**Lucky Cab Company *and* Industrial, Technical and Professional Employees Union, Local 4873 Affiliated with Office and Professional Employees International Union, AFL–CIO.** Cases 28–CA–023508 and 28–RC–006766

February 20, 2014

## DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On December 28, 2011, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel and the Charging Party-Petitioner Union filed answering briefs. The General Counsel filed cross-exceptions and a supporting brief.

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

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

The Respondent operates a taxicab service in Las Vegas, Nevada, employing about 235 cab drivers. In late 2010, the Union commenced an organizing campaign among the drivers, led by a committee consisting of about 13 employees. The Union notified the Respondent of the organizing campaign by letter on February 25, 2011,[3] and filed an election petition on March 30.

The Respondent campaigned against the Union in meetings with employees and in flyers distributed to them. Between February 24 and April 20, the Respondent discharged six drivers, including five organizing committee members and a sixth who assisted in soliciting union support.

The Union lost the May 6 election by a vote of 105 to 93 (with 3 nondeterminative challenged ballots) and filed timely objections and unfair labor practice charges. The objections alleged, among other things, that the Respondent discharged three drivers during the critical period prior to the election. The complaint alleges that these discharges, as well as three others that occurred outside the critical period, violated Section 8(a)(3) and (1) of the Act.

We agree with the judge, for the reasons she stated, that in meetings with employees and in its campaign flyers, the Respondent violated Section 8(a)(1) by threatening employees with the futility of seeking union representation and loss of employment benefits and job security if they chose union representation. As discussed in section 1 below, however, we reverse the judge's finding that the Respondent's road supervisors are supervisors within the meaning of the Act. We therefore dismiss 8(a)(1) interrogation and threat allegations based on conduct by one of the road supervisors. In section 2, we agree with the judge, for the reasons she stated and for the additional reasons discussed, that the six discharges violated Section 8(a)(3) and (1). In section 3, we also find, as alleged in the complaint but not addressed by the judge, that the Respondent violated Section 8(a)(1) by instructing an employee not to discuss her discipline with other employees. Finally, in section 4, we find that the three unlawful discharges alleged as election objections warrant setting aside the election.

### 1. The supervisory status of road supervisors and related 8(a)(1) allegations

The judge found that a group of drivers who acted as "road supervisors" were statutory supervisors under Section 2(11) of the Act based on their role in the disciplinary process. Relying on that determination, the judge found that Road Supervisor Karen Jacobs violated Section 8(a)(1) by interrogating employee Mesfin Hambamo about his organizing activities and threatening him with bodily harm for refusing to answer. Contrary to the judge, we find that the record evidence shows that the road supervisor's role in the disciplinary process is merely reportorial and not indicative of supervisory status.[4] Therefore, we dismiss the 8(a)(1) allegations.

There are nine taxi drivers designated by the Respondent as road supervisors. They perform the same driving functions as the other taxi drivers but have additional duties that include resolving disputes among drivers and between drivers and passengers, assisting drivers when their cabs break down, and completing paperwork for drivers involved in car accidents.

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

[2] We shall modify the judge's recommended Order to conform to our findings and to the decision in *Latino Express, Inc.*, 359 NLRB 518 (2012). We shall substitute a new notice to conform to the Order as modified.

[3] All dates are 2011, unless otherwise indicated.

[4] The road supervisors' role in disciplining coworkers, or effectively recommending discipline, was the only statutory indicia of supervisory authority asserted.

The employee handbook issued to all employees states that road supervisors have the "direct authority to discipline employees up to and including issuing warnings . . . [and] through a reporting procedure can recommend further administrative action, up to and including termination, which in most cases will be followed." All three road supervisors who testified, however, stated that they neither issue discipline to drivers nor recommend such action. They do, however, report misconduct by drivers. Pursuant to management instructions, they prepare a "Supervisor's Daily Report" (SDR) during the course of their shift that details their observations of drivers who violated company rules or committed traffic infractions. Copies of SDRs submitted into evidence list some of the infractions observed and reported by these road supervisors, including running a red light, failing to pick up a customer, smoking in the cab, failing to respond to dispatch calls, argumentative and rude behavior toward other employees, "almost causing an accident" by driving too fast, and failing to wear a seat belt.

These infractions are listed in the employee handbook as violations that "will generate some type of disciplinary action up to and including termination." But nowhere on the SDR form is there a place for the road supervisor to record the imposition or even a recommendation of discipline, and none of the SDRs in evidence include disciplinary actions or recommendations. Rather, as explained by Director of Operations Desiree Dante, road supervisors only "report what they see out on the road and then it is up to [Assistant Manager Steven Gerace] or I to decide what happens to that employee."

Dante explained that not every infraction noted in an SDR results in discipline. She testified that "sometimes, depending on the infraction, a paper may be generated [and s]ometimes it may be just a verbal conversation." Referring to the SDR that noted a speeding driver who "cut off six cars . . . almost causing an accident," Dante explained that either she or Gerace "would call the person in and address the situation with them. Whether they would actually be issued a physical discipline, I do not know. It could just be a conversation, hey, what happened, don't do it again." Dante gave varying answers to the question whether smoking in the cab would result in discipline. She first testified that discipline "would" result for that infraction, then stated it "should" result in discipline, before changing again to state that the driver "may be called in, [and told] you were observed smoking [and] they might sign a paper saying do not smoke in the cab," before concluding by reverting to her original statement, that the driver "would" be disciplined for smoking.

Analysis

In *Franklin Home Health Agency*, 337 NLRB 826 (2002), the Board explained that:

> [r]eporting on incidents of employee misconduct is not supervisory if the reports do not always lead to discipline, and do not contain disciplinary recommendations. To confer 2(11) status, the exercise of disciplinary authority must lead to personnel action, without the independent investigation or review of other management personnel.

Id. at 830 (internal citations omitted). In *Jochims v. NLRB*, 480 F.3d 1161, 1170 (D.C. Cir. 2007), the court approved and relied on the principles of *Franklin Home* in finding that "[u]nder established [Board] law" nurse Jochims was not a supervisor where no evidence showed that her written reports of employee misconduct were a "prerequisite to discipline" imposed on employees, or "resulted in discipline . . . or . . . inevitably resulted in the initiation of discipline." Applying these principles, we find that the evidence fails to establish that road supervisors are supervisors within the meaning of Section 2(11).

In finding to the contrary, the judge relied first on the employee handbook's stated grant of authority to the road supervisors to discipline drivers or recommend that they be disciplined. The Board has consistently held, however, that "[T]he mere . . . giving of 'paper authority' which is not exercised does not make an employee a supervisor." *North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976). Here, Dante explained in testimony acknowledged by the judge that road supervisors do not possess the authority stated in the handbook to issue discipline, and the evidence shows that the road supervisors shared this understanding. They testified uniformly that they neither discipline nor recommend that drivers be disciplined. "That's not my job," said Road Supervisors Asrat Worku and Ioammis "John" Likos, and their testimony, as well as that of Road Supervisor Karen Jacobs, is supported by their actual practice. As discussed, none of the SDRs that they submitted to Dante or Gerace prescribe any level of discipline or recommend discipline against a driver. We reject, therefore, the judge's reliance on the "paper authority" set forth in the handbook, in light of the contrary evidence of the road supervisors' actual practice. *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 265 (2d Cir. 2000), enfg. in relevant part 327 NLRB 253 (1998) (no authority to discipline, despite statement in job description, where the alleged supervisors did not actually discipline or recommend discipline).

Nor do we agree with the judge that under *Oak Park Nursing Care Center*, 351 NLRB 27, 28 (2007), the SDRs lay a foundation for future discipline against driv-

ers. That case, like those it cited,[5] involved a progressive disciplinary system of defined escalating steps of warnings, suspensions, and ultimately termination, and the alleged supervisors initiated the disciplinary process through counseling forms that they issued to employees. Because the evidence showed that the counseling forms were considered by upper management to constitute discipline under the progressive system, and thus clearly affected the job status of the disciplined employee, the Board found the individuals who prepared the forms were supervisors within the meaning of Section 2(11). The Respondent, by contrast, does not have a progressive disciplinary procedure. The handbook states that the Respondent "may exercise its discretion in utilizing forms of discipline" that include "warnings, suspensions, and loss of shift," but that "no formal order or system is necessary" and that employees may be terminated "without following these steps."[6] In *Ohio Masonic Home*, 295 NLRB 390, 392 fn. 5 (1989), the Board found that a procedure for discipline that was administered similarly to the Respondent's was not a progressive disciplinary system.

Moreover, although the SDRs show that driver infractions are brought to the attention of Dante and Gerace by the road supervisors, the record includes no corresponding documentary evidence of discipline issued to the drivers based on the infractions reported in the SDRs. The Board has consistently held in similar circumstances that reports of employee misconduct or the issuance of minor discipline that does not "alone affect job status or tenure" does not constitute the exercise of supervisory authority under Section 2(11). *Passavant Health Center*, 284 NLRB 887, 889 (1987); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996) (written warnings not evidence of supervisory authority where they are merely reportorial and not clearly linked to disciplinary action affecting job status); *Ken-Crest Services*, 335 NLRB 777, 778 (2001) (same).

We reach the same conclusion here. The General Counsel had the burden of establishing the supervisory status of the road supervisors. By providing no evidence that discipline emanated directly from the SDRs submitted by the road supervisors, the General Counsel has failed to make the required showing that the road supervisors, through the SDRs, affected the job status or tenure of the drivers.

Nor does the record support the judge's finding that the SDRs constituted effective recommendations of discipline because the Respondent "regularly based discipline" on them without conducting an independent investigation. This finding rests solely on Dante's equivocal and contradictory testimony about the consequences of smoking in the cab, about which she variously testified that discipline "would," "should," and "might" ensue for this reported infraction. For the same reason that this testimony fails to establish that discipline flows automatically from the SDRs, it does not support a finding that the road supervisors, through the SDRs, effectively recommend discipline for smoking or for any other infraction that they report. As the D.C. Circuit's stated in *Oil Chemical & Atomic Workers v. NLRB,*[7] "what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority." The record here lacks any documented examples of discipline that directly resulted from the road supervisors' SDRs. Contrary to the judge, we find that Dante's testimony is no substitute for such evidence.

Because the General Counsel has not shown that the road supervisors' reportorial function in documenting driver misconduct had a demonstrable affect on drivers' job status, we conclude that his burden of proving supervisory status has not been met. Therefore, we reverse the judge's finding that Road Supervisor Jacobs' statements to Hambamo violated Section 8(a)(1). *Shaw, Inc*., 350 NLRB 354, 358 (2007). Accordingly, we dismiss this allegation.

2. The discharges

The Respondent excepts to the judge's finding, based on the analysis set forth in *Wright Line,*[8] that the Respondent violated Section 8(a)(3) and (1) by discharging drivers Almethay Geberselasa, Elias Demeke, Endale Hailu, Melaku Tesema, Assefa Kindeya, and Mesfin Hambamo in response to their efforts to organize the drivers. We affirm the judge's findings.

Under *Wright Line*, the General Counsel has the initial burden of showing that the employees' protected conduct was a motivating factor in the Respondent's decision to discharge them. "The elements commonly required to support such a showing are union or other protected activity by the employee, employer knowledge of that activity, and antiunion animus on the part of the employer."

[5] *Sheraton Universal Hotel*, 350 NLRB 1114 (2007), and *Promedica Health Systems*, 343 NLRB 1351 (2004), enfd. in relevant part 206 Fed. Appx. 405 (6th Cir. 2006), cert. denied 549 U.S. 1338 (2007).

[6] See sec. IV, A. of the judge's decision, under the heading "Provisions relating to discipline."

[7] 445 F.2d 237, 243 (D.C. Cir. 1971), cert. denied 404 U.S. 1039 (1972).

[8] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

See *Austal USA, LLC*, 356 NLRB 363, 363 (2010).[9] We find that the General Counsel established all three elements. It is undisputed that all six discriminatees engaged in protected organizing activity. As found by the judge, they were among a small group of employees who led the organizing effort by discussing the benefits of unionization with fellow drivers and soliciting authorization cards from them. They conducted their organizing activities both on and off the Respondent's property. The on-premises activity took place in the employee parking lot and in an area of bleacher seating immediately outside the front entrance of the Respondent's administration building, where drivers were required to assemble prior to the beginning of their shifts. The administration building housed the office of Dante and Gerace, the Respondent officials involved in the discharges.

The Respondent's animus against the discriminatees' organizing activities is well supported by the record. The Board has long held that the timing of adverse action shortly after an employee has engaged in protected activity, or close to the filing of an election petition, may raise an inference of animus and unlawful motive. See *Real Foods Co.*, 350 NLRB 309, 312 (2007); *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004). Such an inference is appropriate here. The first discharge, that of Geberselasa, occurred on February 24, approximately 2 weeks after the organizing effort intensified with the solicitation of authorization cards.[10] Hambamo was discharged last, on April 20, about 3 weeks after the March 30 filing of the petition.

The Respondent's animus is further demonstrated by its contemporaneous 8(a)(1) violations. See *Austal USA,* supra, 356 NLRB 363, 364. In leaflets and in statements made by Dante while the employees were conducting their organizing activities, the Respondent threatened the loss of employment benefits and job security if they chose union representation, and the futility of seeking such representation.

Persuasive evidence that the Respondent's reasons for the discharges were pretextual further supports our finding of animus. See *Relco Locomotives, Inc.*, 358 NLRB 229, 229 (2012), enfd. 734 F.3d 764 (8th Cir. 2013); *Tidewater Construction Corp.*, 341 NLRB 456, 458 (2004); *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995), enfg. 312 NLRB 155 (1993) (evidence of pretext may be used to show discriminatory motivation). This evidence includes:

- *Disparate treatment*—Personnel action forms (PAFs) show that other drivers were not discharged for the same or similar infractions as those committed by the six discriminatees.[11]
- S*hifting explanations*—At the hearing, Gerace gave new reasons for the discharges of Geberselasa and Kindeya that were not stated in their termination PAFs, i.e., that Geberselasa was an "aggressive" driver with a "very combative" attitude and Kindeya was "very combative [and] resisted advice."[12]
- F*ailure to allow the discriminatees to respond to allegations of misconduct*—The Respondent prepared termination PAFs prior to the discharge interviews with the discriminatees. The judge found (at fn. 19) that Geberselasa was not given a chance during her interview to dispute the basis for her discharge. Nor were the other five discriminatees provided this opportunity.[13]
- *Falsified documentation and abrupt change in discipline*—When Hambamo informed Gerace that he failed to attend a state-required safety class that resulted in the suspension of his taxi permit, Gerace gave Hambamo a 1-day suspension, but later in the day, and without any explanation to Hambamo, discharged him. The judge found that this unexplained change, coupled with a "spurious" PAF introduced to show another driver's purported discharge for a permit suspension, was evidence of pretext and unlawful motive.[14]

[9] Member Johnson notes that in a number of cases the Board has alternatively described the animus element of the General Counsel's initial *Wright Line* burden as requiring a showing that "the employer bore animus toward the employee's protected activity." *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011). For the reasons fully set forth in his personal footnote statement in *St. Bernard Hospital & Health Care Center*, 360 NLRB 53 fn. 2 (2013), he finds the quoted description preferable, but he recognizes that the briefer description of the animus element is also consistent with substantial precedent. He finds no need for further comment on this issue until, if ever, the different descriptions support different results in the circumstances of a particular future case. That is certainly not true in the circumstances of this case.

[10] The judge found that Geberselasa was discharged before she could distribute any authorization cards.

[11] See *Windsor Convalescent Center*, 351 NLRB 975, 983 (2007), enfd. in relevant part 570 F.3d 354 (D.C. Cir. 2009).

[12] See *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007) (raising additional allegations of misconduct for the first time at the hearing supports finding of pretext).

[13] See *Rood Trucking Co.*, 342 NLRB 895, 900 (2004) (denying discharged employees the opportunity to explain their alleged misconduct is evidence of pretext).

[14] See *Chino Valley Medical Center*, 359 NLRB 992, 992 fn. 3 (2013) (abrupt and unexplained change from written warning to discharge is evidence of pretext); *Sunshine Piping, Inc.*, 351 NLRB 1371, 1377–1378 (2007) (use of altered documents is proof of pretext and unlawful motive).

- *Gerace's false reasons for discharges*—Gerace made the decision to discharge all six discriminatees and also decided the reasons stated in their PAFs. The judge found, however, that Gerace was an "unreliable witness" whose testimony was "facile, self-serving, and sometimes improbable." The judge noted in particular that Gerace's reason for discharging Geberselasa—improperly picking up passengers in a "geographically restricted" area of Las Vegas—was based on an "inherently implausible" anonymous phone tip. The judge also found that Gerace's claim of a "safety period," permitting up to 5 trip sheet violations in a 6-month period without termination, was so "uncorroborated and inconsistent as to merit no weight whatsoever." Accordingly, the judge deemed "incredible" Gerace's explanation for discharging several discriminatees, namely that they, unlike other drivers, had excessive trip sheet violations during a 6-month safety period.[15]

In excepting to the judge's finding of animus, the Respondent asserts that it did not commit the 8(a)(1) violations, that its campaign flyer contained no threats of lost benefits or job security, and that the judge erroneously credited employees' testimony that Dante orally threatened them with a loss of benefits during safety meetings. We find no merit in these arguments. We similarly reject the Respondent's contention that its failure to discharge other drivers who expressed their union support to Dante demonstrates an "absence of animus [which] is fatal to the claim of discrimination in this case." As explained in *McKee Electric Co.*,[16] "a discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents." Thus, we conclude that the record amply demonstrates the Respondent's animus toward its employees' union activities.

Turning to the knowledge element of *Wright Line*, we agree with the judge that the General Counsel showed that the Respondent knew of the discriminatees' organizing activities. The Respondent argues that there is no direct evidence that it knew of any discriminatee's activities, but the Board has consistently held that direct evidence is not required. *Windsor Convalescent Center*, supra, 351 NLRB at 983 fn. 36. Rather, it is well established that the Board may infer knowledge from such circumstantial evidence as "the employer's demonstrated knowledge of general union activity, the employer's demonstrated union animus, the timing of the discharge in relation to the employee's protected activities, and the pretextual reasons for the discharge asserted by the employer." *Kajima Engineering & Construction*, 331 NLRB 1604 (2000). All of these factors are present here.

The record shows that the Respondent was aware of the organizing campaign. The Union informed the Respondent of it by letter on February 25, before the Respondent discharged four of the discriminatees in March and April. Moreover, we agree with the judge that the Respondent was aware of the organizing activity even before then, when it discharged Geberselasa on February 24 and Demeke on February 25. For months prior to February 25, both were among the core group of organizing committee members who openly solicited employees in the bleacher area in front of Dante's and Gerace's office, and often in plain sight of both of them. Gerace, in particular, was frequently in that area due to his chain-smoking habit. See *Metro Networks*, *Inc.*, 336 NLRB 63, 65 (2001) (opportunity for managers easily to observe open union activity in workplace among factors relied on to find knowledge), and *American Chain Link Fence Co.*, 255 NLRB 692, 693 (1981), enfd. in relevant part *NLRB v. American Spring Bed Mfg. Co.,* 670 F.2d 1236, 1245 (1st Cir. 1982) (same). Discrediting Dante's and Gerace's testimony that February 25 was the earliest they learned of the organizing activity, the judge found that the solicitation of authorization cards commenced on February 8, and employees started asking Dante what the cards meant soon thereafter. In addition, the timing, animus, and pretext evidence discussed above further warrants an inference that the Respondent was aware of the discriminatees' organizing activities. On the basis of this wealth of circumstantial evidence, the judge reasonably inferred that the Respondent was aware of the discriminatees' organizing activities when it discharged them.[17]

Having concluded that the General Counsel satisfied his initial burden under *Wright Line* to show that the discriminatees' organizing activities were a motivating factor for their discharges, the burden shifted to the Respondent to prove, as an affirmative defense, that it would have discharged them even in the absence of their

[15] *Windsor Convalescent Center*, supra, 351 NLRB at 984 (discredited testimony as to the reasons for discharge is the essence of pretext).

[16] 349 NLRB 463, 465 fn. 9 (2007), quoting *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964).

[17] Having found that the road supervisors were 2(11) supervisors, the judge imputed their knowledge of the discriminatees' union activity to the Respondent. We do not rely on that aspect of the judge's analysis in light of our finding that the road supervisors are not Sec. 2(11) supervisors and based on the evidence discussed above establishing the Respondent's knowledge of the discriminatees' organizing activities. Nor do we rely on the judge's finding that Dante knew of Kindeya's union support based on a statement to Dante that he was "going to choose the Union," because it is not clear from the record that Kindeya made this statement.

organizing activities. *Austal USA*, supra, 356 NLRB 363, 364; *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). This burden may not be satisfied by proffered reasons that are found to be pretextual, i.e., false reasons or reasons not in fact relied upon for the discharge. Rather, as the Board has consistently held, a finding of pretext defeats an employer's attempt to meet its rebuttal burden. *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB 633, 637 (2011), enfd. sub nom. *Mathew Enterprise, Inc. v. NLRB*, 498 Fed. Appx. 45 (D.C. Cir. 2012). Further, an employer does not carry its *Wright Line* burden merely by asserting a legitimate reason for an adverse action, where the evidence shows it was not the real reason and that protected activity was the actual motivation. *T&J Trucking Co.*, 316 NLRB 771, 771–773 (1995), enfd. mem. sub nom. *NLRB v. T&J Container Systems*, 86 F.3d 1146 (1st Cir. 1996); *Stevens Creek*, supra, 357 NLRB 633, 637; *Metropolitan Transportation Services*, 351 NLRB 657, 659–660 (2007).[18] Applying these principles here, we agree with the judge that the Respondent's proffered reasons for discharging the discriminatees are pretextual, and we find that the Respondent failed to satisfy its *Wright Line* defense.

In its exceptions, the Respondent primarily contests the judge's disparate treatment findings, arguing that it discharged other employees for committing the same infractions as those committed by the discriminatees. We reject this argument.

Employee Geberselasa was assertedly discharged for picking up passengers on two occasions on February 17 in a geographically restricted area of downtown Las Vegas, in violation of State and company rules. However, as the judge found, the Respondent knew that Geberselasa had previously made similar pickups and had not disciplined her for it. Only after she engaged in union activity did the Respondent determine that this infraction warranted discipline. The Respondent offered no explanation for imposing discipline, much less discharge, in contrast to its prior toleration of the same conduct. Such disparate disciplinary treatment following Geberselasa's protected activity is evidence that the Respondent's asserted reason for discharging her was false. *Approved Electric*, 356 NLRB 238, 240 (2010).

The Respondent maintains that it discharged Hambamo because his driver's permit was suspended. Its argument that this was consistent with past practice fails, however, because as the judge found, the PAF of the other driver who was assertedly discharged for the same reason was falsified. As the judge further noted, the Respondent could not explain at the hearing, and still fails to justify in its exceptions, why it did not terminate at least two additional drivers whose permits were also suspended.

In rejecting the Respondent's defenses with respect to the remaining four discriminatees, we first note that although their PAFs specify several reasons for each discharge, the Respondent on exception now relies on just one reason as the lawful basis for each action. The Respondent's abandonment of the other reasons for these four discharges not only leaves uncontested the judge's findings that those reasons were pretextual, but shows that even the Respondent recognizes their lack of merit. We find the Respondent's remaining contention, that the discharges were based on the consistent application of a disciplinary policy, no more credible.

The sole reason relied on for Kindeya's discharge is that he refueled his cab too soon before the end of his shift. Although the Respondent claims that other drivers were discharged for this reason, the record shows that those drivers, unlike Kindeya, had previously received discharge warnings for early refueling. As for Hailu, the Respondent now asserts that it discharged him because he failed to collect and record on his trip sheet the correct amount of fares for several trips. Contrary to the Respondent's argument, however, the record does not show that he had previously received a discharge warning for this infraction on February 5, and the Respondent failed to establish that others were discharged for this infraction without such a warning. Similarly, with respect to Demeke's termination, the Respondent now relies only on his failure to record two permitted meal breaks on a trip sheet. Again, unlike other drivers who the Respondent claims were discharged for this infraction, Demeke did not receive a prior discharge warning. And finally, the question of consistent disciplinary treatment has no application with respect to Tesema, because the stated reason for discharge on his PAF—failure to "log a ride" on one of his trip sheets—was demonstrably false. The GPS records in evidence show that Tesema logged all of his rides on the day in question, as Gerace could easily have ascertained.[19]

[18] See also *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1352 (3d Cir. 1969) (the policy and protection provided by the National Labor Relations 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), cert. denied 397 U.S. 935 (1970).

[19] The Respondent argues on brief that Tesema's PAF should have stated failure to "log a break" rather than failure to "log a ride," and that he was lawfully discharged for not logging a break on April 3 because he was previously warned for this trip sheet violation. We find no merit in this contention.

In sum, for the reasons cited by the judge and those that we have discussed, we agree with her finding that the General Counsel carried his *Wright Line* burden of showing that the Respondent discharged the discriminatees in response to their organizing activities, and that the Respondent has not shown that it would have discharged them absent that activity. Accordingly, we affirm the judge's finding that the discharges violated Section 8(a)(3) and (1).

3. The unaddressed allegation regarding Slack

The complaint alleged that Human Resources Manager Debra Slack violated Section 8(a)(1) on February 24 by orally promulgating and enforcing an overly broad and discriminatory rule prohibiting employees from discussing discipline issued to them. We find merit in the General Counsel's cross-exception to the judge's failure to address the allegation.

The judge found that after Slack informed employee Geberselasa of her discharge on February 24, Slack gave Geberselasa her final paycheck, escorted her out of the office, and told her "not to speak to anyone as she left [the] property." Geberselasa testified that her coworkers were "surprised" when they saw her leaving, but that she did not stop to talk to them because Slack was following her.

An employer violates Section 8(a)(1) when it prohibits employees from speaking with coworkers about discipline and other terms and conditions of employment, absent a legitimate and substantial business justification for the prohibition. *SNE Enterprises*, 347 NLRB 472, 491–492 (2006), enfd. 257 Fed. Appx. 642 (4th Cir. 2007); *Caesar's Palace*, 336 NLRB 271, 272 (2001). Slack's instruction to Geberselasa plainly interfered with her Section 7 right to discuss her discharge with the employees who were witnessing it, as well as with other employees. Having provided no justification for the prohibition, we find that the Respondent violated Section 8(a)(1).[20]

4. The representation case

As discussed above, the Union contends that the 8(a)(3) discharges of Tesema, Kindeya, and Hambamo, which occurred during the critical period before the election, constituted objectionable conduct. The judge set aside the election, applying the rule set forth in *Dal-Tex Optical Co.,* 137 NLRB 1782, 1786–1787 (1962), that unfair labor practices committed during the critical period are, "*a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election." The Respondent argues that *Dal-Tex* is not applicable here because, even assuming that the three discharges violated Section 8(a)(3), the Union did not demonstrate that they interfered with the election results.

The Respondent's argument is contrary to longstanding Board law. The Board has recognized a narrow exception to the *Dal-Tex* rule for 8(a)(1) violations that are so minimal or isolated that "it is virtually impossible to conclude that the misconduct could have affected the election results." *Long Drug Stores California*, 347 NLRB 500, 502 (2006), quoting *Clark Equipment Co*., 278 NLRB 498, 505 (1986). However, this exception to the broad *Dal-Tex* presumption has never been applied to violations of Section 8(a)(3). See *Baton Rouge Hospital*, 283 NLRB 192, 192 fn. 5 (1987).[21] The facts of this case provide no basis for any argument that we should break new ground here.[22]

Accordingly, we find that the election must be set aside.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Lucky Cab Company, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of benefits, job security, and other reprisals, and informing employees

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The warning for this trip sheet violation was issued on September 10, 2010, based on Tesema's failure to log his breaks on July 26, 2010. However, even under Gerace's asserted 6-month "safety" rule, after which a driver's trip sheet violations are expunged, Tesema's record of prior trip sheet violations and warnings for not recording breaks would have been wiped clean as of March 1, 2011. Thus, Tesema's April 3 failure to log a break, his first trip sheet violation in a different 6-month safety period, would not have resulted in his discharge.

[20] Inasmuch as we find Slack's statement unlawful even if it did not constitute oral promulgation of a formal workplace rule applicable to all employees, we need not pass on the complaint's allegation that it was such a rule.

[21] In *Baton Rouge Hospital*, the Board concluded that departure from *Dal-Tex* was not warranted where in addition to several 8(a)(1) violations, the employer committed two 8(a)(3) violations during the critical period, specifically the unlawful layoff of one employee and the imposition of more onerous work assignments on another employee. The Board found that because those 8(a)(3) violations "are, by their nature, not fleeting in their effects, and they are unlikely to escape the notice of fellow employees," it was "not a case in which 'it is virtually impossible to conclude that the misconduct could have affected the election results.'"

[22] Member Johnson notes that the Board has never held, including in *Baton Rouge Hospital*, supra, that the "virtually impossible" exception should never apply to violations of Sec. 8(a)(3), particularly those that affect one or few employees and involve no loss of employment. He agrees that there is no basis in this case for applying this exception.

that it would be futile to select the Union as their bargaining representative.

(b) Instructing employees not to discuss their discipline with coworkers.

(c) Terminating any employee for engaging in union activities or to discourage employees from engaging in union activities.

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

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

(a) Within 14 days from the date of this Order, offer Almethay Geberselasa, Elias Demeke, Endale Hailu, Melaku Tesema, Assefa Kindeya, and Mesfin Hambamo full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Almethay Geberselasa, Elias Demeke, Endale Hailu, Melaku Tesema, Assefa Kindeya, and Mesfin Hambamo whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, as provided for in the remedy section of the judge's decision as modified.

(c) Compensate Almethay Geberselasa, Elias Demeke, Endale Hailu, Melaku Tesema, Assefa Kindeya, and Mesfin Hambamo for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful terminations of Almethay Gebersalasa, Elias Demeke, Endale Hailu, Melaku Tesema, Assefa Kindeya, and Mesfin Hambamo and within 3 days thereafter notify them in writing that this has been done and that the terminations will not be used against them in any way.

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

(f) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 28, 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 the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since February 24, 2011.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 28 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 election held on May 6, 2011, in Case 28–RC–006766, is set aside and remanded to the Regional Director for Region 28 for the purpose of conducting a new election.

[Direction of Second Election omitted from publication.]

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.

[23] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT threaten you with loss of benefits, job security and/or other reprisals, or inform you that it would be futile to select Industrial, Technical and Professional Employees, Local 4873, affiliated with Office and Professional Employees International Union, AFL–CIO (the Union) or any other union as your bargaining representative.

WE WILL NOT instruct you that you are not to discuss your discipline with coworkers.

WE WILL NOT discharge you for engaging in union activities or to discourage employees from engaging in union or other protected, concerted activities.

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

WE WILL within 14 days of the Board's Order, offer Almethay Geberselasa, Elias Demeke, Endale Hailu, Melaku Tesema, Assefa Kindeya, and Mesfin Hambamo full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or to any other rights or privileges previously enjoyed.

WE WILL make Almethay Geberselasa, Elias Demeke, Endale Hailu, Melaku Tesema, Assefa Kindeya, and Mesfin Hambamo whole for any loss of earnings and other benefits suffered as a result of our unlawful discharges, less any net interim earnings, plus interest.

WE WILL compensate Almethay Geberselasa, Elias Demeke, Endale Hailu, Melaku Tesema, Assefa Kindeya, and Mesfin Hambamo for the adverse tax consequences, if any, of receiving lump sum backpay awards, and WE WILL file a report with the Social Security Administrative allocating the backpay awards to the appropriate calendar quarters.

WE WILL within 14 days of the Board's Order remove from our files any reference to the unlawful discharges of Almethay Geberselasa, Elias Demeke, Endale Hailu, Melaku Tesema, Assefa Kindeya, and Mesfin Hambamo, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

LUCKY CAB COMPANY

*Pablo Godoy* and *Larry A. Smith, Esqs.,* for the General Counsel.

*Frederick C. Miner* and *David R. Keene II, Esqs. (Littler Mendelson, PC.),* of Phoenix, Arizona, and Las Vegas, Nevada, respectively, for Respondent/Employer.

*Sidney H. Kalban, Esq.,* of New York, New York, for the Charging Party/Petitioner.

## DECISION

### I. STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. Pursuant to unfair labor practice (ULP) charges and timely objections to a representation election of May 6, 2011,[1] filed by Industrial, Technical and Professional Employees, Local 4873, affiliated with Office and Professional Employees International Union, AFL–CIO (the Union), the Regional Director for Region 28 of the National Labor Relations Board (Region 28 and the Board, respectively) issued a complaint and notice of hearing (the complaint) and an order directing hearing on objections and notice of hearing (order on objections), both dated June 30, an order consolidating Cases 28–CA–023508 and 28–RC–006766 dated July 1, and an amendment to complaint, dated September 6.[2] The complaint alleges that Lucky Cab Company (Respondent) violated Sections 8(a)(3) and (1) of the National Labor Relations Act (the Act).[3] This consolidated case was tried in Las Vegas, Nevada, on September 20 through 23, and 26, and November 2 and 3.

### II. ISSUES

A. Were road supervisors, Asrat Worku, Ioonis "John" Likos, and Karen Jacobs, supervisors within the meaning of Section 2(11) at material times.

B. Did Respondent violate Section 8(a)(1) by the following conduct:

1. Threatening employees with loss of benefits including 60-day leaves of absence, convenience leaves upon request, gas checks, clean upgraded cars, and Friday BBQs if they selected the Union as their bargaining representative;
2. Threatening employees with unspecified reprisals if they selected the Union as their bargaining representative;
3. Informing employees that it would be futile to select the Union as their bargaining representative;

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[1] All dates herein are 2011, unless otherwise specified.

[2] At the hearing, the General Counsel amended the complaint to substitute the following names and titles for those set forth in par. 4:

Desiree Dante—Director of Operations
Steven Gerace—Asst Cab Operations Manager
Debra Slack—Human Resources Manager
Donald Chan—General Manager
Asrat Worku—Road Supervisor
Joey Hicks—Trainer/Biller
Jason Awad—Owner
Ioonis (John) Likos—Road Supervisor
Karen Jacobs—Driver Supervisor

The parties corrected the name of John Lyck to Ioonis "John" Likos. General Counsel withdrew complaint allegations 6(6) and (h) and appropriately renumbered succeeding paragraphs.

[3] In representation cases, an employer is traditionally referred to as "Employer" and the union as "Petitioner." For convenience, Lucky Cab Company will be referred to throughout as "Respondent," and Industrial, Technical and Professional Employees, Local 4873, affiliated with Office and Professional Employees International Union, AFL–CIO as "the Union."

4. Threatening employees with loss of benefits, including the convenience of requesting days off, if they selected the Union as their bargaining representative;
5. Threatening employees with less favorable shifts if they selected the Union as their bargaining representative; Threatening employees with unspecified reprisals because they refused to disclose their union membership, activities, and sympathies;
6. Interrogating employees about their union membership, activities, and sympathies.

C. Did Respondent violate Sections 8(a)(3) and (1) of the Act by terminating the following employees on the dates indicated:

Almethay Geberselasa—February24
Elias Demeke—February 25
Endale Hailu—March 8
Melaku Tesema—April 6
Assefa Kindeya[4]—April 7
Mesfin Hambamo—April 21

D. Did Respondent engage in conduct that affected the results of the representation election held May 6 so as to require setting it aside?

## III. JURISDICTION

At all material times Respondent, a Nevada corporation, with an office and place of business in Las Vegas, Nevada (the facility), has been engaged in the business of taxicab service in the Las Vegas, Nevada metropolitan area. During the 12-month period ending May 12, Respondent, in conducting its business operations derived gross revenues in excess of $250,000. During the same 12-month period, Respondent purchased and received at the facility goods and materials valued in excess of $50,000 that originated from points outside the State of Nevada.[5] At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

## IV. FINDINGS OF FACT: UNFAIR LABOR PRACTICE CASE

Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony regarding events occurring during the period of time relevant to these proceedings. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and Respondent, I find the following events occurred in the circumstances described below during the period relevant to these proceedings:

### *A. Work Rules and Policies*

Respondent operates a fleet of taxicabs from its facility located on a large property bordered by Diablo Drive and Wynn Road. The facility includes the administrative offices, dispatch office, a trailer where employee meetings and training are held (the trailer), and parking for Respondent's taxicabs and limousines. The dispatch office looks out on the area in front of the administrative offices where two sets of bleachers are located (the bleacher or waiting area). The sets of bleachers are separated by several feet and the set to the east is designated a smoking area. The bleacher area serves as a waiting area for drivers awaiting dispatch. Respondent required drivers to be in the waiting area about 30 minutes prior to start of shift. A podium utilized by the dispatcher was placed a few feet west of the nonsmoking bleacher.

Respondent employs about 240 drivers to operate about 150 taxicabs. Drivers employed by Respondent are initially hired as "extra" drivers, meaning they have no assigned route or shift. As shifts/routes become available, extra drivers are converted to permanent drivers and given specific shift/route assignments. Because of the potential to make higher "book," certain shifts/routes are more desirable than others.

The Nevada Taxi Cab Authority (NTCA) oversees Respondent's taxicab operations, enforcing various regulatory provisions of Chapter 706, *Motor Carriers,* of the Nevada Revised Statute (NRS). The NTCA conducts periodic, random audits of taxicab companies, called certificate holders, in which the NTCA may do the following: reconcile company records and trip sheets, check personnel files to ensure drivers have received a copy of rules and regulations during employment orientation, check taxicabs for seatbelts, and check to see that drivers are not working in excess of 12 hours a day. Agents of the TA may periodically stop and inspect working taxicabs, checking for proper equipment, valid driver's licenses, NTCA driver's permits, and accurate and complete trip sheets.[6] The NTCA also enforces prohibitions, including the following: high flagging (transporting a passenger without the meter engaged), long hauling (taking a passenger on a longer than necessary route to inflate the fare), smoking in a taxicab, leaving the cab unattended while on-duty, and ignoring taxicab stands. Such offenses both the certificate holder and the taxi driver can be penalized, up to and including loss of the certificate for the Company and revocation of a driver's permit to operate a taxicab.

The NTCA issued Respondent colored metal plates called medallions, each of which was a license to operate a specific taxicab. The medallions, 102 of which were issued to Respondent, were affixed to individual taxicabs and by color specified the physical operating parameters of the cabs to which they were attached. Some medallions were geographically restricted, preventing the taxi from picking up (but not dropping off) in an area known as "The Golden Triangle": McCarren International Airport, downtown Las Vegas, and the Las Vegas Strip.[7] Operating a taxi outside medallion parameters violated both State regulations and company policy, a fact of

[4] The name appears as corrected at the hearing.

[5] At the hearing, the General Counsel amended par. 2(c) of the complaint to include the words, "that originated directly from points outside the State of Nevada."

[6] Trip sheets, completed by each driver for each shift, detail information about the taxi's services.

[7] Geographically restricted medallions were intended to ensure that persons outside of The Golden Triangle would receive adequate taxi service.

which drivers were well aware through required NTCA training programs and Respondent's written policies, which were distributed to all drivers.

Each taxi driver was required to hold a NTCA permit, to be renewed yearly. Prior to permit expiration, a permit holder had a 30-day renewal opportunity, during which the permit holder was required to successfully complete a safety course. If the permit expired, the permit holder could not legally drive a cab until the permit was renewed. A driver had two chances to attend the prerequisite safety course; if the driver missed the first course, permit was suspended until the class was rescheduled. Missing the second class resulted in an indefinite suspension of permit until the safety class requirement was completed. During suspension, the certificate holder could not permit the driver to operate a taxi.

The NTCA required each driver to keep daily trip sheets in a form prescribed by the NTCA, which the NTCA used to monitor compliance with its rules.[8] Drivers were required by law, at the beginning of a shift or duty period to log driver name and cab number; to record the shift start time along with current meter and odometer readings for the cab. During the shift, each driver was required to record on the trip sheet: (1) the time, place of origin, and destination of each trip and (2) the number of passengers and fare for each trip. At the end of shift, each driver was to record shift end time along with meter and odometer readings. Respondent maintained a Global Positioning System (GPS) log of taxi positions during each shift.

Respondent's employee handbook, entitled "Lucky Cab Company Policies, Procedures & Regulations" (employee handbook) directed that trip sheets be submitted at the end of a driver's shift and provided detailed instructions for filling them out:

> Top Section**:** 1. Write in your TA number; 2. Print your full name; 3. Write in your current telephone number; 4. write in the date; 5. Select your Medallion type/shift; 6. Write in the Cab number; 7. Write in the Medallion number; 8. Write in the number of radio calls taken (if none, put a zero) . . .; 9. Write in the number of NO-GO's (if none put a zero); 10. Write in the cost of gas; 11. Write in the number of gallons of gas. Mid Section: 2. Each time you pick-up and drop-off a fare, do the following a.) Enter the pick-up location of the trip in the "FROM" box; b.) Enter in the time of pick-up in the "TIME IN" box; c.) Enter in the drop-off location of the trip in the "TO" box; d.) Enter in the time of the drop-off in the "TIME OUT" box; e.) Enter in the number of passengers you are transporting in the "#of PASS" box; f.) Enter in the amount of the fare in the "AMOUNT" box.

Respondent permitted drivers an 1-hour-15-minute meal break, which was to be noted on the trip sheet. Because many of Respondent's drivers were from Ethiopia, Respondent permitted unpaid 60-day leaves of absence to accommodate the travel involved in visiting that country.

At all relevant times the following individuals held the following positions with Respondent. The first five named were admitted supervisors at the facility within the meaning of Section 2(11) and agents within the meaning of Section 2(13) of the Act; the status of the last three is in issue:

> Jason Awad (Awad)—Owner
> Desiree Dante (Dante)—Director of Operations
> Steven Gerace (Gerace)—Asst Cab Operations Manager
> Debra Slack (Slack)—Human Resources Manager
> Donald Chan (Chan)—General Manager
> Ioonis (John) Likos (Likos)—Road Supervisor
> Asrat Worku (Worku)—Road Supervisor
> Karen Jacobs (Jacobs)—Road Supervisor

The employee handbook contained the following relevant policies and rules in pertinent part:

> *Provisions relating to discipline*:
>
> Progressive Counseling . . . Lucky Cab may exercise its discretion in utilizing forms of discipline that are less severe than termination in certain cases. These include verbal and written warnings, suspension, and loss of shift. Although one or more of these steps may be taken in connection with a particular employee, no formal order or system is necessary. Lucky Cab may terminate the employee without following these steps.
>
> *General Rules and Policies*
>
> . . . .
>
> 3. All applicable laws and the regulations of the [NTCA] must be adhered to and are strictly enforced by the company.
>
> . . . .
>
> 6. You cannot drive a cab without your driver's license, physical card, and T.A. [permit] in your possession. Revocation of either card or your inability to pass a physical may result in your termination.
>
> . . . .
>
> 20. Any driver that is a habitual offender with the [TA] will face disciplinary action up to and including termination of employment.
>
> . . . .
>
> 21. The company will not grant more than a sixty (60) day leave of absence.
>
> . . . .
>
> 31. Driver Productivity: Driver productivity is the lifeblood of the company. It will be monitored very closely. Drivers that are consistently or repeatedly 10% or more below average will face disciplinary action up to and including termination of employment.
>
> 32. . . . we DEMAND that all drivers wear their SAFETY BELTS AT ALL TIMES! It's the law, NRS 484.641.2.
>
> . . . .
>
> 34. You are entitled to a 1.15 hour lunch break and this must be noted on your trip sheet as you would any other trip.
>
> . . . .

[8] The NTCA could impose sanctions for trip sheet violations against both the company and the offending driver.

36. Smoking is prohibited in all company vehicles as well as in the drivers' room and shop area.

Respondent's handbook lists 69 acts, the pertinent numbers of which are listed below, that would "generate some type of disciplinary action up to and including termination":

1. Any act which might jeopardize the Employer's certificate.
2. Falsifying a trip sheet.
. . . .
14. Long hauling [taking a longer route than necessary].
. . . .
24. Not wearing seat belts.
. . . .
42. Smoking in a company vehicle.
. . . .
62. Failure to ensure that the gas tank is completely full at the end of the shift.
63. Unsatisfactory productivity.
. . . .
68. Being a habitual offender of T.A. Regulations.

*B. Supervisory Authority of Likos, Worku, and Jacobs*

Likos, Worku, and Jacobs were road supervisors. Respondent's employee handbook stated their authority as follows:

> [Assistant/Backup Road Supervisors] have the direct authority to discipline employees up to and including issuing written warnings. Furthermore, through a reporting procedure [Assistant/Backup Road Supervisors] can recommend further administrative action, up to and including termination, which in most cases will be followed.[9]

Road supervisors performed normal taxi driving functions with the added responsibility of responding, and providing assistance, to drivers' problem situations, including but not limited to: providing a battery jump start; changing vehicle tires, providing street directions, restaurant recommendations, and trip price quotes, resolving driver-customer or interdriver disputes, completing accident investigation paperwork, and providing driver transportation when necessary.

Road supervisors were also responsible for observing other drivers and preparing daily reports of unusual situations (e.g., passenger threw up) and driver misconduct, such as traffic code violations, medallion violations, or driver smoking in a cab. Management reviewed the reports regularly and might take action based on reported information. Road supervisors exercised discretion in reporting misconduct. For example, "from [his] goodness," Worku did not report a driver's conduct until his February 12 report, detailed below. Some reports contained subjective assessments, as follows:

From Jacobs' reports:

1–20–11: #863 Scott—rude—told another driver . . . "that was the worst update he has ever heard" I told him, that was not necessary! He also doesn't have his radio at audio level.
1–27–11: #834 went thru a red light Trop & Swenson.
2–3–11: #857—stopped at his car. I told him he couldn't do that until he was clocked out! He said he was sorry.
2–5–11: #840 Scott—argumentative. Rude! Accusing dispatch-not doing her job—then being rude to another driver over the radio . . . he has done this many time—and still continues to do it.
2–10–11: Mary Davis came to work late!
4–7–11: #800—he doesn't respond to the dispatch. When he is asked a question, it takes 5 times to get him to answer.

From Worku's reports:
2–12–11: #2875 . . . [did not pick up the customer] This driver is not his first time to do like this. He keeps doing the same thing.
4–9–11: #2895 . . . passenger throw up in his cab . . . by the time he went to the yard, it was 12:20 . . . I didn't put him on the road.

Road supervisors' daily reports did not include discipline recommendations, but Respondent relied upon them to issue discipline with or without further investigation. A road supervisor's report of a driver speeding, for example, could result in written discipline ("a paper may be generated") or an oral discussion. A report on a driver smoking in a cab would cause Dante to "call [the offending driver] in and say you were observed . . . smoking in your cab, and to issue a verbal warning." Road supervisor reports of customer pickups that violated medallion restrictions served as the basis for driver discipline.

*C. Union Organizational Campaign*

In 2009, the Union conducted an unsuccessful organizational campaign among Respondent's drivers. In November 2010, hoping to renew organizational interest among Respondent's drivers, several drivers contacted the Union. In the 2 months that followed, a number of drivers, including Almethay Geberselasa (Geberselasa), Elias Demeke (Demeke), Endale Hailu (Hailu), Melaku Tesema (Tesema), and Mesfin Hambamo (Hambamo) were named to the Union's organizing committee. They in turn recruited additional drivers to assist in the organizing campaign, one of whom was Assefa Kindeya (Kindeya). On February 8, the Union provided union authorization cards to committee members to distribute among Respondent's drivers. By letter dated February 25, the Union informed Respondent it was engaged in a union organizing campaign among the Company's drivers (the February 25 organizing letter).

Geberselasa, Demeke, Hailu, Tesema, Kindeya, and Hambamo, employed for the length of time and discharged as noted below, engaged in the following union activities among their fellow drivers in the following circumstances:

> *Gebersalasa* (employed three years; fired February 24): After November 2010, Gebersalasa frequently talked about the Union to other drivers in the bleacher area during the 30–35 minutes before her shifts began, asking drivers if they were willing to sign union authorization cards; she thereafter told

[9] While acknowledging the handbook's authority description of road supervisors, Dante testified that road supervisors did not issue discipline, except to send drivers home if the NTCA or the police determined the driver was involved in an at-fault accident.

drivers she would obtain authorization cards from the Union on Wednesday, February 23. On Wednesday, February 23, Gebersalasa obtained authorization cards from the Union but was fired on Thursday, February 24, before she could distribute any.

*Demeke* (employed 6 years; fired February 26): Starting in mid-December, Demeke talked about the Union to drivers in the bleacher area, by cell phone while waiting to pick up at the airport, and in driver gatherings after work; from about January 15, he served on the Union's organizing committee, and after February 8 distributed authorization cards to other drivers in the bleacher area. On one occasion on an unknown date, as Worku stood about 1 foot from him, Demeke distributed cards to other drivers in the bleacher area, telling them they needed the Union.

*Hailu* (employed 6-1/2 years; fired March 8): Beginning in February, Hailu encouraged other drivers to sign authorization cards, as they waited for shift start in the bleacher area. Sometime about the end of February, Hailu told road Supervisor Likos that if the drivers had a union, Respondent would not push them so hard about getting high book. Hailu enumerated other advantages of unionization, contrasting Respondent unfavorably with unionized companies.

*Tesema* (employed about 3-1/2 years; fired April 6): Beginning in February, Tesema encouraged other drivers to complete union authorization cards while waiting for shift start in the bleacher area and while waiting to pick up at the airport. During times when Tesema distributed cards, Worku and Gerace were also in the bleacher area.

*Kindeya* (employed nearly 4 years; fired April 8): Distributed union authorization cards at the facility in areas removed from the bleacher area, such as the parking area. On March 15 during his attendance at a driver safety meeting where Dante spoke, Kindeya told Dante that Respondent had failed to keep promises and that he was "going to choose the Union" and be involved in the Union.

*Hambamo* (employed nearly 8 years; fired April 20): Beginning February 8, distributed union authorization cards to other drivers when he saw them waiting at the airport and at other cabstands.

A number of employees came to Dante with union authorization cards that had been given to them, asking what the cards meant and what effect signing them would have. Dante testified that no employee discussed authorization cards with her until about a week after receipt of the Union's February 24 organizing letter, an assertion I cannot accept.[10]

[10] Dante's testimony often appeared expedient rather than candid. I find it inherently unlikely that although card distribution began around February 8, no drivers questioned Dante about the cards until early March. I do not accept Dante's testimony of when she knew of union organizing among employees.

*D. Alleged Independent Violations of Section 8(a)(1)*

1. Respondent's flyer

Following its receipt of the Union's February 25 organizing letter, Respondent distributed a flyer to employees (Respondent's flyer) that read (with emphasis as written) in pertinent part:

THE UNION WILL **NOT** DELIVER TO THE DRIVERS

** 60-DAY LEAVE OF ABSENCE
** CONVENIENCE LEAVE UPON REQUEST
** GAS CHECK
** OPEN DOOR [TO] DESIREE FOR MANAGEMENT ISSUES
** CERTAINTY CLEAN UPGRADED CARS
** JOB SECURITY
** FRIDAY BAR-B-QUE

THE ABOVE **ARE** SOME OF THE MANY LUCKY BENEFITS *EVERY DRIVER NOW ENJOYS!* . . . BEWARE UNION CANNOT

** **PROVIDE JOB SECURITY**—FOR WRONGFUL & ILLEGAL ACTS[11]

*BUT* . . . YOU SHALL PAY EXPENSIVE **UNION DUES!!** VOTE NO ON UNION!

2. Respondent's March statements to employees at driver safety meetings

Between March 15 and 17, Respondent held seriatim driver safety meetings at the facility involving all drivers. In some, but not all, of the meetings, Dante spoke to groups of 20–40 employees about the union organizing. Employees Sisay Eba (Eba), Tesema, and Hambamo attended meetings at which Dante spoke. Each testified that Dante said if employees selected the Union, they would lose the current 60-day leave of absence benefit. All but Eba testified that Dante warned employees they would lose the gas bonus. Eba recalled that Dante said the current method of scheduling shifts would change; Tesema and Hambamo recalled Dante saying that management's open door and vacation policies would end.

Dante denied telling employees that any benefits would change if they chose the Union. According to Dante, she encouraged employees to educate themselves about the Union by talking to other drivers before making the decision they felt was best for them. She also touched on some of Respondent's unique benefits, i.e., the 60-day leave of absence, biannual gas bonus awards, and merit shift assignments.

I have carefully considered the manner and demeanor of the witnesses who testified about Dante's remarks at the March safety meetings, and I credit the employee witnesses. In addition to an unconvincing manner, Dante's testimony was general and uncorroborated by any contemporaneous notes, which might reasonably be expected when multiple employee assemblies were addressed. Further, the witnesses' testimonies are

[11] The phrase "for wrongful & illegal acts" was in smaller type than the bolded "provide job security" phrase.

consistent with statements in Respondent's flyer, i.e., that the Union would not deliver 60-day leaves of absence and gas bonus benefits or open-door management.

3. Hambamo's April 15 conversation with Jacobs

On the afternoon of April 15, while Hambamo sat on the nonsmoking bleachers in the waiting area, Jacobs, standing a few feet away, crooked her finger for Hambamo to come to her. When Hambamo complied, Jacobs asked him what the employees were trying to do with the Union. Hambamo asked what she was talking about, and Jacobs said, "The Union, the thing that you are trying to organize."

Hambamo said he was unwilling to discuss the issue with her at that location. Jacobs said, "Are you sure?" Hambamo said he was positive and returned to the bleachers.

Jacobs went into the office; returning a few minutes later, she asked Hambamo if he was quite sure he didn't want to discuss the issue, saying, "If you don't want to speak, I'm going to hurt you."

Hambamo asked why Jacobs was threatening to hurt him. Jacobs said, "Because you said that you don't want to discuss about the union with me. Because I want to know what you guys are doing and you're refusing. That's why." Jacobs said she was joking about hurting Hambamo.[12]

*E. Terminations of Geberselasa, Demeke, Hailu, Tesema, Kindeya, and Hambamo.*

1. Geberselasa

According to Gerace, on February 17,[13] he received a telephone complaint from an anonymous person[14] who said, "Your restricted cab is picking up at a hotel that they're not supposed to do that." The next day, Gerace reviewed Geberselasa's February 17 trip sheet. The trip sheet showed that at 4:29 p.m. Geberselasa picked up at the Westin Hotel (160 East Flamingo Road) and delivered at the Best Western Motel (both unrestricted areas). As written, the trip sheet showed no infraction. Gerace reviewed the February 17 GPS trip log for Geberselasa's cab, which showed a corresponding GPS location of 103 East Flamingo Road, the address of Bally's, a restricted hotel a few blocks from the Westin Hotel.[15] Gerace did not contact or interview Geberselasa about her trip sheet before directing that she be fired.[16]

After arriving at work on February 24, Geberselasa was called to a meeting with Slack and Dante. Slack gave Geberselasa a Personnel Action Form (PAF) and said she was being terminated for picking up a customer from a restricted area on February 17. The PAF read:

> 1. In reviewing your trip sheet against the GPS report the following discrepancies' were found. At approximately 4:29 p.m. your trip showed that you had picked up at the Hilton[17] and dropped at the Best Western, when the GPS report showed that your Cab was at 103 E. Flamingo Rd. (Bally's).
>
> 2. Your trip sheet indicated that at 8:17 p.m. you picked up at Hooters and dropped at the Venetian. The GPS report showed that your Cab was at 3746 Las Vegas Blvd—(City Center).
>
> 3. You were also driving a Night Restricted Cab which prohibits you from picking up passengers that are listed in (1) & (2). Reference enclosed "Geographically Restricted" list. By doing this you placed the Company in jeopardy of losing their certificate.[18]

Gebersalasa tried to explain her February 17 trip sheet, but Dante would not listen.[19] Dante gave Gebersalasa her final paycheck and wished her luck. Slack told Gebersalasa not to speak to anyone as she left Respondent's property. Before leaving, Geberselasa told Slack she knew she was being fired for union activities. Slack only said goodbye.

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[12] Jacobs denied having such a conversation with Hambamo. I found Hambamo to be a candid and reliable witness, and I credit his account. Respondent argues the conversation could not have taken place, as Jacobs' shift would not have put her at Respondent's facility at that time. The fact that Jacobs' shift did not overlap the time of the conversation does not preclude her having been at the facility then.

[13] Gerace initially testified the date was February 24, the "day I terminated [Gebersalasa]," then corrected himself to say it could have been February 17.

[14] Gerace testified, "I don't know if it was a customer, other driver, Taxicab Authority, metro, I don't know who it was."

[15] Considerable testimony was taken regarding the accuracy of GPS logs, in which Gerace assertedly placed absolute confidence. It is unnecessary to resolve a question of GPS accuracy, as the issue is not the GPS accuracy but whether Gerace had a reasonable belief in its accuracy sufficient to warrant his conclusion that Geberselasa had falsified her trip sheet.

[16] I cannot accept Gerace's account of his being alerted to and his later investigation of Geberselasa's February 17 conduct. I found Gerace to be an unreliable witness. In this, as in later-detailed instances, his testimony was facile, self-serving, and sometimes improbable. I do not credit Gerace's vague testimony of a catalyzing complaint about Gebersalasa's pickup. His initial testimony that the complaint came on the same day as the termination appeared to be a miscalculated ordering of events rather than mere confusion, and it is inherently implausible that Gerace would not have a clearer recollection of the complaining party in a situation so serious that it resulted in a discharge.

[17] According to Gerace, "Hilton" was an error. The PAF should have read, "Westin," as written on Geberselasa's February 17 trip sheet. The Westin was in an unrestricted area.

[18] Geberselasa denied having picked up a fare in a restricted area on February 17. Both the General Counsel and Respondent offered considerable testimony as to whether Geberselasa's February 17 trip sheet and corresponding GPS tracking showed pick up in a restricted area, but neither party provided evidence that clearly resolved the question. I find that while Geberselasa may not have made an improper pickup, the trip sheet and GPS tracking, at least superficially, may have provided contrary evidence.

[19] Slack testified she always gives employees facing discharge an opportunity to explain or justify their actions, which sometimes results in a reversal of the termination decision. Slack initially testified that she and Dante questioned Geberselasa about what had happened, and Slack asked Geberselasa if she wanted to explain, which offer the driver declined. When pressed as to what questions the managers had asked Geberselasa, Slack testified that she read the PAF to Geberselasa and asked Geberselasa if she had any questions, which does not amount to an explanation opportunity. Where testimonies differ, I credit Geberselasa.

Gebersalasa had improperly picked up in restricted areas in the past, which she documented on her trip sheets but for which she was not disciplined. Management witnesses denied knowledge of Gebersalasa's prior restricted-area pickups. A trip sheet completed by Geberselasa on May 29, 2010, shows a pickup at the Grand Vacation Hilton (a restricted area); a written notation on the trip sheet reads "6/11 Verbal . . . counsel[ed] regarding filling out trip sheet accurately [Dante]." A trip sheet completed by Geberselasa on July 17, 2010, shows a pickup at the Sahara (a restricted area); a written notation on the trip sheet reads "7/30 Verbal . . . counsel [Dante]," which verbal counsel-ing was for failing to clock out. Gebersalasa received neither discipline nor counseling for the restricted-area infractions noted on the May 29 and July 17, 2010 trip sheets. It is reasonable to infer from the written notations of verbal counseling on the May 29 and July 17, 2010 trip sheets that management reviewed them. I find, therefore, contrary to management denial of knowledge, that management knew of Gebersalasa's prior restricted-area pickups.[20]

In explaining Respondent's reasons for discharging Gebersalasa without prior warning, Gerace testified:

> Geberselasa was a very aggressive driver . . . she was very combative with me whenever I would talk to her about something. I was trying to help her and she would be combative. She would storm out of my office and she would yell things out in the parking lot. She admitted to me many times that she did the same violation over and over and over again. I just felt termination was warranted with her.[21]

2. Demeke

During his employment with Respondent, Demeke incurred discipline for such infractions as trip sheet violations, low productivity, suspension of NTCA permit, and threatening to shoot and kill one of Respondent's office employees,[22] but until February 25, he was not terminated.

When Demeke reported to work on February 25, he was directed to meet with Slack and Gerace. The managers gave Demeke a PAF, which they told him to read and sign. The PAF read in pertinent part:

> a) On 01/09/111 and 01/28/11 you failed to sign your Trip Sheet.
>
> b) On 01/15/11, 01/24/11 & 02/24/11 you failed to clock in at the end of your shift
>
> c) Also you failed to list your break periods on your Trip Sheet. In comparing your Trip Sheet against the GPS report your cab was parked at 4249 Las Vegas Blvd at 9:54 p.m. and then again at 2:28 a.m. your Cab was parked at 4727 W Flamingo Rd and nothing was written on your Trip Sheet.[23]

Neither manager discussed Demeke's past discipline, explained the PAF statements, or asked Demeke for any explanation. Demeke refused to sign the PAF; the managers gave him his final check, and Demeke left the facility.

3. Hailu

Respondent disciplined Hailu multiple times before firing him on March 8: multiple counselings for trip sheet violations; a suspension for insubordination; eight low productivity warnings; three drive cam violations; and eight notices for cash drop shortages.

A few days after Hailu's conversation with Likos about the Union, on March 8, he was directed to meet with Slack and Gerace. Slack gave Hailu a PAF and told him he was terminated. When Hailu asked why, Slack told him to read the PAF, which, in pertinent part stated:

> 1. On 02/28111 your Trip Sheet is missing the Gas dollar amount as well as the gallons amount.
>
> 2. On 03/05/11, 03/06/11 & 03/07111 you have listed that you have a total of two radio calls, yet your Trip Sheets shows only one "R" listed in the Radio column for those days.
>
> 3. On your Trip Sheets for 03/04/11,03/05/11 & 03/06/11 your Trip Sheet fare totals do not match the Trip Log report.[24]
>
> . . . .
>
> You've been counseled on 5/29/10, 36/11/10, 09/24/10, 11/19/10, 02/05/11 & 2/19/11, regarding these issues. On 02/05/11 you were counseled regarding Trip Sheet violations and it was noted that any other violations would result in termination.

Although not mentioned in Hailu's PAF, Gerace testified that Hailu was fired for the additional infractions of "lying" about the places and times he picked up passengers up.

4. Tesema

On April 8, Slack called Tesema into her office. She gave him a PAF and told him he was terminated. In pertinent part, the PAF stated:

> On *09/01/10* you were issued a final warning regarding filling out your trip sheet accurately.[25]
>
> Now again your trip sheet dated *04/03/11* shows that you failed to log a ride, at 10:10 p.m. to 10:45 p.m. your cab was parked at 2890 W Sahara Ave, Las Vegas, NV, and there was nothing noted on your trip sheet.[26] This is

[20] Respondent terminated Stanley Milano in August 2009 for picking up in a geographically restricted area, as observed by a driver supervisor, and entering inaccurate information on his trip sheet. No other information about the circumstances of the discharge was adduced.

[21] Gebersalasa was never counseled or disciplined for being "aggressive" or "combative."

[22] Demeke was disciplined on May 21 and 29, June 5, July 15, September 24, November 4, and December 3, 2010, for trip sheet violations.

[23] Drivers were entitled to a 1.15-hour lunchbreak, which was to be noted on a driver's trip sheet. Gerace considered failure to log breaks to constitute trip sheet falsification.

[24] Slack testified that but for reason three, Hailu would not have been fired.

[25] The specific infractions were failing to record breaks and trips on the July 26, 2010 trip sheet, which assertedly constituted falsification.

[26] That was the address of the restaurant where Tesema took a 25-minute meal break, a breaktime well under Respondent's limit, but which Tesema failed to note on his trip sheet.

considered falsification and therefore termination is warranted immediately.

Also on *04/03/2011* your trip sheet shows that you had one Radio Call yet there is nothing listed on your trip sheet indicating that ride.

Please be advised that you were issued a final warning and based on these new trip sheet violations your position as a Cab Driver has been terminated effective immediately.

Dante testified that Tesema's failing to note his lunchbreak was falsification because he did not justify his time, even though he was entitled to it. She acknowledged that drivers often forget to mark their meal breaks. She said she would not expect drivers to log a 10-minute break but would expect recordation of a 90-minute break.

5. Kindeya

On April 8, Slack gave Kindeya a PAF and told him he was terminated. The PAF stated:

On *04/04/11* your cab was at the pumps at 11:23 p.m., this is against company policy and procedures drivers must complete their assigned shift and are not allowed to gas-up prior to an half an hour before your shift ends.

On *04/04/11* your trip sheet shows that you took a Radio Call, yet your trip sheet does not indicate that ride.

On 03/29/11 you were caught driving via the cabs DriveCam camera for not wearing your seatbelt. This is in violation of company and state policy. . . .

On 03/01/11 & 03/29/11 you failed to enter in the correct number of radio calls . . . On 03/28/11 you failed to enter in your telephone number on your trip sheet. You have been counseled regarding filling out your trip sheets back on 06/04/10 & 06/11/10.

Gerace testified that an underlying, though unarticulated, reason for discharge was that Kindeya was "very combative [and] resisted advice." Respondent provided no corroborative documentation, including prior counseling or discipline, to support Gerace's criticism.

6. Hambamo

On April 13, Hambamo was scheduled to attend the NTCA's Driver Safety Program class, as the prerequisite to renewing his NTCA permit. Hambamo failed to attend and complete the course on April 13. He rescheduled to attend the course on April 20 but was denied admission when he arrived late. Since the remaining classes on April 20 were full, Hambamo had to sign up for an April 27 class.

When Hambamo reported to work on April 20, he explained the situation to Gerace, who later gave him a PAF, stating: "You are being suspended 1 shift because your T.A. permit has been Revoked you are to report back to this office on 4/21/2011 at 2:00 PM." Hambamo told Gerace his NTCA permit had been suspended, not revoked. Gerace said Hambamo should not worry about the wording of the PAF, that it was "only a statement," and Hambamo should sign it.

About 1–1/2 hours later, Slack telephoned Hambamo. Slack told Hambamo he was no longer employed by Respondent and that he needed to come in to complete paperwork. The following morning, April 21, Hambamo met with Slack in her office. Slack gave him a PAF, reading in pertinent part:

Lucky Cab was notified by the [TA] on 4/20/11 that you have failed to attend a second Driver's Safety Program class. Failure to abide by company policy and procedure as well as per NRS laws will result in disciplinary action up to and including termination. Please be advised that your position as a Cab Driver has been terminated effective today 14/21/11.

Hambamo attended the Driver Safety course on April 27, after which his permit was immediately reinstated by the NTCA.

Respondent introduced into evidence a PAF for one driver assertedly terminated in October 2009 for failing to maintain a valid NTCA permit. The document consists of two pages. The first page, dated October 22, 2009, states the reason for discharge as "failed probation." The second page is dated September 14, 2011, and states in pertinent part, "You are being terminated because of your failure to keep a valid TA card." When asked to explain the first page/second page discrepancy in dates, Gerace testified, "You know, it's a computer-generated time. I couldn't answer that without speculation. It's got to be a computer error, that's all I could say. It's very interesting that you brought that up because I don't know how that could've been there like that." It is reasonable to infer that Respondent generated the second page of the PAF shortly before commencement of trial to bolster Respondent's case against Hambamo.

The General Counsel presented evidence of three drivers, each of whom missed a second scheduled NTCA class (Abraham Worke, Metekya Absu, and Demeke) but were not terminated. Although Gerace said Absu was on leave of absence at the time he missed his second class, which Respondent apparently considered as mitigation, Gerace could not explain Respondent's restraint as to the other two drivers.

7. Discipline issued to other drivers

Respondent introduced evidence of discipline for a number of drivers, identified by their initials, including the following:

AY—fired November 4, 2010: counseled and issued a final warning on July 13, 2010. On October 28, 2010, cab parked, respectively, for 25, 97, 60, and 25 minutes without trip sheet notation.

GC—fired February 5, 2010: trip sheet showed activity from 5:14 a.m. to 3:26 p.m., while trip log showed activity from 10:39 a.m. to 3:26 p.m.

DC—fired January 28, 2010: failed probation; on January 26, 2010, discrepancies between GPS and trip sheet information.

CE—fired September 11, 2009: on September 10, 2009, large gaps of time unaccounted for on the trip sheet.

AG—fired March 5, 2010: on February 14, February 21, and February 23, 2010, incorrect fare amounts and cab parked for 60, 55, and 25 minutes, respectively, although trip sheet showed loading and dropping off during those periods.

SM—suspended on September 1, 2010 and fired on September 2, 2010: On August 25, 2010, overall breaks

totaled 1 hour 50 minutes; repeated counseling in the past regarding productivity, referred to a training class on August 12, 2010.

WS—fired December 1, 2010: on April 27, 2010, counseled and given final warning regarding productivity and falsifying trip sheets; on November 24, 2010 GPS report showed cab stopped for seven hours.

PS—fired July 3, 2009: on April 10 and June 5, 2009 counseled and warned for, respectively, failing to follow company policies and for incorrectly filling out trip sheets; on July 2, 2009, failed to fill out trip sheet correctly, failed to clock out properly, lunch breaks were over an hour; performance for June was low.

DW—fired July 4, 2009: failure to clock out and to complete June 27, June 29, and July 2 trip sheets accurately; low productivity.

MH—fired July 19, 2009: failure to complete accurately trip sheets on six different days from July 8 to July 16, 2009; low productivity.[27]

The General Counsel introduced evidence from the personnel files of 23 drivers who were disciplined but not terminated for infractions identical to those committed by the 6 alleged discriminatees including low productivity, and trip sheet and medallion violations. Gerace testified that the discipline accorded these drivers was not comparable to that of the six alleged discriminatees because the unterminated drivers' circumstances fit within a "safety period" maintained by Respondent, a justification produced late in the hearing.

Gerace was called by the General Counsel as a witness in the government's case in chief, but it was not until he testified during Respondent's defense presentation that he claimed Respondent had a "safety period" during which drivers were allowed to commit up to five different trip sheet violations within a six month period of time before being terminated. Gerace was vague as to details of the safety period and could not identify any document or oral promulgation of any such policy.[28] When confronted with personnel records of employees who were not terminated despite having more than five trip sheet violations within a 6-month period,[29] Gerace testified that Respondent treated each category of trip sheet violation separately in calculating the five-time maximum. In later testimony regarding Respondent's failure to terminate an employ with multiple violations breaching the safety period policy, Gerace added a further qualification that where the same violation may have occurred 4 or 5 days running, Respondent lumped the separate violations into one for purposes of the safety period policy. I find Gerace's testimony in this regard to be so uncorroborated and inconsistent as to merit no weight whatsoever. Since I do not accept that the safety period policy ever existed, it is unnecessary to detail facts demonstrating that the policy was inexplicably not applied to some of the six alleged discriminatees so as to avert their discharges.

## V. DISCUSSION

### *A. Supervisory Status of Road Supervisors Likos, Worku, and Jacobs*

The stated supervisory authority of Road Supervisors Likos, Worku, and Jacobs was to discipline employees up to and including issuing written warnings and, through a reporting procedure effectively recommend further administrative action, including termination. While no evidence was adduced that the road supervisors directly issued discipline, as authorized by the handbook, there is no evidence that they were, in fact, dispossessed of that authority. Failure to exercise authority does not negate supervisory status because possession rather than exercise of supervisory authority determines supervisory status. *Westwood Health Care Center,* 330 NLRB 935, 938 (2000).

Notwithstanding the road supervisors' failure directly to discipline employees, it is clear they were charged with responsibility to report the driver infractions they observed. The evidence shows the road supervisors exercised significant discretion in determining whether to report infractions[30] and engaged in subjective editorializing about the infractions.[31] Their reports, laying as they did, foundations for future discipline against drivers, were a form of discipline. See *Oak Park Nursing Care Center,* 351 NLRB 27 (2007).

Respondent argues that while management may take disciplinary action based on information submitted in road supervisors' daily reports, the reports contain no discipline recommendations and are simply observations. It is true that purely reportorial functions are not effective recommendations of discipline so as to confer supervisory authority. But the assigned duty to report the infractions of other employees can be purely reportorial only if an employer conducts its own investigation of the reported misconduct. See *Los Angeles Water & Power Employees' Assn.,* 340 NLRB 1232, 1234 (2003) (individual's report of misconduct does not constitute effective recommendation of discipline where management undertakes its own investigation and decides what, if any, discipline to impose); *Ryder Truck Rental, Inc.,* 326 NLRB 1386 (1998) (authority to issue verbal or written warnings that do not affect employee status or to recommend discipline do not evidence disciplinary authority); *Millard Refrigerated Services,* 326 NLRB 1437, 1438

[27] At the hearing, the General Counsel objected to receipt of these documents as being incomplete as to, inter alia, employment tenure, and argues they should be afforded little weight. The documents do not establish the length of employment of the discharged employees, and that deficiency impacts the weight to be accorded the documents.

[28] Gerace first testified the safety policy was contained in the employee handbook and that Dante knew of it, although he was not sure how she knew. When Gerace could not find such a policy in the handbook, he said it was an understood rule among managers.

[29] Six drivers incurred six or more technical violations within 6 months but were not terminated, i.e., TS failed to write his phone number on his trips sheets 16 times in a 30-day span; AW failed to clock out at the end of his shift five times within 8 days; JG-O failed to clock out at the end of his shift six times within 1 month; RB failed to clock out five times in 7 days in November 2010, and five times in 43 days between January 27 and March 11; NN failed to write his phone number on his trip sheets 14 times in a 33-day span between October 14 and November 16, 2010, and was not terminated.

[30] As when Worku, from his "goodness," did not report a driver's conduct.

[31] As when Jacobs pronounced employee Scott to be argumentative and rude many times over.

(1998) (employees did not effectively recommend discipline when they submitted disciplinary forms to the plant superintendent who approved them only after conducting an independent investigation; the employees exercised nothing more than a reportorial function). Since Respondent regularly based discipline on the road supervisors' reports without conducting intervening, independent investigation, the reports played a significant role in the disciplinary process and amounted to effective recommendation of discipline. See *Bon Harbor Nursing & Rehabilitation Center,* 348 NLRB 1062 (2006). Accordingly, Road Supervisors Likos, Worku, and Jacobs were, at all times material hereto, 2(11) supervisors.

*B. Independent Violations of Section 8(a)(1) of the Act*

1. Respondent's flyer and Dante's March 15 statements

The complaint alleges that through printed communication to its employees, Respondent threatened employees with loss of benefits, including 60-day leaves of absence, convenience leaves upon request, gas checks, clean upgraded cars, Friday BBQs, and other unspecified reprisals if they selected the Union as their bargaining representative, and further informed employees it would be futile to select the Union as their bargaining representative.

Respondent's flyer, distributed to employees sometime after February 25, stated adamantly that the Union would not deliver to the drivers benefits they then enjoyed: 60-day leaves of absence, convenience leave upon request, gas bonus checks, open door to management, clean upgraded cars, Friday bar-b-que, and job security. Respondent's flyer reiterated that employees should "beware" because the Union could not provide job security.

Respondent argues the flyer simply invited employees to contrast Respondent's enumerated benefits with those of unionized taxi companies, which was not threatening and which was protected by Section 8(c).

The complaint also alleges that between March 15–17, Dante threatened employees with loss of benefits, including gas checks, 60-day leaves of absence, the convenience of requesting days off, and with less favorable shifts if they selected the Union as their bargaining representative. I have found credible General Counsel's witness accounts of what Dante said in the March meetings with employees, and I find she told employees that if they selected the Union, they would lose their 60-day leave of absence benefit, their gas bonus, their method of scheduling shifts, their vacation policies, and their open door access to management.

It is unlawful under Section 8(a)(1) for an employer to "interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. In deciding whether a statement is threatening or coercive, the Board applies the objective standard of whether the remark would reasonably tend to interfere with the free exercise of protected employee rights. If it would, it is unlawful.[32]

Neither Respondent's flyer nor Dante's March statements made any attempt to clarify statutory collective-bargaining obligations or qualify the circumstances under which give and take labor negotiations might result in benefit tradeoffs. An objective reading of Respondent's flyer as well as consideration of the credited accounts of Dante's March statements show Respondent threatened employees with the loss of benefits and job security upon selecting the Union.

Since Respondent's flyer and Dante's statements were devoid of any indication that Respondent intended to bargain in good faith with the Union, if selected, the statements that union selection would "not" deliver established benefits or job security informed employees that union representation would be an exercise in futility. Since Respondent's statements, written and oral, would reasonably tend to interfere with employees' free exercise of protected rights, the statements violate Section 8(a)(1).

2. Jacobs' interrogation and threat

In determining whether interrogation is unlawful under Section 8(a)(1), the Board applies a totality of the circumstances test. *Westwood Healthcare Center*, 330 NLRB 935 (2000); *Rossmore House*, 269 NLRB 1176 (1984). The Board said it would look at five factors to determine whether the questioning of an employee constitutes an unlawful interrogation: (1) The background, i.e., is there a history of employer hostility and discrimination? (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees? (3) The identity of the questioner, i.e., how high was he in the company hierarchy? (4) Place and method of interrogation, e.g., was employee called from work to the boss's office? Was there an atmosphere of unnatural formality? (5) Truthfulness of the reply.

As detailed above, on April 15, Jacobs, seeing Hambamo in the bleacher area, asked what the employees were trying to do with the Union. After Hambamo feigned puzzlement, Jacobs pressed him, and elicited Hambamo's unwillingness to discuss the issue with her at that location. A short time later, Jacobs asked Hambamo if he was quite sure he didn't want to discuss the matter, saying that if he did not, she was going to hurt him because she wanted to know what the employees were doing.

Putting Jacobs' interrogation of Hambamo to the *Rossmore* test, although several of the *Rossmore* factors are not met, it is clear the questioning would reasonably tend to coerce Hambamo, causing him to feel restrained from exercising rights protected by Section 7. Thus, although the setting was casual and Jacobs a low-level supervisor, the interrogation occurred in an atmosphere of unremedied threats, coercion, and unlawful discharge of active union proponents, as detailed below. Jacobs conducted the questioning near Respondent's offices, which location might reasonably be expected to disquiet Hambamo, who attempted to evade her questions. Jacobs clearly sought information about the union organizational effort, saying, "I

[32] *Flagstaff Medical Center,* 357 NLRB 659, 665–666 (2011); *KenMor Electric Co.,* 355 NLRB 1024, 1027 (2010); *Joseph Chevrolet, Inc.,* 343 NLRB 7, 9 (2004), enfd. 162 Fed.Appx. 541 (6th Cir. 2006). [Citations omitted]; *Southdown Care Center,* 308 NLRB 225, 227 (1992); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998); *Miami Systems Corp.*, 320 NLRB 71, 71 fn. 4 (1995), affd. in relevant part 111 F.3d 1284 (6th Cir. 1997).

want to know what you guys are doing." The reasonable inference to be drawn from Jacobs' unexplained curiosity was that she intended to take some action that would disadvantage union supporters. In these circumstances, Jacobs' interrogation and threat to "hurt" Hambamo, notwithstanding her characterizing the threat as a joke, would reasonably tend to coerce and restrain Hambamo in violation of Section 8(a)(1).

### *C. Terminations of Geberselasa, Demeke, Hailu, Tesema, Kindeya, and Hambamo*

The General Counsel contends that Respondent terminated Geberselasa, Demeke, Hailu, Tesema, Kindeya, and Hambamo for engaging in union activities and that its claimed bases were pretextual. Respondent argues that the General Counsel has not shown the requisite knowledge and animosity to establish a prima facie case, or, in the alternative, that Respondent met its burden of proving that Geberselasa, Demeke, Hailu, Tesema, Kindeya, and Hambamo would each have been terminated even in the absence of union activity.

In termination cases turning on employer motivation, the Board applies an analytical framework that assigns the General Counsel the initial burden of showing that union activity was a motivating or substantial factor in an adverse employment action. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The elements required to support such a showing are the employee's union activity, employer knowledge of the activity, and employer animus toward the activity. If the General Counsel meets the initial burden, the burden of proof then shifts to the employer to show, as an affirmative defense, that it would have taken the same action even in the absence of the employee's protected activity. *Wright Line,* supra at 1089; *Alton H. Piester, LLC,* 353 NLRB 369 (2008).

The General Counsel has clearly met two prongs of its initial *Wright Line* burden. The General Counsel adduced credible evidence of the union activities of Geberselasa, Demeke, Hailu, Tesema, Kindeya, and Hambamo, all of whom were members of the Union's organizing committee and fully engaged in soliciting union support among fellow drivers, some as early as November 2010. By proving the independent violations of Section 8(a)(1) described above, the General Counsel has shown Respondent's animus toward employees' union activities. The only *Wright Line* prong open to further discussion is the question of Respondent's knowledge of union activities.

Respondent was unquestionably aware of union organizing when it received the Union's letter on about February 25, announcing the organizational drive. There is no direct evidence Respondent knew of the organizing effort before February 25 and no direct evidence Respondent knew of the activities of specific employees. In determining whether employer knowledge existed before February 25, the totality of circumstances may support an inference of knowledge generally and specifically. *Best Plumbing Supply, Inc.*, 310 NLRB 143, 144 (1993). Such circumstances may include timing and abruptness of discharge, contemporaneous 8(a)(1) conduct, absence of credible evidence to support the discharges, and pretextual reasons for discharge. Id.; *Pan-Oston Co.,* 336 NLRB 305, 308 (1988).

By the following circumstantial evidence, the General Counsel has demonstrated that Respondent knew generally of union organizational efforts by at least early February and knew of, or suspected, the active involvement of Geberselasa, Demeke, Hailu, Tesema, Kindeya, and Hambamo: (1) Beginning in November, Gebersalasa often talked about the Union to other drivers in the bleacher area during the 30–35 minutes before her shift began. The bleacher area was immediately in front of Respondent's offices and regularly frequented by supervisors.[33] (2) Beginning in December, Demeke often talked to drivers in the bleacher area about the Union and on one occasion distributed authorization cards as Worku stood nearby.[34] (3) Beginning in February, Hailu and Tesema solicited employees to sign authorization cards in the bleacher area; Hailu made his prounion sentiments known to Likos, and Worku and Gerace were also in the bleacher area at times when Tesema distributed cards. (4) Kindeya distributed cards in areas other than the bleacher area; he told Dante on March 15 that he was "going to choose the Union."[35] (5) Hambamo was the object of Jacobs' April 15 interrogation and threat.[36] (6) Authorization card solicitation, which began on February 8, was reported to Dante by various employees. I have not credited Dante's testimony that it was not reported until February 25. Since the reporting related to questions about the cards' purpose, it is reasonable to infer that it began soon after card distribution commenced. (7) Gerace's incredible and shifting explanations of the bases for discharge of the six alleged discriminatees. (8) Respondent's generation of a spurious document to bolster its case against Hambamo. (9) Gerace's additional, postdischarge termination reasons for Gebersalasa and Kindeya, i.e., respectively, because Geberselasa was "aggressive" and "combative," and Kindeya was "very combative," when neither was counseled about such behavior, justifies an inference that the descriptions were disguised references to Gebersalasa and Kindeya's protected, concerted activity. See *Rock Valley Trucking Co.*, 350 NLRB 69 (2007); (10) Respondent's unexplained April 21 shift in Hambamo's discipline from suspension to termination. (11) Termination of Tesema for, in part, failing to log a 25-minute break, despite Dante's acknowledgment of frequent driver failure to log meal breaks.

The same circumstantial evidence that created a reasonable inference of knowledge substantiates Respondent's discriminatory motivation. The evidence, detailed above, of contrived defenses,[37] timing,[38] departure from past practice, brusque ter-

[33] It is reasonable to infer that supervisors would be aware of frequent, long-term organizing efforts occurring so close to office and dispatch areas.

[34] It is reasonable to infer that Worku would have seen Demeke's distribution of cards, and Worku's knowledge is imputed to Respondent. See *State Plaza, Inc.,* 347 NLRB 755, 756–757 (2006).

[35] Likos' knowledge of Hailu's prounion sentiments is imputed to Respondent as is Dante's knowledge of Kindeya's decision to choose the Union.

[36] It is reasonable to infer that Jacobs would not have interrogated Hambamo as she did unless she knew he was actively involved in the organizational drive. Her knowledge is imputed to Respondent.

[37] Where an employer's proffered motivational explanation is false, the trier of fact may infer unlawful motivation. *Hahner, Foreman, &*

minations of six long-term employees[39] without permitting explanation or justification, the unusually high number of discharges in a relatively short period before the election reinforces the General Counsel's proof of animus and discriminatory motivation. Consequently, the General Counsel has met the initial burden under *Wright Line* by showing the union activity of Geberselasa, Demeke, Hailu, Tesema, Kindeya, and Hambamo, Respondent's knowledge of it, and Respondent's animus toward it. The General Counsel having presented probative evidence of protected activity, employer knowledge, and employer animus, the burden shifts to Respondent to show, as an affirmative defense, that it would have taken the same action against Geberselasa, Demeke, Hailu, Tesema, Kindeya, and Hambamo even in the absence of their protected activities.

Respondent has not met its burden; Respondent has not shown that the six alleged discriminatees would have been fired regardless of their union activities. Respondent has unsuccessfully attempted, by comparison of discipline records, to show that the six alleged discriminatees were treated the same as similarly situated employees. The numerous factors involved in individual disciplines documented herein make it difficult to formulate concrete comparisons, a drawback compounded by the failure of Respondent's termination documents to show length of employment. Since Respondent bears the burden of proving its affirmative defense, the deficiency must weigh against Respondent. Viewed overall, when ranged against the substantial evidence of animus, the comparative documents do not show Respondent has consistently terminated employees who were in the same disciplinary posture as the six alleged discriminatees. Accordingly, I find Respondent discharged Gebersalasa, Demeke, Hailu, Tesema, Kindeya, and Hambamo because each engaged in union activities. Respondent thereby violated Section 8(a)(3).

## VI. REPRESENTATION CASE: OBJECTIONS TO THE ELECTION FINDINGS OF FACT AND DISCUSSION

The Union filed a petition for election on March 30. Following a Stipulated Election Agreement, an election by secret ballot was conducted by the Region on May 6 among employees in the unit found appropriate for collective bargaining.[40] The tally of ballots served on all the parties at the conclusion of the balloting showed the following:

| | |
|---|---|
| Approximate number of eligible voters | 235 |
| Number of Void Ballots | 1 |
| Number of Votes casted for Petitioner | 93 |
| Number of Votes cast again participating labor organization(s) | 105 |
| Number of Valid votes counted | 198 |
| Number of Challenged ballots | 3 |
| Number of Valid votes counted plus challenged ballots | 201 |

Thereafter, the Union filed five timely objections to conduct affecting the results of the election on May 12. Objections 1 and 2 parallel the complaint allegations, and I consider them together. Objections 3–5 relate to alleged events occurring during the polling periods, and I consider them together.

### *A. Legal Overview*

The Board does not lightly set aside representation elections. *Quest International,* 338 NLRB 856 (2003); *Safeway, Inc.*, 338 NLRB 525 (2002); *NLRB v. Hood Furniture Mfg. Co.,* 941 F.2d 325, 328 (5th Cir. 1991) (citing *NLRB v. Monroe Auto Equipment Co.*, 470 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973)). "There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *NLRB v. Hood Furniture Mfg. Co.*, supra, 941 F.2d at 328, and the burden of proving a Board-supervised election should be set aside is a "heavy one." *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) (quoting *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir.), cert. denied 416 U.S. 986 (1974). The objecting party must show that objectionable conduct affected employees in the voting unit. *Avante at Boca Raton, Inc.,* 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence unit employees knew of alleged coercive incident).

As the objecting party, the Union has the burden of proving interference with the election. See *Jensen Pre-Cast,* 290 NLRB 547 (1988). The test, applied objectively, is whether an employer's conduct has the tendency to interfere with the employees' freedom of choice. See *Taylor Wharton Division,* 336 NLRB 157, 158 (2001); *Baja's Place*, 268 NLRB 868 (1984).

### *B. Objections 1 and 2*

1. The Employer illegally fired six (6) employees . . . for their participation in protected Union activity.[41]
2. The Employer during meetings with employees threatened the loss of several benefits if the employees voted for the Union.

The evidence relating to Objections 1 and 2 has been set forth above in the unfair labor practice case. As to Objection 1, I have found that during the critical period,[42] Respondent unlawfully discharged union activists, Tesema, Kindeya, and Hambamo, in violation of Section 8(a)(3). Such unlawful con-

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*Harness, Inc.,* 343 NLRB 1423, 1429 (2004), citing *Shattuck Denn Mining Corp. (Iron King Branch) v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966); *Fluor Daniel, Inc.,* 304 NLRB 970 (1991).

[38] Discharges on the heels of union activity and evidence of disparate treatment support a finding of pretextual termination. *La Gloria Oil & Gas Co.,* 337 NLRB 1120, 1124 (2002).

[39] Gebersalasa and Tesema were employed over 3 years, Kindeya 4 years, Demeke and Hailu over 6 years, and Hambamo nearly 8 years.

[40] All full-time and regular part-time taxicab drivers employed by the Employer at its facility located at 4195 West Diablo Drive, Las Vegas, Nevada; excluding all other employees, including mechanics, dispatchers, limousine drivers, confidential and office clerical employees, guards, managers and supervisors as defined in the Act.

[41] At the hearing, the Union withdrew that portion of Objection 1 that alleged Respondent had suspended one employee.

[42] The critical period during which conduct allegedly affecting the results of a representation election must be examined "commences at the filing of the representation petition and extends through the election." *E.L.C. Electric, Inc.,* 344 NLRB 1200, 1201 fn. 6 (2005). Here, the critical period is March 30 through May 6.

duct "a fortiori, interferes with the results of an election." See *Arkema, Inc.,* 357 NLRB 1248, 1252 (2011), citing *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786–1787 (1962).

Objection 2 relates to Dante's March 15–17 statements made in employee meetings. While unlawful under Section 8(a)(1), as noted above, and reasonably having the effect of discouraging employees from voting for the Union, the statements occurred outside the critical period. Accordingly, I recommend that Objection 1 be sustained and Objection 2 be overruled.

Objections 3, 4, and 5

1. During the voting period and in the polling area an employee engaged in electioneering favorable to the Employer.
2. During the voting period and in the polling area the Employer's observer used her computer for a lengthy amount of time, during which she had access to information as to who had voted and had not voted at the time. The computer was not in view of the Union's observer.
3. During the voting period the Employer engaged in electioneering by having numerous painted antiunion slogans on the windows of a building directly next to the polling area.

As to Objection 3, during the polling, two voters, the only ones then present, had a brief oral exchange. After receiving his ballot, the first voter asked the second what he should do, and the second voter said, "Vote no." The first voter entered the voting booth and upon emerging, placed his ballot in the ballot box, whereafter the Union's observer belatedly attempted to challenge the ballot. Insofar as the second voter's advice to "vote no" could be considered electioneering, it was both minimal and noncoercive and could, in any event, have affected only one voter. In light of Respondent's 12-vote victory, the voters' exchange could not materially have affected the results of the election. Accordingly, I recommend Objection 3 be overruled.

Objection 4 addresses Respondent observer's use of a portable computer during polling periods. During a preelection conference, the Board agent, after ascertaining the use to which the observer's computer would be put and that it did not have internet access, told the observer she could perform the work of inputting schedules during polling periods when voters were not present. Respondent's observer complied with the Board agent's instructions, and the Board agent periodically checked her computer use.[43] There is no evidence the observer's computer use impacted the integrity of the election process. See *Cedars-Sinai Medical Center,* 342 NLRB 596, 609 (2005). Accordingly, I recommend Objection 4 be overruled.

As to Objection 5, the voting polls were located in a trailer at the facility adjacent to the building housing Respondent's administrative offices. In route to the polls most voters passed the administrative offices, the windows of which sported "Vote No; No Union" messages. The entrance door to the polling area faced a solid brick wall, the east side of the administrative offices. From the polling area no written campaign materials could be viewed.

In considering objections of impermissible electioneering, the Board determines whether the conduct, under the circumstances, warrants an inference that it interfered with the free choice of the voters by assessing the following factors: whether the conduct occurred within or near the polling place, whether the conduct occurred within a designated "no electioneering" area, the extent and nature of the alleged electioneering, whether it was conducted by a party to the election or by employees, and whether it is contrary to the instructions of the Board agent. *Boston Insulated Wire & Cable Co*., 259 NLRB 1118, 1119 (1982).

Under the circumstances of this case, the evidence is insufficient to warrant an inference that the existence of Vote No posters interfered with the exercise of the employees' free choice. There is no evidence the posters could be seen by employees waiting in line to vote; they were not displayed in any no-electioneering area, and their placement did not violate any instructions by the Board agent. The evidence provides no basis for inferring that the campaign signs, without more, rose to the level of impermissible electioneering. Accordingly, I recommend Objection 5 be overruled.

## VII. CONCLUSIONS AS TO THE UNION'S OBJECTIONS

Inasmuch as I have recommended that Objection 1 be sustained, I recommend the election held on May 6, 2011, in Case 28–RC–006766 be set aside and that the representation proceeding be remanded to the Regional Director for Region 28 for the purpose of conducting a second election.

Further, in accordance with *Lufkin Rule Co.*, 147 NLRB 241 (1964), and *Fieldcrest Cannon, Inc.,* 327 NLRB 109 fn. 3 (1998), I recommend the following notice be issued in the Notice of Second Election in Case 28–RC–006766:

**NOTICE TO ALL VOTERS**

> The election conducted on May 6, 2011 was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' exercise of a free and reasoned choice among employees in the following unit:
>
> All full-time and regular part-time taxicab drivers employed by the Employer at its facility located at 4195 West Diablo Drive, Las Vegas, Nevada; excluding all other employees, including mechanics, dispatchers, limousine drivers, confidential and office clerical employees, guards, managers and supervisors as defined in the Act.

Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National labor Relations Act gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.[44]

[43] I credit the account of Respondent's observer whose testimony was clear, detailed, and specific.

[44] Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, DC, within 14 days from the date of issuance of this report

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by threatening employees with loss of benefits and other reprisals, by informing employees it would be futile to select the Union as their bargaining representative, by interrogating employees, and by threatening to "hurt" employees.

4. Respondent violated Section 8(a)(3) and (1) of the Act by terminating employees Almethay Gebersalasa, Elias Demeke, Endale Hailu, Melaku Tesema, Assefa Kindeya, and Mesfin Hambamo because they engaged in union or other concerted, protected activities and to discourage employees from engaging in these activities.

5. The unfair labor practices set forth above affect commerce within the meaning of Sections 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

6. By the conduct described in Objection 1, which conduct occurred during the critical election period, Respondent has interfered with the holding of a fair election; the conduct warrants setting aside the election in Case 28–RC–006766 that was conducted on May 6, 2011.

REMEDY

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

Respondent having unlawfully terminated employees Almethay Gebersalasa, Elias Demeke, Endale Hailu, Melaku Tesema, Assefa Kindeya, and Mesfin Hambamo, it must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed on a quarterly basis from the dates of their discharges to the 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*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). Respondent will be ordered to make appropriate emendations to the personnel files of Almethay Gebersalasa, Elias Demeke, Endale Hailu, Melaku Tesema, Assefa Kindeya, and Mesfin Hambamo. Respondent will be ordered to post appropriate notices.

[Recommended Order omitted from publication.]

and recommendations. Exceptions must be received by the Board in Washington by [date].