Acme Bus Corporation *and* International Brotherhood of Teamsters, Local 445. Cases 02–CA–038981 and 02–CA–039422

August 26, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE AND HAYES

On February 9, 2010, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent 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 and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] as modified, to modify his remedy,[3] and to adopt the recommended Order as modified.[4]

The Respondent is a bus transportation company operating in Orange County, New York. In 2008,[5] Orange County awarded the Respondent a contract, previously held by First Student, Inc., to transport preschool children with special needs. First Student had recognized the Union, and the Respondent had initially attempted to fill its ranks with former First Student employees. There had apparently been some hint that the Respondent might recognize the Union, but ultimately the Union commenced a new organizing campaign. The complaint alleged that the Respondent committed a number of unfair labor practices during the course of that campaign.

We adopt the judge's conclusions, for the reasons stated by him, that the Respondent violated Section 8(a)(1) of the Act by interrogating employees about union activities, orally promulgating and maintaining a rule prohibiting employees from discussing the Union at work,[6] orally promulgating, maintaining, and disparately enforcing an overly broad solicitation/distribution rule,[7] creating the impression that employees' protected activities were under surveillance,[8] and subjecting employees to closer scrutiny in retaliation for their support of the Union. We also adopt the judge's conclusions, again for the reasons stated by him, that the Respondent violated Section 8(a)(3) and (1) by discharging employees Miosotis Mieses, Catherine Pomella, Eileen Haskell, Roberta Cheatham, and Paula Mercado.

As explained below, we adopt the judge's conclusion that the Respondent's interrogation of employee Richard Azar regarding his pretrial affidavit violated Section 8(a)(1), but for reasons different from those stated by the judge. Similarly, we adopt the judge's 8(a)(3) finding concerning the discharge of employee Penny Kuhhorn, consistent with our discussion below.

1. The interrogation of Richard Azar

The judge found that, after being subpoenaed by the General Counsel, Azar went to Terminal Manager Charlie Mazzei's office holding an envelope that contained both his subpoena and his pretrial affidavit and handed the envelope to Mazzei. As fully detailed in his decision, the judge found that Terminal Manager Charlie Mazzei read employee Azar's Board affidavit, shortly before he was to appear as a witness at the unfair labor practice hearing in this proceeding. Mazzei then asked Azar, "did I really do this?" When Azar responded, "no," Mazzei asked him if he would "be willing to voluntarily write a statement," which Azar then did.[9] The judge concluded that Mazzei's questioning of Azar violated Section 8(a)(1) because Mazzei did not provide him with the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

[2] There are no exceptions to the judge's rejection of the General Counsel's request for a *Gissel* bargaining order, which request the General Counsel had tried unsuccessfully to withdraw, or to his finding that the Respondent's Employee Handbook contains a facially valid no-solicitation/no-distribution rule.

[3] In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), we will modify the judge's recommended remedy by requiring that backpay be paid with interest compounded on a daily basis.

[4] We will modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

[5] All subsequent dates are in 2008.

[6] We find it unnecessary to rely on *Alan Ritchey, Inc.*, 354 NLRB 628 (2009), cited by the judge. Instead, we rely on *Jensen Enterprises, Inc.*, 339 NLRB 877, 878 (2003), and *Willamette Industries*, 306 NLRB 1010, 1017 (1992).

[7] We find it unnecessary to rely on *DPI New England*, 354 NLRB 849 (2009), and *Loparex LLC*, 353 NLRB 1224 (2009), cited by the judge. We rely on *Powellton Coal Co.*, 354 NLRB 419 (2009), as incorporated by reference in 355 NLRB 530 (2010).

[8] We adopt the judge's finding that the Respondent unlawfully created the impression of surveillance by Terminal Manager Charlie Mazzei's statements to monitor Chris Hagelmann that "maybe" he had employees spying at the union meeting, and that he had people "looking out" for people. Accordingly, we find it unnecessary to address the judge's additional finding that the Respondent similarly violated Sec. 8(a)(1) by Mazzei's interaction with drivers Catherine Pomella and Eugene Blanton at the Quick Chek store. Any such finding would be cumulative and would not affect the remedy. See, e.g., *Bentonite Performance Minerals*, 353 NLRB 668 fn. 2 (2008), as incorporated by reference in 355 NLRB 935 (2010).

[9] Azar's subsequent statement is not in evidence.

requisite *Johnnie's Poultry* assurances prior to questioning him.

Although we agree with the judge that the Respondent violated the Act, we find that the facts do not implicate a *Johnnie's Poultry* privilege. *Johnnie's Poultry Co.*[10] accords an employer a limited privilege, despite an inherent danger of coercion, to interrogate employees "where an employer has a legitimate cause to inquire," such as an investigation of factual issues to prepare a defense for trial. 146 NLRB at 774–775. But *Johnnie's Poultry* itself makes clear that, "[i]n defining the area of permissible inquiry, the Board has generally found coercive, and outside the ambit of privilege, interrogation concerning statements or affidavits given to a Board agent." Id. at 775. The Board reasoned that "such questions have a pronounced inhibitory effect upon the exercise by employees of their Section 7 rights, which includes protection in seeking vindication of those rights," and that "interrogation concerning employee activities directed toward enforcement of Section 7 rights also interferes with the Board's processes in carrying out the statutory mandate to protect such rights." Id. Thus, the Board views the interrogation of employees regarding statements or affidavits given to Board agents as inherently coercive. See *Wire Products Mfg. Corp.*, 326 NLRB 625, 627–628 (1998), enfd. mem. sub nom. *NLRB v. R.T. Blankenship & Associates*, *Inc.*, 210 F.3d 375 (7th Cir. 2000). Accordingly, we find that the *Johnnie's Poultry* privilege was not available to the Respondent in these circumstances. Mazzei's questions to Azar regarding his affidavit were inherently coercive, and violated the Act.

2. The discharge of Penny Kuhhorn

The Respondent requires that all drivers perform a "dry run" of their assigned bus routes before the school term begins. On Thursday, August 21, driver Penny Kuhhorn and her monitor performed their dry run. Kuhhorn was not scheduled to work again between August 21 and the start of school on September 3, except to attend a mandatory training session on Wednesday, August 27. At that time, Terminal Manager Mazzei asked Kuhhorn to do a second dry run; her first one had proved too long and he wanted her to try a major highway. Kuhhorn, who had her grandson in tow and who knew that nonemployees were not allowed on the bus, offered to rerun the route on August 28, the following day. Mazzei, however, insisted that the route be rerun by 4 p.m. that day. Kuhhorn then offered to rerun the route in her car, but Mazzei refused that request as well. As a result, Kuhhorn did not rerun the route on August 27.

Not scheduled to work, Kuhhorn went out of town for the Labor Day holiday, returning on September 2. On arriving home, she retrieved two voice mail messages asking her to report to work to redo the dry run by noon on Friday, August 29, at the latest, and a third telling her to report to work at 6 a.m. on September 3, the first day of school.

When Kuhhorn arrived on September 3, Mazzei suspended her for not following company policy. The Respondent's employee status report, dated September 3, states that Kuhhorn was suspended because she "refused to re-do dry runs. Wouldn't return phone calls." On September 5, Mazzei discharged Kuhhorn for "insubordination"; the September 5 status report reiterates the reasons given in the suspension report. Also on September 5, Mazzei told Danea Wolven, the assistant terminal manager, that Kuhhorn "was a big union supporter and that this . . . her refusal to do a dry run would get rid of her."

The judge concluded that the Respondent discriminatorily discharged Kuhhorn. He found, and we agree, that the General Counsel met his initial burden under *Wright Line*.[11] We observe in particular, as did the judge, that Kuhhorn was the first, and one of the most active, union adherents among the employees. Indeed, it was Kuhhorn who had initiated contact with the Union to inquire about the status of negotiations, and upon learning that "talks fell through," had advised the Union that employees were still interested in representation. She spearheaded the new organizing effort, was instrumental in soliciting authorization cards, and notified Mazzei directly that she intended to distribute flyers regarding the Union's first organizational meeting. Mazzei obtained one of these flyers and showed it to Wolven, stating, "[T]hey were trying to bring the Union in to us and that he wasn't going to have a union here." Moreover, in addition to the Respondent's knowledge of her role in the campaign, Mazzei unambiguously identified Kuhhorn as an unlawful target when he told Wolven that Kuhhorn was "a big union supporter" and that her refusal to do a dry run "would get rid of her." It is significant as well that Kuhhorn's discharge was not an isolated incident. As indicated above, the Respondent committed multiple violations of Section 8(a)(1) and unlawfully discharged five other employees because of their support of the Un-

[10] *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965).

[11] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

ion. The General Counsel thus established a strong case of unlawful motivation by the Respondent.[12]

We also agree with the judge that the Respondent did not meet its rebuttal burden under *Wright Line*. That burden required that the Respondent provide more than simply a legitimate reason for the discharge. Its evidentiary obligation was to prove by a preponderance of the evidence that it would have terminated Kuhhorn in the absence of her union activity.[13] Moreover, given the strength of the General Counsel's showing of discrimination, the Respondent's burden here was substantial.[14]

The Respondent argues, and our dissenting colleague agrees, that Kuhhorn engaged in misconduct justifying discharge. Assuming that Kuhhorn's failure to timely perform a second dry run was, in fact, misconduct, we conclude that the Respondent has not proven that it would have discharged Kuhhorn for this single incident because it constituted "gross misconduct," i.e., a basis for immediate discharge under its progressive disciplinary policy.

The Respondent's employee handbook, article 10, entitled "Progressive Discipline," states in part:

> . . . The main purpose of any disciplinary action is to correct the problem and attempt to prevent recurrence . . . .
>
> Disciplinary action may result in any of the following: Verbal Warning, Written Warning, Suspension or Termination of Employment—depending on the severity of the problem and the number of occurrences. There may be circumstances when one or more steps are bypassed.
>
> While it is impossible to list every type of behavior that may be deemed a serious offense, the TERMINATION OF EMPLOYMENT policy includes examples of problems that may result in termination of employment.
>
> By using progressive discipline, we anticipate that most conduct or job performance issues can be corrected at an early stage, benefiting both the employee and the Company.

The Respondent's "Termination of Employment" policy states, in turn, that the Company may discharge an employee for, among other reasons, "any of the following," and lists 30 examples, including "Insubordinate behavior or refusing to obey work instructions." It concludes with the statement that the Respondent "will attempt to address these issues through Progressive Discipline. However, [the Respondent] reserves the right to immediately terminate the employment of an employee without prior notice in situations involving *gross misconduct*" (emphasis added).

The Respondent's policy thus establishes a preference for addressing disciplinary issues—including insubordination or refusal to obey work instructions—through progressive discipline. A reasonable reading of the policy evinces a clear intent not to immediately discharge employees for workplace transgressions, except in circumstances that amount to "gross misconduct." Significantly, Kuhhorn had no record of prior discipline. Assuming that she engaged in misconduct concerning the second dry run, it was an initial offense under the policy. In addition, neither the failure to do a dry run nor the failure to respond to phone calls while off duty is listed among the 30 enumerated infractions. Given Kuhhorn's offers to rerun the route and her scheduled vacation over the holiday weekend, we are hard pressed to find that the Respondent established that Kuhhorn would have been regarded as "insubordinate" under its policy or as that term is generally understood. In support of the insubordination charge, Mazzei testified that Kuhhorn "absolutely" refused to do the second run on August 27, and that she told him "if you want it done, do it yourself" and walked out. However, the judge did not believe Mazzei, and discredited him, leaving the charge of insubordination itself lacking significant support

Further, the Respondent's documentary evidence does not demonstrate that it would have immediately terminated Kuhhorn for misconduct, absent her union activities. Kuhhorn completed the initial dry run, and she made reasonable efforts to timely complete the second

[12] On exceptions, the Respondent suggests that the General Counsel's case fails because Human Resources Manager Jim Poisella testified that he made or approved the decision to discharge Kuhhorn for insubordination based on her failure to rerun her route and to timely submit the "left-right" sheets, and Poisella denied having any knowledge of Kuhhorn's union activities. Even assuming Poisella made the decision, however, the judge found as a factual matter that Mazzei had informed Poisella of Kuhhorn's earlier distribution of union flyers. In any event, Poisella's decision was based entirely on reports from Mazzei, whose unlawful animus is clear. As a matter of law, then, Mazzei's unlawful animus may be attributed to the Respondent. See *Albertson's, Inc*., 344 NLRB 1172, 1176 (2005); *Parts Depot, Inc.*, 332 NLRB 670, 672 (2000), enfd. mem. 24 Fed. Appx. 1 (D.C. Cir. 2001) (per curiam); *Springfield Air Center*, 311 NLRB 1151, 1151 (1993). See also *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 117–118 (6th Cir. 1987); *Boston Mutual Life Insurance Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982).

[13] See, e.g., *L.B.&B. Associates*, *Inc.,* 346 NLRB 1025, 1026 (2006), enfd. 232 Fed. Appx. 270 (4th Cir. 2007).

[14] See, e.g., *Metro One Loss Prevention Services Group*, 356 NLRB 89, 103 (2010). Accord: *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 933 (D.C. Cir. 2011), enfg. 355 NLRB 1333 (2010).

dry run.[15] None of the documents establish that any other employee was terminated for failing to perform a dry run. The vast majority of the termination reports in the record show that employees were discharged for "no call/no shows," failed drug and/or alcohol tests, or failed criminal background checks. In our view, these instances bear a striking dissimilarity to failing to perform a dry run.[16] Most significantly, the Respondent did not establish that *any* of these discharged employees was guilty of "gross misconduct," i.e., terminated immediately for a single transgression rather than as the final step under the progressive disciplinary policy.

In sum, we find that the Respondent has not demonstrated that it would have terminated Kuhhorn for her failure to repeat the required dry run in the absence of her union activity.[17]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Acme Bus Corporation, Middletown, New York, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

1. Substitute the following for paragraph 1(e).

"(e) Coercively interrogating any employee about the contents of a pretrial affidavit given by the employee to a Board agent."

2. Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its Middletown, New York facility, copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 15, 2008."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER HAYES, dissenting in part.

I write separately only to express my disagreement with my colleagues' finding that the Respondent failed to meet its rebuttal burden under *Wright Line* of showing that it would have discharged Kuhhorn for her misconduct of refusing to follow instructions to complete her repeat school bus dry run by noon on the Friday before the beginning of the school term or to respond to voicemail messages about these instructions.[1] The Respondent's employee handbook specifically provides for the possibility of termination for "Insubordinate behavior or refusing to obey work instructions." That is exactly the misconduct Kuhhorn engaged in, and there is no evidence that discharging her in reliance on this misconduct involved disparate treatment.

At least 12 other drivers were also required to rerun their routes. All of the other drivers did so. Nevertheless, my colleagues express the view that the Respondent failed to meet its rebuttal burden because it did not establish that it had discharged another employee for a "single transgression." On the contrary, an employer's failure to show that its discipline paralleled the treatment of other employees where no other employee has engaged in the same misconduct is not dispositive.[2]

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[15] The Respondent has not explained why, after Mazzei rejected Kuhhorn's offer to rerun the route on August 28, it decided, while she was off duty, that August 29 was an acceptable deadline for the rerun.

[16] One of the "no call/no show" dischargees failed to do a dry run in August. In the comment section, the Employee Status Report states "no call or show for route selection, Sept. 3 & 4 and no dry run." However, the "reason for termination" was "2 days [no call/no show]." We observe that "no dry run" was not a listed reason for termination, and that the discharge occurred at about the same time as Kuhhorn's. The Respondent did not explain why summary discharge was appropriate for Kuhhorn based solely on a failure to repeat her dry run, but insufficient in the former instance.

[17] We disagree with our dissenting colleague that we have "recast the Respondent's disciplinary system" to our liking. Consistent with the Respondent's burden of proof, we have simply evaluated its proffered evidence in the context of its published progressive disciplinary policy and its demonstrated antiunion animus against Kuhhorn.

[1] I agree with the disposition of all other issues except the majority's finding that the Respondent unlawfully interrogated employee Richard Azar about the Board affidavit he mistakenly gave to Terminal Manager Charlie Mazzei. I would find no need to pass on whether this interrogation was unlawful inasmuch as it is essentially cumulative of other unlawful interrogation findings, including the finding that Mazzei unlawfully interrogated Azar about his attendance at a union meeting.

[2] See *Albis Plastics*, 335 NLRB 923, 928 (2001) (finding employer met *Wright Line* rebuttal burden), enfd. 67 Fed.Appx. 253 (5th Cir. 2003) (unpublished); *NACCO Materials Handling Group*, 331 NLRB 1245, 1246 fn. 5 (2000). My colleagues state that the Respondent "did not explain why summary discharge was appropriate for Kuhhorn based solely on a failure to repeat her dry run," when one of two reports related to another dischargee, who also failed to perform a dry run and to appear for route selection, listed the reason for termination as "2

The majority has recast the Respondent's disciplinary system as they would apply it, a clearly impermissible basis for finding a violation. E.g., *Framan Mechanical, Inc.*, 343 NLRB 408, 412 (2004) (Board should not substitute its own judgment for that of the employer in determining whether an employer's conduct is unlawful). They even go so far as to claim that Kuhhorn's refusal to make a timely second dry run (necessitated because her initial dry run was inadequate) was not a dischargeable offense because it was not specifically enumerated as such in the handbook. I cannot seriously believe that they mean to suggest an employer's legitimate discharge defense fails unless its handbook specifically lists every work instruction that an employee must obey or be subject to discharge. Further, I cannot share my colleagues' apparent lack of appreciation that an employer charged with the transportation of preschool children with special needs would want assurance that all of its drivers knew their routes and could drive them according to schedule before the day when actual transportation operations began.

It is true that the Respondent has committed numerous unfair labor practices and, by doing so, has demonstrated union animus. Of course, that fact is not dispositive of our *Wright Line* analysis of alleged discriminatory discharges. Neither is it dispositive that Kuhhorn was a major employee supporter of the Union, or that the Respondent's manager, Mazzei, referred to this status when stating that Kuhhorn's refusal to make the second dry run would "get rid of her." An employee's union activity does not insulate her from discharge for nondiscriminatory reasons. "If an employee provides an employer with a sufficient cause for [her] dismissal by engaging in conduct for which [she] would have been terminated in any event, and the employer discharges [her] for that reason, the circumstance that the employer welcomed the opportunity to discharge does not make it discriminatory and therefore unlawful."[3] That is what happened here, and I would therefore dismiss the allegation that Kuhhorn's discharge was unlawful.

days [no call/no show]." My colleagues' suggestion that this other dischargee would not have been discharged had she reported to work but refused to do a dry run (the conduct for which Kuhhorn was discharged) finds no support in the record. Similarly, my colleagues do not explain their conclusion that employees discharged for "no call/no shows," failed drug and/or alcohol tests, or failed criminal background checks, were not immediately terminated for a "single transgression."

[3] *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966).

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate and maintain a rule prohibiting employees from discussing International Brotherhood of Teamsters, Local 445, or any other union, at work.

WE WILL NOT promulgate and maintain a rule prohibiting union solicitations and distributions on employer property.

WE WILL NOT create the impression that union meetings are under surveillance.

WE WILL NOT coercively question you about your union support or activities, or about the union support or union activities of any other employees.

WE WILL NOT coercively interrogate you about the contents of any pretrial affidavit given to a Board agent.

WE WILL NOT subject you to closer scrutiny in retaliation for your support of the Union.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting International Brotherhood of Teamsters, Local 445, or any other union.

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

WE WILL within 14 days from the date of the Board's Order, offer Penny Kuhhorn, Eileen Haskell, Catherine Pomella, Roberta Cheatham, and Paula Mercado 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. It appears that Miosotis Mieses was offered reinstatement by letter of June 10, 2009.

WE WILL make Miosotis Mieses, Penny Kuhhorn, Eileen Haskell, Catherine Pomella, Roberta Cheatham, and Paula Mercado whole for any loss of earnings and other

benefits resulting from their discharge, less any net interim earnings plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Miosotis Mieses, Penny Kuhhorn, Eileen Haskell, Catherine Pomella, Roberta Cheatham, and Paula Mercado, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

ACME BUS CORP.

Gregory B. Davis and *Rachel F. Preiser, Esqs.,* for the General Counsel.

John K. Diviney, Esq. (Rivkin, Radler, LLP), of Uniondale, New York, and *Alan B. Pearl, Esq. (Alan B. Pearl & Associates),* of Syosset, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge and a first, second, third and fourth amended charge in Case 02–CA–038981 filed by International Brotherhood of Teamsters, Local 445 (Union) on September 29, December 8, 2008, January 29, February 28, and March 12, 2009, respectively, an amended complaint was issued on July 15, 2009 against Acme Bus Corporation (Respondent, Employer or Acme). Based upon a charge and an amended charge in Case 2–CA–39442 filed by the Union on August 5 and October 1, 2009, respectively, a complaint was issued in that case on October 8, 2009. The General Counsel's motion to consolidate the two complaints for hearing was granted over the Respondent's objection.

The complaint,[1] as amended at the hearing, alleges that the Respondent (a) promulgated and maintained rules prohibiting union solicitations and distributions and discussing the Union at work (b) engaged in surveillance by spying on employees who attended a Union meeting (c) created the impression of surveillance by informing employees that the Respondent was monitoring employees who attended a Union meeting (d) interrogated employees about their union activities and the union activities of other employees and directed employees to induce other employees to sign a petition against the Union (e) subjected employees to closer scrutiny in retaliation for their support of the Union (f) threatened employees with discipline and other unspecified reprisals (g) engaged in surveillance of employees to discover their union activities (h) threatened to call the police and called the police to remove a union representative who was distributing flyers to employees in order to interfere with employees seeking information from the Union and (i) engaged in surveillance by videotaping employees.[2]

The complaint also alleges that the Respondent discharged employees Miosotis Mieses, Penny Kuhhorn, Eileen Haskell, Catherine Pomella, Roberta Cheatham and Paula Mercado because of their Union and concerted activities. The complaint further alleges that on about September 16, 2008, the Union represented a majority of the unit employees, and that because the unfair labor practices set forth above are so serious and substantial in character that the possibility of erasing their effects and conducting a fair election is slight, and inasmuch as the employees' sentiments regarding representation having been expressed through authorization cards, those sentiments would be protected better by the issuance of a bargaining order than by traditional remedies alone.

The Respondent's answer denied the material allegations of the complaint and a hearing was held on 11 days between September 22 and November 2, 2009, in New York, New York.

Upon the evidence presented in this proceeding and my observation of the demeanor of the witnesses and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent, a domestic corporation having its place of business located at 12 Fulton Street, Middletown, New York, has been engaged in the operation of school transportation of special needs children. Annually, in conducting its business operations, the Respondent purchases and receives at its place of business goods and supplies valued in excess of $50,000 from suppliers located directly outside New York State, and during the same period, the Respondent derives gross revenues in excess of $1 million. The Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits and I find that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Employer's Business

Acme is a subsidiary company of Baumann & Sons Buses, Inc. whose headquarters is located in Ronkonkoma, Long Island, New York. Baumann's human resources director, James Poisella and his assistant Maureen Oulette, are responsible for major personnel decisions of Baumann's 2000 employees employed by Baumann and other subsidiary companies. He or Oulette review the supporting documentation for discipline and make the appropriate decision regarding discipline.

Acme is a bus company which provides transportation for "special needs" passengers in Orange County, New York, the location of this dispute, and also on Long Island. In the early

[1] The consolidated complaints will be hereafter referred to as the "complaint."

[2] The General Counsel's brief requested withdrawal of par. 10(i) of the complaint, that the Respondent created the impression of surveillance by its informing employees that it believed that they were at a particular location which employees used for union meetings. The request is granted.

The General Counsel also, in the brief, moved to amend par. 11, above, to allege that the Respondent created the impression of surveillance of employees by videotaping employees and withdrew the allegation in that paragraph that it engaged in surveillance by videotatping employees.

Spring, 2008, Acme bid on and won the contract to provide such a service in Orange County. Its terminal manager when the operation began was Tom Mattingly, and the assistant terminal manager was Charles Mazzei. On September 1, 2008, Mattingly was fired, Mazzei became the terminal manager, Danea Morris-Wolven,[3] who was then the dispatcher, became the assistant terminal manager, and Cyndee Cuddy became the dispatcher. In July, 2009, Wolven was demoted to dispatcher and Cuddy was promoted to assistant terminal manager.

Acme's Orange County operation was to begin with the summer session on July 1, 2008. First Student, Inc., a school bus company which lost the contract, apparently had recognized the Union as the collective-bargaining representative of the unit employees there. According to Jerry Ebert, the Union's business agent and director of organizing, negotiations had not yet started with First Student when that company lost the contract.

Acme sought to hire any First Student employee who was otherwise qualified for hire and it obtained from the Union a list of 165 First Student workers. Acme expected to fill its complement of 115 to 120 employees from the former First Student ranks. However, only 35 First Student workers were hired, and the rest of the employees were hired from advertisements. Employee Tammy Bartula who had worked at First Student stated that the Employer's officials knew that the First Student employees had just voted for the Union and encouraged her to have her former colleagues apply for jobs with Acme.

Acme began its operation with 55 buses in a temporary facility on the grounds of a medical facility and then moved in mid August 2008 to a permanent facility on Fulton Street in Middletown, New York which contains the office of the terminal manager Charles Mazzei, a dispatcher's office, break rooms for the drivers, and parking lots for the buses and employees' personal vehicles. At the time of the hearing it operated 67 buses.

B. The Nature of the Population Served by Acme

The children transported are of pre-school age, between 3 and 4-1/2 years old, having emotional, learning and/or physical disabilities. Special rules for their transportation set forth in the agreement between Orange County and the Employer include a requirement that they cannot be on the bus longer than 75 minutes, must have special car seats, safety vest or wheelchair hook up, and that each bus have a monitor or matron.

Each bus has a driver and monitor. The monitor assists the child onto and off the bus, and makes certain that the child's seat belt is fastened. The bus is equipped with a radio enabling the driver to be in contact with Acme's dispatcher. Normally, the radio is used for such communications, but at times when an emergency is being handled by radio, drivers are advised to communicate with the dispatcher by their own personal cell phone.

The Orange County Department of Health contracts with a service company to provide transportation management and oversight for the preschool contract with Acme. Servisair was the first management company and then, on January 1, 2009, VMC Group, Inc. provided that service. Each management company had an elaborate set of rules that Acme was required to follow and it is clear, as will be set forth below, that each exercised extremely careful control of Acme's operations relating to the transportation of the children. Incident reports are completed by the driver and monitor and are faxed to VMC the same day as required in the contract between the management company and the Employer. In cases of misconduct by Acme's employees, the management company had the power to fine the Employer, disqualify drivers and monitors, and make recommendations to Acme relating to its workers.

C. The Union's Organizational Campaign

1. Employees' efforts in behalf of the Union

Union director of organizing and business agent Jerry Ebert stated that he believed that the Employer may have agreed to recognize the Union following its winning the contract with Orange County, but "talks fell through."

In late July, or early August 2008, employee Penny Kuhhorn phoned Union Agent Cindy Garlinghouse and was told that no contract negotiations between the Employer and the Union were being held. Kuhhorn volunteered that several drivers were interested in the Union, and Garlinghouse said she would meet them. Shortly thereafter, Garlinghouse met with Kuhhorn and her monitor Miosotis Mieses at the end of the driveway at the temporary facility. About 10 to 20 employees joined them. Garlinghouse told the group that there were no negotiations between the Employer and the Union, and that if the workers wanted a union they would have to sign cards. She gave Kuhhorn a few authorization cards but asked her to wait until the Union advised the Employer that she would be distributing them.

Ebert met with driver Penny Kuhhorn and her monitor Miosotis Mieses directly outside the Employer's permanent facility in mid August 2008, and gave Kuhhorn a flyer for a meeting scheduled for August 19 at a local restaurant. He asked her to distribute the flyers on nonworktime in the parking lot and also asked her to encourage her co-workers to attend the meeting. Kuhhorn and Mieses told Ebert that they were nervous and he suggested that the only way they can protect themselves was to notify the Employer that they were organizing, so that if "something bad happens" they would have proof that the Employer was advised of their activities in advance.[4]

Mieses testified that, at that time, she and Kuhhorn met Bob Calli, an assistant manager, near the mechanic's facility, and Mieses advised him "we're here to tell you that we are involved in a union fully. We were giving flyers to everyone. We will give it to them when they finish their runs. So we're going to be here in the parking lot." Calli told them to be careful because the Union was "just after your money." Mieses stated that they saw Mazzei looking through the window and he came out of the building yelling "I don't want that guy here. That guy cannot be here. You cannot be doing that in the company yard. Mieses stated that she told Mazzei "I just came to tell you that I'm fully involved in the union and we are giving flyers to the people that are interested." Mazzei yelled "you cannot do

[3] Ms. Morris-Wolven will be referred to hereafter as "Wolven."

[4] Ebert's pretrial affidavit stated that he advised them to tell Mazzei that they intended to handbill during nonwork hours.

that." Human resources director Poisella testified that Mazzei informed him that union representatives visited the premises in about August 2008 and spoke to employees.

Kuhhorn stated that she and Mieses went into the building, showed Mazzei the flyer and Kuhhorn said that she wanted to hand them out. Mazzei replied that they "couldn't do it on company property." Kuhhorn then called Ebert and told him what Mazzei said. Ebert said that he would call the company attorney. Ebert testified that he called Employer attorney Mark Portnoy and told him that Mazzei prohibited their distribution of literature on nonwork time. Portnoy agreed with Ebert that Mazzei was wrong and said that he would take care of it. Kuhhorn stated that Ebert then told her that the Employer's attorney said that she could distribute literature on nonwork time.

Employee Pomella signed a union card on August 15, 2008, that was given to her by Ebert that day on the sidewalk bordering the facility. Pomella stated that she received blank cards from Ebert in August, and told manager Bob Calli at that time, with Mieses and Haskell present, that Ebert gave her union cards and he asked that they request permission before they distributed them. Calli asked to see a card and Pomella gave him one which he read. Calli said that he was familiar with Teamsters 445. Mazzei approached them and asked Pomella what she was doing. Pomella replied that she was requesting permission to distribute the Union cards. Mazzei retorted that she could not do so on company property. Pomella apologized. Calli gave Mazzei the Union card, and Mazzei took the card and left the area.

The Employer's handbook states as follows:

> Solicitation, or sale of goods, is not allowed on Baumann premises by non-Baumann representatives during working time. Distribution of other than Baumann approved materials is prohibited during working hours in working areas and on Baumann company property. Breaks, lunch, before and after work is considered non-working time. Our employees may sell goods or solicit contributions during non-working hours, in non-working areas on the condition it does not interfere with Baumann activities or services.

Mazzei testified that in mid August 2008, he was told by employees that Kuhhorn was "blocking the entry of buses." He saw Kuhhorn standing near Union Agent Garlinghouse in the center of a narrow area where the buses entered. They were both handing out flyers. He observed that buses could not pass unless they stopped for her. He saw one or two buses enter when he approached her. Mazzei stated that he asked Kuhhorn to stop blocking the buses and move away. Kuhhorn moved away and stood next to Garlinghouse. Mazzei did not know how many buses were blocked and noted that Kuhhorn engaged in this activity after she had completed one of her runs. Mazzei did not issue a written warning because Kuhhorn immediately complied with his order to move. Mazzei denied that Kuhhorn asked for permission to distribute the flyers. Mazzei called Poisella who told him his actions were correct. He denied having any other conversation with Kuhhorn relating to the distribution of literature.

Kuhhorn stated that she distributed authorization cards to employees outside the facility, advising about 12 workers them that she had cards if anyone wanted to sign them. She asked workers to sign the cards, telling them that their purpose was "so we can try to get the Union in; and that if they were interested in it, please sign. . . . But that was the bottom line that this was to help get the Union in to protect our jobs."

Wolven testified that the Union was first brought to her attention in early August, about one month before she was promoted to assistant terminal manager when Mazzei mentioned to her that "they were trying to bring the Union in to us and that he wasn't going to have a union here. That we didn't need the union." Mazzei showed her the flyer announcing the August 19 Union meeting.

2. The discharge of Miosotis Mieses

Mieses began work for the Employer in July, 2008 as a monitor. She worked with Penny Kuhhorn. Mieses stated that when the operation first began she did not receive eight hours of work, so apparently Kuhhorn asked for and received permission to take the bus to a gas station for fuel. The extra time taken in fueling the bus was paid by the Employer. Since Mieses went with Kuhhorn to fuel the bus she also was paid for the extra time for about 2 or 3 weeks.

Some time later, Mieses asked Mazzei and assistant terminal manager Tom Mattingly why her pay check was lower than usual. They told her that she should not be fueling buses. Apparently, only one person, the driver, was needed for this task and the Respondent did not want to pay monitors to assist in this endeavor. She agreed not to fuel the bus and no longer did so. She also denied adding time for fueling to her time sheet after she was told not to fuel the buses. Thereafter, she waited on her bus for another bus to take her to the facility or just waited in the bus until the next run had to be made.

Mazzei testified that monitors were not assigned fueling work because there was no such work for them to do. He stated that any money Mieses received for the extra time in fueling was not authorized. Rather, the monitors were picked up at the gas station by other buses returning to the facility.

As set forth above, Mieses and Kuhhorn met with Garlinghouse and then Ebert in early August near the facility and received flyers to distribute, and Mieses told mangers Mazzei and Calli that she and Kuhhorn were organizing for the Union and distributing flyers, and they were told that they could not distribute flyers on company property. As set forth above, Pomella stated that Mieses was with her in August when Pomella told managers Mazzei and Calli that they would be distributing union cards. Mazzei told her that they could not do so on company property.

On August 15, 2008, Kuhhorn and Mieses did a run in the morning. When they returned, Mazzei asked them to do an extra run. Kuhhorn protested that Mieses could not go on that run since she had to take a test to be a driver for the company, but they agreed to do the run and did so. When they returned, Mazzei told Mieses that her three month probationary period had ended and that her services were no longer needed. According to dispatcher Wolven, Mazzei told her that she was not "working out." An employee status report written by Wolven

and dated August 15, 2008, states that Mieses was "disrespectful to management, argumentative on several occasions."

Wolven wrote a memo which stated essentially that she and Mazzei terminated Miosotis:

> Due to her constant disrespectful attitude and behavior towards the office staff and management. On several occasions Miosotis has argued with the dispatcher over turning in paperwork and her pay sheets. She was informed . . . several times that the monitors do not get paid for fueling the buses but she continues to keep marking it on her pay sheets. She was told that just because her driver was fueling other buses, that she was not entitled to it. She was told she was to come back to base but she insisted to stay with her driver. When she spoke to the girls in the office, her tone towards the girls is rude and disrespectful. She brought down morale in the office. She made the girls in the office very uncomfortable when she came to the dispatch window because there was always an argument. Charlie and I felt it was best to terminate a person like this before her 90 days probation period was up to help avoid anymore conflict in the office.

Mieses denied that Wolven told her she was rude and disrespectful to her and other dispatchers. Wolven testified that she typed that memo to accompany the above employee status report, stating that Mazzei told her what to include in the memo, but in fact Wolven testified that the comments in the memo were correct. Indeed, regarding the bus-fueling issue, Wolven stated that the Employer paid Mieses for fueling buses but it was the understanding that the monitors would return to the yard and not assist in fueling the bus. Mieses disregarded instructions twice and continued to include in her time sheet the time for fueling the bus "after she was specifically told not to."

Wolven stated that Mieses was first told in mid July[5] not to fuel the buses, and that issue continued in the week ending August 9.

Two time sheets were received in evidence.[6] One, for a week in mid-July, shows that she worked on July 15–18, and claimed payment for, and was paid for fueling the bus on July 16, 17, and 18. The other, for the period August 4–8, shows that on Monday, August 4, she claimed payment for, and was paid for fueling the bus. However, she did not claim payment for fueling the bus for any other day that week. Rather, on August 6, she wrote on her time sheet that "Penny [Kuhhorn, her driver] call [sic] and wait for some one to bring me to base." Accordingly, after being told that she could not be paid for fueling the buses, she apparently did not do so, according to the time sheets in evidence. Instead, she waited for another vehicle to return her to the facility, as demonstrated in the time sheet notation for August 6. If she was paid for that waiting time, she was entitled to such payment, as Mazzei testified, if she waited for 15 minutes to be picked up.

Accordingly, I find, as testified by Mieses that the last time she requesting payment for fueling the buses was on August 4, and did not thereafter make such a request. There is no written evidence that she made such a request after August 4. The only written evidence that has been offered in evidence is that on August 6 she waited to be returned to the base and did not fuel the bus that day.

Wolven testified that a few days before Mieses was fired, Mazzei told Wolven that Mieses was "a big union supporter" and that "we were getting rid of another union supporter."

Poisella stated that the discharge of Mieses was approved by the human resources department but he was not involved in that decision because he was not at work in that period of time. On June 10, 2009, Mieses was offered unconditional reinstatement to her former position.

Mazzei testified that the human resources department asked for his recommendation concerning Mieses, and he recommended that she be fired. He recalled that in July and August, dispatcher Wolven told him that Mieses was "very uncooperative" with the dispatcher, was not following her instructions, was entering the bus at unauthorized times, was "rude and obnoxious" and that she recommended her discharge. Mazzei stated that he was not aware that Mieses had been involved in any union activity and denied that she spoke to him regarding distributing union literature. Mazzei further denied that he and Wolven spoke about Mieses' involvement in union activities.

The employee handbook contains no mention of a probationary period. It states that after 90 days of employment, employees receive certain benefits. Mazzei testified that employees were not notified in writing of the probationary period. However, Mazzei stated that the Employer has an unwritten "formal review process" at the end of an employee's ninetieth day of work where an employee is evaluated. He termed that 90 days a "probationary period." If an employee is "not up to standards" within 90 days she is terminated. He mentioned the names of other employees who were dismissed within 90 days of the start of their employment. Wolven also confirmed that other employees were fired within 90 days of their hire.

3. The August 19 union meeting

On August 19, a union meeting was held at a restaurant. Ebert, Garlinghouse and 30 to 40 employees were present. Ebert told the group that he expected that the Employer would recognize the Union as the exclusive agent of the employees but that did not occur, but that "there were some indications [by the Respondent's counsel] that if we gathered a substantial amount of cards, a strong majority of cards that we might be able to obtain recognition." He told them that there would be no union dues until after a contract was signed. Ebert stated that 90 percent of those present signed cards at the meeting which he and Kuhhorn collected by going to each of the 15 tables and taking the signed cards from the workers.

Kuhhorn stated that before the cards were distributed, the union representatives said that "these were not anything binding. They were just so that the Union could start negotiations and see how about getting the Union in. It was basically something that would give them permission to talk to the company as far as getting the Union in." Employees Pomella and Haskell stated that they saw employees sign cards at the meeting. Haskell stated that Ebert spoke about why the workers should be part of

[5] The transcript records that the first time she was warned was in mid-August, an obvious error.

[6] GC Exhs. 15, 16.

the Union and what it would accomplish for them, including job security.

Kuhhorn signed a card at the meeting and gave it to Ebert. She saw that other employees signed cards at that time. Kuhhorn stated that Timothy "Cowboy" Kellison, a driver, was at the meeting. Employee Christopher Hagelmann attended the August 19 meeting.[7] He stated that he signed a card at that meeting and saw employees sign and return cards that were given to them at the meeting.

Regarding her solicitation of employees, Kuhhorn, in answer to a question on cross-examination Kuhhorn answered "yes" to the question "did you understand that the purpose of the cards was to get an election?" Also, in answer to the question "is it correct that the reason that you told people to sign the cards was only for an election to get a union in?" Kuhhorn answered "yes."

Kuhhorn also testified that when soliciting employees to sign cards she told them it was to "try to get the Union in here. It was not an obligation. If they wanted the Union in to sign the card and give it back or mail it." She received four signed cards and gave them to Ebert in the week following the meeting.

Hagelmann also stated that he gave cards to 43 workers on separate occasions but not on company property and that all of them returned signed cards to him. He first stated that the workers did not sign the cards in front of him, but then said that most did so. He gave the signed cards to Garlinghouse. When he solicited their signatures he told the employees that the purpose of the cards was that "we're going to try to start a union here." He did not tell them that their purpose was to try to get an election or only for an election.

4. Mazzei's questioning employees about the meeting

Hagelmann testified that on August 20, the day after that meeting, upon arriving at work, Mazzei asked him to enter the garage, and then asked him what happened at the meeting "can I trust you about what happened at the meeting?" Hagelmann answered "yes." Mazzei then asked "what was going on at the meeting." Hagelmann replied that they spoke about "union business and stuff." Hagelmann said that "the Uno would be here eventually" and he quoted Mazzei as saying "I don't want to have the Union here because we don't need to have a union here right now." Hagelmann disagreed, saying a union was needed for health benefits and would be good for the workers. Hagelmann described the conversation, which lasted about 30 minutes, as "heated."

Hagelmann also stated that Mazzei told him at that time that "maybe "J.J." [James Jenkins, a driver from Long Island] might have been at the Chinese restaurant because he had people looking out." Hagelmann quoted Mazzei as saying that he "didn't want people going to the Chinese restaurant and go to the meeting" and that "J.J. and Cowboy [Timothy Kellison] were looking out for people." At hearing, Hagelmann stated that he did not see either man at the union meeting. Mazzei denied asking Kellison or Jenkins to attend any union meeting.

Hand-written timecard records for Jenkins shows that he worked on Long Island from 6 a.m. to 6:30 p.m. on August 19 and was paid for 10 hours.

Wolven testified that following the August 19 union meeting, certain employees "voluntarily" went into Mazzei's office, entering without Mazzei's calling them in, and spoke with him about the union meeting during which she was present.

She stated Mazzei "initiated" conversations with employees Frees and Rink, asking them "what happened at the meeting." They told him what was said at the meeting and that Ebert promised more money and other benefits that they were already receiving, but would not guarantee anything or put anything in writing. Mazzei responded that "they couldn't get anymore than what they've got already; and they would lose everything if they got the union in."[8]

Wolven also stated that shortly after the August 19 meeting, Veronica Anglero and Chris Rudy "came in to tell us what happened at the meeting." Mazzei asked who was there and they mentioned a few names. Further, Wolven stated that Richard Berlly "came in and began discussing what was said at the meeting, including that the Union was offering more money and benefits that the employees were already receiving. Mazzei replied that they weren't going to get any more money and they were already getting everything the Union was offering.

Mazzei testified that employees Frees, Rink, and Azar came to him after the meeting and asked whether Ebert's statement that he wrote the employee handbook was true. Mazzei denied asking any questions whether they signed cards for the Union or attended union meetings, and further denied that he asked any workers who attended the Union meetings.

5. The discharge of Penny Kuhhorn

Penny Kuhhorn began work for the Employer as a driver in early July 2008. She has been employed as a bus driver for 20 years.

As set forth above, in mid August, 2008, Kuhhorn distributed flyers and cards with her monitor, attended a union meeting and signed a card for the Union. She told Mazzei that she intended to distribute material for the Union and was told that she could not do so on company property. Mazzei conceded seeing Kuhhorn handing out Union literature.

The "Dry Run" Procedure

According to the employee handbook, all drivers are required to perform a "dry run" of their assigned route prior to the start of the school term. The purpose of the dry run is to ensure that the driver is familiar with the route prior to the first day of school. The driver plan the run on a map provided by the dispatcher and must verify the pick-up and drop-off points at the school and at the children's' homes. The handbook provides that at least 3 days prior to the first day of school, the driver must give the dispatcher left and right sheets detailing all

[7] Hagelmann was confused as to the date of the meeting. His testimony that he attended a meeting in July is clearly wrong, but then stated that he signed a card, dated August 19, at the first meeting he attended.

[8] This threat was not alleged in the complaint. A finding of a violation as to the threat would be cumulative of the other 8(a)(1) violations I will find herein.

the turns the driver makes with approximate pick up and drop off times for each route the driver is assigned. The driver must meet every parent during the dry run.

Kuhhorn stated that on Wednesday, August 20, 2008, she was asked to do a "dry run." All the drivers were asked to do a dry run on August 21 or 22. On August 21, Kuhhorn and her monitor did a dry run for all three of their routes. Kuhhorn stated that they returned to the terminal after doing the dry run and her monitor submitted a list of the runs. She was told that Wolven said that the Employer wanted only the left-right sheets. Kuhhorn rewrote the papers and submitted it.

Kuhhorn was not scheduled to work on Thursday or Friday, August 21 or 22, or the following Monday and Tuesday, August 25 and 26, and had no communication with the Employer during that period of time. On Wednesday, August 27, Kuhhorn came to work and attended a mandatory training session. She was accompanied by her grandson for whom she was babysitting. Mazzei told her that her run was too long. The Respondent's contract with Orange County requires that a child be on the bus no longer than 75 minutes. Apparently, Kuhhorn's run took longer than that to complete. Mazzei also said that he wanted her to travel via Interstate Route 84 rather than on the "back way," local or smaller roads. He asked her to do the route again. Kuhhorn protested that her route was actually shorter but Mazzei insisted that she do the run as he suggested. Kuhhorn said that she would re-drive the route but could not do so that day because her grandson was with her. Inasmuch as nonemployees are not permitted in the bus for liability purposes, she could not do the run in the bus with the child. She told Mazzei that she could re-do the dry run the next day, Thursday, August 28. Mazzei refused, insisting that the run be done by 4 p.m. that day. Kuhhorn replied that she would try to have her daughter leave work early to take her child, and if so, she would re-do the route that day.

Kuhhorn stated that she learned that her daughter could not leave work early, and she called Mazzei with the news. Mazzei said that she would have to do the run in her own vehicle that day since he needed the report by 4 p.m. Wolven agreed that Kuhhorn requested permission to use her own vehicle, but said that Mazzei denied her request to use it. Wolven testified that the first time that drivers were permitted to do dry runs in their personal vehicles was one year after Kuhhorn was discharged, just prior to the summer 2009 school session. On those occasions Mazzei specifically authorized the use of personal vehicles because the drivers were not available on the days that were scheduled for the dry runs but offered to do them on the weekend in their personal vehicles.

Mazzei testified that dry runs are supposed to be done in a company vehicle because the driver was on company time and was paid for her time during which the Employer's insurance covers the driver. Further, the Employer can determine the route the bus took in the event the driver needs help finding an address. Mazzei conceded that drivers asked to do the dry run in their personal vehicle but he never authorized it and he is not aware that any dry runs took place in a private vehicle.

Kuhhorn testified that she re-drove the route with her grandson that day, Wednesday, August 27. She returned to the terminal at 3:50 p.m. after Mazzei had left for the day, and gave the report to Wolven, advising her that if there were any problems with the report, she should call her early the next morning as she was going away for the Labor Day holiday. Wolven denied that Kuhhorn re-did the dry run that day.

Kuhhorn was not called the next morning and left for vacation at noon. She was not scheduled to work that day, August 28 through September 1, and she returned home on September 2, Labor Day. Upon arriving home, she found several messages on her voice mail. The first was on August 28, advising her that she should call because she had to re-do the run. Another message, on Friday, August 29, related that Kuhhorn was to report to the facility that day to re-do the run. It should be noted that Wolven stated that she made that call because Kuhhorn had not re-done the dry run. Finally Kuhhorn received another message that she should report to work on the first day of school, September 3, at 6 a.m.

Kuhhorn reported to work on September 3, and was told by Mazzei that she was suspended for not following company policy. Kuhhorn asked what policy he was referring to. Mazzei replied that the handbook requires that she do a dry run with her monitor. Kuhhorn protested that no one told her that. In fact, the handbook does not mention that requirement.

An employee status report on September 3 states that Kuhhorn was suspended because "driver refused to re-do dry runs. Wouldn't return phone calls." Another employee status report dated September 5 states that "she refused to do dry runs when told. She refused to return phone calls and follow orders. She refused to follow dry run procedures." On September 5, Mazzei told her she was fired. Both reports were prepared and signed by Wolven. It must be noted that Kuhhorn was not the only driver asked to re-do her dry run. Others were asked at that time and did so. Wolven testified that Kuhhorn did not do the second dry run as requested by the time the school term began.

Wolven testified that on the day of Kuhhorn's termination, Mazzei told her that Kuhhorn "was a big union supporter and that this . . . her refusal to do a dry run would get rid of her." Mazzei denied speaking with Wolven concerning Kuhhorn's alleged Union activity, nor did he express his satisfaction that he would be able to fire Kuhhorn.

Dispatcher Cuddy testified that company policy requires that a dry run be done in a company vehicle. She conceded that on occasion, drivers asked to do the dry run in their personal vehicle but she denied those requests because when they perform the dry run they are on paid time and should be in a company vehicle, and if they use their personal vehicle the Employer's insurance liability may not cover them, and the Zonar GPS system would not be able to track the route that they take.

Mazzei testified that the initial "mandatory" dry runs were scheduled for Thursday and Friday, and that after he received the drivers' reports, he had a certain number of days to review them and determine if they could be done via a shorter or more direct route which would be safer. He also determines if the dry run was done within 75 minutes. After his review, he sends the documents to Servisair for its approval.

Mazzei stated that he reviewed the drivers'' reports of their initial dry runs. At least 12 runs had to be re-done because the run exceeded 75 minutes or used secondary roads instead of

main roads. He testified that he immediately called the drivers who had to re-do their dry runs and that most did them the following Monday through Wednesday, August 25 through 27.

Mazzei testified that he asked Kuhhorn to do a second dry run because her first run was too lengthy in that the first child picked up would have been on the bus more than 75 minutes, and because she used secondary roads instead of a highway which would have reduced the time for the run. Mazzei told her at about the time of the August 27 class that she had to re-do the run for the reasons indicated. According to Mazzei, Kuhhorn was "absolutely refusing" to do the second dry run, telling him "if you want it done, do it yourself" and walked out. Mazzei noted that Kuhhorn was not fired that day because he did not have a chance to discipline her, but instead he gave her additional time to re-do the run.

Mazzei testified that he was told by Wolven and Poisella that they both told Kuhhorn by phone that she had to the dry run again, and that Poisella gave her a deadline to complete it, Friday, August 29 at noon. Mazzei believed that Kuhhorn was home between August 27 and September 2 because he was told by Wolven that she spoke to her, but Wolven denied speaking to Kuhhorn. According to Mazzei, Kuhhorn told Wolven that she was not coming to work and that if Mazzei wanted the dry run made, he should give her written directions and she would follow those directions. Mazzei immediately informed Poisella of this development, who, according to Mazzei, gave Kuhhorn a deadline to do the dry run. Poisella denied giving Kuhhorn a deadline.

Mazzei stated that Kuhhorn never did the second dry run that reflected the changes in route and time that he asked her to make, and she was terminated for insubordination. The regular run was made on the first school day with the left-right sheets originally prepared by Kuhhorn although Mazzei had changed the start of the route and had gone over the new route with the monitor. Mazzei stated that the substitute driver and three children were lost on the bus for more than one hour in the morning run.

Human Resources Director Poisella stated that Mazzei brought to his attention Kuhhorn's failure to submit left-right sheets for her route. He identified Kuhhorn's misconduct as a failure to submit those sheets in a timely manner, and that she had more than one opportunity to do so but seemed to "disregard" the order given to her. Poisella stated that Mazzei advised him that he "reached out" to Kuhhorn unsuccessfully. Poisella denied that he gave her a deadline to complete the dry run. He stated that he told Mazzei to give her a noon deadline to complete the sheets, but Poisella did not himself give Kuhhorn a deadline as Mazzei testified. Poisella further stated that another driver initially failed to submit the sheets but met the noon deadline imposed by Mazzei.

Poisella testified that he approved or made the decision to fire Kuhhorn for insubordination since she did not obey the order to turn in the left-right sheets for the corrected run. Poisella later testified that he decided to terminate Kuhhorn for refusing to do a corrected dry run. He was told by Mazzei that her left-right sheets were "inadequate." Poisella did not review those sheets. He further stated that he had no knowledge that Kuhhorn had engaged in any activities in behalf of the Union, however Mazzei stated that he informed Poisella about the incident in which he warned Kuhhorn that she could not block the facility's entrance when she was distributing Union flyers.

6. The events of September

Union meetings were held on September 11 and 25. By the time of those meetings, Kuhhorn and Mieses had been discharged, so Ebert asked Catherine Pomella to distribute flyers advertising the meetings.

Thirty to 35 employees were present at the September 11 meeting. Ebert repeated the same message he gave at the August 19 meeting, and said that the most important task was to continue to gather signed authorization cards. He distributed cards to those who were not at the first meeting or had not signed cards already, and asked them to sign them. A number of cards were signed at that meeting which were collected by him and Pomella.

Richard Azar, who was employed as a driver with the Employer since July 2008 and was still employed at the time of the hearing, testified that he attended a union meeting on a Thursday in September 2008, and signed a card dated September 4.

Azar testified that on the day following the meeting, he was called into Mazzei's office, and questioned about the meeting. He was asked "if there were people there, how many people were there and how many voted or how many didn't vote." Azar did not answer the questions because he did not know the answers. Mazzei testified that Azar "stopped by my office" and told him that he attended a union meeting only for the food. He denied asking Azar any questions about the meeting.

On September 16 Ebert wrote to the Employer's attorney advising him that the Union represents "an overwhelming majority of [the Employer's] employees in a unit appropriate for collective bargaining." He asked for voluntary recognition and also requested a meeting with him as soon as possible, and offered to have the Union's majority status verified by an independent third party.

At hearing, Ebert was shown the cards and identified them as the cards that were signed and collected at the Union's meetings on August 19 and September 11, and also solicited and obtained by employees Pomella and Christopher Hagelmann to whom he gave blank cards. Ebert did not recall which specific cards were obtained by those two workers.

On September 23, the Employer's human resources director Poisella issued a memo to all employees stating that the Union claimed to represent a majority of the workers and requested recognition but Acme declined the request and asked the Union to have the Board conduct an election. The letter further stated that "we respect your right to make your own informed decision about representation. However, we believe that when you have reviewed all of the facts, you will conclude that at this time, the presence of outsiders would not benefit our relationship."

Pomella stated that on the day after she received that memo Mazzei asked to speak to her before she began her run. They spoke in dispatcher Cuddy's presence in the office where Mazzei closed the glass window and held his hand over it so no one could open it. Pomella testified that Mazzei told her that "he did not want me to talk to any of my co-workers; that he

did not want me going up to anyone's bus to talk to me—for me to talk to them; he didn't want anyone to come to my bus to talk to me; he didn't want me to talk to anybody in the company parking lot; and he didn't want me conducting any business on company property."

Pomella stated that at the end of that day, Mazzei again called her into her office. She asked for a witness. Mazzei refused because she was "not Union and are not allowed," saying that she should not leave, and if she did she would be considered insubordinate and could be suspended. She went into an office where Wolven was present. Mazzei told her that their talk was "not personal" since he was doing a "route audit" for all employees and since he was going in order and hers was route 2, she was being spoken to first. Mazzei asked her some questions about her claim for time for which she was allegedly ineligible. Pomella gave an explanation and told Wolven that she had approved her time sheet. Pomella announced that she believed that she was being questioned because of her union activity and Mazzei denied it. Mazzei testified that he did 30 other route audits and that Pomella corrected the small "discrepancy."

7. The exchange between Mazzei and Tammy Bartula

Bartula worked at First Student before being hired at Acme, where she is employed as a driver. She spoke with Employer officials Mazzei and Mattingly about the Union. Apparently they confided in her. She was asked in June, 2008 for the seniority list used at First Student, Mazzei showed her the applications of employees, and asked her to encourage her former coworkers to apply for jobs with the Employer. She stated that both men knew of her role in the Union as early as June, 2008 when hiring began.

Bartula stated that in June 2008, she was "very open" with Mazzei, advising him that she "ran" the union campaign at First Student, had become an organizer and was "very involved." She stated that Mazzei was aware that she worked with Union Agent Garlinghouse on the preparation of the seniority list, and that he confided in her that he "did not mind working with a union." Bartula attended the first Union meeting on August 19 where she signed an authorization card. She went to two more meetings, in August and September.

Bartula stated that in September 2008, Mazzei's attitude toward her changed. He called her in to complain that a driver who had substituted for her got lost on a run. When Bartula protested that that was not her fault, Mazzei agreed. About one week later, Mazzei criticized her for making an unauthorized stop. She apologized, saying that she stopped on her way home to pick up medication for her sick son, but said that other drivers did the same thing. Mazzei refused to discuss other drivers with her. At the same time, Mazzei threatened that she would lose her home bus privilege, adding that "you are not the person you were when you were hired." Nevertheless, her home bus privilege was not removed at that time.

A driver is permitted to keep the bus at her home if the driver and monitor live near each other in relation to the first stop they have to make. Bartula conceded that the Respondent's rules concerning the use of a home bus changed. Further, when the buses were house in the crowded, temporary facility, the Employer wanted more buses to remain overnight at the drivers' homes. That situation changed when the permanent facility was obtained.

Bartula stated that on October 3, she and her monitor Agnes Smith complained vocally to the dispatcher that their paychecks were not yet available, with Smith threatening to call the "Labor Board." In fact, all the employees' paychecks were not available. Mazzei, who was not there at the time, called them later when they were on a run and said that he would not keep the office open just for them to get their checks. Bartula told him that he could not legally keep their checks. Mazzei told them to see him when they returned from that run.

When they returned, Mazzei told Bartula that he would begin doing "audits" and was considering removing her home bus privilege. Bartula protested, saying that whatever action was taken with respect to her must be applied to everyone, referring to others who had home bus privileges that should be removed. Mazzei asked her to see him on the next workday. Bartula stated that a couple of days later Mazzei examined the issue and told her that he would not take a run away from her or reduce her hours and that she could keep her home bus privilege.

Bartula told Mazzei that she believed that she was being picked on or singled out because of the protest that she and Smith made about the paychecks not being ready on time. Mazzei denied picking on her, but asked if she had a problem with him. Bartula denied having a problem with him but said that she wished that they had the same "fantastic" working relationship as they had when she was hired, when he told her that she was one of the best workers he had. Bartula asked what he meant and he said "I wasn't the person I was when I was hired." Bartula believed that Mazzei incorrectly blamed her for comments Smith may have made.

At about the same time Mazzei told her that her bus had to be brought to the shop immediately because of "electrical problems." Bartula denied that the bus had any such problems. Mazzei told her to take her bus to the shop and get another bus. Later, she learned that the Zonar GPS tracking device was not working on her bus.

Bartula stated that in October, Mazzei told her that she could no longer park out, whereby the driver and monitor are permitted to remain with the bus and park in an authorized location between runs rather than returning to the facility. The standard applied is how much time there was between runs. According to Bartula, if there was less than 45 minutes between runs the bus could remain off premises during which time the driver and monitor could have lunch. But if there were more than 60 minutes between runs, the bus had to be returned to the facility. Bartula stated that, at that time Mazzei criticized her for allegedly not returning to the yard between runs, the Respondent's standard for parking out had changed and that the "vast majority" of drivers were subject to that change.

Mazzei stated that the time between Bartula's runs changed. At first there was only 25 to 30 minutes between runs and she was therefore permitted to park out. Thereafter, she had more than one hour between runs and was required to return to the facility. Mazzei stated that he told her that she could no longer park out. He noted that, at that time, other employees were losing their park out privileges, some on a daily basis, because

of changes in the runs. For example, the Employer experienced a loss in the number of children being transported—from 578 to 400, and then to 360. Thus, with fewer children the runs were less concentrated. However, Mazzei's reason for removing her park out privilege was that she had used her bus to go shopping for about 1 hour to 1h hour and 45 mintutes. When he confronted Bartula, she said that he was visiting her father in the hospital. Mazzei showed her the Zonar report, and she admitted that she was purchasing food at a shopping center. Previously, Bartula signed a home vehicle guideline form which stated that "no unauthorized use of vehicles is permitted. Unauthorized use is cause for loss of home vehicle privileges . . . . "

Bartula stated that, again in October, she was called into Mazzei's office who said that two employees said that she harassed or threatened them. Bartula denied doing so. Bartula knew that Linda Frees and her monitor Emily Rink made the complaint against her. Mazzei asked her to write a statement about the incident and Bartula did so. Later, Mazzei told her that the complainants were satisfied with her explanation of the incident and they had withdrawn their complaint. Bartula asked why it took so long for the allegation to be made and Mazzei replied that he had to watch her "actions."

Bartula stated that many of their conversations ended with his saying that she was not the person she was when she was hired, and included comments such as she was a "horrible" worker and did a "terrible job."

8. Further union organizing

The Union's Handbilling

Ebert stated that on October 7, he distributed handbills publicizing the October 9 meeting. He handbilled at about 2:00 p.m. for nearly three hours at the back of the property on Mulberry Street at the entrance and exit to the Respondent's property. Ebert stated that the parking lot was being paved and the buses were using the Mulberry Street entrance and exit. He testified that at all times during his handbilling he stood on the sidewalk, and denied stepping off the sidewalk onto the Respondent's property.

Ebert stood at the entrance of the property and handbilled about 30 entering buses during approximately one hour. After a period of time, the drivers and monitors entered their personal vehicles and left the premises. Ebert then stood at the exit of the property and offered handbills to the drivers of those vehicles as they left the premises. He stated that a majority of drivers did not take a flyer, while only about five accepted one.

Ebert stated that within five minutes of his handbilling the entering buses, he saw Mazzei staring at him from a distance of 15 to 20 feet. Ebert shook his finger at Mazzei, telling him that he was illegally surveilling him. Although he did not know Mazzei at the time, he believed that he was a company official since he stood in an "authoritative way" with his arms crossed. Ebert denied that Mazzei asked him to leave the property, but said that he was trespassing. Ebert accused him of surveilling his activities, claimed that he was legally "three feet in from the road" and asked Mazzei to leave the area. Mazzei remained watching Ebert for 20 minutes during which time the police arrived. Four or five employees were nearby. An officer told Ebert to remain on the sidewalk and not enter the driveway which was Acme's property. Ebert continued to handbill and Mazzei left. Ebert denied blocking any vehicles from entering or leaving the facility.

Mazzei testified that he saw Ebert walk from the sidewalk up the driveway and introduced himself to Mazzei and gave him a flyer. Mazzei told him that he was not permitted on company property and Ebert became "argumentative," claiming that he had a right to be present 100 feet within the company property. Mazzei told him several times to leave. Mazzei called the police and asked to have him removed. Ebert then moved to the sidewalk before the police arrived. Mazzei told the police that he was trespassing. Ebert told the police that he did not enter the Employer's property. The officer told Ebert to stay off company property.

Wendy Amundson, a monitor, testified about this confrontation. She stated that she saw a union agent on company property when she entered the facility on a bus at the end of the day. The agent had some papers in his hands. She walked from the bus to her vehicle and saw the agent walk up the driveway and stop at the garage fence. Mazzei asked if he could help him. The representative said that he was from the Union and Mazzei told him that he had to leave the property and could not stay there. The Union agent replied that he had a right to speak to the employees. Mazzei responded that he understood that but he was on private property and could speak to them off the premises. As Amundson was leaving the premises, Mazzei again asked him to leave the property and the Union agent said that he had a right to speak to the workers. At that time, Mazzei's phone rang and the union agent walked away. She heard the agent yell at Mazzei to call the police and walked back toward Mazzei, poking his finger at Mazzei's chest. She heard Mazzei tell the agent that he had to go to the end of the driveway.

Ebert held further union meetings on October 9 and 22 which were publicized by handbills. Ebert stated that Pomella and Hagelmann refused to distribute them, saying that they were afraid to do so. He stated that "I distributed handbills. I couldn't get anyone to distribute handbills on the property, so I was forced to do it myself."

About 30 to 40 employees attended the October 9 union meeting. Ebert handbilled again on October 15, distributing flyers for the October 22 meeting. He stood at the entrance on Mulberry Street and saw Mazzei drive his vehicle into the entrance and park it, partially blocking the entrance. Employee Pomella stated that she observed an Employer's SUV blocking the entrance when Ebert was handbilling on the sidewalk. According to Ebert, Mazzei exited the car and began yelling at Ebert to "get off the property. You have no right to be here. You're trespassing. What are you doing here?" Ebert replied that he was illegally surveilling him. At hearing, Ebert stated that he stood on the sidewalk and did not enter the Employer's property or block any vehicle from entering or exiting. Employee Haskell stated that she saw Ebert on the sidewalk and not on the Employer's property.

Mazzei moved his vehicle, and they spoke back and forth for nearly one hour until 3 p.m. during which time Ebert attempted to give flyers to about 25 buses, but only 3 accepted them. The

police came and told Ebert to stay on the sidewalk and not enter the property. About 30 employees watched the two men talk and were present when the police arrived. After the buses arrived, Ebert moved to the exit of the building and left at about 4:45 p.m.

Mazzei's version of the incident is that upon driving into the lot he saw Ebert on the property attempting to distribute flyers. Mazzei got out of his car and asked him to get off the property. Ebert said that he was permitted to be 100 feet inside the Employer's property. Mazzei asked him to leave and asked Jonathan Hernandez, the Respondent's maintenance worker to do the same while he called the police. When the police arrived, Ebert was standing on the sidewalk.

Hernandez testified that in the late summer or early fall of 2008, he saw Ebert distributing flyers on the Respondent's property. Mazzei asked him to request Ebert to leave the property. Hernandez approached Ebert and observed that he was "disrupting the buses" and asked him to get off the property or the police would be called. Ebert then moved to the sidewalk. When the police arrived, Ebert was on the sidewalk.

Wolven testified that on the occasions she saw Ebert and Garlinghouse, they were always on the Mulberry Street sidewalk and not on the Respondent's property.

D. The Discharges of Catherine Pomella and Eileen Haskell

Pomella, a driver and Haskell, her monitor, began work with the Employer in June 2008. Pomella signed a union card on August 15, 2008, and was given blank cards by Ebert that month as she stood on the Mulberry Street sidewalk speaking to Ebert, as set forth above. Pomella stated that she told manager Bob Calli at that time, with Haskell and Mieses present, that Ebert gave her Union cards and he asked that they request permission before they distributed them. Calli asked to see a card and Pomella gave him one which he read. Calli said that he was familiar with Teamsters 445. Mazzei approached them and asked Pomella what she was doing. Pomella replied that she was requesting permission to distribute the union cards. Mazzei replied that she could not do so on company property. Pomella apologized. Calli gave Mazzei the union card, and Mazzei took the card and left the area. Haskell corroborated Pomella's testimony concerning Mazzei's comments. Mazzei denied speaking to Calli, who was an assistant terminal manager for about 2 weeks, regarding employees distributing Union literature.

Haskell testified that she signed a union card in August 2008, and that Ebert gave Pomella blank cards which she gave to Haskell. Haskell kept the cards in her pocketbook. They both solicited employees by standing in front of the garage where buses entered and left and offered cards to the drivers.

Mazzei testified that in late September or early October 2009, two employees told him that Pomella was blocking buses from entering the facility. He spoke to Pomella twice that day about that matter. The first time Haskell was about 50 feet away and the buses were entering the facility. He did not see Haskell holding any flyers and he did not speak to her. Later that same day, he told Pomella that she was not permitted to block egress of the buses. Mazzei conceded that he did not see Pomella blocking any buses but only saw her blocking the entrance. He asked her what she was doing and Pomella replied that she was distributing literature for the Union. Mazzei responded that she could not do that on company time. Mazzei stated that she asked if she could handbill the employees where they parked their cars as they were leaving work. Mazzei agreed as long as she was not on paid time. He did not issue a written warning because Pomella immediately complied with his order not to block the buses.

Pomella testified that she distributed about 20 union cards with Haskell's help, while Haskell stated that they both handed out about 40. Pomella stated that employees returned signed and dated cards to her. She held them until she accumulated a number of them and gave them to Ebert at a September Union meeting. She recalled receiving signed cards from 21 workers. Her technique was to approach her coworkers and ask if they wanted to join the Union as more than 50 percent were needed to enable the Union to represent them. She said nothing to them concerning trying to obtain an election. She also received some cards from employee Hagelmann in early September.

Pomella also distributed flyers advertising the September 11 and the October union meetings. She further stated that form October 2008 to March 2009 she was asked a number of questions by employees, and was in constant contact with Ebert in referring the questions to him, obtaining answers and then advising the workers of his response. She spoke with her coworkers about the Union in the company parking lot or during park-outs.

On February 18, 2009, Pomella and Haskell had picked up all seven children on their bus at their homes and drove them to the Inspire School. As Haskell began to unbuckle the seatbelt of Linda,[9] a 3-year old, the child apparently saw something and "lurched forward" falling to the floor. According to Haskell she landed with her hands on the floor and her head on top of her hands. Haskell did not see whether her head hit the floor. Haskell immediately told Pomella that Linda fell, but she was okay. Pomella asked to see the child and Haskell brought her to the driver who examined her, observed that she was not crying and had no bruises and was not bloody. Pomella told the teacher's aide who met the bus that Linda fell but seemed all right, adding that if there was a problem the school should call Acme because a report must be made. No report of the incident was made to the dispatcher at that time.

Pomella and Haskell then left, and took their after-run break. After the break, Pomella reported that they were beginning the mid-day run and was told to return to the office at the conclusion of that run. Pomella saw Lawrence Iannucci, the Respondent's safety supervisor at the Inspire School when they were at the school during their mid-day run.

Dispatcher Cuddy testified that VMC's representative Chuck Ganim called her, saying that Linda's school called him and informed him that Linda fell in the bus. Gannon asked if she was aware of the accident. Cuddy said she was not know about the incident but would find out. She then radioed Pomella to return to the terminal. Linda's mother called advising Cuddy that Linda had a lump on her head and was crying, and that she was bringing her to the terminal to show her injuries.

[9] I have not included the last name of the child.

At the terminal, Cuddy asked Pomella and Haskell whether anything happened to Linda that morning. Pomella replied that Linda fell and she checked her for bruises. Cuddy asked them to complete incident reports. When Linda and her mother arrived, Pomella noticed a small discoloration on Linda's forehead, and Haskell saw a lump on her head, and Wolven noticed a bruise on her head and scratches near her eye.

Wolven said that Mazzei came to the terminal and was advised that a child was injured on the Pomella-Haskell bus and the incident was not reported. Mazzei replied "Good, that was something to get rid of her with." He then called the human resources department. Mazzei denied expressing any satisfaction to Wolven that he would be able to fire Pomella and Haskell.

At the end of the day, Pomella and Haskell prepared and turned in incident reports. They were suspended. That day, February 18, VMC agent Ganim wrote to Mazzei advising that VMC recommends that Pomella and Haskell "be suspended from driving and attending for a period of 1 to 3 days (your discretion) and that they also be permanently reassigned" from the run they were on to another run. Ganim added that "this is due to a breach in policy of not reporting an incident on a company vehicle in a timely fashion." The memo concluded that the recommendation is "pending receipt of the nurse's report tomorrow. If there are any changes to this recommendation, I will let you know."

Mazzei testified that when he spoke to Pomella about the incident she apologized and said that she "dropped the ball by not reporting" it, but she also said that she had "medically evaluated and examined" the child.

Wolven testified that there was no discussion between her and Mazzei about whether Pomella and Haskell should be reassigned pursuant to the VMC memo as opposed to being terminated. Wolven stated that Mazzei "was never going to reassign them. He wanted them terminated. He said that he was not going to put them on another run; he wanted them out." Wolven testified that she discussed with Mazzei "quite a few times" before Pomella and Haskell were discharged that "they were the biggest Union supporters; how they were going around talking to people about the Union; about how Catherine wanted to be the shop stewardess; and just that we had to get rid of them."

On March 11, Pomella and Haskell were terminated for "failure to follow company procedure—failure to report a child getting hurt on the bus."

Haskell stated that when she was suspended, she asked Mazzei for permission to remove certain personal items from the bus, including a pocketbook, notebook, clipboard, scarf, and tape recorder. Haskell and Wolven stated that Mazzei refused permission, Wolven adding that Mazzei told Haskell that "she was suspended, she had to leave the grounds." Mazzei denied that Haskell asked to return to the bus and denied refusing permission to do so, adding that she did not have to ask his permission since the bus was open and she could have retrieved her items on her way out of the terminal.

Jonathan Hernandez a maintenance worker, testified that he found the tape recorder hidden in the console of the bus 2 or 3 weeks after Haskell's suspension. He gave the tape recorder to Mazzei who confirmed that Hernandez gave him the recorder. He did not know who it belonged to because the bus had been used by other drivers and monitors following the suspensions. However, after he listened to it he realized that it belonged to Pomella or Haskell. He denied seeing a notebook.

However Wolven, the assistant terminal manager, testified that after Mazzei refused permission to Haskell to retrieve her items because she was "suspended and had to leave" Mazzei "ran out to the bus to see what was in it" and returned with a bag containing a notebook and tape recorder. Wolven stated that she and Mazzei listened to the recording.[10] Some time after Haskell was terminated she again requested the items but only the pocketbook was returned. Thereafter, the tape recorder was returned to Haskell, and at the hearing, the tape that was inside the recorder was returned. Mazzei testified that since his voice had been taped he believed that the tape was company property, justifying his refusal to return it to Haskell. Wolven stated that Haskell's notebook contained names and phone numbers of employees, including a "list of complaints" employees had against the Employer. She gave the notebook to Mazzei who said he would call Ed Lynch, the vice president of operations.

Pomella stated that she was told to radio the dispatcher at the start and conclusion of each run; that the bus was clear of sleeping children, if the driver is running more than 10 minutes late, if there are mechanical problems, vehicle accidents and when children do not appear for pick up. She did not recall being told that an injury to a child on the bus must be reported immediately.

Pomella stated that she attended two training-refresher courses, one was on August 19, 2008, and the other on February 13, 2009. She stated that no one at the August 19 session, neither Nellie Mendoza, from Orange County, or the Employer representatives spoke about the importance of reporting all incidents to the dispatcher. In contrast, Mazzei testified that Mendoza spoke extensively about the driver's obligation to call in incidents by radio or cell phone. He quoted her as saying that "anything out of the ordinary must be reported via radio immediately to dispatch. . . ." Pomella and Haskell denied seeing the memo requiring the immediate reporting to dispatch of an incident on the bus no matter how small the incident is, stating that they were not employed that week as the school they serviced was closed that week.

Pomella added, broadly, that at no meeting she attended was that subject discussed or even mentioned. However, she noted that at a January 2009 meeting Mazzei mentioned an incident in which a child was released to an unauthorized person and the police were called. The drivers were told to call the dispatcher if they were not certain of the person receiving the child. Pomella stated that that was the first time she was told that incidents had to be called into the dispatcher. Wolven testified that at that meeting, the drivers were told to report all incidents and "all things that are a little out of the ordinary to dispatch immediately."

[10] Pomella had recorded a conversation she had with Mazzei in which he counseled her for an infraction.

Pomella recalled that in December 2008, a child had a bloody nose on her bus. It was not reported to the dispatcher, and at the end of the day, the monitor reported it and filled out an incident report. Haskell testified that she was never instructed concerning the procedure to be used if a child fell on her bus.

Human resources director Poisella testified that he recommended that Pomella and Haskell be suspended immediately pending an investigation. He received the appropriate documentation including incident reports and records sent by VMC. He decided to terminate Pomella and Haskell based on his conversations with Mazzei and his assistant and after reviewing the incident and the accompanying paperwork. In reaching the decision to fire them a factor he considered was the significance of the injury to the child.

Mazzei denied participating in the decision to discharge Pomella or Haskell. Poisella stated that when he made the decision to discharge the two women he was aware of the recommendation of VMC that they be permanently reassigned to another run. However, he decided not to follow that recommendation because the Employer holds itself to a "higher standard" because there is "no room for falling outside boundaries of following procedure regarding a head injury" especially to a pre-kindergarten age child. Therefore notification is extremely important. Poisella informed Mazzei of his decision.

Wolven testified that the terminal manager had to have the approval of the human resources department before an employee could be terminated. She stated that prior to an employee's termination she faxed only the warning notices to that department and not the employee status reports, which were sent after the worker was fired. She noted that Mazzei spoke to the human resources department before any decisions were made, and that the department relied on the memos that were faxed to it.

E. The Alleged Impression of Surveillance at Quick Chek

Driver Eugene Blanton testified that he attended a union meeting on August 19, 2008, and signed a card there.

On March 2, 2009, Blanton submitted a letter of resignation which would be effective on March 13. On March 12, 2009, his normal routine was to take a break between his morning and mid day break at a Quick Chek convenience store where he parked out and notified the dispatch office at about 12:05 p.m. of his location, as was required, and that there were no sleeping children on the bus.

He parked the bus at that location and noticed Catherine Pomella getting into her car. She hailed Blanton and they spoke. Pomella told Blanton that she had been discharged two days earlier. Blanton stated that he, his monitor Donna Larli and Pomella went inside the store, sat down and spoke for about 15 to 20 minutes. They both used the rest room and left the store.

Blanton stated that as he walked toward his bus, and Pomella walked toward her car, he noticed Wolven's car, a black SUV, approach and saw Mazzei pointing a camera at him, Pomella and Larli. The car passed in front of the bus and Pomella's car. Pomella quoted Mazzei as saying "don't mind me. I'm just taking some pictures."

Blanton said that he did not plan to meet Pomella at the Quick Chek store, adding that no one could have known that he was meeting her there because it was not a prearranged meeting. When he completed his route, Blanton was asked to report to Mazzei with Larli. Mazzei did not speak about the incident earlier in the day, but instead asked Blanton if he still wanted to resign, which Blanton interpreted as Mazzei's attempt to persuade Blanton to remain an employee of the company. Blanton declined the offer. Mazzei testified that he told Blanton that he should have let the dispatcher know where he was and that he did not call in, although Mazzei conceded that Blanton often used the Quick Chek to park out.

Dispatcher Cuddy stated that the Employer had a practice of investigating park-outs. If the driver was called while she was on her park out, and the driver did not respond, a company employee would drive to the location of the bus and look into the matter. Cuddy stated that she was asked where Blanton was and she did not know. She checked Zonar and located the vehicle. She said that Blanton did not call her to report the location of his park out which was the required procedure. She called Blanton on his radio and cell phone but received no response. Mazzei went with maintenance employee Jonathan Hernandez to the location of the bus.

Hernandez testified that he was asked by Mazzei to drive him to a location where Zonar indicated a bus was parked, but the whereabouts of the driver was unknown. Hernandez drove his personal vehicle. Upon arriving at the Quick Chek location, no employees were present and the bus seemed abandoned. Mazzei entered the store and then waited 30 minutes. A car pulled in and Blanton and Larli got out and walked toward the bus. Hernandez drove his car next to them, but denied that Mazzei pointed his camera at them, stating that he only used the camera when he first arrived at the location. Hernandez denied that Mazzei said anything to Pomella, Blanton or Larli.

Mazzei testified that he was informed by Cuddy that Blanton's bus was unattended. She reported that she tried to contact Blanton but he did not respond by radio or cell phone, and she believed that there was "something wrong." Mazzei checked the Zonar report to see where the bus was located and took the accident kit and his personal video camera because the company camera was not in the accident kit. He asked Hernandez to drive him in the event he had to drive the bus back to the terminal. Hernandez drove Mazzei in a car owned by Hernandez, a white sports car. Mazzei saw the bus, got out of the car and tried to film the bus but his camera did not work. He looked in the bus and in the convenience store and did not see the driver or his monitor. He asked the store clerk if he gave permission to the driver to leave the bus in the lot. Mazzei called Cuddy. Pomella then drove up and Pomella and the monitor exited the car.

Mazzei stated that he asked Blanton where he was and what happened, Blanton "put his head down it looked like in disbelief that I was there." They spoke briefly. Mazzei called Cuddy and told her that everything was all right. Mazzei, who denied knowing that Pomella was meeting with Blanton or his monitor, also denied saying anything to Pomella, instead asserting that Pomella said that he had no right to be there. Mazzei testi-

fied that he has checked on other buses prior to that time, either alone or with another company employee.

In contrast, Wolven testified that her car was used by Mazzei and Hernandez to locate Blanton's bus because it was new and would not be recognized by the workers, and that Mazzei stated that Zonar showed that the bus was sitting idle, and that he was told that Blanton and his monitor were meeting Pomella. Mazzei took his video camera, telling Wolven that he was "going to get them on tape meeting." Wolven stated that when he returned to the facility, he was laughing, "saying he caught them all meeting, and how shocked they all looked when they seen him. But he didn't camcorder it because the battery was dead."

Wolven testified that it was the dispatcher's duty to monitor the buses using Zonar but they never did. She called Mazzei's explanation that he went with Hernandez so that he could drive the bus back "an excuse."

F. The Antiunion Petition

From June 3 to 10, 2009, employees Linda Frees and Emily Rink asked employees to sign a petition in opposition to the Union. It stated "No To the Union." Sixty one workers signed. On June 14, Frees and Rink sent the petition to human resources director Poisella stating:

> We hope that these letters and signatures stating that we do not support the Teamsters Local 445 will help on July 28, 2009 in court. Due to our work schedule, we were not able to see all employees. We were only able to talk to about 60% of the workers. Although we only have 60 signatures, there are employees that do not support the union, but did not want to sign. It is our pleasure to support and work for Acme Bus Corporation.

Frees testified that Rink typed the petition, and that they both solicited employees to sign the petition on company property over a period of 1 or 2 days, and that they engaged in that activity on their own. Their sole motivation was that they did not want the Union to represent them. No Employer representative asked her to solicit signatures for the petition or helped her in having it signed. However, she stated that she told Mazzei that they intended to solicit signatures for the petition and asked if they would be disciplined for doing so. Mazzei replied that they could do so as long as they were on their own time. She did not show the petition or the accompanying letter to Mazzei.

Mazzei stated that Frees and Rink asked if they could solicit employees to sign the petition. He said that they could do so as long as it did not interfere with the "work flow" and neither they nor the employees they solicited were on company time.

Employee Christopher Weir stated that he attended a Union meeting and signed a card for the Union there. He testified that on June 6, 2009, he was asked by Frees and Rink to sign the petition, with Frees advising him that its purpose was to "protect Charlie [Mazzei] from getting fired, and against the Union. Weir asked her if the Employer allowed him to sign it, and she said that Mazzei gave his permission for Frees and Rink to "go around and ask people to sign the petition."

Weir stated that shortly after he signed the petition he went to the office to return his keys for the day and saw Mazzei and asked him if he gave permission to circulate the petition. Mazzei said he had, adding it's "a stop petition against the Union and to protect me also." Mazzei then asked "what about your boys?" Weir asked "which boys?" and Mazzei said "your boys." Weir said he did not know. Mazzei asked him to "just talk to them ask them to sign it. I give permission so they can sign it." Weir stated that his "boys" referred to two friends who he recommended for hire and who were hired. Weir did not ask his friends to sign the petition.

Mazzei denied speaking with Weir regarding the petition, nor did he discuss with Weir any permission he might have given to Frees or Rink to distribute it.

Wolven stated that she saw an antiunion letter signed by Frees and Rink which was dated January 29, 2009 on Mazzei's email and believed that it was sent to him by Poisella. She saw it in April or May 2009. Mazzei remarked to Wolven "they did a really nice job on this." Further, Wolven testified that employee Berlly wrote an antiunion letter which Mazzei directed her to make copies of.

G. The Discharges of Roberta Cheatham and Paula Mercado

Roberta Cheatham and Paula Mercado were employed as driver-monitor for the Respondent. Cheatham began work in November 2008 and Mercado in December.

Cheatham attended a union meeting in January 2009. Cheatham began work for the Employer as a driver, and, in April 2009, assumed responsibilities as a 19A Examiner. Section 19A refers to the New York State Vehicle and Traffic Law regulation regarding the requirements for a school bus driver. A 19A examiner makes certain that the employer's files contain documentation proving that the drivers possess the necessary qualifications and training for the position of school bus driver.

Cheatham had extensive experience as a 19A examiner with the Orange County Association for the Help of Retarded Children. After becoming a 19A examiner she continued driving for the Employer, and occasionally worked as a monitor.

Cheatham stated that when she became a 19A Examiner, it was her responsibility to maintain the drivers' records concerning certification and testing and ensure that those records were contained in the files. She looked at her file and saw that it was certified that she took certain tests, but in fact, she had not. She became convinced that the records and her name was falsified, and that other drivers' records were falsified.[11] She brought her concerns to Mazzei and showed him the suspected paperwork. Mazzei said that he agreed and that he would "take care of it." About one month later, she concluded that she could no longer work as a 19A examiner because she believed that she was violating her promise to ensure the safety of the driver and the children.

In June 2009, Mercado accepted a union flyer from someone on the sidewalk outside the Employer's premises. She stated that a few days later, Mercado was in the parking lot at the end of the day and greeted Mazzei there. He asked her whether she was "in agreement with the Union or not." Mercado replied

[11] Cheatham identified the prior 19A examiner, Lawrence Iannucci, the Respondent's safety supervisor, as perhaps being responsible for the improper data. At hearing, Iannucci denied any wrongdoing.

that she did not want the Union and was happy with the Employer. Mazzei did not deny this conversation.

A few days later Mercado was asked by employees Frees and Rink to sign the antiunion petition. Mercado said that she had to think about it. The following day, Mercado's friend suggested that she sign the petition. Mercado went into the office and asked Cuddy where the petition was. Cuddy replied that Frees and Rink had it. They were in the office at the time, and came out and gave Mercado the petition which she signed. In early June, Cheatham was asked by employees Frees and Rink to sign the antiunion petition and she refused.

Mazzei denied speaking to Mercado about the Union or asking what her views on the Union were.

On June 15, Cheatham wrote to the Employer's headquarters, advising that due to "personal reasons" she could no longer work as a 19A examiner, and asked to work as a driver. The Respondent granted her request on June 17.

Cheatham stated that after resigning as a 19A examiner, she contacted Union agent Ebert and told him that she found drivers' records which were falsified. She offered to help the Union's campaign. It should be noted that she had no contact with the Union from the time she attended a Union meeting in January until she spoke with Ebert in mid June.

Union agent Ebert stated that on June 19, 2009, he sent identical letters to the Respondent at its Long Island headquarters, its Middletown operation and to its attorneys advising that Cheatham is a "member of the Teamsters Contract Committee at Acme/Middletown. Any attempt on the company's part to harass, intimidate or otherwise interfere with her lawful rights will be met by the full force of the law." The letter also advised that "as the former 19A Examiner, Ms. Cheatham has evidence that 19A certifications were allegedly falsified at Acme. We are turning that investigation over to the appropriate state authorities. Any attempt to retaliate against her will subject her to whistleblower protection under NY State statute." Ebert received no response to the letters.

Poisella and Mazzei received the Union's June 19 letter. Wolven testified that when the facility received it, she gave it to Mazzei who stated that "he was surprised that she was—as he called her—the rat, and that she would have to go now." Wolven noted that Mazzei often said that other employees "had to go," for example, Peter Cortez because he was "no good," half the mechanics, and "anyone who stood up to him."

Cheatham stated that on July 21, 2009, she was driving children to their homes at the end of the school day, when she overheard Justin[12] say to monitor Mercado that "I can't breathe." Mercado immediately sat with the child and asked if he could sing the "abc's." He said he could and they began singing together. Cheatham asked if everything was okay and Mercado said yes, and told her that he was all right and happy. Cheatham continued driving and announced that she would call the dispatcher. At that moment, there was a radio transmission involving the transport of a child to the police station. Cheatham had been trained to stay off the radio when an incident is being reported. Instead, she used her cell phone to call the dispatcher while she was driving.

[12] Justin's last name is omitted from this Decision.

Cheatham stated that she was connected to the dispatcher, was placed on "hold," but then was disconnected. Two seconds later Cheatham again called while they were en route to the child's house. Dispatcher Cuddy answered the phone and Cheatham told her that Justin said he could not breathe, that they were then at the child's house and the child was being released to the babysitter, and asked for instructions. It must be noted that Cheatham later testified that she told Cuddy that she was only two minutes from his house and that she would keep driving there. She further stated that she was two minutes from the house when she heard him say that he could not breathe. Mercado stated that when Cheatham was speaking to Cuddy, they were arriving at the child's house. According to Mercado, Cheatham asked Cuddy what they should do, and was told to file a report when they returned to the facility.

Mercado stated that she told the babysitter that the child said that he could not breathe. The babysitter responded that he always "plays like that" but there is nothing wrong with him.

Cheatham stated that the child showed no signs of difficulty breathing, and in fact he was singing. She did not check the child to see whether he was all right. The bus returned to the facility and she and Mercado completed incident reports. When Cheatham handed her report to Cuddy, Cuddy wrote "reported to dispatch after child was home." Cheatham protested that that statement was not true. Cuddy did not reply. She stated that she asked that it be changed and Cuddy said that she should not worry about it.

Mercado wrote that the time of the incident was "2:45" because that was the general time of arrival at Justin's house, that it was the approximate time that the incident occurred, and was about the time that they arrived at the child's home. The child at issue was the first one to be dropped off at home on that run.

At hearing, Cuddy testified that Cheatham called her after she left Justin at the home, explaining to her that Justin was having problems breathing and that they were close to the home so they dropped him off. Cuddy asked why she did not call before dropping him off, and Cheatham replied that she was "so close to the house." Cuddy reported the incident to VMC who asked her where the child was and whether "911" was called. Cuddy denied that Cheatham told her that she was just arriving at the house.

Cheatham stated that the following day, July 22, Cuddy and Mazzei told her that she was suspended because she wrote the incident report wrong. She asked why, and Mazzei said that VMC did not like the way she wrote the report. Cheatham stated that she told Cuddy that the report improperly says that she called the dispatcher after she dropped off the child, but that she has her cell pone records which show that she was talking to Cuddy when the child was still on the bus. Cuddy refused to accept the records and suggested that she send them to the human resources department on Long Island. Cheatham gave Cuddy a copy of those records.

That day, Cheatham faxed a letter to the Respondent which noted that the incident occurred at 2:45 p.m.

On the same day, July 22, VMC Transportation Manger Edwin Morales sent a letter to Mazzei which stated that he received the incident reports of Cheatham and Mercado and Cuddy's note, and he requested the immediate suspension of both

until an investigation is conducted and a determination made. The following day, July 23, Morales wrote that he had requested from Mazzei the Employer's written policy concerning "what drivers and monitors are to do . . . in the event of an incident/accident and how and when they are to report it to dispatch."

The letter further noted that on July 23 Mazzei asked that VMC write a memo of disqualification for the driver and monitor for poor judgment and not communicating with dispatch in a timely manner. Morales wrote that VMC already recommended that they be suspended, and noted that a final determination had not yet been made. Morales concluded by asking Mazzei again to send VMC a copy of Acme's policy. Mazzei and the Respondent's counsel denied that the Respondent received VMC's July 23 letter, but Cuddy stated that she received it, and human resources director Poisella testified that he received it from Mazzei.[13] Mazzei did not recall asking Morales, as set forth in the letter, to write a letter of disqualification, however he conceded asking Morales if VMC had decided to disqualify them.

The following day, July 24, Morales wrote to Mazzei, recommending that Cheatham and Mercado attend a three hour recertification in-service class on Sensitive Issues and Children with Special Needs, and that once they attend that class they would be permitted to "participate in any and all programs involving the Orange County Pre-School children." Mazzei stated that he sent that letter to Poisella.

An Employee Status Report dated July 29 signed by Cuddy stated that Cheatham "did not report an incident with a child immediately as required." On July 29, Cuddy told Cheatham and Mercado that they were fired for failing to follow company policy. That day, Cheatham sent a letter to the human resources department with her cell phone records which indicated that she called the facility at 2:54 in a call that lasted three minutes, during which Cheatham said that she was put on "hold" and was then disconnected, and a second call was placed at 2:56 p.m. which consumed two minutes. Cheatham stated that she did not leave the child's home until the end of the second call. The letter stated that the records show that the child was still on the bus when she called the dispatcher.

Cheatham testified that the established time for the first drop-off was 2:45 p.m., and that it should have taken her 15 to 20 minutes to travel to the next stop. Accordingly, she left the first stop at 2:58 p.m., thirteen minutes after the set drop-off time. She could not recall if she told Cuddy that she would be late for the rest of the steps inasmuch as there is only a five minute "window" at each stop.

Cheatham stated that in the event of an emergency or if "something happened to a child" she was supposed to call the dispatcher on the radio.

Mazzei testified that he was told by Cuddy that Justin said that he could not breathe and that Cheatham-Mercado dropped him off since they were close to his house and did not call the dispatcher until after he was dropped off. Mazzei stated that in this circumstance, they should have called 911 or the dispatcher immediately. He stated that he spoke to Cheatham after the incident and was told by her that "I was that close. I just figured I would drop the child and then I would call." Mazzei stated that he told her the Employer's policy regarding immediately reporting incidents and Cheatham said that she was aware of it. Mazzei stated that he did not make the decision to terminate Cheatham and Mercado and made no recommendation concerning their termination.

Poisella testified that Mazzei informed him of the incident regarding Justin, and he deiced to fire Cheatham and Mercado because they did not immediately report that incident. When he made the decision, Poisella had seen the letter sent by Ebert one month earlier concerning Cheatham's claims that the Employer falsified information regarding the drivers' safety documentation. However, that letter did not play a part in his decision to fire the two women. Poisella also reviewed Cheatham's cell phone records that she sent him and the incident reports filed by her and Mercado, but believed that they had not immediately notified the dispatcher when the incident occurred, relying on the notation in the incident report that the incident occurred at 2:45 p.m., and the first call was made at 2:54. Poisella informed Mazzei of his decision, based on the "severity" of the situation—the failure to immediately report that a pre-kindergarten child with special needs was complaining of difficulty breathing.

Poisella decided not to follow the July 24 recommendation of VMC that Cheatham and Mercado be required to attend a three hour in-service recertification class and then be permitted to resume their duties because the Employer holds itself to a higher standard than what VMC recommends.

H. The Alleged Interrogation of Richard Azar

Richard Azar was subpoenaed by the General Counsel to appear at the hearing. He testified that some time before the fifth day of the hearing, October 27, 2009, Azar brought the subpoena in its envelope to show Mazzei that he had been subpoenaed and also to express his concern about the subpoena and tell him that he did not want to testify because he liked his job and did not want to lose it "over something like this." Azar noted at hearing that the Respondent did not suggest that he would lose his job because he testified.

The envelope also contained his pre-trial affidavit taken by the General Counsel. Azar handed the envelope to Mazzei but "forgot" to remove the affidavit from the envelope. Mazzei took the affidavit from the envelope and read it, asking "did I really do this?" Azar said "no." Mazzei then asked him if he would "be willing to voluntarily write a statement." Azar agreed and wrote the statement. Mazzei had it notarized and sent it to human resources director Poisella. Azar did not recall the contents of the statement and it was not offered in evidence, but it related to Mazzei's interrogation of him, set forth above.

Azar expressly testified that he did not ask Mazzei to read the affidavit. Rather, he handed Mazzei the whole envelope containing the subpoena and affidavit.

Mazzei testified that Azar told him that he had a subpoena and had to go to court. Mazzei told him to give the subpoena to the dispatcher, but Azar said that he wanted Mazzei to look at it. Azar gave him the envelope, and Mazzei removed the subpoena and read it. Mazzei said that there were other papers in

[13] GC Exh. 48; Tr. 815, 1170, 1352.

the envelope and returned it to Azar who said that he wanted Mazzei to read it "because this is untrue. I gave testimony over the phone, and these are not my words. They were changed." Mazzei read the affidavit. Azar asked him what he could do about the situation and Mazzei advised that Azar, if he wanted, could "give us a voluntary statement on anything you want." Azar left the room and returned with a statement which he gave to Mazzei.

Azar specifically denied that he asked Mazzei to read the affidavit, and also denied that his intent was to talk to him about the subpoena and the affidavit. Rather, he stated that the purpose of his visit to Mazzei was "to let him know that I had been subpoenaed."

Mazzei sent Azar's statement to Poisella, telling him that the affidavit about him "said some awful things about me in it and he said that he didn't say these things." Poisella said that there was not much they could do about it, when Mazzei said "well, he volunteered the statement." The "voluntary" statement that Azar wrote that day was not offered in evidence by the Respondent.

Analysis and Discussion

A. Credibility

This case presents marked differences in versions of events by witnesses for the General Counsel and the Respondent. "The Board has found that . . . "one-on-one credibility contests may be resolved with reference to 'the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole.'" *RC Aluminum Industries,* 343 NLRB 939 fn. 1 (2004).

The principal differences in testimony is that between Wolven and Mazzei. Wolven was the dispatcher who was then promoted to a supervisor's position as assistant terminal manager, both positions while Mazzei was the terminal manager. In those positions, Wolven had the trust and confidence of Mazzei, and had access to his thoughts concerning the Union and its supporters and the Respondent's position regarding unionization. I credit her testimony.

The Respondent contends that Wolven should be discredited because, following her tenure as assistant terminal manager she was demoted to dispatcher and then discharged. Wolven stated that she was not happy when Cuddy was promoted to assistant terminal manager and she was demoted to dispatcher, and admitted saying that she would try to make Cuddy "look bad." Further, although she said that she was not angry at the Employer, she did "have something against" Cuddy and Mazzei, against whom she is considering filing a sexual harassment lawsuit. These instances do not harm her credibility for the following reasons.

I credit Wolven because her testimony has been corroborated by other witnesses whose versions are the same and they are consistent with other witnesses. For example, she corroborated the testimony of Pomella and Haskell that Mazzei refused Haskell permission to retrieve her belongings from the bus after her suspension. Mazzei's testimony that Haskell did not ask for permission to take her personal items, including a pocketbook, is not believable. Rather, as testified by the General Counsel's witnesses, Mazzei said that she was suspended and had to leave, and then went to the bus to retrieve her items and played the tape recording she left on the bus.

In addition, Wolven demonstrated her lack of bias by refusing to agree with the testimony of another General Counsel witness. For example, Wolven denied Kuhhorn's testimony that she completed the dry run on August 27 and gave the papers from that run to Wolven.

Another instance of Mazzei's lack of credibility is his testimony concerning Azar, a current employee. Azar impressed me as someone who could be, and was, intimidated by Mazzei. At the time he gave Mazzei the envelope containing his subpoena and affidavit he had been disciplined several times by Mazzei for various reasons including lateness, having unauthorized food and beverages on his bus, and problems with his personal hygiene.

Thus, when Mazzei read in the affidavit that Azar stated that he had interrogated him and asked him "did I really do this" it is reasonable that Azar would have said no. After all, as Azar explained at hearing, he did not want to testify because he liked his job and did not want to lose it "over something like this." Clearly, he was reluctant to testify because he did not want to testify to Mazzei's illegal interrogation.

I cannot find that, as Mazzei testified, Azar voluntarily gave him his pretrial affidavit and asked him to read it. The affidavit detailed Mazzei's illegal interrogation of Azar. His job was already in peril by virtue of his prior discipline. It would have made no sense for Azar to have asked Mazzei to read it. As to Mazzei's testimony that Azar told him that his affidavit was false, there is no evidence that Azar sought to change his affidavit or complained to the Board agent after he had given it. In addition, Azar's "voluntary" statement was not offered in evidence, nor was he questioned about it at hearing. Further, the fact that Mazzei told his superior, Poisella, that the affidavit contained some "awful things about me" would have induced Mazzei to try to have Azar retract those statements, which he did by asking him to write a "voluntary" statement.

Azar's "voluntary" statement could not have been freely made if he harbored a fear of the consequences if he did not make that "voluntary" statement. Thus, Azar was the subject of a prior unlawful interrogation which his affidavit detailed. Mazzei's questioning of Azar about the affidavit's contents, and then request that he recant it, constituted another unlawful interrogation.

The Board has stated 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 interests . . . [t]hus, a witness' status as a current employee may be a significant factor, but it is one among many which a judge utilizes in resolving credibility issues." *Advocate South Suburban Hospital,* 346 NLRB 209 fn. 1 (2006), citing *Flexsteel Industries*, 316 NLRB 745 (1995).

I accordingly do not credit Mazzei where his testimony contradicts any of the General Counsel's witnesses, except in the instances noted below, particularly concerning Ebert's presence on the Respondent's property.

B. The Alleged Violations of Section 8(a)(1) of the Act

1. The alleged interrogations and the creation of the impression of surveillance

The complaint, as amended, alleges that the Respondent interrogated employees, engaged in surveillance of its employees and created the impression in its employees that it had engaged in surveillance of their union meetings.

The Board has held that "the test for determining the legality of employee interrogation regarding union sympathies is 'whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with employees in the exercise of their statutory rights.'" *Mathews Readymix, Inc*., 324 NLRB 1005, 1007 (1997). Factors which may be considered in making this determination are (a) the background (b) the nature of the information sought (c) the identity of the questioner and (d) the place and method of the interrogation. *Stoody Co.,* 320 NLRB 18, 18, 19 (1995). The Board has viewed the fact that an interrogator is a high-level supervisor as one factor supporting a conclusion that questioning was coercive. *Stoody*, above.

The General Counsel has the burden of establishing, by a preponderance of the evidence, that an employer unlawfully created an impression of surveillance. *Bridgestone Firestone South Carolina,* 350 NLRB 526, 527 (2007). Whether an employer's statements or actions have created an unlawful impression of surveillance is based on the objective test of whether the employees would reasonably assume from the statement or actions that their union activities had been placed under surveillance, based on the perspective of a reasonable employee. *Flexsteel Industries*, 311 NLRB 257 (1993).

I credit Hagelmann's testimony that one day after the August 19 union meeting, Mazzei asked him to step into the garage and told him that "maybe" employee Jenkins was spying at the union meeting, and that he had people, including Kellison "looking out" for people. Although Hagelmann stated that he did not see either man at the August 19 union meeting Kuhhorn said that she saw Kellison there. The General Counsel asserts that this evidence constitutes unlawful surveillance of the employees' union activities. Mazzei denied asking Kellison or Jenkins to attend any union meeting, and Jenkins' time records show that he was on Long Island until 6:30 p.m. that evening.

The issue is whether Mazzei's statements to Hagelmann constituted the creation of the impression of surveillance. In determining this issue, I credit Hagelmann's further testimony that during that conversation Mazzei asked him what happened at the meeting. As set forth above, I credit Azar's testimony that Mazzei called him into his office on the day following a union meeting in September and asked him how many people were present and how many voted or did not vote. I cannot credit Mazzei's testimony that Azar simply "stopped by my office" and volunteered that he attended a union meeting only for the food. Mazzei's questioning of Azar 1 day after the union meeting was consistent with his asking Hagelmann one day after the meeting he attended for details concerning the meeting. I accordingly credit Hagelmann's testimony as to the interrogation.

I credit Wolven's testimony that certain employees "voluntarily" went into Mazzei's office and spoke about the meeting. However, those workers had allied themselves with the antiunion movement at the facility, including Frees, Rink and Berlly. Nevertheless, I find that Mazzei coercively questioned Hagelmann and Azar whose union leanings he apparently did not know, as to what occurred at the meeting. I accordingly find that Mazzei unlawfully created the impression of surveillance when he told Hagelmann that he had people at the meeting looking out for others. Regardless of whether Jenkins or Kellison actually attended the meeting, it is clear that a reasonable employee would believe that Mazzei had enlisted others to observe the activities at the union meeting.

I also credit Weir's testimony that Mazzei told him that he had given permission to Frees and Rink to distribute the antiunion petition and asked him about his friends' views as to the Union. When Weir said he did not know, Mazzei asked him to tell them to sign the petition. Weir, a current employee, testified consistently with Frees who said that Mazzei permitted them to circulate the petition. I find that Mazzei's questioning of Weir as to his friends' union sympathies and encouraging him to have them sign the petition violated the Act. *Garrett Railroad Car*, 255 NLRB 620, 628–629 (1981).

I credit Mercado's testimony that in June, 2009, Mazzei asked her in the parking lot whether she was "in agreement with the Union or not." The question, asked by the highest official at the Middletown facility, directly required her to state whether she was a union supporter, and was unlawful. I accordingly find that Mazzei unlawfully interrogated Mercado about whether she supported the Union.

The complaint, as amended, alleges that the incident at the Quick Chek constitutes the creation of the impression of unlawful surveillance of employees' union activities. As set forth above, it is undisputed that Mazzei and Hernandez drove to the Quick Chek and confronted Pomella, Brandon and his monitor Larli.

I credit Wolven's testimony that Mazzei told her that he would go to that location to record a meeting between Pomella, Blanton and Larli. Even if Cuddy's testimony that she had to speak to Blanton and could not reach him is credited, nevertheless Blanton was in a legitimate park out location that he had used frequently in the past, and, according to his testimony, had called Cuddy to report that he was at that location. There was no evidence that he spent an inordinate amount of time there or that he was late for his afternoon run. Accordingly, there was no reason that Cuddy could not have called and contacted him when he resumed his run. There was no evidence as to the reason for the urgency of her need to speak to Blanton.

Mazzei took his camcorder because the Employer's camera was missing from the accident kit. There was no reason for him to believe that an accident had occurred. Blanton was at a proper park out for the appropriate time period. I credit Pomella and Blanton that they met at the location and spoke at a table there. Thus, I do not credit Mazzei and Hernandez' testimony that the bus was empty and the driver and monitor were not inside the Quick Chek.

I further credit the testimony of Pomella and Blanton that Mazzei pointed the camera at them. I cannot credit the testimony of Mazzei and Hernandez that Mazzei did not do so. If

the camera was in the car as Mazzei stated, Pomella and Blanton would not have seen it.

It is not necessary to find that Mazzei traveled to the Quick Chek facility in order to photograph a meeting between Pomella, Blanton, and Larli. However, based on Wolven's credited testimony that Mazzei told her that was his purpose, and upon returning, told her that he caught them meeting I make such a finding.

The clear implication of the evidence is that Mazzei pointed the camera at Pomella who was unlawfully discharged 2 days earlier, and Blanton in order to give the impression that they were being recorded. It does not matter that no pictures were actually taken. Clearly, Mazzei created the impression that their meeting was under surveillance. Whether or not they actually planned to meet or in fact met to discuss the Union is irrelevant because the violation was established by Mazzei's creation of the impression of surveillance in appearing to photograph them.

The Board has held that photographing of employees' union activities without some legitimate justification constitutes a form of surveillance, or at least creates that impression and tends to create fear among employees of future reprisals. *Mercedes Benz of Orland Park*, 333 NLRB 1017, 1041 (2001). Mazzei's pointing a camera at the employees tended to interfere with their protected, concerted right to meet with each other. The Respondent has established no legitimate justification for its conduct. Even given Mazzei's reasons for taking the camera, Mazzei examined the bus and apparently found no damage. His only reason for pointing the camera was to intimidate the employees. Regardless of whether the camera was actually operating the effect was the same. *Chester County Hospital*, 320 NLRB 604, 619 (1995), where a violation was found in the employer's "pretending to photograph or videotape employees' union activity" by "knowingly pretending to be filming when not actually doing so." In addition, whether or not Pomella, Blanton and Larli were actually meeting to discuss Union matters is irrelevant. Mazzei created the impression that their meeting was under surveillance by photographing or pretending to photograph them. See *Jumping Jacks Div., U.S. Shoe*, 206 NLRB 88, 92 (1973).

At the hearing the complaint was amended to allege that Mazzei interrogated regarding the issues in this case, in violation of *Johnnie's Poultry Co.,* 146 NLRB 770 (1964).

In *Johnnie's Poultry,* the Board recognized that an employer could properly question employees on matters involving their Section 7 rights "where such interrogation is necessary in preparing the employer's defense for trial of the case." However, the Board established "specific safeguards designed to minimize the coercive impact of" such interrogation. The employer "must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees."

The Board has stated that it "has consistently required an employer to administer three warnings to each employee it interviews in preparation for an unfair labor practice proceeding. . . ." *Bill Scott Oldsmobile*, 282 NLRB 1073, 1075 (1987). The Board found in that case that by failing to administer all three warnings that the respondent violated the Act.

Here, it is apparent that Mazzei questioned Azar regarding his affidavit prior to Azar's being called to testify. Mazzei knew that Azar was subpoenaed to testify and would testify in this matter. Mazzei's questioning him about the veracity of his affidavit and asking him to make a statement contradicting it constituted unlawful interrogation of Azar.

I accordingly find and conclude that Mazzei unlawfully conducted an interview concerning the issues in this case in violation of Section 8(a)(1) of the Act by not providing Azar with the assurances required by *Johnnie's Poultry,* 146 NLRB 770 (1964). In addition, the interview was conducted by Mazzei, a manager who had previously unlawfully interrogated Azar as to the events at a Union meeting, and had engaged in other activity which was hostile to union organization. *Johnnie's Poultry*, above. Accordingly, the interview concerning Azar's pre-trial affidavit was unlawful.

2. The alleged unlawful rules

The complaint alleges that in August, and September, 2008, the Employer promulgated and maintained rules prohibiting union solicitations distributions on company property, and prohibiting employees from discussing the union at work.

I credit the mutually consistent testimony of Kuhhorn and Mieses that in mid August, 2008, Mazzei told them that they could not distribute union flyers "on company property," and also the testimony of Pomella and Mieses that Mazzei told them they could not distribute union cards on company property.

Pomella credibly stated that on September 24, the day after she received a memo from Poisella stating that the presence of "outsiders" would not benefit their relationship, Mazzei prohibited her from talking to her coworkers at their buses, in the parking lot, and did not want her to conduct any business on company property.

The Employer's handbook has a facially valid no-solicitation no-distribution rule. However, Mazzei's instructions to the workers that they could not engage in union solicitation or distribution of union literature on company property was unlawfully broad.

Section 7 of the Act guarantees to employees the right of self-organization, which "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978).

The Respondent's prohibition of distribution of union literature on company property is unlawfully broad and violates Section 8(a)(1) of the Act, both because Mazzei singled out union activity, and because the rule extended to union solicitation and distribution activities engaged in by employees on their own time in nonwork areas of the facility. *Powellton Coal Co.*, 354 NLRB 419, 422 (2009); *DPI New England*, 354 NLRB 849, 867 (2009); *Republic Aviation Corp. v. NLRB,* 324

U.S. 793 (1945); *Our Way, Inc*., 268 NLRB 394, 394–395 (1983). *Winkle Bus Co.*, 347 NLRB 1203, 1216 (2006), quoting *Laidlaw Transit Inc*., 315 NLRB 79, 82 (1994). *Loparex LLC*, 353 NLRB 1224, 1234 (2009).

In addition, the Employer unlawfully enforced its no solicitation-no distribution policy by prohibiting union solicitations and distributions while at the same time permitting the solicitation of signatures on the anti-union petition circulated by Frees and Rink. *Register Guard*, 351 NLRB 1110, 1118 (2007). In this regard, Mazzei conceded being asked by Frees or Rink if they could distribute "literature" to the workers and he agreed, provided that such distribution not interfere with the work flow and that neither they nor the employees were on company time. Although Mazzei was allegedly not shown the petition I credit Weir's testimony that Mazzei told him that he permitted the workers to sign the petition which he called a "stop petition against the union."

The "no-talking" rule violates Section 8(a)(1) and (3) of the Act. *Alan Ritchey, Inc.,* 354 NLRB 628, 629 (2009). There is no evidence that the Respondent had prohibited anyone but Pomella from talking. It is clear that Mazzei's warning was directed at Pomella's open and active involvement in encouraging employees to support the union campaign. There was no evidence that she had conducted any "business" on company property other than soliciting employees to sign cards for the Union. In contrast, Frees and Rink were free to solicit their coworkers to sign the antiunion petition.

C. *The Violations of Section 8(a)(3) of the Act*

1. The subjection of employees' work to closer scrutiny

a. Pomella

As set forth above, on the same day that Mazzei instructed Pomella not to speak to her coworkers, he again called her into his office, and after he refused her request for a witness, warned her that if she left she would be disciplined for insubordination. Mazzei questioned her about an alleged discrepancy in her time sheet which she explained to his satisfaction.

I cannot credit Mazzei's testimony that he was doing a routine route audit and that her route was the first of 30 to be selected. There was no evidence that he specifically questioned 30 employees as he testified. The timing of this alleged route audit coming shortly after she had been unlawfully warned not to speak to her coworkers suggests that her work was being closely monitored as a result of her open activities in behalf of the Union.

Further, Wolven credibly testified that she was asked by Mazzei to check the time sheets and runs of employees he believed to be Union supporters to see if they were stealing time. She did so with respect to Pomella and others.

I accordingly find and conclude that the General Counsel has proven that Mazzei's scrutiny of Pomella's work was motivated by her activities in behalf of the Union and that the Respondent has not shown that it would have done so even in the absence of her Union activities. *Wright Line*, above.

b. Bartula

I credit Bartula's testimony that she told Mazzei that she "ran" the Union's campaign at First Student, and that Mazzei was aware that she worked with Union Agent Garlinghouse on the preparation of the seniority list. She signed a card for the Union on August 19 and attended three union meetings. I credit her further testimony that Mazzei told her at the start of her employ that she was one of the best workers he had, but then later said that she was not the person she was when she was hired, and did a "horrible, terrible" job.

She was the subject of criticism by Mazzei concerning her job performance. On the first occasion, Mazzei complained that a substitute driver was lost, but agreed that it was not Bartula's fault. Then she made an unauthorized stop for which she apologized, but claimed that other drivers did the same thing. Thereafter, she and her monitor complained that the paychecks were not available, which affected the entire workforce, the monitor threatening to call the Labor Board and Bartula telling Mazzei that the company could not legally hold their checks. Mazzei threatened to remove her home bus privilege and perform an audit but did neither. Mazzei also told her that she could no longer park out but this was consistent with the Respondent's changed policy. Finally, Mazzei alleged that Frees and Rink complained that she was harassing them, but then the complaint was withdrawn. It appears that there was some type of exchange between Bartula, her boyfriend and Frees and Rink.

I cannot find that the General Counsel has established that the questioning of Bartula concerning her job performance was motivated by her union activities. It is true that Bartula made known to Mazzei that she was involved with the First Student union campaign, but that knowledge came to Mazzei's attention in June, 2008 when she began work. However, she was not an open and active union supporter here. Even assuming that I find that a prima facie showing has been made, I do not agree with the General Counsel that Mazzei's questioning of Bartula beginning in September demonstrates a pattern of persistent questioning or unlawful threats as to amount to a prima facie showing of discrimination for her union activities or that the Respondent would not have taken these actions even in the absence of her union activities. *Wright Line,* above. The comments to Bartula were related to changes in the Respondent's work procedures involving park outs, home bus privileges and unauthorized use of the bus, none of which have been alleged or shown to be illegally motivated.

2. The involvement of the police to remove a union representative

As set forth above, Union Agent Ebert testified that he handbilled employees while standing on the sidewalk of the Respondent's premises and that Mazzei confronted him and then called the police who visited the premises and spoke to Ebert with employees being able to observe the scene.

Witnesses for the General Counsel stated that they observed Ebert only on the sidewalk while the Respondent's witnesses, including Mazzei, Amundson and Hernandez stated that they saw Ebert on the company property, Mazzei stating that he saw Ebert walk 100 feet onto the driveway.

In this instance I credit Mazzei, Amundson and Hernandez. Ebert testified that he sought to publicize the October 9 and 22 Union meetings. He stated that Pomella and Hagelmann refused to distribute the flyers advertising the meetings, saying that they were afraid to do so, so he distributed them. He could have remained on the sidewalk even if he could not obtain the help of the workers. But it is apparent that he wanted to go further. He stated "I couldn't get anyone to distribute handbills on the property, so I was forced to do it myself." Ebert's preferred method of distributing the flyers was that employees themselves perform this task. He asked employees to do so suggesting that they give out the flyers to their co-workers on company property. It therefore follows that Ebert would have sought to hand out the flyers on company property as the most direct way to reach the workers. There was evidence that only a few drivers took flyers as they entered or left the premises in the company bus or their personal vehicle. It stands to reason that Ebert would enter the premises to hand the flyers to the workers while they were present on the company grounds.

I accordingly find that in those instances where Mazzei directed Ebert to leave the property and summoned the police, Ebert had entered the Respondent's property. Where a nonemployee trespasses onto an employer's property, the Act is not violated when the employer directs him leave its private property and calls the police to enforce such an order. It further follows that there can be no unlawful surveillance where the employer is acting properly in seeking to evict the trespasser from its property. *Hoschton Garment Co.*, 279 NLRB 565, 566–567 (1986); *Ordman's Park & Shop*, 292 NLRB 953, 956 (1989); *Berton Kirshner, Inc*., 209 NLRB 1081, 1081 (1974).

3. The discharges

The question of whether the Respondent's discharges of the six employees involved herein were unlawful is governed by *Wright Line*, 251 NLRB 1083 (1980). Under that test, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the terminations. He must show union activity by the employees involved, employer knowledge of such activity, and union animus by the Respondent.

I find that the General Counsel has proven that the discharges of the individuals who were terminated here were all motivated by union animus. The discharges all were made during an ongoing campaign by the Union to organize the Respondent's employees. The Respondent was well aware of the campaign and its director of human resources, Poisella, issued a memo which stated that, although the Employer respects the rights of its employees to choose make up their own mind regarding representation, it was the Respondent's belief that employees would conclude that "the presence of outsiders would not benefit our relationship." Further, the statements by Mazzei to Wolven that the drivers and monitors he discharged were supporters of the Union and he had to "get rid" of them establish the animus of the Respondent.

The Respondent argues that even assuming that Mazzei possessed animus toward the Union and its supporters, the decisions to discharge were made by Poisella and not by him. First, Mazzei admitted recommending the termination of Mieses. Secondly, it is clear that Poisella was informed by Mazzei concerning the circumstances of the incidents leading to the decision to discharge the workers. Although Poisella may not have asked for Mazzei's recommendations concerning the employees, it is clear that Mazzei's discussions with Poisella dealt with the alleged severity of the wrongdoing and the need for severe discipline. Mazzei's testimony that the incidents on the bus constituted the "highest tier of violation" necessarily involved the highest tier of discipline.

The Respondent further argues that it possessed no animus toward the Union because it sought to hire all of its predecessor's employees who, it believed were all members of the Union. If it hired all of those employees presumably the Respondent would be subject to a successor's obligation to bargain with the Union and by knowingly seeking to hire those workers it demonstrated its lack of animus toward the Union.

Where this argument fails is the Respondent's acknowledged desire to hire the employees of predecessor companies regardless of whether they were represented by a union. Thus, the Employer was anxious to fill its ranks with drivers who knew the routes they would be driving which would result in a problem-free start up of its operation. More importantly, it had to hire 115–120 people within a short period of time in order to fulfill its contract with the County, and the most obvious source of such workers was the prior employer.

Once the General Counsel has made the requisite showing, the burden then shifts to the Respondent to prove, as an affirmative defense, that it would have discharged the employees even in the absence of their union activity. 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 even in the absence of the protected activity." *L.B.&B. Associates, Inc*., 346 NLRB 1025, 1026 (2006). "The issue is, thus, not simply whether the employer 'could have' disciplined the employee, but whether it 'would have' done so, regardless of his union activities." *Carpenter Technology Corp.,* 346 NLRB 766, 773 (2006).

Accordingly, the Respondent may present a good reason for discharge, but unless it can prove that it would have discharged the worker absent her union activities, the Respondent has not established its defense. If the General Counsel presents a strong prima facie showing of discrimination, the Respondent's burden is "substantial." *Vemco, Inc*., 304 NLRB 911, 912 (1991). "The policy and protection provided by the Act does not allow the employer to substitute 'good' reasons for 'real' reasons when the purpose of the discharge is to retaliate for an employee's concerted activities. Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for taking the action in question; rather it "must show by a preponderance of the evidence that the action would have taken place even without the protected conduct." *North Carolina Prisoner Legal Services*, 351 NLRB 464, 469 fn. 17 (2007).

Therefore, a careful examination of the Respondent's record of discharging other employees for the same offense must be made. Differences in treatment of employees who committed the same or similar offenses is an important factor to be consid-

ered in evaluating the Respondent's defense. The presence of disparate treatment toward the dischargees indicates a discriminatory motive. *Central Valley Meat Co.*, 346 NLRB 1078, 1079 (2006).

"To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity." *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004).

a. Miosotis Mieses

As set forth above, Mieses spoke with Union agent Garlinghouse and then with Ebert at the entrance to the facility in August, 2008. She was with co-worker Kuhhorn when Ebert gave Kuhhorn a flyer in mid August. Mieses gave uncontradicted testimony that she told assistant manager Calli that she and Kuhhorn were involved with the Union and would be distributing flyers.

The Respondent correctly argues that Ebert did not testify that Mieses was present when he was confronted by Mazzei, yet Mieses stated that when she told Mazzei that she was handing out flyers, and later when Pomella told Mazzei that she, with Mieses present would do so, Mazzei demanded that Ebert leave the property. Another alleged inconsistency noted by the Respondent is that Mieses stated that Mazzei told her when he was outside the premises that she could not distribute flyers, but Kuhhorn stated that they went into the building where Mazzei made that statement. However, Ebert did state that when Kuhhorn told Mazzei that they would be distributing flyers for the Union, Mieses was with her. Also, the Respondent's argument that Ebert was not present at the facility until October is incorrect. Ebert testified that he met with Mieses in mid August directly in front of the facility.

Further, the Respondent argues that Mieses could not have been with Kuhhorn when Kuhhorn spoke to Mazzei because Mieses testified that she went home immediately after the incident where Mazzei yelled at Ebert. However, Kuhhorn specifically testified that Mieses was with her when she spoke to Mazzei at 4:00 p.m. Mieses stated that she generally went home after her last run, at 4:00 p.m. Similarly, Pomella testified that she spoke to Mazzei at about 3:20 p.m. with Mieses, and Mieses who was with her testified that she went home at 4:00 p.m.

Accordingly, the evidence is clear that Mieses engaged in activities in behalf of the Union by assisting Kuhhorn and Pomella in distributing cards and flyers at the Respondent's facility. She credibly testified that, pursuant to Union agent Ebert's advice, she informed Mazzei that she was involved with the Union and would be distributing flyers. Further, dispatcher Wolven credibly stated that Mazzei told her a few days before Mieses was fired that she was a "big union supporter" and that he would be "getting rid of another union supporter."

The timing of Mieses' discharge supports a finding that it was effected because of her activities in behalf of the Union. Thus, only a few days following her advice to Mazzei that she was organizing in behalf of the Union she was fired.

Thus, a strong prima facie showing has been established that Mieses Union activities were a motivating factor in her discharge. *Wright Line,* above. The Respondent's defenses include that Mieses was fired within her 90 day probationary period. As set forth above, there is no written evidence that a probationary period exists. The fact that certain benefits are provided after 90 days, or that other employees have been discharged within 90 days of their hire is not evidence of such a period. Even if a probationary period was in effect, an employee cannot be discharged in violation of the Act simply because she has not completed her probationary period. Accordingly the question becomes whether Mieses would have been discharged even in the absence of her Union activities.

As set forth above, Mieses admitted being told that she was not entitled to be paid for the time in fueling the buses. I credit her testimony that she obeyed that instruction and did not claim time for that task after being warned. Wolven testified that Mieses persisted in claiming the time in the week ending August 9. That is true, as set forth in the time sheet for that week which establishes that although she claimed the time for fueling the bus on August 4, 2 days later, on August 6, she did not fuel the bus and instead waited for another vehicle to return her to the terminal.

Accordingly, there was no issue regarding Mieses' fueling the buses following August 4, the last time she claimed the time for that job. Thus, one of the reasons for her discharge the following week, that she continued to claim the time for fueling the buses, has no merit.

The other reasons for Mieses' discharge were that she was disrespectful and argumentative with the dispatcher, office staff and management. Wolven testified that the detailed memo setting forth Mieses' poor attitude was accurate but that it was written at Mazzei's behest. Mazzei testified that he was asked for his recommendation by the human resources department, and he recommended termination. Accordingly, he decided to fire Mieses and not Wolven.

There was no specific evidence that Mieses was disrespectful to management as set forth in the employee status report or in the memo. No details were given regarding her allegedly disrespectful behavior, just that she "always" argued with the office staff concerning her paperwork and time sheets. Mieses admitted that she questioned the managers as to why her pay check was short before they told her that she would no longer be paid for the time in fueling the buses. Her request for an explanation was reasonable, and when she was told to stop claiming the time for fueling the buses she did so. If the allegedly disrespectful behavior set forth in the memo was related to the bus-fueling issue, it is clear that that matter had been resolved at least as of August 5 when she no longer claimed the time for fueling the bus. There were no other details of her other alleged arguments.

In addition, Mieses was not disciplined for her alleged disrespectful behavior, apart from her summary termination, and the Respondent's progressive discipline policy was not utilized to attempt to correct her misbehavior.

I accordingly find and conclude that the Respondent has not met its burden of proving that Mieses would have been discharged even in the absence of her union activities. *Wright Line*, above.

b. Penny Kuhhorn

Kuhhorn was the first, and one of the most active advocates in behalf of the Union. She met with Union Agents Garlinghouse and Ebert at the start of the campaign in mid-August and was present with them at the Respondent's facility and was given flyers and authorization cards to distribute to her coworkers which she did. She advised managers Calli and Mazzei that they intended to distribute flyers and was told that they could not do so on company property. Mazzei conceded that he saw Kuhhorn standing near Union agent Garlinghouse where the buses entered the property and that they were handing out flyers.

Kuhhorn was discharged 2 weeks later, with Mazzei telling Wolven that she "was a big union supporter and that this . . . her refusal to do a dry run would get rid of her." I accordingly find that the General Counsel has established a strong prima facie showing that Kuhhorn's discharge was motivated by her union activities.

The evidence establishes that Kuhhorn completed her original dry run on August 20. It is undisputed that she was not advised until one week later, August 27, that the dry run she had performed had to be repeated because it was too lengthy and failed to use a highway.

I cannot credit Mazzei's testimony that Kuhhorn refused to do the second dry run on Wednesday, August 27. If Kuhhorn told him to "do it himself" it is clear that he would have suspended or terminated her on the spot for insubordination. According to Kuhhorn's testimony, which I credit over Mazzei's, Kuhhorn first offered to the re-run that day with her grandson. When Mazzei refused, according to Wolven and Kuhhorn, she offered to do it in her own vehicle. He refused permission for that procedure, although, according to Wolven, Mazzei thereafter granted such permission to other drivers due to their unavailability when the buses were accessible. Then, Kuhhorn offered to do the re-run the following day, August 28. Mazzei refused that offer saying that it had to be completed that day, August 27.

I cannot credit Kuhhorn's testimony that she did the re-run in her own car on August 27, and gave the papers to Wolven that afternoon.[14] Wolven denied that Kuhhorn did so. In any event, if Mazzei's testimony is believable, he stated that Poisella gave Kuhhorn a deadline of Friday, August 29. If that was the case, Mazzei should have granted her request to do the re-run on August 28, one day before the deadline.

Accordingly, it is clear that Kuhhorn did not refuse to do a dry run or refuse to return phone calls as set forth in her termination papers. As set forth above, she offered to re-do the dry run three times—with her grandson, in her own vehicle, and the following day, August 28. She did not refuse to return phone calls because she was not at home to receive them. When she finally returned home she retrieved the phone calls made to her and immediately followed the Respondent's order to report to the terminal at 6 a.m. on September 3 at which time she was suspended.

Significantly, there was no evidence that any of the Respondent's drivers at any of its locations was disciplined for failing to do a dry run. I find and conclude that the Respondent has not met its burden of proving that it would have discharged Kuhhorn even in the absence of her union activities.

c. Pomella and Haskell Cheatham and Mercado

As set forth above, Pomella and Haskell were early supporters and activists in behalf of the Union. In mid August, Pomella was given blank authorization cards by Ebert outside the facility, and Pomella asked permission of managers Calli and Mazzei to distribute the cards. Mazzei prohibited her from doing so on company property. They both offered the cards to drivers as they entered the facility. Mazzei stated that he believed that Pomella was blocking buses and was told by her that she was handing out union literature. In addition, on September 24, Mazzei told her that he did not want her to talk to her co-workers on company property.

Although Mazzei denied knowing about Haskell's union activities, I credit the testimony of Pomella and Haskell that they both distributed union cards and handbilled the drivers, and that they stood together when Pomella informed the two managers that they would be handing out literature. Mazzei conceded seeing Haskell about 50 feet away from Pomella when she stood near the facility's entrance as the buses entered. I credit Wolven's testimony that Mazzei told her several times before their discharge that they were the "biggest Union supporters"—that they were speaking to workers about the Union and that Pomella wanted to be the shop stewardess and that "we had to get rid of them."

Based on their activities in behalf of the Union and Mazzei's animus toward them as active supporters of the Union, I find that the General Counsel has established that the discharges of Pomella and Haskell were motivated by their activities in behalf of the Union.

Cheatham and Mercado worked without incident from November 2008 until June 2009 when, on June 19, Union Agent Ebert wrote to the Respondent identifying Cheatham as a member of the Union's Contract Committee. Wolven stated that when Mazzei received the letter he said that she was the "rat, and that she would have to go now." At about the same time, Mercado accepted a union flyer in front of the premises and I credit her testimony that a few days later was asked by Mazzei whether she agreed with the Union.

The four employees were terminated for failing to immediately report an incident on the bus to the dispatcher. In the case of Pomella and Haskell, that a child fell on the bus, and regarding Cheatham and Mercado, that a child reported that he could not breathe.

[14] "A trier of fact . . . is not required to accept the entirety of a witness' testimony, but may believe some and not all of what a witness says." *TNT Skypak, Inc.*, 312 NLRB 1009 fn. 1 (1993).

d. The Respondent's defenses

Because Pomella and Haskell, and Cheatham and Mercado were discharged for the same reason I will discuss the Respondent's defenses to their discharges together.

The Respondent's valid rule requires that any incident, no matter how minor, be reported immediately to the dispatcher. Wolven testified to the issuance of a memo to this effect on August 29, 2008, and training sessions were held concerning it. Notwithstanding that Pomella and Haskell may not have been at work on the day the memo was issued, I find that they could have or should have been aware of this rule. Other employees such as Bartula and Blanton were aware of the rule.

The significant question presented is whether the four employees would have been discharged for violating this rule. As set forth above, the Respondent may have a good reason for discharge, but was it the real reason? It must show that it would have discharged the four workers for that reason.

Assistant terminal manager Cuddy testified that the Respondent does not maintain records of calls from drivers reporting incidents on their buses, although an extensive log is kept whenever a driver calls to report such matters as a child was not going to school that day or the bus is running late due to traffic.

According to Cuddy, the "Daily Parent Contact Log" is essentially used, as indicated on the form, for instances of a bus being late, a child not gong to school or not appearing for the bus, or if the parent calls that the child will not attend school that day. Thus, if a driver reports an incident by radio it would not be reported on this log. Indeed, Cuddy stated that calls from drivers reporting incidents are not reported on any document. There was one instance where the dispatcher recorded that a driver called in and reported that a child was vomiting, and it was written on the log. This should indicate that if a driver called in such an incident it would have been reported. The absence of such written records of drivers calling in incidents is some indication that drivers did not call in such incidents.

It is significant that the importance which the Respondent gives to this rule is not supported by some means of recording whether drivers report incidents occurring on their buses. Mazzei's testimony that incidents involving injuries to children represent the "highest tier" indicates that Respondent would have had a procedure whereby drivers' reports of incidents were recorded.

A number of incidents occurred on the Respondent's buses in which children were hurt or became ill, as follows, in chronological order. It should be noted that as to all the incidents set forth below Cuddy was the dispatcher and would normally have received calls from the drivers reporting the incidents if they called. She signed all the incident reports set forth below.

1. September 19, 2008—GC Exh. 69. Driver Linda Frees' report stated that the child "slipped on step and slid down 2 steps." She and the monitor checked him for marks and found none. Cuddy did not testify concerning whether the driver called the dispatcher to report the incident.

2. October 29, 2008—GC Exh. 71. Driver Robert Crane's incident report stated that the child was crying on the bus. The driver and monitor observed a small mark on his forehead and notified the child's brother that they believed that the child fell asleep and hit his head on the window. In her report to Servisair, Cuddy stated that "driver reported incident to brother." Cuddy did not testify concerning whether the driver called the dispatcher to report the incident.

3. November 17, 2008—GC Exh. 67. Driver Jacqueline Ellery's report stated that the child threw himself on the ground as he stepped on the bus, striking his head. The child's grandmother put him on the bus and the monitor had to prevent the child from throwing himself down the stairs. Cuddy stated that "child was picked up and put into his seat. Mother and grandmother were notified." Cuddy did not testify concerning whether the driver called the dispatcher to report the incident.

4. November 21, 2008—GC Exh. 65. Driver Howard Velazquez' report stated that child hit his head on the window, and the monitor comforted him. The school staff was notified. No visible injury but child was crying. Cuddy wrote "comforted child and notified school." Cuddy did not testify concerning whether the driver called the dispatcher to report the incident.

5. February 27, 2009—GC Exh. 63. Driver Peter Cortes' report stated that the child fell on her knees while in the bus. The driver noted that she may have a bruise or scratch but noticed no bleeding. Cuddy did not testify concerning whether the driver called the dispatcher to report the incident.

6. April 8, 2009—GC Exh. 59. Driver Vincent Ellis' report stated that the child bumped his head on the window. The driver told the child's mother what happened when he dropped the child off at home. Cuddy testified that the driver called her at the time the incident occurred when the child was on the bus.

7. May 8, 2009—GC Exh. 57. Driver Peter Cortese's report stated that the child threw himself onto the floor of the bus and may have hit his head on the floor. He noted that he gave the incident report to the dispatcher. Cuddy did not recall whether the driver called to report this incident.

8. May 13, 2009—GC Exh. 56. A notation was made on the Daily Parent Contact Log by dispatcher Cuddy that the driver called to report a child throwing up on the bus. Cuddy recalled receiving the driver's call.

9. May 13, 2009—GC Exh. 55. Driver Arlene Green's report stated that the child "fell onto both knees" and that the driver "advised teacher taking her off the bus." Cuddy who was the dispatcher could not recall the incident and therefore could not recall whether the driver called it in.

10. May 14, 2009—GC Exh. 54. Driver Edward Guider's report stated that while boarding the bus, a child fell off the bottom step and onto the ground. The child did not appear to have any marks or scars. He noted that the "action taken" was "wrote report." Cuddy testified that the driver called in the incident.

Significantly, it was stipulated that no written warnings or discipline were issued regarding the incidents set forth in GC Exhibits 63–72, which would encompass the incidents of September 19, October 29, November 17 and 21, 2008, and February 27, 2009, above. As to the other incidents set forth above, there was no evidence that any of those drivers or monitors were issued discipline for the incidents involved therein.

Indeed, of the 54 drivers and monitors discharged during the period January 2008, to August 2009, at the Middletown facility involved here, the only terminations for failing to call the dispatcher regarding an incident on a bus were Pomella, Haskell, Cheatham and Mercado.[15]

Of the 407 drivers and monitors in all of the Respondent's facilities except the Middletown facility who were discharged from 2007 to October 2009, none were listed as being fired for failing to call the dispatcher regarding an incident on a bus.[16]

It should also be noted that none of the drivers involved in the above incidents were among the 61 who signed cards for the Union. It may be that those drivers were hired after the cards were solicited in August and September 2008. But certainly Linda Frees, who circulated a petition against the Union, was employed at the time of the Union campaign.

As set forth above, VMC agent Morales wrote that Mazzei asked VMC to disqualify Cheatham and Mercado. It has not been shown that Mazzei had, in the past, sought the disqualifications of any other employee. It is clear that in Mazzei's zeal to discharge them he sought the imprimatur of the VMC for their terminations even before it had made its final recommendation. I do not credit Mazzei's denial that he received the letter since Cuddy testified that she received it and Poisella stated that Mazzei sent it to him. Nevertheless, VMC recommended only that they be given a three-hour recertification class and returned to duty.

Similarly, it was recommended by VMC that Pomella and Haskell be suspended from their duties for one to three days and that they also be permanently reassigned to another run.

Wolven supplied the Respondent's reason for not following VMC's recommendation: Mazzei would not reassign them or put them on another run. He wanted them out. The Respondent's reason was that it had a "higher standard" than VMC's. That may be true, but the Respondent has not proven that it had disregarded VMC's recommendations in the past.

The Respondent's records show that in the period January 2008, to April 2009, there had been only two disqualifications of employees by VMC, that of driver William Canty and his monitor Melva Simmons who, in January 2009, dropped off a child to an unauthorized adult, resulting in the child being missing for one hour and the police being called.[17] It must be noted that in the memo disqualifying Canty and Simmons, the VMC official stated that they were ineligible to work on any of Acme's runs. Here, in contrast, the VMC official recommended only a recertification class, and reassignment for the drivers and monitors involved.

[15] R. Exh. 37.
[16] R. Exhs. 26, 27.
[17] R. Exh. 37.

In addition, although Mazzei called the two incidents the highest tier of violation, VMC, which had responsibility for the oversight of Acme's contract and whose first concern was the children serviced by the Employer, did not recommend termination.

Furthermore, the Respondent did not use its progressive discipline program with the four employees it terminated. Mazzei agreed with the Employer's handbook statement that "the main purpose of any disciplinary action is to correct the problem and attempt to prevent recurrence" and that "by using progressive discipline, we anticipate that most conduct or job performance issues can be corrected at an early stage, benefitting the employee and the Company." The Respondent's progressive discipline policy is outlined as verbal warning, written warning, suspension or termination—"depending on the severity of the problem and the number of occurrences. There may be circumstances when one or more steps are bypassed."

The "Termination of Employment" section of the handbook lists examples of conduct for which an employee may be summarily terminated, such as positive testing for controlled substances, conviction of a felony for a drug or alcohol related matter, and any conduct listed under "prohibited employee conduct" which includes drug or alcohol related activities. The handbook notes that "Baumann will attempt to address these issues through Progressive Discipline. However, Baumann reserves the right to immediately terminate the employment of an employee without prior notice in situations involving gross misconduct." Mazzei explained that certain cases involving discipline may be resolved through progressive discipline. For example, if an employee is late, she is given a verbal warning. If she is late again, a written warning. If lateness continues, further discipline, including suspension and termination may result.

The incidents involving Linda and Justin, where (a) no serious harm was done to either child (b) teachers' aides and the caregiver were notified immediately of the incident (c) incident reports were filed when the employees returned to the facility, and (d) VMC was timely notified of the incidents, seem to be appropriate for the application of the progressive discipline policy and not termination. As set forth above, the policy's purpose is to "correct the problem and prevent recurrence." Such a policy would seem to be consistent with VMC's recommendation for a training class and reassignment to a different route.

I accordingly find and conclude that the Respondent has not proven that it would have discharged Pomella and Haskell, and Cheatham and Mercado in the absence of their union activities. *Wright Line*, above.

D. The Request for a Bargaining Order

The complaint alleges that based on the seriousness of the alleged unfair labor practices committed by the Respondent, the possibility of conducing a fair election is slight. Accordingly, the General Counsel requested that a bargaining order be issued against the Respondent.

1. The appropriate unit

The complaint alleges and the Respondent denies, that the appropriate unit includes all full-time and regular part-time

drivers and monitors employed at the Middletown facility, excluding all other employees, including mechanics and guards. The Respondent asserts that the mechanics and the maintenance employee should be included in the unit.

The Union's letter requesting recognition did not set forth the requested unit. The petition for representation filed by the Union on February 5, 2009, requested a unit of "all drivers and monitors."[18] Ebert stated that all of the Union's contracts with school bus employers include drivers and monitors, but that some of them include mechanics and maintenance employees.

Mazzei as the terminal manager is responsible for discipline to all employees at the terminal, including drivers, monitors, mechanics and the maintenance worker. However, Employer official Poisella stated that the mechanics receive their day to day supervision from a shop supervisor who works in the terminal.

Kuhhorn stated that she interacted with the mechanics only if there was something wrong with the bus. For example, if she complained that the bus was making a noise, the mechanics asked her what the noise sounded like. She had no interaction with the one maintenance employee who worked at the facility. Assistant terminal manager Cuddy testified that the mechanics, who have a commercial driver's license and the maintenance employee, who does not have such a license, work in the garage for the most part, and that neither the mechanics nor the maintenance worker generally ride on the buses. However, a mechanic may occasionally drive a route if the Employer is short of drivers, and the maintenance employee may occasionally work as a monitor if a monitor was needed.

Mazzei stated that the Employer does not maintain records showing the percentage of time the mechanics worked as drivers or the percentage of time that the maintenance employee worked as a monitor. He noted that on one occasion a driver became a mechanic.

Mazzei stated that the Employer's handbook, rules and procedure apply to all its employees regardless of their job duties. Further, all of the company's benefits apply to all employees except its policy regarding "snow days." When schools are closed due to inclement weather, the drivers and monitors do not report to work, but are paid for the day. However, the maintenance employee and mechanics report to work on such days. All employees receive the same holidays, sick days, and health insurance benefits.

Mechanics have two areas in which they can take a break. One is the general break area in the drivers'' room which the drivers, monitors and mechanics use.

The Board has long held that although the Act requires a unit for bargaining to be *an* appropriate unit, it does not require that the unit be the *most* appropriate unit. *Positive Electrical Enterprises, Inc.*, 345 NLRB 1, 1 fn. 1 (2005); *Bartlett Collins Co.*, 334 NLRB 484, 484 (2001).

The Board has found a unit of school bus drivers and monitors to be an appropriate unit. *New Britain Transportation Co.,* 330 NLRB 397, 397 (1999); *Galloway School Lines,* 321 NLRB 1422, 1428 (1996), where the unit found specifically excluded the mechanics.

I reject the Employer's contention that the mechanics and the maintenance employee should be included in the unit of drivers and monitors. Although there is a similarity of benefits and overall supervision by terminal manager Mazzei, and all employees are subject to the handbook's provisions, there are significant differences in the working conditions of the drivers and monitors as compared to the mechanics and the maintenance employee.

Thus, the mechanics are separately supervised by a shop supervisor, there is no evidence as to the frequency with which the mechanics work as drivers, or as to how often the maintenance employee works as a monitor, the only contact between the drivers and the mechanics is when the driver reports a problem with her bus to the mechanic, and there was no evidence as to the frequency of such complaints, their work situs remains separate—with the drivers and monitors working in their buses and the mechanics working in the garage and the maintenance worker performing his duties in the facility generally.

Accordingly, I cannot find that a community of interest between the drivers and monitors exists with the mechanics and the maintenance employee sufficient to include the mechanics and the maintenance employee in a unit of drivers and monitors.

2. The Union's majority status

a. The cards

I granted the General Counsel's request that I authenticate the signatures on the authorization cards by comparing the signatures thereon with signatures from employees' employment applications and W-4 forms. Counsel for the Respondent objected to this procedure. "The Board has long held, consistent with Section 901(b)(3) of the Federal Rules of Evidence, that a judge or a handwriting expert may determine the genuineness of signatures on authorization cards by comparing them to W-4 forms in the employer's records." *Parts Depot, Inc*., 332 NLRB 670, 674 (2000).

I have carefully compared the signatures on the authorization cards to the known exemplars from the Respondent's records, specifically the signatures on the employees' employment applications and W-4 forms. I find that the signatures on all 61 authorization cards compare favorably with their employment applications and W-4 forms, and that those signatures are genuine and authentic.

b. The Union's majority status

The complaint alleges that on about September16, 2008, when the Union made its request for recognition, the Union represented a majority of the drivers and monitors.

A payroll list containing the names of drivers and monitors, the appropriate bargaining unit, employed during the payroll period September 14 to 20, 2008, was received in evidence. That list contains the names of 112 employees. I must add Penny Kuhhorn to that number. She was discharged in August and therefore was not on the September payroll list. However, as I have found that she was unlawfully discharged, she remains a

[18] Case 02–RC–023360. On February 11, the Union requested that the petition be blocked by the pending charges.

statutory employee. Accordingly, the Employer employed 113 workers in the appropriate payroll period.

Sixty-one signed authorization cards were received in evidence.[19] However, of the 113 employees on the payroll list, only 54 signed cards for the Union,[20] less than a majority of the unit employees employed on that date. No contrary proof has been presented.[21]

I accordingly find and conclude that the Union did not represent a majority of the employees employed in an appropriate bargaining unit on about September 16, 2008 when it made a demand for recognition, and I therefore dismiss that allegation of the complaint which requests that a bargaining order be issued against the Respondent.

CONCLUSIONS OF LAW

1. By promulgating and maintaining a rule prohibiting employees from discussing the Union at work, the Respondent violated Section 8(a)(1) of the Act.

2. By promulgating and maintaining a rule prohibiting union solicitations and distributions on employer property, the Respondent violated Section 8(a)(1) of the Act.

3. By creating the impression that Union meetings were under surveillance, the Respondent violated Section 8(a)(1) of the Act.

4. By interrogating employees about their union activities and the union activities of other employees the Respondent violated Section 8(a)(1) of the Act.

5. By interrogating employees without providing them with the assurances set forth in *Johnnie's Poultry*, 146 NLRB 770 (1964), the Respondent violated Section 8(a)(1) of the Act.

6. By subjecting employees to closer scrutiny in retaliation for their support of the Union the Respondent violated Section 8(a)(1) of the Act.

7. By discharging its employees Miosotis Mieses, Penny Kuhhorn, Eileen Haskell, Catherine Pomella, Roberta Cheatham, and Paula Mercado, the Respondent violated Section 8(a)(3) of the Act.

[19] Teannee Alves, Lorna Aguilar, Veronica Anglero, Sandra Armato, Richard Azar, Nilsa Barreto, Tammy Bartula, Eugene Blanton, Shanae Britt, Linda Brown, William Canty, Daphne Carman, Susan Carroll, Patrick Casale, Lola Cast, Jennifer Cawein, Tina Clayborne, Donna Consolo, Mary De Sousa, Thomas Greak, Carola Greiser, Christopher Hagelmann, Eileen Haskell, Donald Helms, Jerri Henry, Rosalina Hernandez, Huber Irala, Pamela Jackson, Alisha Jennings, Richard Jennings, Penny Kuhhorn, Barbara Lamphere, Donna Larli, Rebecca Long, Walter McGrath, Gwendolyn Mikell, Lillian Mingolla, Rachael Mingolla, Wesley Morse, Joseph Ulrich, Farrel Palazzo, Catherine Pomella, Victor Reyes, Evelyn Rivera, Victoria Rogers, Christopher Rudy, William Ruerup, Jackie Schelin, Gerald Schoonmaker, Melva Simmons, Alamo-Quinones Siulhayly, Agnes Smith, Brigitte Stanley, Ann Stimus, Edward Tamburo, Yonique Thompson, Barbara Walker, Christopher Weir, Debra Willard, Douglas Weber, and Sharon Zanelli.

[20] Aside from Kuhhorn, card signers Britt, Jackson, McGrath, Morse, Thompson, and Walker were not on the payroll list.

[21] The Respondent presented this argument in its brief. The General Counsel did not rebut it in any way—either by reply brief or offer to reopen the hearing.

THE REMEDY

Having 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 employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In the complaint, the General Counsel seeks interest computed on a compounded, quarterly basis for any backpay or other monetary awards. I deny the General Counsel's request as that is not the current law. *Cox Ohio Publishing*, 354 NLRB 271, 271 fn. 5 (2009); *Glen Rock Ham*, 352 NLRB 516, 516 fn. 1. (2008), citing *Rogers Corp*., 344 NLRB 504 (2005).

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

ORDER

The Respondent, Acme Bus Corporation, Middletown, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining a rule prohibiting employees from discussing the Union at work.

(b) Promulgating and maintaining a rule prohibiting union solicitations and distributions on employer property.

(c) Creating the impression that Union meetings were under surveillance.

(d) Coercively interrogating any employee about his or her union support or union activities or the union support or union activities of any other employees.

(e) Interrogating employees without providing them with the assurances set forth in *Johnnie's Poultry*, 146 NLRB 770 (1964).

(f) Subjecting employees to closer scrutiny in retaliation for their support of the Union.

(g) Discharging or otherwise discriminating against any employee for supporting International Brotherhood of Teamsters, Local 445, or any other union.

(h) 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 Penny Kuhhorn, Eileen Haskell, Catherine Pomella, Roberta Cheatham,and Paula Mercado 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

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

or privileges previously enjoyed. It appears that Miosotis Mieses was offered unconditional reinstatement by letter of June 10, 2009. Any issues relating to the validity of that offer may be raised in the Compliance part of this proceeding.

(b) Make Miosotis Mieses, Penny Kuhhorn, Eileen Haskell, Catherine Pomella, Roberta Cheatham, and Paula Mercado 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, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) 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.

(e) Within 14 days after service by the Region, post at its facility in Middletown, New York, copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 2, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 15, 2008.

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

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

[23] 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."