzen's failure of the test was the result of discriminatory change in the administration of the test and the timing of that change in process led directly to Franzen's discharge.

Similarly, my colleagues state that the Respondent's justification for Allen administering the NTST "does not explain why the Respondent did not have Franzen take the NTST within his first [thirty] days of employment . . . ."

My colleagues err in suggesting that the General Counsel established animus because Franzen did not take the NTST within the 30-day period. They concede, as they must, that there is *no evidence in the record* that would support any particular explanation for Franzen failing to take the test. The majority is wrong to infer malicious intent from a neutral fact. Nor was the Respondent required to establish the reason for Franzen's failure. Not only is it the General Counsel's burden to establish animus but, as my colleagues conveniently ignore, the parties did not litigate that issue because the General Counsel never suggested that any delay in administering the NTST to Franzen prior to August 16 was evidence of animus.

Unfortunately, I cannot stop my colleagues from speculating that every aspect of the events leading to Franzen's discharge was part of a sinister plot on the part of the Respondent,[15] but I can voice my concern that it is not appropriate for the Board to decide cases based on speculation that is not supported by a shred of evidence.[16]

C. The Respondent's decision to have Allen administer the NTST does not establish antiunion animus

As mentioned previously, my colleagues' entire theory of the case turns on one fundamental premise: that Allen chose to administer the test himself, rather than have Jesiolowski administer the test, because he knew the extent to which Jesiolowski had been allowing employees to cheat on the test and he did not want Franzen to have Jesiolowski's assistance in passing the test. The problem, however, is that there is no evidence in the record to establish that Allen or any other manager at the Respondent had any knowledge whatsoever of the manner in which Jesiolowski had been administering the NTST

[14] My colleagues' refusal to "assume" the timing is coincidental flies in the face of logic. Franzen began working at the site on July 15 and was required to take the NTST within 30 days. Completely independent of Franzen's hiring, the Union filed its representation petition within the 30-day period for Franzen to take the NTST. Based on his date of hire, Franzen was required to take the test by August 15, regardless of whether the Union had filed a petition before that date. There is no need to assume the timing was coincidental—the record establishes that it was. And, as the Board has recognized, "mere coincidence is not sufficient evidence of union animus." *Neptco, Inc.*, 346 NLRB 18, 20 (2005), quoting *Chicago Tribune Co. v. NLRB*, 962 F.2d 712, 717-718 (7th Cir. 1992); see also *Volvo Group North America*, 372 NLRB No. 27, slip op. at 3 (2022) (finding timing was inconclusive evidence of animus when the employee's protected conduct occurred just 1 day before the employee's misconduct).

In addition, the majority's reliance on *Healthy Minds, Inc.*, 371 NLRB No. 6 (2021), to find that timing supports the General Counsel's prima facie case is unavailing. In that case, the discharge occurred on the same day as the protected conduct and, further, the protected conduct in that case (discussing wages and discrimination with another employee) is what precipitated the meeting leading to the employee's discharge. Here, an intervening event not controlled by the Respondent (the deadline for Franzen to complete the NTST) set in motion the events leading to Franzen's discharge.

Finally, my colleagues err in stating that the Respondent had a duty to rebut the "suspect timing" in this case. Under *Wright Line*, there is no requirement that the Respondent rebut the facts underlying General Counsel's *prima facie* case. Rather, the Respondent need only show that it would have taken the same action in the absence of the employees' concerted protected activity. See, e.g., *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984) (clarifying that an employer's burden is to "persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct").

[15] Similarly, my colleagues implicitly suggest that there could be a nefarious purpose behind "what made Jesiolowski unavailable for the two days for which the expiration date for Franzen's badge was extended." Again, there is nothing whatsoever in the record about this, and it is completely inappropriate for my colleagues to base their finding of a violation of the Act on pure speculation. Indeed, the extent to which my colleagues resort to their imagination in seeking to establish that the Respondent acted with antiunion animus here only emphasizes the fact that the General Counsel failed to proffer sufficient actual record evidence to establish that animus had anything whatsoever to do with Frazen's discharge.

[16] My colleagues also appear to take the position that it was the Respondent's burden to explain why Franzen failed to take the NTST in a timely manner. This is incorrect. The General Counsel has the burden to establish animus as part of her prima facie case.

test.[17] Absent record evidence supporting a finding that Allen was aware of this, my colleagues' entire theory of the case falls apart.

My colleagues half-heartedly attempt to take issue with this critical point, taking the position that there is in fact record evidence to support a finding that Allen had this requisite knowledge. However, the evidence upon which they rely does not establish that Allen knew anything about Jesiolowski's manner of administering the NTST. Franzen testified as follows:

> I had asked [Allen] why I got treated different than other people who got tested. Like why I got treated different from the way they all got tested with [Jesiolowski], the [supervisor] that helped take the other test with other people. And [Allen] had said that he had no control over how other people tested with [Jesiolowski].

Contrary to the suggestion of my colleagues, this testimony in no way establishes that Allen had any knowledge of how Jesiolowski administered the NTST. It only establishes that Allen did not control how others administered the NTST. My colleagues' finding to the contrary rests upon their pure speculation that, had Allen not known about Jesiolowski's practices, he would have expressed surprise. Yet again, this "finding" is not supported by record evidence but, rather, is an unsupported assumption on the part of my colleagues.[18]

In summary, my colleagues' position that the General Counsel established that animus was a motivating factor in Franzen's discharge is based on three fundamental factors: timing, the fact that Franzen failed to pass the test within the 30-day period, and the fact that Allen administered the NTST because he wanted to deprive Franzen of Jesiolowski's assistance in taking the test.[19] However, the timing of Franzen's discharge is unquestionably tied to the deactivation of his badge on August 16, not antiunion animus. There is no record evidence supporting a finding that animus played any role in Franzen failing to take the NTST before the end of the 30-day period. Finally, there is no evidence that Allen had any knowledge whatsoever that Jesiolowski had been providing any assistance—let alone, a great deal of assistance—to test takers before Allen administered the test to Franzen. For all these reasons, my colleagues' finding that the General Counsel established her prima facie is not supported by the record. Because the General Counsel failed to establish her prima facie case, I would dismiss the complaint allegation.

II. ADDITIONAL ERRORS UNDERMINE MY COLLEAGUES' DECISION TO FIND THE VIOLATION

Even though it is clear that the General Counsel failed to establish her prima facie case, I feel a responsibility to address numerous other positions set forth in my colleagues' decision. To begin, the majority on occasion mischaracterizes the record, seemingly in an attempt to bolster their position. For example, they state that by Jesiolowski administering the test, "the Respondent had always made sure that employees passed the NTST." In fact, Jesiolowski did not testify that it was his intent to ensure that all employees passed the NTST. To the contrary, Jesiolowski testified that he did not, in fact, provide any answers to employees.[20] Similarly, my colleagues assert that, as a result of Allen's decision to administer the test, "Franzen consequently failed the NTST." This, of course, is not established by the record.

[17] Indeed, there is no record evidence to establish that Allen, who was the Project Manager, had any knowledge that Jesiolowski, a first-line supervisor and statutory employee, had been administering the NTST to new employees.

[18] For that matter, it is clear that my colleagues' speculation isn't the only assumption one could draw from Allen's statement. I believe it is just as likely—if not more so—that Allen's reaction had nothing to do with being aware of how Jesiolowski had been administering the tests and everything to do with how one would typically react when someone tries to blame their own failure on the fact that others would have treated them more leniently. For example, imagine how referees or teachers typically respond when they receive complaints that other referees or teachers are more lenient. In fact, you can imagine them using the exact language used by Allen: "I have no control over how other teachers grade their exams," or "I have no control over how other referees issue yellow cards." All this, of course, is beyond the point because speculation about record evidence is not the same thing as record evidence.

My colleagues' erroneously state that, in the above paragraph, I "chalk[] up Allen's response to Franzen's protest as being comparable to a complaint to a teacher or a referee . . . ." Of course, I am doing no such thing. I am merely pointing out that my colleagues' entire case rests on their subjective interpretation of Allen's words rather than the words themselves, which could easily be interpreted differently.

[19] Other circumstantial evidence cited by my colleagues is hardly worth noting. The majority discerns animus from the fact that Allen had never administered the NTST before. But to assume animus based on that fact is to ignore the record facts establishing that the deactivation of Franzen's badge left Allen as well as others scrambling to figure out how to address the novel situation. To assume that the fact that Allen administered the test is evidence of animus, as opposed to a reflection of the unique facts presented, is not a reasonable reading of the record. Similarly, my colleagues find animus in the fact that Franzen was the first employee to fail the NTST at the Channahon site. However, as explained repeatedly above, there is no evidence the Respondent *caused* Franzen to fail the NTST. Indeed, Allen offered Franzen assistance on the test, and there is no suggestion that the assistance he provided was inaccurate.

[20] Given that the judge expressly credited Jesiolowski's testimony, based on his *demeanor*, it is not clear from the judge's decision why the judge found that Jesiolowski had provided the employees with answers. In fact, the judge seemed to credit the testimony of employee Nikolas Holland on cross-examination *after* he had clearly lied about the extent of Jesiolowski's assistance on direct examination. As mentioned earlier, however, I do not believe it is necessary to revisit the judge's credibility determinations because it would not affect my findings.

As mentioned above, Allen did not *cause* Franzen to fail the test, nor did Jesiolowski testify that, based on Franzen's performance, he would have passed Franzen. My colleagues' assertion is pure speculation, not record evidence. Finally, my colleagues find animus asserting that, once Franzen told Allen that Jesiolowski had provided assistance to other test-takers, "Allen could have treated Franzen the same as his coworkers when they had the NTST administered to them." However, Franzen only raised this objection after he had already twice taken and failed the NTST. The record establishes that once an employee failed the NTST twice, they were not permitted to retake the test for another 6 months.

My colleagues' theory of the case also entirely disregards the fact that the way in which Allen handled the deactivation of Franzen's badge, the administration of the NTST, and Franzen's ultimate discharge all weigh *against* the majority's finding that Allen's decision to administer the test himself was evidence of antiunion animus. After all, under my colleagues' theory, the only logical reason why Allen would have intentionally administered the test himself would be that he wanted Franzen to fail the test.[21] The record evidence, however, does not reflect that the Respondent's actions were consistent with such a plan. When the Respondent learned that ExxonMobil had deactivated Franzen's badge, certainly that would have provided the Respondent with a perfect opportunity to discharge him. Instead, the Respondent sought and obtained a special extension of 2 days in order to allow Franzen to pass the NTST beyond the required 30-day period. Thereafter, Allen could have easily administered the test to Franzen without providing any assistance whatsoever, which surely would have furthered its alleged plan to ensure that Franzen failed the test. As recounted above, however, that is not what happened. After Franzen failed the test on his first attempt, Allen showed him what questions he had gotten wrong and provided him with the correct answers.[22] Shortly after providing Franzen with these correct answers, Allen administered the test again. After Franzen had completed the test, and Franzen continued to have incorrect answers, Allen did not simply fail Franzen. Rather, Allen marked specific questions with question marks and gave Franzen the opportunity to change his answers.[23] Despite this assistance, certainly beyond what was required and certainly inconsistent with the alleged goal of having Franzen fail the test, Franzen failed the test for the second time. At that point, pursuant to its policies, Franzen was barred from employment at the site by ExxonMobil for a minimum of 6 months.

Again, if the goal had been to get rid of Franzen in retaliation for his union activity, the Respondent could have discharged him at this point. Instead, Allen contacted Citgo Project Manager Eric Wollenzien to see if Franzen could work at the Citgo site, where, presumably, he was not barred by ExxonMobil. Wollenzien indicated that he did not have work for Franzen. Only after exhausting that possibility was Franzen discharged.[24]

Finally, and this is a minor point, my colleagues take the position that the Respondent had Allen administer the test because the Respondent's "aim—as demonstrated by its other unlawful conduct—was to communicate to its employees the negative repercussions of their union activity on their working conditions, included that the assistance they used to rely on would no longer be available." To begin, of course, the Board does not automatically infer bad intent in one action based on bad intent in another action; if that were the case, you could never have a case where the Board found one 8(a)(3) discriminatory discharge and dismissed another. Next, my colleagues' position assumes that the other employees would be aware of the fact that Allen, rather than Jesiolowki, administered the test. There is no evidence, however, that any other employees were aware of this fact before the General Counsel based her argument in support of the 8(a)(3) discharge violation on this alleged "change." Finally, if it were in fact the Respondent's "aim" to send a threatening message to its employees about their terms and conditions of employment, it certainly seems odd to send that message through the administration of the NTST, which presumably all employ-

[21] I do not understand my colleagues to be taking the position that Allen administered the test himself simply because he wanted to make it harder for Allen to pass. That would make no sense whatsoever.

[22] Curiously, the judge does not mention that Allen provided these correct answers at all, let alone that they were provided mere minutes before Franzen re-took the test.

[23] My colleagues argue that the Respondent's aim in having Allen administer the NTST "was to communicate to its employees the negative repercussions" of union activity and to remove assistance they used to rely on. If this was the Respondent's aim, they surely failed, as the evidence shows Allen provided significant and substantial assistance to Franzen during and after the test.

[24] I recognize that employers can transfer employees to different work sites for discriminatory purposes. Here, however, given all the other evidence suggesting that the Respondent was actually attempting to keep Allen employed at the site following his failure to take, and then pass, the NTST, this last effort to keep him employed suggests a lack of animus toward Franzen.

My colleagues assert that the Respondent did not intend, in good faith, to seek employment for Franzen off-site at Citgo because "the Respondent . . . hired two job applicants to fill open positions there later that same month." Record evidence, not discredited by the judge, establishes that Allen contacted the Citgo site to see if Franzen could work at that site, and was informed by Wollenzien that no work was available at that time. My colleagues are free to speculate whether Wollenzien's assessment was correct, but they are not free to satisfy the General Counsel's evidentiary burden through such speculation.

ees onsite had already passed, and there is no evidence that they would ever have to take again.[25]

The record evidence clearly establishes that the General Counsel failed to meet her burden of proof under *Wright Line*. The record evidence also clearly establishes that, even if she had met that burden, she failed to rebut the Respondent's evidence establishing that Franzen's discharge was based on ExxonMobil's deactivation of his badge, and subsequent barring of his employment on site for a minimum of 6 months, as a result of his failure to pass the NTST during the extension that the Respondent had obtained for him. Accordingly, I would dismiss this complaint allegation.[26]

The Respondent did not threaten employees with pay cuts if the employees voted for the Union.

On August 16, Allen called a meeting of the Respondent's employees at the ExxonMobil site and showed them a PowerPoint presentation he had created to explain why the Respondent opposed union representation. When employees had questions about individual slides during the presentation, Allen answered them as they arose. The meeting lasted about 45 minutes.

The General Counsel concedes that nothing on the PowerPoint was unlawful. Nonetheless, based on the credited testimony of two employee witnesses,[27] my colleagues find that, during the course of the presentation, Allen made statements that went beyond the language on the slides. Specifically, they find that Allen unlawfully threatened employees with a pay cut if they went union.

In my view, however, any such statements made by Allen during the meeting must be considered in the context of the meeting. Allen's presentation was clearly meant to demonstrate to employees that, in light of financial constraints imposed by its contract with ExxonMobil, the Respondent would not be able to accommodate additional labor costs.[28] To that end, Allen presented the terms of the Respondent's existing contract with ExxonMobil, setting forth the limits of the costs that the Respondent could bill to ExxonMobil, as well as the union benefits contained in a comparator contract between the Union and an unidentified employer. Given that context, I believe that employees would reasonably understand any statements made by Allen about pay were explaining the realities of the Respondent's financial situation, in light of its contract with ExxonMobil, rather than a threat to take retaliatory action if the employees voted to unionize. Cf. *High Point Construction Group*, 342 NLRB 406, 406–407 (2004) (finding no threat to cut wages when the employer told employees they would receive a $2 an hour pay cut if the employer signed the union's proffered contract), enfd. sub nom. *Mid-Atlantic Reg'l Council of Carpenters v. NLRB*, 135 F. App'x 598 (4th Cir. 2005).[29]

The majority overstates the egregiousness of the Respondent's violations in order to justify a panoply of unnecessary extraordinary remedies.

In considering what remedies to order, my colleagues' first decision is to reject the narrow cease-and-desist deemed appropriate and ordered by the judge and, instead, order a broad cease-and-desist order. Then, as predicted in my dissent in *Noah's Ark*, my colleagues use this broad order as justification for issuing numerous extraordinary remedies. See *Noah's Ark Processors, LLC d/b/a WR Reserve*, 372 NLRB No. 80 (2023). As explained above in this dissent, I am not joining my colleagues in all the violations they are finding. But even assuming that I were, I would not agree that the broad cease-and-desist order and the other extraordinary reme-

[25] Of course, if there were other new employees on site, it is conceivable that they would have an interest in the manner in which the NTST would be administered should they fail to take the test within the allotted 30-day period. But, if anything, it seems as though the "message" being sent by the Respondent was that employees should be sure to take the test during the required time period to avoid having their badge deactivated and having to take the test on an emergency basis.

[26] My colleagues rephrase the Respondent's burden as requiring it to prove "it would have taken the same action, which in this case was to have Allen administer the NTST to Franzen and do so differently than Jesiolowski." However, the complaint does not allege that the Respondent violated the Act by changing its administration of the NTST; the complaint alleges the Respondent violated the Act by discharging Franzen. Thus, the Respondent's burden is to prove it would have discharged Franzen (taken the same action) even in the absence of protected activity. The majority's phrasing inherently assumes that Allen's administration of the NTST was a negative employment action akin to discipline or discharge. As I have explained above, Allen's administration was both necessary because of the exigent circumstances and also not a substantial change in working conditions because Allen also offered significant help to Franzen to pass the NTST. The majority's profound disagreement with my analysis reflects their own profound confusion at the issue before the Board.

[27] Three employees, Franzen, Holland, and Schell, testified about statements made at the meeting that are alleged to be threats of a reduction of wages. Their accounts were not identical, but the judge found they were the same in substance. The judge specifically credited Franzen and Schell's testimony on this point and found that Holland's testimony indirectly corroborated their testimony.

[28] My colleagues characterize Allen's comments as "unfounded." However, Allen's statements were informed by the terms of the Respondent's contract with ExxonMobil and his personal knowledge of labor costs under that contract.

[29] I note that the case cited by my colleagues in support of finding the violation is clearly distinguishable from the instant case. *Southern Pride Catfish*, 331 NLRB 618 (2000) (finding unlawful threat where respondent's owner "made express threats that he would reduce all employees' compensation to the minimum wage level if the Union came in" and "threatened to move the plant elsewhere"), enfd. 265 F.3d 1064 (11th Cir. 2001).

dies ordered by colleagues are necessary and appropriate for the Respondent's nonextraordinary unlawful actions.

A broad cease-and-desist order is warranted when a respondent is shown to "have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357, 1357 (1979). The majority finds that the Respondent engaged in such "egregious or widespread" misconduct. In so finding, the majority points to a short time span where the Respondent's conduct was directed at "most, if not all" of the Respondent's employees.

The record establishes, however, that the Respondent has not engaged in the sort of "egregious or widespread" misconduct that the Board has long viewed as demonstrating "a general disregard for the employees' fundamental statutory rights." Under the majority's unfair labor practice findings, the Respondent discharged two employees and made a few unlawful statements at a captive audience meeting. This conduct is hardly the sort of "unmistakable campaign to undermine the Section 7 rights of unit employees" that the Board has found sufficient to warrant a broad order. Cf. *Santa Barbara News Press*, 359 NLRB 1110, 1112 (2013), incorporated by reference 362 NLRB 252 (2015). Indeed, the Board has substituted a narrow cease-and-desist order in similar cases. See, e.g., *Dawn Trucking Inc.*, 365 NLRB No. 121 (2017) (substituting a narrow order in a case where the employer discharged employees for electing the union, conditioned reinstatement offers on rejecting the union, and bypassed the union to deal directly with employees).

Nevertheless, the majority orders a broad cease-and-desist provision, thereby opening the door to the extraordinary remedies that the Board concerningly advised the General Counsel pursue in dicta in *Noah's Ark Processors, LLC d/b/a WR Reserve*, 372 NLRB No. 80 (2023).[30] For the reasons explained below, I believe these additional remedies are also unwarranted.

The Notice-Signing Remedy. My colleagues order the Respondent's owner, president, and CEO, Jeff Hill, to sign the notice. By requiring Hill's signature on the notice, the majority compels Hill to authorize the language in the notice. As I observed in my dissent in *Noah's Ark Processors*, this remedy raises a concerning First Amendment issue. See id., slip op. at 17. Accordingly, I dissent to my colleagues' inclusion of this remedy.

The Notice-Mailing Remedy. My colleagues order the Respondent to mail the remedial notice to its employees. Here as well, I dissent for the reasons set forth in my dissent in *Noah's Ark*, 372 NLRB No. 80, slip op. at 18. Notice posting is the standard remedy for advising employees of their Section 7 rights and of a respondent's unlawful conduct. In ordering this remedy, my colleagues have once again chosen to provide a remedy based on unsubstantiated concerns. As far as the record shows, the Respondent remains in business and employees will have access to read the posted notice at the Respondent's facilities. There is no reason to believe employees are fearful of reading a posted notice. And as always, there is the chance that former employees may not see the notice, but this is a reasonable outcome, as those former employees are no longer at risk of being interfered with, coerced, or restrained by the Respondent in their Section 7 rights. My colleagues do not proffer any valid reasons for including this notice-mailing remedy.

The Notice-Reading Remedy. Based on the violations committed by the Respondent and their timing, I join my colleagues in ordering that the notice be read to employees by a high-ranking management official or by a Board agent. However, my colleagues would take it one step further by requiring the Respondent's owner, president, and CEO; its supervisors and managers; and its labor relations consultant to attend the notice reading. My colleagues argues that this is necessary to ensure that the Respondent's management is aware of what they cannot do and for employees to see them at the meeting where they will be publicly scolded. I disagree. The notice-reading remedy is to inform employees of their rights, not to rebuke and criticize individual members of management. The majority's insistence that these individuals be present for the notice-reading suggests a punitive motivation.[31]

I also would not order the Respondent to distribute copies of the notice to employees at the meeting. The majority presumes that distribution of the notice will facilitate comprehension without explaining why the notice posting and reading will not suffice. Accordingly, I disagree with my colleagues ordering of this remedy for the same reasons expressed in my dissent in *Noah's Ark*. Id., slip op. at 16–17.

The Explanation-of-Rights Remedies. I also dissent from the majority's decision to order the Respondent to

[30] In *Noah's Ark*, I explained why the fact that my colleagues deemed it appropriate to provide litigation advice to party—let alone prosecutorial advice, where the Act intends the Board to act as a neutral decision-maker—with regard to future cases to be brought before the Board was troubling, at best. Id., slip op. at 14–16.

[31] My colleagues observe that the Respondent did not except to the judge's imposition of this remedy. As my colleagues well know, however, the Board's discretionary authority under Sec. 10(c) is broad, and the Board may exercise that authority even in the absence of relevant exceptions. *Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996).

post, read, and mail an "explanation of rights." The Respondent has no history of unfair labor practices, the unlawful conduct in this case was neither widespread nor egregious, and there is no reason to believe that the remedial notice is insufficient to inform employees of their rights. In fact, the case for an explanation of rights here is even less persuasive than in *Noah's Ark*, where the respondent was a recidivist and had been found in contempt of court for failing to abide by a Section10(j) injunction. Id., slip op. at 1. Accordingly, there is no valid basis to require even the posting of an explanation of rights in this case, let alone a reading and mailing of that document as well. See id., slip op. at 18 (Member Kaplan, dissenting).

Reimbursement for Economic Assistance. The majority also takes the nearly unprecedented step of awarding reimbursement to the Union for the economic assistance it voluntarily provided to employees who participated in the unfair labor practice strike. In awarding this extraordinary remedy, my colleagues rely on *Alwin Manufacturing Co.*, 326 NLRB 646 (1998), enfd. 192 F.3d 133 (D.C. Cir. 1999).[32] In the 25 years since *Alwin* issued, the Board has never cited to that case as standing for the principle that a respondent can be required to reimburse such economic costs to a union, let alone applied it in such a manner.[33]

Moreover, the misconduct at issue in *Alwin* cannot reasonably be compared to the Respondent's misconduct here. Both the majority and dissent in *Alwin* variously characterized the respondent's misconduct as "flagrant," "unusually aggravated," and "egregious," all of which are apt descriptions of the respondent's unlawful conduct in that case. The Respondent in *Alwin* violated Section 8(a)(1) by taking action to ascertain whether its employees had resigned from the Union and by telling employees that it did not want to recall any more unfair labor practice strikers "than it had to." The Respondent violated Section 8(a)(5), (3), and (1) by refusing to reinstate unfair labor practice strikers, by not reinstating them to their former positions although those jobs existed; by subjecting them to the employment terms of the respondent's unlawfully implemented final contract offer; and by variously disciplining them in enforcement of Respondent's unlawfully implemented production standards. The Respondent also violated Section 8(a)(5) by unilaterally implementing its final contract proposal when no valid impasse had been reached in negotiations because the Respondent had not remedied prior unlawful unilateral changes.

In further justifying the remedies, the Board in *Alwin* observed that, in enforcing the Board order in a prior case involving the same Respondent, "the Seventh Circuit stated that, considering Alwin's record, the case was one where there was a reasonable expectation '*that the wrong will be repeated*.' . . . . [and] characterized the [r]espondent's attitude as '*obstreperous*' and its appeal as '*frivolous*.'" Id. at 647 (internal citations omitted) (emphases added). To state the obvious, the unlawful conduct at issue in *Arwin* is as comparable to the misconduct found by colleagues in this case as a great white shark is comparable to a minnow. By finding *Alwin* applicable here, my colleagues strongly suggest that this most extraordinary of remedies, only ordered once before, will heretofore constitute a routine remedy for any expenses incurred as a result of an unfair labor practice strike.

Finally, I reject my colleagues' finding that the reimbursement was a "direct and a foreseeable pecuniary harm that the Union suffered as a result of the Respondent's unlawful conduct." "After all," my colleagues contend, "if the Respondent had not unlawfully terminated Rossey, there would not have been an unfair labor practice strike, and the Union would not have suffered the economic harm for which it is now seeking reimbursement." Critically, however, my colleagues leave out of their tidy chain of causation the fact that the Union *voluntarily* decided to make such payments to its members participating in the strike. Nothing compelled the Union to do so. The Union's discretionary choice to make these payments broke any "direct" connection between the Respondent's unfair labor practices and the economic costs it incurred.[34] Nor could the Respondent have reasonably "foreseen" that the Union would voluntarily incur such costs.[35]

III. THE RESPONDENT'S CONDUCT DOES NOT WARRANT THE ISSUANCE OF A *GISSEL* BARGAINING ORDER.

Despite ordering a litany of new remedies to address the Respondent's unlawful conduct, the majority also

[32] In *Alwin*, the respondent did not except to the judge's reimbursement order. 326 NLRB at 646. In enforcing the Board's order, the D.C. Circuit expressly relied on that fact in concluding that it lacked jurisdiction under Sec. 10(e) to consider the respondent's objections to the Board's remedies. 192 F.3d at 143–144.

[33] Although for the past 25 years, given that *Alwin* had fallen into obscurity, there had not been any reason to revisit that case, I would be open to reconsidering it in a future appropriate case.

[34] I note that the Union presumably made these payments to further its own interests, such as by encouraging employees not to cross the picket line to return to work.

[35] I agree with my colleagues that the additional remedies sought by the General Counsel—namely, training the Respondent's employees and managers on the rights afforded by the Act, requiring the Respondent to issue a letter of apology, Board agent access, Union access, allowing the Union to choose qualified applicants should Rossey and Franzen be unable to return to work—are unnecessary here.

affirms the judge's finding that the Respondent's unfair labor practices warrant issuance of a remedial bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). "In determining the propriety of a remedial bargaining order, the Board examines the seriousness of the violations and the pervasive nature of the conduct, considering such factors as the number of employees directly affected by the violations, the size of the unit, the extent of dissemination among employees, and the identity and position of the individuals committing the unfair labor practices." *Garvey Marine, Inc.*, 328 NLRB 991, 993 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001). The Board has long held that because a *Gissel* bargaining order is an extraordinary remedy, the Board prefers to provide traditional remedies for unfair labor practices and to hold an election so that employees can decide for themselves whether they want to be represented by a union. *Aqua Cool*, 332 NLRB 95, 97 (2000). Accordingly, in determining whether a bargaining order is appropriate, a consideration of the effect of the order on employee choice is critical.

In this case, I would find that the Respondent's unlawful conduct can be adequately redressed by the traditional remedies and that, therefore, the extraordinary remedy of a bargaining order, which eliminates employees' ability to determine for themselves whether to be represented, is not necessary. My colleagues and I find that on August 12, the Respondent discharged Robert Rossey. On August 16, Allen unlawfully told a group of employees that if they walked off the job because of Rossey's firing, and if that walkout was not an unfair labor practice strike, he would not have to take them back. On August 17, Allen held a meeting with one employee, Selby, and made several statements that violated Section 8(a)(1). My colleagues also find that the Respondent additionally violated the Act by discharging Franzen on August 18 after he failed the NTST for the second time and, in the process of explaining the financial realities of the Respondent's contract with ExxonMobil at the August 16 meeting, threatened employees that they would receive a pay cut if they voted for the Union.

First, although the majority categorizes the Respondent's conduct as "extensive," the majority of unfair labor practices found consisted of two discharges and several statements made by Allen to an employee at a one-on-one meeting. Furthermore, the illegal activity subsided well in advance of the election. See *United Supermarkets, Inc.*, 261 NLRB 1291, 1292–1293 (1982) (bargaining order not warranted when the unlawful conduct occurred more than 2 months before the election).

Second, I agree that the discharge of Rossey, an open union supporter, is a "hallmark" violation. However, the Board must still examine the violations and nature of the conduct in each case to determine whether a bargaining order is warranted; a hallmark violation does not automatically result in a bargaining order. See, e.g., *Pyramid Management Group, Inc*., 318 NLRB 607, 609 (1995), enfd. mem. 101 F.3d 681 (2d Cir. 1996) (finding the unlawful discharge of two union supporters, in the absence of other hallmark violations, insufficient to support bargaining order in a 69-employee unit); *Phillips Industries*, 295 NLRB 717, 718 (1989) (finding the unlawful discharge of two primary in-house union supporters, in the absence of other hallmark violations, insufficient to warrant a bargaining order in a 90-employee unit). Based on this precedent, the discharge of two union supporters in a unit of 23 employees is not sufficient to automatically warrant a bargaining order on its own; we must look at the other violations as well.[36]

Turning to those other violations, I disagree with my colleagues that the violations here were consistent with the type of serious or pervasive violations that the Board has found warrant a bargaining order. In particular, the General Counsel has not shown that the Respondent's unlawful conduct has created an atmosphere in which a free and fair election cannot be held. Compare *Desert Aggregates*, 340 NLRB 289, 293–294 (2003) (finding unlawful solicitations, promises to remedy employee grievances, and laying off two leading union supporters was not enough to warrant a bargaining order, even in a small unit of 11 employees), with *Evergreen America Corp.*, 348 NLRB 178, 180–181 (2006) (finding a bargaining order necessary because of numerous, serious, and extensive violations, including three sets of hallmark violations, a "torrent" of 8(a)(1) violations occurring over 3 months, and additional 8(a)(3) violations, where each of the violations directly affected all or a significant portion of the bargaining unit). Finally, it is notable that, in response to the Respondent's unlawful discharge of Rossey, several employees engaged in an unfair labor practice strike. This is evidence, rather than undermining employee support for the Union, the conduct of the Respondent bolstered the Union's strength. See *PBA Inc.*, 270 NRLB 998, 999–1000 (1984) (finding that employee participation in a strike after the employer threatened employees with plant closure "weakens any contention that the [employer's] unlawful conduct had a reasonable tendency to undermine the Union's strength").

As a result, I would find that because the discharges and threats did not impact a significant portion of the

[36] Although my colleagues misstate my reasons for citing to these cases, it seems we are all in agreement—the presence of a hallmark violation does not automatically warrant the issuance of a bargaining order.

bargaining unit, the Respondent's unlawful conduct, although committed by a high-ranking official, can be adequately redressed by the Board's traditional remedies. See *Desert Toyota*, 346 NLRB 118, 121–122 (2005). Although, in my view, the circumstances here do not warrant a *Gissel* bargaining order,[37] I would find that the unfair labor practices constituted objectionable conduct during the critical period such that a rerun election is required.

For all of the foregoing reasons, I respectfully dissent in part and concur in part.

Dated, Washington, D.C. April 10, 2024

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for supporting the International Union of Operating Engineers, Local 150, AFL–CIO (the Union) or any other labor organization.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT threaten you with loss of pay if you select the Union as your bargaining representative.

WE WILL NOT threaten you with termination if you engage in protected concerted activities, including participating in an economic strike.

WE WILL NOT threaten you with stricter enforcement of our work rules if you select the Union as your bargaining representative.

WE WILL NOT threaten you that selecting the Union as your bargaining representative would be futile.

WE WILL NOT tell you that we are working on a petition that would make a union election unnecessary.

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

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement:

> All full-time and regular part-time operators, techs and laborers employed by us at the following locations: Citgo Petroleum located at 135 & New Avenue in Lemont, Illinois 60439; Exxon-Mobil, Arsenal Rd & I-55, Channahon, Illinois 60410; and Citgo Petroleum 12815 South Homan, Blue Island, Illinois 60406; excluding all salaried managers, temporary employees, other contracted employees, office clerical employees, confidential employees, professional employees, guards and supervisors as defined in the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Robert Rossey and Cody Franzen full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Rossey and Franzen 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 any other direct or foreseeable pecuniary harms suffered as a result of the

[37] My colleagues assert that they did not "consider whether a bargaining order was warranted" under *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023). The very existence of my colleagues' footnote, however, indicates that they *did* consider the remedy and decided not to order it. Indeed, if they had not considered the remedy, there would be no reason to raise *Cemex* at all in this case; there is no 8(a)(5) allegation or argument in support thereof, and no party has requested that the Board apply *Cemex* to this case. Despite their assertion to the contrary, it is clear that my colleagues *sua sponte* considered whether to order a *Cemex* bargaining order remedy here, as they were entitled to do consistent with the longstanding principle that "the Board has broad discretion under Section 10(c) of the Act to fashion appropriate remedies and may exercise its discretion to do so even in the absence of exceptions." *Mondolez Global LLC*, 369 NLRB No. 46, slip op. at 5 (2020) (citing *Indian Hills Care Center*, 321 NLRB 144, 144 fn.3 (1996)).

For the reasons outlined in my dissent in *Cemex*, I continue to believe that case should be overturned because it is inconsistent with the language and policies underlying the Act.

unlawful discharges, including reasonable search-for work and interim employment expenses, plus interest.

WE WILL compensate Rossey and Franzen for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, a copy of Rossey's and Franzen's corresponding W-2 forms reflecting their backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Rossey and Franzen, 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.

WE WILL reimburse the Union for its costs and expenses incurred in connection with the unfair labor practice strike which began on August 20, 2021, including any picketing costs, strike benefits, and other assistance paid by the Union to our striking employees during the strike and after the unconditional offer to return to work, until we offer our striking employees full and proper reinstatement.

WE WILL, from the date of the strike, reinstate on request all striking employees to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any replacements hired after the start of the strike, and make the employees whole, with interest, for any loss of earnings or other benefits resulting from any failure to reinstate them on unconditional request. WE WILL maintain proofs of mailing as required by the Board.

WE WILL post this notice and an Explanation of Rights at our Lemont, Channahon, and Blue Island, Illinois facilities for 60 consecutive days. In addition, WE WILL post this notice and the Explanation of Rights on our intranet and any other electronic message area, including email, where we generally communicate with you.

WE WILL, within 14 days from the date of the Board's order, mail a copy of this notice and the Explanation of Rights to the last known home addresses of all current and former employees employed by us at any time since August 12, 2021.

WE WILL hold meetings during working time and have this notice and the Board's Explanation of Rights read to you and your fellow workers by a management official in the presence of a Board Agent, owner, president, and CEO Jeff Hill, our supervisors and managers, and, if the Union so desires, a union representative, or, at our option, by a Board agent in the presence of Hill, our supervisors and managers, and, if the Union so desires, a union representative. A copy of this notice and the Explanation of Rights will be distributed by a Board agent during these meetings to each bargaining unit employee, supervisor, and manager in attendance before this notice is read aloud.

SPIKE ENTERPRISE, INC.

The Board's decision can be found at http://www.nlrb.gov/case/14-CA-281652 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.

APPENDIX B

Explanation of Rights

POSTED, READ, AND MAILED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

Employees covered by the National Labor Relations Act have the right to join together to improve their wages and working conditions, including by organizing a union and bargaining collectively with their employer, and also the right to choose not to do so. This Explanation of Rights contains important information about your rights under this Federal law.

The National Labor Relations Board has ordered Spike Enterprise, Inc. to provide you with the Explanation of Rights to describe your rights and provide examples of illegal behavior.

Under the National Labor Relations Act, you have the right to:

- Organize and show support for a union and, if it becomes your representative, have it negotiate

with your employer concerning your wages, hours, and working conditions.
- Support your union in negotiations.
- Discuss your wages, benefits, other terms and conditions of employment, and negotiations between the union and your employer with your coworkers or your union.
- Take action with one or more coworkers to improve your working conditions.
- Strike and picket, depending on the purpose or means used.
- Choose not to do any of these activities.

It is illegal for your employer to take any adverse action against you because you formed, joined, assisted, or supported the Union or any other labor organization, expressed support for unions in general, or took action with one or more coworkers to improve your working conditions, or to discourage you from doing so.

Prohibited adverse actions include
- Discharge.
- Discipline.
- Reducing your pay.
- Requiring you to more strictly follow work rules.

It is also illegal for your employer to

- Discharge or otherwise discriminate against you for supporting a union.
- Give you the impression that your union activities are under surveillance.
- Threaten you with loss of pay for supporting a union.
- Threaten you with termination for participating in an economic strike.
- Announce that it would more strictly enforce work rules because of your organizing drive.
- Threaten you that selecting a union as your bargaining representative would be futile.
- Tell you that it is working on a petition that would make a union election unnecessary.
- Make unilateral changes in your terms and conditions of employment by implementing a collective-bargaining proposal without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement.

There are rules that govern your employer's conduct during collective bargaining with your union:

- Your employer must meet with your union at reasonable times to bargain in good faith about wages, hours, vacation time, insurance, safety practices, and other mandatory subjects.
- Your employer must participate actively in the negotiations with a sincere intent to reach an agreement.
- Your employer must not change existing working terms and conditions while bargaining is ongoing.
- Your employer must honor any collective-bargaining agreement that it reaches with your union.
- Your employer cannot retaliate against you if you participate or assist your union in collective bargaining.

Illegal conduct will not be permitted. The National Labor Relations Board enforces the Act by prosecuting violations. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within 6 months of the unlawful activity. You may ask about a possible violation without your employer or anyone else being informed that you have done so. The NLRB will conduct an investigation of possible violations if a charge is filed. Charges may be filed by any person and need not be filed by the employee directly affected by the violation.

You can contact the NLRB's regional office, located at: 219 South Dearborn St. – Suite 808, Chicago, IL 60604.

The Board's decision can be found at http://www.nlrb.gov/case/14-CA-281652 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.

Kevin M. McCormick, for the General Counsel.
Gregory H. Andrews, Sarah J. Gasperini, and *Elliot R. Slowiczek,* for the Respondent.
Melinda S. Burleson and *Emil P. Totonchi, Esqs.,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. Procedurally, the

case arises from (1) a first amended complaint issued on December 16, 2021 (the complaint),[1] based on charges that the Charging Party (the Union or Local 150) first filed against the Respondent (the Company or Spike) on August 19 in Region 14, and the later charges it filed in Region 13; and (2) a December 20 order consolidating challenges and the Union's objections to the mail-ballot election conducted in November.

The issues before me have arisen from the petition that the Union filed on August 11 to represent Spike's employees at its three Illinois locations, including ExxonMobil, Channahon (ExxonMobil), the situs of all alleged unfair labor practices;[2] and the unfair labor practice strike that the Union called on August 20.

Pursuant to notice, I conducted a Zoom trial from January 31–February 3 and February 15–18, 2022, during which I afforded the parties a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

Alleged Unfair Labor Practices at ExxonMobil[3]

(1) Did the Respondent on August 12 discharge Robert Rossey (Rossey) in violation of Section 8(a)(3) and (1) of the Act? (UO 18)

(2) Did the Respondent on August 18 discharge Cody Franzen (Franzen) in violation of Section 8(a)(3) and (1)? (UO 25)

(3) Did Project Manager David Allen (Allen) commit the following violations of Section 8(a)(1):

a. On August 16, in a group meeting,

(1) Threatened employees with a reduction in wages if they chose the Union as their bargaining representative? (UO 20)

(2) Threatened employees with discharge if they went out on an economic strike? (UO 22)

b. On about August 16, told Nikolas Holland (Holland) to remove a Local 150 sticker from his truck, thereby creating an impression that the Respondent was surveilling employees' union activities? (UO 21)

c. On August 17, in an individual meeting with Steve Selby (Selby),

(1) Threatened a reduction in wages if employees chose the Union as their bargaining representative?

(2) Told Selby that he knew who signed authorization cards, thereby creating an impression that the Respondent was surveilling employees' union activities? (UO 21)

(3) Threatened employees would be discharged if they went out on an economic strike? (UO 22)

(4) Announced a stricter enforcement of rules because of the union organizing drive? (UO 23)

(5) Stated that he would never sign a contract with the Union, thereby saying that it would be futile for employees to select the Union as their bargaining representative? (UO 24)

(4) Did Labor Consultant Amed Santana (Santana) commit the following violations of Section 8(a)(1):

a. In about late August, told employees in a group meeting that the Company was working on a petition that would make a union election unnecessary? (UO 26)

b. At that same meeting, gave employees the impression that they were required to sign a petition denouncing their support for the Union?

CHALLENGES AND OBJECTIONS

The tally of ballots issued on November 23 was five votes for the Union, eight against, and eight challenged ballots, out of about 23 eligible voters. (GC Exh. 9.)

CHALLENGES

The Union challenged the ballots of the following individuals as alleged supervisors, all of whom Acting Regional Director Paul Hitterman (the Regional Director) found to be eligible employees in his 27-page Decision and Direction of Election (DDE) of October 8 (GC Exh. 10):

(1) Piotr Jesiolowski (Jesiolowski)—ExxonMobil
(2) Quinn Johnson (Johnson)—ExxonMobil
(3) Jeff Lundberg (Lundberg)—Citgo
(4) Robert Weathersby (Weathersby)—Blue Island
(4) Chris Woodward (Woodward)—Blue Island

The underlying representation case hearing was held on September 9, 10, and 13, resulting in a 699-page transcript.[4]

The Union was afforded a full opportunity to present evidence in the representation case in support of its position that the above individuals were supervisors. However, after reviewing the evidence and analyzing the applicable law, the Regional Director rejected the Union's assertions in a comprehensive and well-reasoned decision.

It is long settled that a party in an unfair labor practice proceeding may not relitigate issues which were or could have been raised in a related representation case in the absence of newly discovered or previously unavailable evidence. *Krieger-Ragsdale Co.*, 159 NLRB 490, 494 (1966), enfd. 379 F.2d 517 (7th Cir. 1967), cert. denied 389 U.S. 1041 (1968), citing *Pittsburgh Plate Glass Co.*, 313 U.S. 146, 162 (1941) ("[I]t was up to [the company or the union] to indicate in some way the evidence they wished to offer was more than cumulative. Nothing more appearing, a single trial of the issue was enough."). See also *D & M Co.*, 181 NLRB 173, 174 (1970). In other words, a party is not entitled to the proverbial two bites at the apple.

At the hearing, the Respondent objected to relitigating the supervisory status of the named individuals, and the General Counsel adhered to the Regional Director's findings. In agreement with the Respondent, I limited the Union to questioning witnesses only on new evidence that was unavailable at the representation case hearing and therefore not addressed in the DDE.

At trial, the Union agreed with the Region's finding that Lundberg is a unit employee. (Tr. 560.) However, the Respondent on the last day of hearing introduced a Citgo gate log of October 18 (R. Exh. 158), in which Lundberg has the title "site supervisor." The Union's brief (at 52) points this out. Nevertheless, as the Respondent's counsel stated at trial, title alone is insufficient to establish supervisory authority. See

[1] All dates hereinafter occurred in 2021 unless otherwise indicated.

[2] The other two locations are Citgo Petroleum, Lemont (Citgo); and Valero Terminal, Blue Island (Blue Island).

[3] I will indicate where a Union objection (UO) parallels the unfair labor practice allegation.

[4] The parties stipulated to the admission of the underlying representation case hearing transcript as Jt. Exh. 1.

Veolia Transportation Services, Inc., 363 NLRB 902, 912 (2016); *Heritage Hall, E.P.I Corp.*, 333 NLRB 458, 458–459 (2001). Moreover, the General Counsel continues to consider Lundberg an employee (see, e.g., GC Br. at 10 fn. 3). Accordingly, I see no reason to overturn the Region's determination of his employee status.

Finally, although several employees testified that they viewed Jesiolowski and Quinn as supervisors., subjective perceptions of employees are considered secondary indicia of supervisory authority that cannot support a finding of supervisory status in the absence of any of the statutory indicia. See *Sam's Club,* 349 NLRB 1007, 1014 (2007); *J. C. Corp.*, 314 NLRB 157, 159 (1994).

I therefore overrule the Union's challenges to the ballots of the above individuals and will order that they be opened and counted.

In the DDE (at 23), the Regional Director rejected the Union's position that Jordan Darnell was a temporary employee ineligible to vote. During the tally of ballots on November 23, the union challenged his ballot. However, this was not included as one of the Union's objections, and the Union presented no evidence at trial regarding his status. I will therefore order that his ballot be opened and counted.

The Company challenged the ballots of Rossey and Franzen as terminated employees. If they are found to have been wrongfully discharged, the challenges to their ballots will be overruled. See *David Saxe Productions, LLC*, 370 NLRB No. 103. slip op. at 6 (2021); *F.L Smithe Machine Co.*, 305 NLRB 1082, 1082 (1992), enfd. 995 F.2d 218 (3d Cir. 1993).

UNION'S OBJECTIONS

I indicated above the objections that are also alleged by the General Counsel to have constituted unfair labor practices. The following objections are not complaint allegations:

> 15. Holland placed his mail ballot in the U.S. Mail, but it was not received or counted by the NLRB at the vote count on November 23 (the deadline for receipt was November 22).
>
> 16. Employee Cody O'Neal (O'Neal) placed his mail ballot in the U.S. Mail on approximately November 9 or 10, in Crest Hill, Illinois, but it was not received or counted by the NLRB at the vote count on November 23.
>
> 28. On or about October 9, Owner Jeff Hill (Hill) informed employees working at Spike's Citgo facility that he had convinced the NLRB that individuals who the Union had asserted were supervisors were eligible to vote, including Lundberg, Jesiolowski, Johnson, Weathersby, and Woodward, creating the impression of management involvement in the election.

The following objections relate to conduct by persons who have been found to be employees and not Section 2(11) supervisors as alleged by the Union:

> 17. On August 12, Jesiolowski interrogated employees about Local 150 stickers on lockers, and asked if they were "sucking the same dick."
>
> 19. Beginning around August 12, Jesiolowski and Johnson began trading taking lunch in the breakroom and smoke shack so they could overhear employees' conversation, when previously Jesiolowski normally napped in the breakroom and Johnson took his lunch in his truck, creating an impression of surveillance.
>
> 27. On September 3, Lundberg forwarded a petition for "decertification" to counsel for Local 150 and the NLRB, signed by five individuals who are 2(11) supervisors, and for which signatures were solicited by Supervisor Jesiolowski, creating the impression of management involvement and surveillance in the election.

Because Jesiolowski, Lundberg, and Quinn were employees and not Section 2(11) supervisors, their conduct was not imputable to the Respondent. Accordingly, these objections are overruled without the need to discuss testimony thereon.

WITNESSES AND CREDIBILITY

The General Counsel called:

(1) Rossey and Franzen.
(2) Ray Sundine (Sundine) – Local 150 director of organizing.
(3) Striking employees Holland, O'Neal, Selby, and David Schell (Schell).
(4) Nonstriking employees Lundberg and Raymond DeZee (DeZee).

The Respondent's witnesses were:

(1) Hill – Spike's owner, president, and CEO.
(2) Lee-Ann Hill (Ms. Hill)—Spike's vice president.
(3) Allen.
(4) Project Manager Eric Wollenzien (Wollenzien), Citgo.
(5) Shelby Bitner (Bitner) – administrative assistant, ExxonMobil.
(6) Nonstriking employees Jesiolowski, Roy Garner (Garner), Wesley Martz (Martz), Jeffrey Mathis (Mathis), Daniel Matis (Matis), and Shayne Schwartz (Schwartz).

I will address credibility by section, applying the following well-established judicial precepts. Firstly, a witness may be found partially credible because the mere fact that the witness is discredited on one point does not automatically mean he or she must be entirely discredited. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970). Rather, a witness' testimony is appropriately weighed with the evidence as a whole and evaluated for plausibility. Id. at 798–799; see also *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1183 fn. 13 (2004); *Excel Containers, Inc.*, 325 NLRB 17, 17 fn. 1 (1997).

Secondly, when credibility resolution is not based on observations of witnesses' testimonial demeanor, the choice between conflicting testimonies rests on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Taylor Motors, Inc.*, 366 NLRB No. 69, slip op. at 1 fn. 3 (2018); *Lignotock Corp.*, 298 NLRB 209, 209 fn. 1 (1990).

DeZee was the only employee witness of the General Counsel who is still working for the Respondent, other than Lundberg, who by all accounts circulated a decertification petition. DeZee was credible, making no apparent efforts to exaggerate or slant his testimony against the Company. The Respondent's counsel asked him no questions, either after he testified in the General Counsel's case in chief or as a rebuttal wit-

ness.

In assessing DeZee's credibility, I also take into account that '"the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interest.'" *PPG Aerospace Industries,* 355 NLRB 103, 104 (2010), quoting *Flexsteel Industries,* 316 NLRB 745, 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996).

The General Counsel (GC Br. at 10 fn. 3) contends that this precept should also apply to his witnesses out on strike, as well as to Lundberg. However, I find it appropriate to limit its scope to DeZee. Striking employees have a financial stake in the proceeding and stand to gain if the General Counsel prevails, and Lundberg, as the initiator of a decertification petition, presumably has interests antithetical to those of the Union and favorable to the Company.

FACTS

Based on the entire record, including testimony and my observations of witness demeanor, documents, stipulations, and the thoughtful posttrial briefs that all parties filed, I find the following.

Board jurisdiction as alleged in the complaint is admitted, and I so find. At all material times, the Respondent has been a corporation with an office and place of business in Oklahoma City, Oklahoma, engaged in the business of tank cleaning at the three Illinois locations named earlier.

Allen is Spike's project manager at ExxonMobil, and Wollenzien is the Company's project manager at Citgo. They report to owner, president, and CEO Hill. Ms. Hill, his spouse, is the vice president. She does all the office management and billing. At ExxonMobil, Spike has two connected trailers: an office trailer where Allen and Shelby have offices, and a breakroom trailer where employees have their lockers and keep their personal protective equipment (PPE), and take lunch.

UNION ORGANIZING

It is undisputed, and I find, that Holland first contacted Sundine of Local 150 in around the late summer or fall of 2020 and started handing out and collecting authorization cards in June. See GC Exh. 2, which contains 14 signatures. Meetings with employees were held starting in approximately April, at a restaurant or a bar in Channahon. The frequency of meetings and the number of employees in attendance increased in time, with seven to nine employees attending shortly before the petition was filed on August 11. Not always the same employees attended. In June or July, Sundine also gave employees group tours of the Union's training facility so that they could learn of the training benefits that the Union offered.

On August 11, the Union filed a petition in Case 13–RC–281169, seeking to represent a unit of all full-time and regular part-time operators, techs, and laborers employed at the Respondent's three Illinois locations.

General Counsel's Exhibit 6 reflects the following. At 3:27 p.m. that day, the Union emailed Allen a copy of the petition and accidentally included as an attachment copies of the 14 authorization cards. At 8:04 p.m. on August 12, Allen responded that he was unable to accept or reply to any legal documents. At 10:52 a.m. on August 13, the Union emailed a copy of the petition and authorization cards to the Hills, who in turn forwarded them to counsel.

As to the above, I do not believe the statement in counsel's response to the Union (GC Exh. 6 at 1) that Allen did not review the email to him until nearly 24 hours later. I find it wholly implausible that Allen would not have immediately opened it, or at the very least done so within a very short time of its receipt, and then immediately forwarded the petition and authorization cards to the Hills.

Furthermore, the claim in counsel's response that no one at Spike saw the authorization cards until the Hills received their email strikes me as a self-serving and transparent attempt to get around the timing issue regarding Rossey's discharge on August 12. In this regard, Ms. Hill sent an email dated August 11 (date-stamped August 12) to managers concerning the employees' organizing effort and how management should respond (GC Exh. 14). Although Ms. Hill was called as a witness, she was not asked about that email or for an explanation for the inconsistency in dates. In all of these circumstances, I find it only reasonable to conclude that Allen on August 11 had actual notice of the petition and of the names of employees who signed authorization cards, that he immediately forward them to the Hills, and that they then took an active role in responding.

The Union called a strike on August 20 to protest the discharges of Rossey and Franzen. Seven employees went out on strike that day. The strike continues to date.

At trial, the General Counsel called Lundberg only with regard to the General Counsel's pending 10(j) proceeding. (GC Br. at 12.) The General Counsel takes the position that Lundberg was credible in his testimony that he alone created and circulated a decertification petition (GC Exh. 4), which 13 employees signed between August 30 and September 2. In this regard, other witnesses corroborated him regarding his distribution of the petition. The Union (U Br. at 11–12, 39) expresses doubts that he did not receive management assistance, but his testimony was not so farfetched as to be unbelievable, and suspicion alone does not suffice as a basis for discrediting him. I find that he was credible and that management did not assist him.

I described earlier the subsequent developments in the representation case in connection with objections to the election.

THE 8(A)(1) ALLEGATIONS

Allen's conversation with Holland on about August 16

The Respondent does not dispute the testimony of Holland and Rossey that on August 12, for the first time, they wore shirts with a union emblem to work.

Holland provided a detailed and credible account of the August 16 incident, whereas Allen did not offer any testimony thereon. When a party does not question a witness about damaging or potentially damaging testimony, it is appropriate to draw an adverse inference and find that the witness would not have disputed such testimony. See *LSF Transportation, Inc.*, 330 NLRB 1054, 1063 fn. 11 (2000); *Asarco, Inc.*, 316 NLR 636, 640 fn. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996). I therefore credit Holland and find as follows.

On the morning of approximately August 16, Holland was sitting in the breakroom trailer when Allen approached and asked him to follow him outside. When they were in the walkway between the breakroom and office trailers, Holland asked him why. Allen replied that Holland had put a union sticker on his company truck and had to take it off. Holland replied that he had not, but Allen repeated what he had said, and Holland agreed to remove it but said that he did not know where it was. He followed Allen out to truck. They walked around it but could find no sticker. Allen told Holland to stay there for a minute and he would be right back. Allen went to the office trailer. He returned a couple of minutes later and apologized to Holland for having been wrong.

Allen's August 16 group meeting

Allen made a PowerPoint presentation (GC Exh. 7) to all employees at ExxonMobil in the officer trailer shortly after the lunch hour (11 a.m. to 12 noon). He first asked employees to put their cell phones in Bitner's office because he was going to share confidential information. He went through the slides. During the meeting, O'Neal asked about his job review, and Schell questioned Allen's statements about the Company losing money in its contractual relationship with ExxonMobil. The meeting lasted about 45 minutes. Neither the General Counsel nor the Union contend that anything contained in the slides themselves violates the Act.

Allen's testimony about the genesis of the PowerPoint presentation was wholly incredible. He averred that he sua sponte alone put together the very sophisticated PowerPoint presentation from his own online research and then presented it to employees on August 16 and 17—even though the owners had told him not to. Moreover, his testimony was directly contradicted on cross-examination by the email that Ms. Hill sent to managers on either August 11 or 12, showing that the owners and legal counsel approved of the presentation and were going to review it in advance. (GC Exh. 14.) He equivocated on when he first spoke to Ms. Hill about the PowerPoint and unsuccessfully tried to explain away the August 11 date at the top of her email by testifying that she might have had her dates wrong. One would scarcely expect such an error from the Company's vice president, who is in charge of its office management and billing. Irrespective of whether the date was August 11 or 12, the email contradicts Allen's testimony.

No one would reasonably expect employees who attended the meeting to recall verbatim everything that Allen said. Franzen, Holland, and Schell were the General Counsel's witnesses who testified about the meeting. Their accounts were detailed but not identical, leading me to conclude that they were based on genuine recall and not fabricated or scripted. In this regard, Franzen and Schell both testified that Allen stated that there would be a pay cut if employees went union because of Spike's relationship with ExxonMobil, but Holland initially answered no when I asked him if Allen said anything about benefits.

The Respondent's witnesses who testified about the meeting were Bitner, Garner, Jesiolowski, Martz, Mathis, and Schwartz. Bitner overheard only some of what Allen said because she was in her office performing her work. All of these witnesses offered only cursory accounts of Allen's statements, despite the numerous subjects that he covered in a presentation that took place only 6 months before the hearing. This leads me to believe that they may have been reticent to fully detail everything they recalled. In any event, I find that the General Counsel's witnesses' more expansive accounts were more reliable, and I credit them.

Despite Allen's testimony that he strictly followed the contents of the PowerPoint, I find that he did make statements that went beyond the language on the slides. Thus, one of the slides (GC Exh. 8 at 5) states, "We are allowed to replace any employee that goes on strike for economic reasons" but makes no mention of unfair labor practice strikes. On cross-examination, Allen testified that he deviated in no way from the PowerPoint and said nothing else about strikes. However, he was impeached by his affidavit, in which he stated, "I said we could replace the employees if they went on strike for economic reasons, but we could not replace them if they went on strike for ULP reasons." (Tr. 1251.) Bitner also corroborated Holland's testimony that Allen discussed the two types of strikes, and I credit Holland that Allen stated that if employees walked out because Rossey was fired and it was not found to be an unfair labor practice, he did not have to take them back. I further note Matis' testimony that "[f]or the most part," Allen said what was on the screen (Tr. 809), signifying that he made statements beyond what was on the slides.

Turning to the threat of reduction of wages, Franzen's, Holland's, and Schell's accounts were not identical but were the same in substance. In connection with Allen's slide presentation describing the ramifications of unionization vis-à-vis Spike's contractual relationship with ExxonMobil, I credit Franzen and Schell and find that Allen went beyond the wording of the slides and stated that employees would receive a pay cut if they went union because of that financial relationship. (Tr. 194, 288.) In this regard, although Holland testified that Allen said nothing about benefits, he did indirectly corroborate Franzen and Schell by testifying that Allen stated that Spike was already losing money in order to pay employees more and would go bankrupt if the employees went union. (Tr. 66.)

Allen's August 17 meeting with Selby

Selby was off from work on August 16, and the following morning, Allen made the same PowerPoint presentation solely to Selby, again in the office trailer.

Selby, who was employed by Spike since March 2015, gave a very detailed account of what Allen said during the course of his presentation, including statements concerning Rossey's discharge, and I do not believe that he fabricated them. The little cross-examination that was conducted on his testimony on the subject did not detract from his credibility. Selby appeared candid, and I have found other aspects of Allen's testimony to be farfetched. For these reasons, I credit Selby over Allen where their testimony diverged and find as follows.

Allen first asked Selby to place his cell phone in the room next door. Allen kept saying that he had to make the presentation because the employees, including Selby, had signed cards. At one point, Allen stated that he knew who signed cards and that employees had come up to him asking to revoke them. He talked about the pros and cons of a union and contracts and

stated that if the employees went union, they could no longer have one-on-one conversations with him, and he would have to go by the book and strictly follow the rules. Allen further stated that ExxonMobil would never agree to a union. He also said that if employees went on strike for unfair labor practices, he could not get rid of them, but if they went on strike for anything else, they would be terminated.

During their conversation, Allen brought up Rossey. He asked Selby if Selby had seen what happened (on August 12), to which Selby replied no. Allen then stated that Rossey had a few safety violations and "kind of an attitude . . . and was trying to show off his Local 150 shirt and stickers on his hard hat." (Tr. 643–644.) He went on to say, "I didn't fire Rossey because of his safety violation. I fired him because he was a prick . . . [b]ecause of his attitude . . . cocky . . . trying to show his support towards the union." (Tr. 644.) When I asked Selby if he responded to what Allen was saying about Rossey, he testified that he simply said, "[W]ow, okay," because he did not want to engage in a conversation about it. (Tr. 645.)

Santana's group meetings

In about late August, Labor Consultant Santana held a couple of weekly meetings with ExxonMobil employees in the office trailer. Santana was not called as a witness. At the first meeting, he introduced himself as an ex-union organizer and made a PowerPoint presentation that discussed the NLRA. (R. Exh. 110.) At a second meeting, he went through the Union's constitution. (R. Exh. 111.) At each meeting, he asked if there were any questions. The meetings lasted from 40 minutes to an hour. Neither the General Counsel nor the Union aver that anything in his slides violated the Act.

Of the persons who attended Santana's ExxonMobil meetings, only Matis and Schell gave testimony on whether Santana raised the subject of a petition.

Matis gave a very abbreviated account of what Santana said at the meetings and could recall only that Santana distinguished between facts and his opinions and at one meeting discussed the Union's constitution. He testified that Santana did not say anything about a decertification petition.

On the other hand, Schell testified in more detail, as follows. He attended a meeting with Santana on about September 2 or 3. Santana introduced himself as an attorney and said that he used to work with or for a union. He gave a slideshow presentation that included the salaries of union officials. At this or a subsequent meeting, Santana had newspaper clipping regarding someone who crossed a picket line, was not allowed to work, and was sued by the union. At the end of this meeting, he commented, "[W]e're working on a petition where this might not even be a problem," and he smiled. (Tr. 304.) Hill came in at that time and also smiled.

The General Counsel contends (GC Br. 32) that an adverse inference should be drawn from the Respondent's failure to call Santana to testify in rebuttal to Schell. However, Matis testified that Santana did not mention a petition, and I will give the Respondent the benefit of the doubt and infer that the Respondent decided it was unnecessary to call Santana to testify. See *Michigan Bell Telephone Co.*, 371 NRB No. 63, slip op. at 1 (2022).

Even so, Hill was a witness but was not asked about the incident. As I stated earlier, when a party does not question a witness about damaging or potentially damaging testimony, it is appropriate to draw an adverse inference and find that the witness would not have disputed such testimony. See *LSF Transportation, Inc.*, supra; *Asarco, Inc.*, supra.

In light of the above, I credit Schell's more detailed account rather than that of Matis.

ROSSEY'S DISCHARGE

Rossey's employment

Rossey was employed as a vacuum truck operator for Spike since January 2017. He also performed labor work. At ExxonMobil, Allen was always his supervisor.

On February 17, 2020, Rossey received a written warning for "multiple" safety violations that Allen and the ExxonMobil "safety buddy" (safety manager) had observed. (R. Exh. 36.) As a result, Allen verbally coached him and reassigned him to another job for the remainder of the day.

In September 2020, Holland first approached Rossey about the Union, and Rossey thereafter talked to several employees, both at work and off-site, about the benefits that the Union offered. He and Holland met with Sundine about every 6 weeks. After about April, the three met about 10 times with other employees, either at a restaurant or a bar. About five to seven employees attended these meetings.

Until April, Rossey worked at ExxonMobil. That month, Allen wrote him up in an incident report (R. Exh. 23), stating that Rossey "intentionally disregarded protocol by failing to assure all openings were closed. . . .," thereby causing a massive hazardous waste spill of over 200 gallons. As a result, Allen removed him from the site and asked Wollenzien if he could use Rossey at Citgo. Allen testified that he did not terminate Rossey at the time because "he showed that he was genuinely upset with himself for making the mistake. . . . So I didn't feel that he was beyond improvement. . . ." (Tr. 1136.)

In an unpersuasive attempt to minimize the gravity of that incident and the consequences to Rossey vis-à-vis what occurred on August 12, Allen tried on cross-examination to characterize the incident report as nondisciplinary—even though the form states, "disciplinary warning" and was placed in Rossey's personnel file.

After that, Rossey worked 2-l/2 months each at Citgo and Blue Island. During that time, according to Allen, Rossey called him at least half a dozen times, asking to be permitted to return to ExxonMobil. Allen finally allowed him to return on August 9 because Allen felt that enough time had passed and that Rossey was "on the right path and . . . could be a valuable member." (Tr. 1136–1137.)

On July 28, Wollenzien issued Rossey a written warning for falling asleep in his truck. (GC Exh. 15.) He was sent home for the day. The progressive disciplinary program (R. Exh. 2) provides that falling asleep on the job is a Group A offense, the most serious, generally calling for immediate discharge. However, Wollenzien testified that Rossey was not terminated because he was outside a process area, not even on Citgo property, and posed no immediate danger.

Events of August 12

Terminology

Before describing what occurred that day, an overview of certain terms may be helpful.

An H2S meter or monitor is worn around an employee's breathing area, such as on a shirt collar, to measure the presence of hydrogen sulfide gas, which can be dangerous. When a certain level is reached, the meter flashes, buzzes, and beeps loudly. This is called a "meter hit."

The policy to follow when that occurs is uncontroverted. Employees get out of the area, either upwind or crosswind, and report it to a supervisor, who in turn reports it to EPNR or the fire and safety arm of ExxonMobil. EPNR is not always called and does not necessarily come to the site. EPNR was not called on August 12.

Inside the process area, the policy is that employees are required to wear personal protective equipment (PPE) at all times. See R. Exh. 39. This includes hard hat, hearing protection, steel-toed boots, flame- or fire-resistant clothing (FRC), and an H2S meter.

A wheel chock is a block of rubber that prevents a truck from rolling forward or backward.

Events

That morning, Rossey, for the first time, wore his black 150-shirt when he came to work. The same day, he put union stickers on his hard hat and locker.

Allen's testimony as to Rossey's behavior on August 12 was unbelievable and causes me to doubt his account of what occurred that day. As described above, Allen testified that in the April incident, Rossey demonstrated contrition and remorse, and he thereafter repeatedly pleaded with Allen to allow him to come back to ExxonMobil.

Yet, according to Allen, there was what can only be described as a 180-degree swing in Rossey's attitude between April and August, from contrition to contempt. Thus, Allen testified that when he raised safety violations to Rossey on August 12, only 3 days after Rossey was permitted to return to the site, Rossey demonstrated indifference and utterly bizarre behavior, twice shrugging and staring at Allen with his hands on his hips. Furthermore, Allen testified that when he discussed the violations with Rossey in the trailer later that day, Rossey raised his shoulders and shrugged as though nothing Allen stated mattered. I can see nothing in the record that would explain Allen's depiction of Rossey's drastic change in attitude.

Rossey answered questions readily and without hesitation, and his recall of events was detailed. He appeared candid, as reflected in his volunteering on direct examination that he was asked to leave the ExxonMobil site in April by one of its safety coordinators.

For the above reasons, I credit Rossey's testimony where it diverged from Allen's. I also credit Selby that he was in the area, despite Allen's testimony that Selby "was nowhere near there." (Tr. 1156.) I note that Selby, who witnessed some but not all of what occurred between Rossey and Allen, did not contradict Rossey to the extent of his observations. I therefore find as follows.

On August 12, Rossey worked at the waste-water treatment plant on the northside of the refinery. He drove a vac truck and hauled hazardous material with Selby on the passenger side. Selby assisted him in loading and unloading. As Rossey was offloading the vac truck, his H2S meter had a meter hit. He attempted to inform Allen, who was working around a centrifuge or processing equipment, by walking up to him about 3 to 5 feet away and trying to get his attention. He called Allen's name and stayed for about 2 minutes. However, Allen was focused on running the centrifuge, which was not operating properly. Allen did not acknowledge him. Rossey then returned to his truck to go to the breakroom, to notify another supervisor (Jesiolowski), whom he knew would be there.[5] Selby was with him.

When Rossey went back into the truck, he took off his FRC, H2S meter, and hard hat because it was hot. When he drove off, he ran over a wheel chock in between the tires. He stopped, got out, and picked it up. His FRC was still off, but he had put his hard hat back on.

After Rossey was back inside the truck, Allen signaled for him to stop. Allen approached the driver's door and told him to put his PPE back on, exit the vehicle, and meet him at the rear of the vehicle. Rossey put on his FRC shirt and H2S meter and met him there.

Allen saw that Rossey's meter was alerted and asked why he did not report it. Rossey replied that he had attempted to tell Allen, but Allen had not acknowledged his presence. Allen told him to go to the trailer and wait for him.

When Rossey arrived at the breakroom trailer, he notified Jesiolowski of the meter hit. Jesiolowski asked if he had told Allen, to which Rossey replied that he had. It was about 11 a.m., the start of lunchtime, and all other employees were there.

Allen arrived about an hour later, after lunch was over. He and Rossey went to his office. There, Allen stated that he had to give Rossey a written warning regarding his infractions and asked why Rossey had not reported the hit immediately. Rossey responded that he had not been able to get Allen to acknowledge his presence. Allen presented him with the writeup. (GC Exh. 3.) He stated that Rossey had to leave the plant for the day and that he would contact him regarding whether he could come back to work the next day. Rossey was still wearing his Local 150 shirt at the time.

The three infractions listed on the writeup were (1) failure to report H2S meter hit, (2) running over the wheel chock, and (3) not wearing his FR shirt or H2S meter.

Rossey left the site at about 12:40 p.m. He texted Allen at about 4 p.m. and asked if he could come back the next day. Allen replied that he would let him know shortly.

Allen testified that he checked with an attorney for the Company, who advised him to treat Rossey like any other employee and that he and Hill decided to terminate Rossey.

At about 6:10 p.m. Allen called Rossey and said that he was terminated for the safety infractions he had committed that day. Rossey responded that he was shocked because no one else had

[5] Jesiolowski testified that if an employee has a meter hit and cannot reach Allen, the employee notifies him, and he then reports it to Allen.

been fired for those reasons. Allen then stated that Rossey was a safety liability but might be able to come back in a couple of years.

On cross-examination, Allen was evasive on the question of other terminations for safety violations. He could not say how many employees have been terminated during his tenure as plant manager since 2006. He testified that three to five employees have been terminated for "safety violations" but could not say whether they were terminated solely for such violations. He named two employees who were both terminated over 5 years ago but provided no details, and the Respondent provided no documentation concerning any prior discharges.

Other H2S meter hits

Rossey testified without contradiction that he, Allen, and Selby had meter hits right before lunch on August 10, at the same job location. Allen instructed them to evacuate the area and not return until the meters went down to zero. Rossey did not see EPNR come out that day.

I credit Selby's testimony that he has had about 15 meter hits during his employment but did not always immediately report it to a supervisor. The last occurred probably in 2020, when he and a coworker both had meter hits while doing cleanouts at a pit for waste-water treatment. He did not report it to Allen and Jesiolowski until the end of the day, when he returned to the office about 3–1/2 hours later. They told him to report it to them immediately next time, but he received no discipline. I note that other witnesses, including Martz, Matis, and Schell testified that they have had or have observed other employees getting meter hits.

There is no evidence that any employee other than Rossey has been discharged for having a meter hit and/or not reporting it quickly enough.

Wearing of PPE

Witnesses for the General Counsel and for the Respondent gave conflicting testimony on whether, in practice, the policy is strictly adhered to at all times.

Allen, who has been employed by Spike since 2006, testified that he has never seen an employee driving in a truck and not wearing FRC in a process area. The Respondent's employee witnesses, Garner, who has been employed 8 years; Schwartz, who has been employed for over 5 years; Martz, who has been employed 3–1/2 years; and Mathis all testified that they have never seen anyone not wearing FRC in the process areas or in a truck. Jesiolowski, who has been employed for 8 years, testified that he has never seen anyone in process areas not wearing FRC. Martz testified that he has never taken off his FRC in process areas or in a truck and never heard of anyone other than Rossey not wearing FRC. I find their testimonies that they never saw this occur highly implausible and do not credit them. I believe that as currently working employees, they may have been reluctant to admit that they or others have on occasion violated the policy.

I find more believable the consistent testimonies of Holland, Rossey, Schell, and Selby that there is not always strict adherence to the policy. All of them testified that on hot summer days, employees have removed their FRC when inside their trucks coming from or going to a job. Rossey also testified that he has removed his FRC long-sleeve shirt when getting into a vehicle.

Schell made no effort to underplay management's view of the importance of wearing FRC, bolstering my conclusion that he was candid and reliable. He testified that it is important that employees' outer layer of clothing be up to code, anywhere on site. When he took off FRC, as stated above, he admittedly was verbally admonished, explaining that a supervisor would tell him to put in on, and he did so immediately because it was viewed "pretty seriously. . . ." (Tr. 318.) At another point, Schell testified that Jesiolowski would "ream out" him and other employees for not wearing all PPE. (Tr. 345.)[6]

Holland, too, confirmed that the policy is to wear FRC all the time. However, he further testified that special PPE ("chem suits") are required when working inside tanks, that they get very dirty, and that employee have removed them when walking 10 to 20 feet back to their trucks. His testimony also suggests that supervisors did express disapproval ("[W]e would never really get yelled at for it." (Tr. 94)).

Although Rossey stated that Allen observed him without his FR long-sleeve shirt and said nothing, he did volunteer that he received verbal warnings from Allen or Jesiolowski for not wearing other PPE at different times. I credit Rossey's testimony that he has seen other employees not wearing the H2S meter over 12 times. He has also observed both Allen and Jesiolowski not wearing them; the last occasion was after his return on August 9. Rossey had also seen Allen and Jesiolowski not wearing FRC. For example, he observed Jesiolowski not wearing any FRC inside the plant in the process block in 2020 at tank 507 and also saw Allen on numerous occasions get out of his truck without wearing a FR shirt and then put it on.

There is no evidence that any employee other than Rossey has been discharged for not wearing PPE (including FRC or the H2S meter).

Running over a wheel chock

I credit Selby's testimony that he ran over a wheel chock at least 5–10 times but was never disciplined. On occasion Allen or Jesiolowski observed it and told him not to forget the chocks and not to let it happen again. He has seen other employees run over them and never heard of anyone terminated for that reason.

There is no evidence that any employee other than Rossey has been discharged for running over a chock.

FRANZEN'S DISCHARGE

Franzen's employment

Allen interviewed Franzen on about June 28. The resume that Franzen gave to him (CP Exh. 1) had as Franzen's objective "[t]o get started on the right path to become an operating engineer." He testified without contradiction that Allen told him that the Respondent was a nonunion company and did not plan to be unionized.

[6] Schell received a written warning on April 19 (R. Exh. 152) for not having regular safety equipment. It mentions protective gear. Allen sent him home for the remainder of the day.

Franzen was employed from July 15 at ExxonMobil as a tech two, opening drain pads, cleaning up drum barrels, and collecting garbage. Franzen later signed an authorization card, and he attended one union meeting, on August 17.

ExxonMobil requirements for new Spike employees

New employees must attend training at 3 Rivers before they are allowed access to the ExxonMobil facility. Franzen completed such training on July 21. See R. Exh. 102. ExxonMobil also requires a new employee to take a New to Site Test (NTST) after they are onsite, after 30 days, to show their understanding of rules and safety measures. They must pass with 100 percent and can retake the test once if they fail the first time.

Franzen's NTST

Franzen was a more credible witness than Allen, and I credit his account of what occurred, as follows.

At lunch on August 17, Allen informed Franzen that he would be taking the NTST immediately after lunch. Franzen was not provided any preparation. Allen told him that he needed 100 percent or would be kicked off the site for 6 months.

Allen administered the test to him. (R. Exh. 103.) During the test, Franzen stated that he had a question, but Allen responded that he could not help him out. Allen was not there the entire time but took the test from Franzen when he was finished. Franzen asked if he could take it a second time if he did not pass, and Allen replied yes.

The next day, Allen told him that he had gotten three answers wrong (R. Exh. 103 shows four wrong). Franzen asked if Allen could show him which ones they were. Allen replied that he should not, but he did. Allen stated that he could take the test a second time and had to pass. Allen administered the second test (R. Exh. 88) and was again with Franzen part of the time. Afterward, Allen put question marks by some answers and gave him an opportunity to explain. Franzen still missed two questions (R. Exh. 88 shows three).

Allen testified that he did not know what would happen to Franzen because he never had anybody fail the test before, and he had to check ExxonMobil policy. See R. Exh. 21. He learned that Franzen, having failed the test twice, could not come on the site for 6 months. In the evening, Allen called Franzen and told him this. Franzen asked why he was being treated differently from other people who were tested and helped by Jesiolowski. Allen replied that he had no control over how other people tested with Jesiolowski.

Allen called Citgo Supervisor Wollenzien later that day and asked if he could use an extra hand. Wollenzien replied no, that his work was slow.

General Counsel's Exhibit 11 reflects that as of August 2, the Respondent was taking applications for two positions. In late August, DeZee and Hayden Wollenzien were offered positions. (GC Exhs. 12, 13.) Wollenzien testified that there are days when there is not enough work at Citgo, and employees are sent to ExxonMobil or Blue Island.

Other employees and the NTST

As Jesiolowski testified, he is the one who administers the NTST, and DeZee, Holland, Martz, Mathis, Matis, O'Neal, Rossey, and Schell all testified that he was the one who tested them.[7] There is no evidence that Allen has ever administered the test to anyone other than Franzen.

Jesiolowski candidly testified that he runs employees through a checklist (R. Exh. 19) before giving them the test and reads them the questions in advance. Furthermore, "[A]t the end they usually have a couple [of] questions about a couple [of] questions on the test, and I just help them out with it." (Tr. 997.) He does this by giving them hints, running through different scenarios to get them closer to the correct answers without flat out giving them. He has administered about five tests a year but never had anyone fail.

Consistent with that testimony, several employees testified that Jesiolowski helped them pass the test by giving them from one or two to eight correct answers. These included DeZee, Holland, O'Neal, and Schell. Moreover, O'Neal overheard Jesiolowski tell an employee an answer, and the safety coordinator who administered the test to Selby helped Selby correct answers that he initially got wrong.

The Respondent points out (R. Br. at 29) that Holland's testimony that he did not know a single answer and that Jesiolowski fed them to him was hard to believe. However, Holland's testimony on cross-examination was more plausible. He explained that on some questions, he put down partial answers, and Jesiolowski helped him to finish them. See R. Exh. 151, Holland's NTST. This was consistent with Jesiolowski's testimony.

OBJECTIONS

Here, I will address the Union's objections that are not the subjects of unfair labor practice charges.

> 15. Holland placed his mail ballot in the U.S. Mail, but it was not received or counted by the NLRB at the November 23 vote count.

Holland testified that he received a mail ballot on November 15 and placed it in the post office drop box at the Braidwood Post Office on November 16. I have no reason to doubt his testimony. As the initiator of the Union's organizing effort and an avid union supporter, I have to assume that he had a very strong interest in getting his vote counted. I will therefore order that his ballot be opened and counted.

> 16. O'Neal placed his mail ballot in the U.S. Mail on approximately November 9 or 10, in Crest Hill, Illinois, but it was not received or counted by the NLRB at the November 23 vote count.

O'Neal testified that he received a ballot at beginning of November and placed it in his mailbox on November 9, flipping up the little red flag as was his normal practice for showing the letter carrier that he had outgoing mail. It was later gone from the mailbox, presumably having been picked up by a letter carrier. I have no reason to doubt O'Neal's testimony and will order that his ballot be opened and counted.

> 28. On or about October 9, Hill informed employees working

[7] Selby, who was hired in March 2015, was given the test by a safety coordinator.

at Citgo that he had convinced the NLRB that individuals who the Union had asserted were supervisors were eligible to vote, including Lundberg, Jesiolowski, Johnson, Weathersby, and Woodward, creating the impression of management involvement in the election.

Hill held several meetings at Spike's three Illinois locations in about the third week of October. DeZee attended one of them, at Citgo.

Hill testified that he read verbatim the notice of election (R. Exh. 154) and a prepared speech (R. Exh. 153). Wollenzien corroborated this, although DeZee recalled that Hill did not read from anything. This difference in testimony does not affect an analysis of the objection, to which DeZee was the only witness to testify.

DeZee testified that Hill stated in an upbeat manner that he had gotten some people the right to vote and talked as though that was a win. Lundberg was behind him. As Hill spoke, he gave Lundberg a tap on the back.

I conclude that this conduct did not reasonably create an impression that the NLRB had made decisions based on any unlawful interference by Hill. I therefore overrule this objection.

ANALYSIS AND CONCLUSIONS

The 8(a)(1) Allegations

A. Did Allen, on August 16, in a group meeting, (1) threaten employees with a reduction in wages if they chose the Union as their bargaining representative, and (2) threaten employees with discharge if they went on strike?

(1) Allen stated that due to Spike's contractual relationship with ExxonMobil, employees would receive a loss of pay if they went union. Axiomatically, this was an unlawful threat of loss of benefits

(2) Allen stated that economic strikers would lose their jobs and did not provide a full explanation of their rights to reinstatement under *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1969). This was in the context of other statements that suggested employees could lose their jobs if the Union was voted in, because of Spike's relationship with ExxonMobil. I therefore find that Allen's statement was unlawful. See *Great Dane Trailers,* 293 NLRB 384, 384 (1989); see also *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967).

The Respondent (R. Br. 48) cites *Washington Post Co. v. District Unemployment Compensation Bd.*, 379 A.694, 697 (D.C. Court of Appeals 1977) for the proposition that "[a]n employer, when faced with an economic strike, may permanently replace economic strikers." However, the next sentence in the court's decisions reads, "[H]owever, a permanently replaced striker continues to be an employee with the meaning of the National Labor Relations Act, and cannot be denied reinstatement absent substantial business justifications" [fn. omitted], citing *Laidlaw Corp.* and *Fleetwood Trailer Co.* above.

By the above conduct, the Respondent, through Allen, violated Section 8(a)(1) of the Act.

B. Did Allen, on August 17, in a meeting with Selby, (1) threaten employees with discharge if they went on strike; (2) announce stricter enforcement of rules because of the Union's organizing drive; (3) say that he would never sign a contract with the Union, thereby stating that it would be futile for employees to select the Union as their bargaining representative; and (4) tell Selby that he knew who signed authorization cards, thereby creating an impression that the Respondent was surveilling employees' union activities?

(1) Allen stated that if employees went on strikes for unfair labor practices, he could not get rid of them, but if they went on strike for anything else, they would be terminated. For the reasons stated above, this violated Section 8(a)(1).

(2) Allen stated that if employees went union, they could no longer have one-on-one conversations with him and that he would "have to go by the book" and strictly follow the rules.

By so threatening stricter enforcement of work rules, Allen violated Section 8(a)(1). See Remington Lodging & Hospitality, LLC, 363 NLRB 987, 987 fn. 1 (2016), enfd. 847 F.3d 180 (5th Cir. 2017); DHL Express, Inc. 355 NLRB 1399, 1400 (2001).

(3) Allen stated that ExxonMobil would never agree to a union.

By making a statement tantamount to saying that selecting union representation would be futile, Allen violated Section 8(a)(1). See *North Star Steel Co.*, 347 NLRB 1364, 1365 (2006); *Triple H Fire Protection, Inc.*, 326 NRB 463, 464 (1998).

(4) Allen stated that he knew who had signed cards and kept saying that he had to make the presentation because the employees, including Selby, had signed cards.

The Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement in question that his/her union activities had been placed under surveillance. *Moutaineer Steel, Inc.*, 326 NLRB 787, 787 (1998), enfd. Fed.Appx. 180 (4th Cir. 2001), citing *United Charter Service*, 306 NLRB 150 (1992). By saying that he knew who had signed cards—including Selby—without providing any explanation of how he knew, Allen gave Selby reasonable belief that employees' union activities had been surveilled. He thereby violated Section 8(a)(1).

C. Did Allen, on about August 16, tell Holland to remove a Local 150 sticker from his truck, thereby creating an impression that the Respondent was surveilling employees' union activities?

That morning, Allen told Holland that he had put a union sticker on his company truck and had to take it off. Holland replied that he had not, but Allen repeated what he had said, and Holland agreed to remove it but said that he did not know where it was. They went out to the parking lot and examined the truck but found no sticker. Allen apologized to Holland for having been wrong.

Inasmuch as the truck was in a public area and clearly visible, Allen's statements did not imply any kind of surveillance, and I find no merit to that allegation. Indeed, there was no such sticker.

However, I do find that Allen's conduct amounted to unlawful harassment of Holland, the employee who initiated the or-

ganizing effort and distributed and collected authorization cards. See *Miklin Enterprises, Inc.*, 361 NLRB 283, 290 (2014). The fact that no sticker was found strongly suggests that Allen had an improper motive rather than a good-faith belief. Accordingly, Allen's conduct violated Section 8(a)(1) on that basis.

D. Did Santana in about late August, tell employees in a group meeting that the Company was working on a petition that would make a union election unnecessary, and at that same meeting, give employees the impression that they were required to sign a petition denouncing their support for the Union?

At the meeting, Santana made the statement that "we're working on a petition where this might not even be a problem," and both he and Hill smiled. The only "petition" that was in play at the time was Lundberg's decertification petition. This suggestion of management involvement in the petition violated Section 8(a)(1), even though there is no evidence that such involvement actually occurred.

The allegation that Santana gave employees the impression that they were required to sign a petition denouncing their support for the Union is not supported in the record, and I dismiss it.

The 8(a)(3) Analytical Framework

In cases in which the issue is the motive behind an employer's action against an employee (was it legitimate or based on animus on account of the employee's union or protected concerted activities?), the appropriate analysis is provided by *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); see also *Auto Nations, Inc.*, 360 NLRB 1298, 1301 (2014), enfd. 801 F.3d 767 (7th Cir. 2015).

Under *Wright Line,* the General Counsel bears the initial burden of establishing that an employee's union or other protected concerted activity was a motivating factor in the employer's adverse employment action. *Wright Line*, above at 1089. The Board has held that the General Counsel can meet this burden by establishing (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) antiunion animus, or animus against protected activity, on the employer's part. See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). In *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 5–8 (2019), the Board clarified the animus element of this test, explaining that the General Counsel "does not *invariably* sustain his burden of proof under *Wright Line* whenever, in addition to protected activity and knowledge thereof, the record contains *any* evidence of the employer's animus or hostility toward union or other protected activity." Id., slip op. at 7 (emphasis in original). "Instead, the evidence must be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." Id., slip op. at 8.

Once the General Counsel makes out a prima facie case, the burden shifts to the respondent to show that the same action would have taken place even in the absence of the protected activity. *Wright Line*, above at 1089; *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996). To establish this affirmative defense, an 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. *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at 1 (2018); *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007). Where the General Counsel has made a strong showing of discriminatory motivation, the employer's defense burden is substantial. *East End Bus Lines*, Ibid; *Bally's Park Place, Inc.*, 355 NLRB 1319, 1321 (2010), enfd. 646 F.3d 929 (D.C. Cir. 2011).

The Respondent's brief emphasizes that Spike took no disciplinary actions against Holland, the lead union organizer by all accounts. This does not, however, insulate the Respondent from being found to have unlawfully discriminated against Rossey and Franzen. An employer's failure to take action against all or some other union supporters does not disprove discriminatory motive, otherwise established, for its adverse action against all or some other union supporters. See, e.g., *Handicabs, Inc.* 318 NLRB 890, 897–898 (1995), enfd. 95 F.3d 681 (8th Cir. 1996); *Master Security Services*, 270 NLRB 543, 552 (1984).

Rossey's Discharge on August 12

Step one of the analysis is determining whether the General Counsel has established a prima facie case. As to employer knowledge, Rossey wore a union shirt in Allen's presence on August 12 and on the same day put union stickers on his locker. He also signed an authorization card, which Allen knew on August 11. Express animus is demonstrated by the statements that Allen made to Selby, that Rossey had a "kind of an attitude. . . and was trying to show off his Local 150 shirt and stickers on his hard hat. . . .," and "I didn't fire Rossey because of his safety violation. I fired him because he was a prick . . . because of his attitude . . . cocky . . . trying to show his support towards the union."[8]

Animus can also be inferred from the following. None of the employees who testified—either those for the General Counsel or those for the Respondent—knew of any employee other than Rossey who has ever been terminated for having H2S meter hits, not reporting them quickly, or not wearing FRC. For not wearing FRC, employees have been verbally admonished but not subjected to more severe discipline. There is no evidence that any employee other than Rossey has been disciplined for running over a wheel chock. Allen could give no details about two employees whom he allegedly discharged, at least in part for safety violations, over 5 years ago; and the Respondent produced no supporting documentation. Accordingly, on this record, Rossey is the only employee who has ever been discharged for safety violations alone.

The Respondent's disparate treatment of Rossey strongly suggests that unlawful animus motivated the decision to discharge him. See, e.g., *Mondelez Global, LLC*, 369 NLRB No.

[8] I find it unnecessary to address whether Allen's statements about the reasons for Rossey's discharge, not alleged in the complaint, were also independent violations of Sec. 8(a)(1) because they are encompassed by the issue of the legality of the discharge itself.

46, slip op. at 4 (2020); *La Gloria Oil & Gas Co.* 337 NLRB 1120, 1124 (2002), affd. 71 Fed.Appx. 441 (5th Cir. 2003); *Southwire v. NLRB*, 820 F.2d 453, 460 (D.C. Cir. 1987) (absence of evidence employer discharged any other employee for similar violation).

The timing of Rossey's discharge—just 1 day after the petition was filed and the same day that Rossey first openly expressed his support for the Union—also raises a strong inference of unlawful animus. See *Healthy Minds, Inc.*, 371 NLRB No. 6, slip op. at 7 (2021); *Mondelez Global, LLC*, above, slip op. at 1; *Velox Express, Inc.*, 368 NLRB No. 61, slip op. at 10–11 (2019).

Accordingly, I conclude that the General Counsel has made out a prima facie case.

The second step is determining whether the Respondent has rebutted this prima facie case by showing that it would have discharged Rossey regardless of his union activity. The Respondent contends that Rossey was discharged because he engaged in several safety infractions on August 12: (1) failure to report H2S meter hit, (2) running over the wheel chock, and (3) not wearing his FR shirt or H2S meter.

As stated above, the Respondent's failure to show that it has ever discharged any other employees for these offenses undermines any claim that it has treated them as grounds for termination in the past.

Moreover, in earlier incidents in 2021, Allen was much more lenient in disciplining Rossey for equivalent or even more serious safety violations. Firstly, in February, Rossey received a written warning for "multiple" safety violations. Allen did not terminate Rossey but instead verbally coached him and reassigned him to another job for the remainder of the day. Secondly, in April, Allen wrote him up for "intentionally disregard[ing] protocol" and causing a massive hazardous waste spill of over 200 gallons. This had to result in great financial cost and potential health risks. Nonetheless, Allen again did not terminate Rossey but instead removed him from the site and asked Wollenzien if he could use Rossey at Citgo.

Even according to Allen, prior to August 12, he had no intention of discharging Rossey; he allowed Rossey to return to ExxonMobil on August 9 because enough time had passed and Rossey was "on the right path . . . to becoming a valuable member."

As I stated earlier, Allen unsuccessfully attempted to justify why he discharged Rossey for safety violations in August but had not done so in April. His averment that Rossey was contrite and remorseful in April but demonstrated contempt for Allen in August was wholly unbelievable, particularly in light of Allen's testimony that Rossey had repeatedly pleaded with him to be able to return to the site.

The Respondent has therefore not satisfactorily established that it would have discharged Rossey on August 12 had he not engaged in union activity that day, the day after the petition was filed. Accordingly, the Respondent has failed to rebut the General Counsel's prima facie case.

I conclude that what Allen expressed to Selby was the real reason Rossey was fired—his overt support for the Union. Accordingly, Rossey's discharge violated Section 8(a)(3) and (1).

Franzen's Discharge on August 18

As to step one of the *Wright Line* analysis, the resume that Franzen presented to Allen at his interview had as an objective to "get started on the path to become an operating engineer," and Franzen signed an authorization card, of which Allen had knowledge on August 11.

There is no evidence of specific animus against Franzen for engaging in union activity. However, animus can be inferred from the following: (1) there is no evidence that Allen has ever administered the NTST to anyone other than Franzen; (2) in recent years, Jesiolowski has administered all NTSTs and helped employees to pass; and (3) there is no evidence that any employee other than Franzen has ever failed the NTST. In this regard, Allen testified that he did not know the consequences of an employee failing the test because it had never happened before. Disparate treatment can lead to the inference of unlawful motivation. See the cases cited above.

Similarly, the timing of the discharge, a week after the petition was failed, also can be considered as reflecting inferred animus. See the cases cited above. I therefore find that the General Counsel has established a prima facie case.

Turning to the second step of *Wright-Line*, the factors cited above also lead to the conclusion that Franzen was not discharged for legitimate reasons. It is highly significant that in the 16 or so years that Allen has been the Spike project manager at ExxonMobil, no one other than Franzen has been excluded from the site for failing to pass the NTST. Thus, Jesiolowski testified that he administers about five NTSTs yearly and has never had anyone fail. He substantially corroborated the testimony of several employees that he assisted them both before and during the test to arrive at the right answers. Clearly, Allen did not provide Franzen with the same level of assistance that other employees have received on a regular basis. In sum, the record demonstrates that Spike has a longstanding and consistent practice of ensuring that all of its employees pass the NTST so that they can remain employed on the site, failing in Franzen's case alone to adhere to that practice.

The Respondent points out (R. Br. 21) that Allen called Citgo Supervisor Wollenzien later that day and asked if he could use an extra hand. However, that would have been unnecessary had Franzen received the assistance that other employees have been given to pass the NTST.

Based on the above, I conclude that the Respondent has failed to rebut the General Counsel's prima facie case and that Franzen's discharge violated Section 8(a)(3) and (1).

Gissel Bargaining Order

Both the General Counsel and the Union urge a bargaining-order remedy under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613 (1969), wherein the Court found that a bargaining order is appropriate where an employer's unfair labor practices have so decreased the chance of a fair election that the already expressed desires of employees for representation (here, the employees' authorization cards) are a more reliable indication of free choice than an election would be. Id. at 603 ("[C]ards, though admittedly inferior to the election process, can adequately reflect employee sentiment when that process has been impeded."). As the Respondent points out (R. Br. 50), a bar-

gaining order is an extraordinary remedy, with the preferred route being to provide traditional remedies for an employer's unfair labor practices and to hold an election "wherever such remedies may be sufficient to cleanse the atmosphere of the effects of the unlawful conduct." *Desert Aggregates*, 340 NLRB 289, 289 (2003), citing *St. Agnes Medical Center*, 304 NLRB 146, 147–148 (1991).

In *Gissel*, the Supreme Court identified two categories of employer misconduct that warrant imposition of a bargaining order: (1) Category I "exceptional" cases where the unfair labor practices committed are so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible; and (2) Category II cases, "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process." Id. at 614. In Category II cases, the "possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and . . . employee sentient once expressed through cards would, on balance, be better protected by a bargaining order[.]" Id. at 614–615.

The General Counsel does not distinguish between Category I and Category II but contends (GC Br. 56–57) that the Respondent's egregious unlawful conduct inarguably had a demonstrable adverse impact on the Union's employee support, citing *Dlubak Corp.*, 307 NLRB 1138, 1138 fn. 2 (1992) (*Gissel* bargaining order warranted where employees' withdrawal of support for the union was "the product of [the employer's] unfair labor practices"), enfd. 5 F.3d 1488 (3d Cir. 1993); and *Garvey Marine*, 328 NLRB 991, 995 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001) (employer's serious and repeated unfair labor practices undermined union's majority strength, warranting *Gissel* bargaining order).

In support of its position, the General Counsel argues that Union had majority support at the time the petition was filed on August 11, but only a few weeks later, that support dropped to 30 percent due to the Respondent's pervasive unlawful conduct, in particular its discharge of Rossey and its coercion of employees to sign a petition denouncing the Union.[9]

General Counsel's Exhibit 2 shows that 14 employees signed authorization cards between March 27 and August 9, prior to the Respondent's unfair labor practices that occurred starting on August 12. This represented over half of the unit. General Counsel's Exhibit 4 shows that 13 employees later signed the decertification petition, between August 30 and September 21. These included employees who had signed authorization cards: Garner, Mathis, Matis, and Schwartz. Regardless of their testimony of why they changed in their support for the Union, *Gissel* "does not require that the unfair labor practices must actually cause the loss of majority status. As long as they have the tendency to do so, a bargaining order is appropriate." *Amber Delivery Service, Inc.*, 250 NLRB 63, 66 (1980), enfd. in part, vacated in part, 651 F.2d 57 (1st Cir. 1981).

In determining whether to issue a bargaining order, the Board examines "the seriousness of the violations and their pervasiveness, the size of the unit, the number of affected employees, the extent of dissemination, and the position of the persons committing the violations." *Bristol Industrial Corp.*, 366 NLRB No. 101, slip op. at 3 (2018).

The Union cites (U Br. 44) the well-established principle that the discharge of union supporters is a significant consideration in determining whether such an order is appropriate. Thus, "The Board and courts have long considered the discharge of union adherents to be among the 'hallmark' violations justifying the issuance of bargaining orders," because they are more likely to destroy election conditions for a longer period time than are other unfair labor practices (fn. omitted)." *Milum Textile Services Co.*, 357 NLRB 2047, 2055 (2011), citing *Abramson, LLC*, 345 NLRB 171, 176 (2005); see also *Bristol Industrial Corp.*, above, slip op. at 2. As the Board stated in *Dayton Auto Electric, Inc.*, 278 NLRB 551, 558–559 (1986), citing *Apple Tree Chevrolet*, 237 NLRB 876 (1978), the discharge of an employee because of union activity "is one of the most flagrant means by which an employer can hope to dissuade employees from selecting a bargaining representative because no event can have more crippling consequences to the exercise of Section 7 rights than loss of work."

For the following reasons, I find a bargaining order appropriate under *Bristol Industrial Corp.*, above, as a *Gissel* Category II. Most significantly, the discharge of Rossey occurred on August 12, just 1 day after the Union filed its petition, and Franzen's discharge followed on August 18, only 6 days afterward, in a unit of approximately 23 employees. See *General Fabrication Corp.* 328 NLRB 1115, 1115 (1999), enfd. 222 F.3d 218 (6th Cir. 2000) (in a small unit of approximately 31 employees, "The impact of this action was magnified by its proximity to the onset of the Union's organizational effort."); see also *Debbie Reynolds Hotel, Inc.*, 332 NLRB 466, 467 (2000).

Furthermore, on August 16 and 17, Allen, the only on-site supervisor of unit employees at ExxonMobil, committed a number of violations of Section 8(a)(1) at a group meeting or individually with Selby. Also, on about August 16, Allen unlawfully harassed Holland, the leading union adherent.

Thus, the Respondent's commission of a series of unfair labor practices, including the discharges, occurred within a week after the petition was filed. It is noteworthy that on August 20, the Union called an unfair labor practice strike to protest the discharges of Rossey and Franzen, reflecting widespread knowledge by unit employees of the discharges. In short, the Respondent's unfair labor practices had "the tendency to undermine majority strength and impede the election process," and I will include a bargaining-order remedy.

CONCLUSIONS OF LAW

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

2. International Union of Operating Engineers, Local 150, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning

[9] There is no evidence that the Respondent coerced employees into signing the decertification petition. On this record, Lundberg alone initiated and circulated it without any management involvement.

of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act:

(a) Discharged Robert Rossey on August 12, 2021.

(b) Discharged Cody Franzen on August 18, 2021.

4. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act:

(a) Gave employees the impression that their union activities were under surveillance.

(b) Threatened employees with loss of pay if they voted to be represented by the Union.

(c) Threatened employees with termination if they went out on an economic strike.

(d) Harassed employees for engaging in union activities.

(e) Announced stricter enforcement of rules because of the union organizing drive.

(f) Stated that it would be futile to select the Union as the employees' bargaining representative.

(g) Told employees that the Company was working on a petition that would make a union election unnecessary.

THE ELECTION

Objections

The critical period in this case is the period of time from August 11, the date the petition was filed, through the mail ballot election that ended on November 22. The Respondent's above conduct occurred during this timeframe. Accordingly, the Union's objections 18 and 20–26 are sustained. The Union's remaining objections are overruled.

Challenged Ballots

Having found that Robert Rossey and Cody Franzen were wrongfully discharged, I order that their ballots be opened and counted.

I adhere to the Regional Director's determination that the following individuals are eligible unit employees and not supervisors, and I order that their ballots be opened and counted: Petr Jesiolowski, Quinn Johnson, Jeff Lundberg, Robert Weathersby, and Chris Woodward.

I further order that the ballots of Nikolas Holland and Cody O'Neal, which were timely submitted to the United States Postal Service but not delivered in time for the ballot count, be opened and counted.

Finally, I order that the ballot of Jordan Darnell, whose eligibility is no longer contested, be opened and counted.

REMEDY

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

The Respondent having discriminatorily discharged Rossey and Franzen, it must offer them full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed; and make them whole for any losses of earnings and other benefits suffered as a result of their discharges. 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 addition, the Respondent shall compensate Rossey and Franzen for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 13, 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 years. *Advoserv of New Jersey, Inc.*, 363 NLRB 1324 (2016); *Don Chavas, LLC*, 361 NLRB 101 (2014). The Employer shall compensate Rossey and Franzen for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable next backpay, with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above. In addition to the backpay-allocation report, the Employer shall file with the Regional Director copies of Rossey's and Franzen's corresponding W-2 forms reflecting the backpay awards. *Cascades Containerboard Packing—Niagara*, 370 NLRB No. 76 (2021).

The General Counsel requests that the Respondent be directed to send letters of apology to Rossey and Franzen, but I find such a remedy superfluous and therefore will not order it.

The General Counsel also seeks an order that Hill read the notice to employees on worktime in the presence of a Board agent at the Respondent's three Illinois locations or, alternatively have a Board Agent read the notice to employees during worktime in the presence of the Respondent's supervisors and agents identified in the Complaint. 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." *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), affd. 400 F.3d 920, 929–930 (D.C. Cir. 2005); see also *Johnston Fire Services, LLC*, 371 NLRB No. 56, slip op.at 7 (2022). I agree that the notice should be read as the General Counsel requests but will not specify which management official(s) should do so.

Upon the Union's request, the Respondent shall within 10 days of the request commence bargaining in good faith with the Union for a reasonable time and, if an understanding is reached, embody the understanding in a signed agreement. *Nickolas County Health Care Center*, 331 NLRB 970, 970 (2000); *Raven Government Services*, 331 NLRB 651, 651 (2000).

The challenged ballots that I described above shall be opened and counted within 10 days from the date of this decision. If the final revised tally in this proceeding reveals that the Union has received a majority of the valid ballots case, the Regional Director shall issue a certification of representative, in addition to the bargaining order. If, however, the revised tally shows that the Petitioner has not received a majority of the valid votes cast, the Regional Director shall set aside the election, dismiss the petition, vacate the proceedings in Case 13–RC–281169, and the bargaining order alone shall take effect. *Concrete Form Walls, Inc.*, 346 NLRB 831, 840 (2006); *General Fabri-*

cations Corp., 328 NLRB 1114, 1116 fn. 17 (1999); *Eddyleon Chocolate Co.*, 301 NLRB 887, 892 (1991).

The Respondent shall immediately reinstate the unfair labor practice strikers after they make an unconditional offer to return to work as per *NLRB v. International Van Lines*, 409 U.S. 48, 50–51 (1972); *Maestro Plastics v NLRB*, 350 U.S. 270, 278 (1956).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Spike Enterprise, Inc., Channahon, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because of their support for International Union of Operating Engineers, Local 150, AFL–CIO (the Union).

(b) Giving employees the impression that their union activities are under surveillance.

(c) Threatening employees with loss of pay if they vote to be represented by the Union.

(d) Threatening employees with termination if they go out on an economic strike.

(e) Harassing employees for engaging in union activities.

(f) Announcing stricter enforcement of work rules because of the union organizing drive.

(g) Stating that it will be futile for employees to select the Union as their bargaining representative.

(h) Telling employees that the Company is working on a petition that would make a union election unnecessary.

(i) 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 Robert Rossey and Cody Franzen full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Rossey and Franzen 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) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Rossey and Franzen 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.

(d) Immediately recognize the Union as the collective-bargaining representative of unit employees, retroactive to November 22, 2021, and within 10 days of a request for bargaining by the Union, commence bargaining for a reasonable time and, if an understanding is reached, embody the understanding in a signed agreement.

(e) Offer unfair practice strikers immediate reinstatement after they make an unconditional offer to return to work.

(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) Within 14 days after service by the Region, post at its facilities in Channahon, Blue Island, and Lemont, Illinois, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 13, 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. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. The notice shall be read in the presence of all unit employees by a responsible management official or by a Board agent in the presence of a management official. If during the pendency of these proceedings, the Respondent has gone out of business or closed any of its Illinois facilities, 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 August 12, 2021.

(h) 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.

The complaint is dismissed insofar as it alleges violations of the Act that I have not specifically found.

Dated, Washington, D.C. May 16, 2022

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

[10] 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.

[11] 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."

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 International Union of Operating Engineers, Local 150, AFL–CIO (the Union) or any other labor organization.

WE WILL NOT give you the impression that your union activities are under surveillance.

WE WILL NOT threaten you with loss of pay if you vote to be represented by the Union.

WE WILL NOT threaten you with termination if you go out on an economic strike.

WE WILL NOT harass you for engaging in union activities.

WE WILL NOT announce stricter enforcement of work rules because of the union organizing drive.

WE WILL NOT state that it will be futile for you to select the Union as your bargaining representative.

WE WILL NOT tell you that the Company is working on a petition that would make a union election unnecessary.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Robert Rossey and Cody Franzen full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Rossey and Franzen whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL remove from our files any reference to our unlawful discharges of Rossey and Franzen, 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.

WE WILL , on the Union's request, bargain with the Union as the exclusive collective-bargaining representative of our full-time and regular part-time operators, techs, and laborers employed at our three Illinois locations and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL offer unfair labor practice strikers immediate reinstatement after they make unconditional offers to return to work.

SPIKE ENTERPRISE, INC.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/14-CA-281652 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.