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Troy Grove a Div. of Riverstone Group Inc., and Vermillion Quarry a Div. of Riverstone Group Inc. *and* International Union of Operating Engineers Local 150, AFL–CIO. Cases 25–CA–234477, 25–CA–242081, 25–CA–244883, and 25–CA–246978

September 14, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS RING AND WILCOX

On January 11, 2021, Administrative Law Judge Melissa M. Olivero issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed answering briefs, and the Respondent filed reply briefs.

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

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

The Respondent is a mining aggregate company and, as relevant here, operates two quarries in LaSalle County, Illinois: Troy Grove Quarry and Vermillion Quarry. The Union, International Union of Operating Engineers, Local 150, represents a unit of employees at both quarries. In May 2016, the parties' most recent collective-bargaining agreement expired. Subsequently, the parties met to negotiate for a successor collective-bargaining agreement, but they did not reach an agreement. In March 2018, the Union's members voted to begin a strike. The events at issue in the instant proceeding occurred in 2019 while the strike was ongoing.[4]

For the reasons explained by the judge, we agree that the Respondent, by an admitted agent, violated Section 8(a)(1) of the National Labor Relations Act by removing a union picket sign from public property near the Troy Grove quarry. We also agree, for the reasons explained by the judge, that the Respondent violated Section 8(a)(1) by requiring Joe Ellena, a striking employee who made an unconditional offer to return to work, to sign a preferential hiring list located at the Vermillion quarry in order to return to work.[5]

In addition, for the reasons explained below, we agree with the judge that the Respondent violated Section 8(a)(5) by implementing a new punch-in policy for unit employees in January 2019 without first notifying the Union and giving it an opportunity to bargain[6] and, additionally, violated Section 8(a)(1) by interviewing employee Matt Kelly after denying his request for a union representative during the interview, which Kelly reasonably believed could result in discipline. Contrary to the judge, however, we find that the Respondent has carried its burden under *Wright Line*[7] of showing that it would have disciplined, and ultimately discharged, Kelly even if he had not engaged in union activity protected by Section 7. As a result, we dismiss the complaint allegations related to Kelly's discipline and discharge.

I. JANUARY 2019 PUNCH-IN POLICY

Employees at the Troy Grove quarry work a 10-hour shift beginning at 6 a.m., Monday to Thursday. As the judge found, prior to January 2019, the Respondent had no policy regarding punching in early, and many employees punched in for work whenever they arrived at the quarry. Employees punched in at various times from 5:35 a.m. until 6 a.m., and timecards presented at the hearing show that employees Joe Ellena and Jeff Bean often punched in 10 to 20 minutes early and that Ellena had been punching in

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

[2] We have amended the judge's conclusions of law consistent with our findings herein.

[3] Having found that the Respondent unlawfully implemented a change to its punch-in policy in January 2019 that reduced employees' ability to accrue overtime, we amend the judge's recommended remedy to add a limited bargaining order and provide make-whole relief for any affected employees. The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, we shall modify the judge's recommended Order to conform to the amended remedy, to the Board's findings and standard remedial language, and in accordance with our decisions in *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022), and *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021). We shall also substitute a new notice to conform to the Order as modified.

[4] Unless otherwise noted, all dates are 2019.

[5] We find it unnecessary to pass on the judge's finding that the Respondent also violated Sec. 8(a)(3) by requiring Ellena to sign the preferential hiring list, as doing so would not materially affect the remedy.

[6] As explained below, we clarify that that this violation does not extend to strike replacements hired during the strike.

[7] 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).

early since June 2018. In addition, the record demonstrates that several of the Respondent's employees at both quarries—at least 6 out of approximately 14—frequently punched in up to 25 minutes before 6 a.m. Employee Scott Currie testified without contradiction that he had done this since he was hired in 2001. Similarly, employee and union steward Lyle Calkins testified that he had punched in early at least since June 2018. Several employees testified without contradiction that they punched in early or saw others punch in early "every day," "usually every day," or "as soon as they get there[.]" Further, as the judge found, the employees were paid overtime when they punched in prior to 6 a.m.[8]

In January 2019, employee Brad Lower, who had not previously been punching in early, had a conversation with Calkins, Currie, and Ellena about punching in early, and Lower decided that he was going to start punching in early. Lower punched in 30 minutes early on three consecutive days starting in mid-January 2019 and was paid overtime. The following week, the Respondent posted a notice prohibiting employees from punching in more than five minutes before 6. Calkins notified union representative Stephen Russo when the policy was posted, but there is no evidence that the Respondent notified the Union of the new policy prior to implementation or offered the Union an opportunity to bargain over the new policy.

It is well established that an employer has a duty not to change past practices for employees who are represented by a union without first giving the union notice of the proposed change and, on request, bargaining to impasse with the union concerning the contemplated change.[9] In addition, following the expiration of a collective-bargaining agreement, an employer must maintain the status quo of all mandatory subjects of bargaining until the parties either agree on a new contract or reach a good-faith impasse in negotiations.[10] Mandatory subjects include work hours, including, as relevant here, the length of the workday.[11]

Here, it is undisputed that, prior to January 2019, the Respondent had no policy prohibiting early punch-ins. Indeed, it is clear from the record that a significant number of employees had been punching in early on a regular basis and receiving pay for that additional time for at least seven months, and as Scott Currie testified, in some cases the early punch-ins had been going on for much longer. It is also clear that the Respondent had ample notice of this ongoing practice: each early punch-in was conspicuously documented on the employee's timecard, and manager Skerston noted that he personally checked the timecards. In these circumstances, we find that the Respondent had an established practice of allowing unit employees to punch in early. We also find that the Respondent violated Section 8(a)(5) by changing this practice by its implementation of the January 2019 punch-in policy without providing the Union with notice or an opportunity to bargain.[12] We do not, however, find that the Respondent acted unlawfully with respect to the implementation of the punch-in policy as it pertains to any strike replacements. As set forth in *Detroit Newspapers*, 327 NLRB 871 (1999), and precedent cited therein, an employer need not bargain with

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[8] The expired collective-bargaining agreement set the times for the work shift and the unit's pay rates, but did not address the time between early punching in and 6 a.m. The expired contract did provide that "[s]tarting time is optional upon mutual agreement of employees and Employer" and that if the Respondent adopted a work week of "four (4) days at ten (10) hours . . . overtime [would] be paid after ten (10) hours in any one work day."

[9] See *NLRB v. Katz*, 369 U.S. 736 (1962). To the extent the judge suggested otherwise, we clarify that the "contract coverage" standard adopted by the Board in *MV Transportation,* 368 NLRB No. 66 (2019), is not applicable here. The Respondent does not contend that the expired collective-bargaining agreement privileged it to change its punch-in policy. Absent such a provision *plus* language in the expired agreement providing that such a right would survive the expiration of the contract, the "contract coverage" standard does not apply to the January 2019 change to the punch-in policy. See *Nexstar Broadcasting, Inc. d/b/a KOIN-TV*, 369 NLRB No. 61, slip op. at 2 (2020) ("[P]rovisions in an expired collective-bargaining agreement do not cover post-expiration unilateral changes unless the agreement contained language explicitly providing that the relevant provision would survive contract expiration."), enfd. 4 F.4th 801 (9th Cir. 2021). Further, we do not rely on the judge's suggestion that the status quo terms of employment established by an expired collective-bargaining agreement do not extend past the contract's expiration. *Nexstar Broadcasting*, supra, slip op. at 3–4, on which the judge relied, in fact confirmed that an expired collective-bargaining agreement establishes the status quo for terms of employment, which as a matter of law survive for the purpose of Sec. 8(a)(5). Although the Board in *Nexstar* stated that "after a CBA expires, different principles govern the obligations of parties to a bargaining relationship," this referred to the *contractual* obligations that terminate with a collective-bargaining agreement's expiration, not to the employer's *statutory* responsibilities.

[10] *Richfield Hospitality*, 368 NLRB No. 44, slip op. at 3 (2019) (citing *Triple A Fire Protection,* 315 NLRB 409, 414 (1994), enfd. 136 F.3d 727 (11th Cir. 1998), cert. denied 525 U.S. 1067 (1999)).

[11] *Meat Cutters v. Jewel Tea Co*., 381 U.S. 676, 689-691 (1965); see also *Hedison Mfg. Co.*, 260 NLRB 590, 593-594 (1982); *Weston & Brooker Co*., 154 NLRB 747, 763 (1965), enfd. mem. 373 F.2d 741 (4th Cir. 1967).

[12] In arguing to the contrary, the Respondent contends that it did not make any changes to its policies, but instead was simply enforcing the established 6 a.m. start time. Although the starting time established in the expired collective-bargaining agreement was 6 a.m., the agreement did not address early punch-ins, and as demonstrated above, the Respondent had an established practice of allowing employees to punch in early. The Respondent also contends that even if the January 2019 punch-in policy constituted a change, it was not a material, substantial, and significant change. The Board, however, has found that such schedule changes constitute material changes. See, e.g., *Pepsi-Cola Bottling Co. of Fayetteville*, 330 NLRB 900, 902 (2000), enfd. mem. per curiam 24 Fed.Appx. 104, 117 (4th Cir. 2001).

a union regarding the terms and conditions of employment for strike replacements hired during a strike.[13]

II. MATT KELLY'S *WEINGARTEN* REQUEST

As set forth in greater detail below, Matt Kelly was suspended and then discharged on August 14, under the Respondent's progressive discipline procedure, for repeated lateness in arriving for work at the Vermillion quarry. When Superintendent Skerston summoned Kelly to the investigatory meeting at which he was suspended, Kelly asked for Lyle Calkins, the union steward for unit employees at both quarries, to be present. Skerston, however, refused to summon Calkins because Calkins was at the Troy Grove quarry, and this was "too far away." Skerston said they could find someone else and suggested, "How about Ben Gibson?" Kelly acquiesced to this, and Gibson, another unit employee who worked at the Vermillion quarry but had no position with the Union, was summoned to the meeting. Gibson also asked for Calkins to be present. Tom Becker, the Respondent's superintendent from the Troy Grove quarry, was also present at the interview. The meeting continued, culminating with Kelly's suspension and later discharge.

As the judge noted, under *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251 (1975), a represented employee is entitled to have a union representative present at an investigatory meeting that may lead to discipline. Once an employee makes a valid request for union representation, the employer has one of three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview without a union representative or having no interview at all.[14]

The judge correctly found that Skerston did not comply with any of these options. First, he categorically rejected Kelly's request for Calkins and suggested only that Gibson be called to substitute. Kelly was therefore not offered the option of not continuing with the meeting.[15] Second, while the Respondent contends that Kelly waived his *Weingarten* rights by agreeing to continue the meeting with Gibson present, Kelly's acquiescence came only after Skerston refused to call Calkins, and Kelly had no reason to believe he could leave the meeting. There was therefore no such voluntary waiver.[16] Third, after Kelly asked for Calkins, the Respondent was required to allow a reasonable amount of time for Calkins to become available.[17] As the judge indicated, Calkins was not too far away (25 minutes) to attend the meeting within a reasonable period of time.[18] In these circumstances, we agree with the judge that the Respondent violated Section 8(a)(1) by proceeding with the investigatory interview after denying Kelly's request for a union representative.

In arguing to the contrary, the Respondent asserts that Kelly had no *Weingarten* rights because he was a strike replacement. Relying on cases such as *Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 246 (7th Cir. 1982), the Respondent appears to argue that because it has the right to unilaterally set the terms and conditions of employment for strike replacements, this necessarily means that strike replacements have no *Weingarten* rights. Building on this argument, the Respondent then asserts that permanent replacements do not have *Weingarten* rights because unions do not represent the interests of permanent replacements and because, in the Respondent's view, permanent replacements have the same *Weingarten* rights as employees in non-union settings, which is no *Weingarten* rights.[19] We find the Respondent's arguments without merit.

[13] As a result, we have modified the Order and notice to reflect that this violation does not extend to strike replacements hired during the strike. See, e.g., *Ryan Iron Works*, 332 NLRB 506, 509 (2000), enfd. 257 F.3d 1 (1st Cir. 2001). Relatedly, the make-whole remedy we order for this violation would also not extend to strike replacements hired during the strike who may have been affected by the Respondent's implementation of the new check-in policy.

[14] E.g., *Washoe Medical Center, Inc.*, 348 NLRB 361, 367 (2006).

[15] In *Pacific Gas & Electric*, 253 NLRB 1143 (1981), cited by the Respondent, the employee refused the assistance of the steward who was located at his worksite and was assigned by the union to represent the employees there; he instead requested a different steward who was located at a different site and did not normally represent those employees. As noted above, Calkins was the only designated steward for both Vermillion and Troy Grove.

[16] *New Jersey Bell Telephone*, 300 NLRB 42, 49–50 (1990), enfd. 936 F.2d 144 (3d Cir. 1991); *Southwestern Bell Telephone*, 227 NLRB 1223, 1223 (1977) ("Before inferring that a waiver has occurred . . . the Board must assure itself that the employee acted knowingly and voluntarily. The right being waived is designed to prevent intimidation by the employer. It would be incongruous to infer a waiver without a clear indication that the very tactics the right is meant to prevent were not used to coerce a surrender of protection" (alteration in original; citation and internal quotation marks omitted).).

[17] *Manhattan Beer Distributors*, 362 NLRB 1731, 1732 (2015), enfd. mem. 670 Fed.Appx. 33 (2d Cir. 2016); *Ralph's Grocery,* 361 NLRB 80 (2014); *Super Valu Stores, Inc.*, 236 NLRB 1581, 1591 (1978) (where employee's requested steward was not present at his warehouse, "the employer had the choice of giving the employee time or a postponement to obtain the representation or . . . 'of advising the employee that it will not proceed with the interview unless the employee is willing to enter the interview unaccompanied by his representative'" (quoting *Weingarten*, 420 U.S. at 258-259) (brackets omitted)), enf. denied 627 F.2d 13 (6th Cir. 1980).

[18] *Manhattan Beer Distributors*, supra; *Safeway Stores*, 303 NLRB 989, 996 & fn. 13 (1991) ("Respondent was obligated to respect [the employee]'s request for assistance, even if it meant delaying the interview.").

[19] See *IBM Corp.*, 341 NLRB 1288, 1293 (2004). The Respondent also contends that it should not be found to have infringed on Kelly's *Weingarten* rights because it allowed Kelly to have a coworker attend the investigatory interview. As explained above, we find that argument to be unpersuasive.

At all relevant times during this proceeding, the Union was the exclusive bargaining representative of the unit employees at issue in this proceeding. In addition, it is well established that a bargaining unit includes "nonstrikers, strikers, returning strikers, and striker replacements[.]"[20] Here, then, the permanent replacements were part of the Respondent's "unionized employees" for purposes of determining *Weingarten* protections, and thus the Respondent's analogy to non-union settings is inapposite.

It is true, as the Respondent asserts and as noted above, that employers do not have an obligation to bargain with the union over the terms and conditions of employment for strike replacements. See, e.g., *Detroit Newspapers*, supra, 327 NLRB at 871. This precedent, however, does not address the different question of whether strike replacements are entitled to *Weingarten* protections. An employee's right to union representation, on request, during an investigatory interview is a statutory right, not a term and condition of employment to be determined by the employer, and that right extends to all bargaining-unit employees. The right to representation is derived from the Section 7 right of employees to act in concert for mutual aid or protection, and it does not entail a bargaining obligation on the part of the employer. *Weingarten*, 420 U.S. at 256257, 259–260.[21] Instead, the *Weingarten* right is grounded in Section 7 and 8(a)(1) and seeks to ensure that employers carrying out investigations do not restrain or coerce employees in the exercise of their Section 7 rights. The *Weingarten* right is held by the employee, not the union. See, e.g., *Appalachian Power*, 253 NLRB 931, 933 (1980), enfd. mem. 660 F.2d 488 (4th Cir. 1981). Again, in these circumstances, Kelly, a unionized employee, was entitled under *Weingarten* to seek union representation during his investigatory interview.

Moreover, contrary to the Respondent's assertion, Board and court precedent do not support a conclusion that unions and strike replacements lack common interests such that strike replacements should be denied Section 7–based *Weingarten* protections even when they request them. Indeed, the Supreme Court has endorsed the Board's view that an employer's hiring of permanent replacements does not by itself justify a presumption that the replacements disfavor the union. See *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990). In so doing, the Court recognized that unions do not invariably demand displacement of all strike replacements. Id. at 790. And the Court observed that "replacement workers are capable of looking past the strike in considering whether or not they desire representation by the union." Id. at 792. More broadly, in other contexts, the Board has ensured that the Section 7 rights of replacement workers are properly protected and enforced.[22]

Based on the foregoing, we find that Kelly was entitled to the protections set forth in *Weingarten* and that the Respondent violated Section 8(a)(1) by refusing Kelly those protections.

III. DISCIPLINE AND DISCHARGE OF MATT KELLY

Matt Kelly was hired as a strike replacement in May 2018 to work at the Respondent's Vermillion quarry. On May 2, 2019, Kelly admittedly reported to work 16 minutes late, and Superintendent Skerston subsequently prepared a warning notice.[23] The notice, dated May 6, indicates that Kelly refused to sign it. On May 6, Kelly revealed himself to be a union supporter by wearing a union T-shirt when he arrived at work. In the presence of several other employees, Kelly asked Skerston what he thought of the shirt and the two engaged in a brief conversation about Kelly's union support.[24] Also on May 6, Kelly told Skerston that he would be quitting as of May 9 to take another job.[25]

On May 7, Skerston observed Kelly taking a cell phone video while operating a company truck. Kelly admitted making a video in the truck, but claimed it was parked at the time. Skerston prepared a warning notice for a safety infraction and counseled Kelly regarding the violation of the company's cell phone policy while driving. The warning notice the Respondent gave to Kelly for this infraction also indicates that Kelly refused to sign it, but the judge credited Kelly that he was not shown the warning notice at the time.

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[20] *Road Sprinkler Fitters Local 669 v. Herman*, 234 F.3d 1316, 1320 (D.C. Cir. 2000); see also *National Upholstering Co.*, 311 NLRB 1204, 1210 (1993).

[21] See also *Fry's Food Stores*, 361 NLRB 1216, 1217 fn. 6 (2014) (an employer in an investigatory interview is free to insist upon hearing the employee's own account of the matter under investigation and is under no obligation to bargain with the union representative during the interview) (citing *Weingarten*, 420 U.S. at 259–260).

[22] See, e.g., *Teamsters Local 890 (Basic Vegetable Products)*, 335 NLRB 686, 686–687 (2001) (finding that respondent violated Sec. 8(b)(1)(A) by videotaping strike replacement employees as doing so reasonably tended to restrain and coerce the employees in the exercise of their Sec. 7 rights); *Mathews Readymix*, 324 NLRB 1005, 1006 (1997) (finding that respondent violated Sec. 8(a)(1) by questioning strike replacement employees about their union sympathies), enfd. in relevant part 165 F.3d 74 (D.C. Cir. 1999).

[23] In his decision, the judge inadvertently states that this infraction occurred on May 6. The record establishes, and the Respondent admits, that the infraction occurred on May 2. The warning notice, however, is dated May 6.

[24] Thereafter, Kelly continued to wear the shirt and placed union insignia on his hardhat, lunchbox, and truck.

[25] The sequence of events on May 6—the warning notice related to the May 2 attendance infraction, Kelly revealing of himself as a supporter of the Union, and Kelly announcing his intent to quit—is not clear from the record.

Later, on May 7, Kelly received another warning notice from Skerston for entering the shop five times while he was supposed to be working in the pit, and for performing too little work. At the hearing, Kelly admitted visiting the shop multiple times but claimed that going to the shop to get parts or tools on multiple occasions was normal. This performance warning notice indicated that Kelly refused to sign it, but the judge again credited Kelly's testimony that he did not see the notice until his discharge in August. Kelly also testified that Skerston did not talk to him about this infraction on May 7.

On May 8, Kelly again admittedly failed to punch in on time, this time by 30 minutes. Skerston prepared a warning notice for lateness, which again indicated that Kelly refused to sign. Kelly testified that Skerston talked to him about the incident on May 8, but the judge credited Kelly's testimony that he did not see the warning notice until August.

On May 9, Skerston observed Kelly dragging a portable welder on the ground. Kelly acknowledged that he dragged the welder while the jack leg was still down, which caused damage to the welder. Skerston issued him a "final" safety warning. This notice, marked 3:11 p.m., did not indicate that Kelly had refused to sign it, but Skerston noted that Kelly "quit today" on the line for the employee's signature. Kelly denied seeing the notice until August. That same day, Kelly filled out paperwork for resignation, which Skerston forwarded to the Respondent's human resources department. At the same time, Kelly provided Skerston a written notice that he was going on an unfair labor practice strike. On June 26, Kelly sent Skerston an unconditional offer to return to work. Kelly was reinstated and returned to work on July 8.

On July 10, two days after Kelly's reinstatement, Skerston saw Kelly working on a conveyor without a lock-out or tag-out on the breaker. Kelly admitted that he was working on the conveyor without a lock-out or tag-out. The following day, Skerston issued Kelly a final written warning for this infraction. Kelly signed this notice but testified that he did not realize it was a final warning.

On August 7, Kelly arrived late to work by 54 minutes, and Skerston issued Kelly a final written warning for attendance. Skerston looked at Kelly's timecard but did not interview anyone, including Kelly, before issuing the discipline. Kelly was shown this warning notice, but he refused to sign it because, he said, although it said "final warning," he had not received prior disciplinary notices for attendance.

On August 14, Kelly called Skerston at 5:46 a.m. and told him he had a flat tire on his motorcycle. Skerston offered to pick up Kelly for work, but Kelly said that a friend would take him home and he would drive his truck to work. Kelly did not arrive to work until 11:30 a.m., 5½ hours after the start time of his shift. Skerston, joined by Tom Becker, the site superintendent from the Troy Grove quarry, conducted an in-person interview of Kelly concerning his tardiness. Skerston asked Kelly questions about his tardiness, and Skerston asserted that Kelly made conflicting statements about the location of his motorcycle at the time he got the flat tire. At the end of the interview, Skerston issued Kelly a notice of suspension based on attendance and the inconsistent statements Kelly had made in their earlier phone call. Kelly initially signed the form, but later crossed out his signature and initialed the form. Kelly said that he crossed out his signature because he had not received the write-ups mentioned on the form. Later that day, Skerston sent Kelly a notice of termination based on his having been late on May 6 and 8 and August 7 and 14.

Applying *Wright Line*, supra, the judge found that the Respondent violated Section 8(a)(3) when it disciplined employee Matt Kelly multiple times between May and August 2019 and ultimately discharged him on August 14, 2019. Under *Wright Line*, the General Counsel has the initial burden of establishing that an employee's union or other protected concerted activity was a motivating factor in the employer's adverse employment action against the employee. The General Counsel meets this burden by proving that (1) the employee engaged in union or other protected concerted activity, (2) the employer had knowledge of that activity, and (3) the employer harbored animus against union or other protected concerted activity.[26] *Wright Line*, 251 NLRB at 1089. Once the General Counsel sustains her initial burden, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the union or other protected concerted activity. Id. Here, the judge found that the General Counsel met his[27] initial burden of proving that Kelly's union activity was a motivating factor for his numerous disciplines and his discharge, and because the

[26] In *Tschiggfrie Properties, Ltd*., 368 NLRB No. 120, slip op. at 1, 6 (2019), the Board stated that "the evidence of animus must support finding that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." Chairman McFerran adheres to her views expressed in *Tschiggfrie* that the "clarifications" that decision purported to make to the General Counsel's initial *Wright Line* burden were unnecessary, as the relevant "clarifying" concepts were already embedded in the *Wright Line* framework and reflected in the Board's body of *Wright Line* cases. As noted in prior decisions, Member Wilcox agrees with the Chairman's concurring opinion in *Tschiggfrie*.

[27] Although Jennifer Abruzzo is currently the Agency's General Counsel, this case was litigated before the administrative law judge while Peter Robb was General Counsel.

Respondent's disciplinary actions related to Kelly demonstrated pretext, the Respondent failed to meet its burden of demonstrating that it would have disciplined and discharged Kelly even absent his union activity. For the reasons set forth below, we disagree.

Over the course of a few months, Kelly engaged in and was disciplined for numerous safety, performance, and attendance infractions. Kelly does not seriously contest that he engaged in each of the alleged infractions, and the Respondent has established that Kelly's disciplines for these infractions were consistent with its policies and practices. In these circumstances, we find that, even assuming the General Counsel met his initial burden under *Wright Line*, the Respondent nonetheless met its burden of proving it would have disciplined and ultimately discharged Kelly even absent his union activity.[28]

Turning first to the Respondent's discipline and discharge of Kelly for attendance infractions, the Respondent maintains a progressive discipline policy. For attendance infractions, the Respondent's policy provides for a first warning, a second written warning, a final warning or suspension, and then termination of the employee. Attendance violations are tracked for a 12-month period. It is undisputed that Kelly was late for work on May 2, May 8, August 7, and August 14, and the Respondent issued disciplines for these attendance infractions consistent with its progressive discipline policy. With each successive (and admitted) attendance infraction, Kelly arrived at work later than the previous time, and on the last two occasions on August 7 and August 14, he was late by almost an hour and then by 5½ hours, respectively. After Kelly was late to work by more than 5 hours on August 14, the Respondent met with Kelly to discuss his August 14 tardiness, and during this meeting, Kelly made conflicting statements to Skerston about his whereabouts on the morning of August 14 and the reason for his tardiness.[29] At the conclusion of the meeting, the Respondent decided to suspend Kelly pending further investigation and, later that day, discharged Kelly. The record demonstrates that the several disciplines and subsequent discharge of Kelly for attendance infractions were consistent with the Respondent's progressive discipline policy and also consistent with attendance-related disciplines issued to other employees. In this regard, the Respondent demonstrated that it disciplined employees for attendance violations and, as pertinent here, has followed its progressive discipline policy for repeated attendance-related infractions.[30] In these circumstances, we find that the Respondent has met its burden of establishing that it would have disciplined and ultimately discharged Kelly for his numerous attendance violations in May and August 2019 even in the absence of his union activity.

As to Kelly's remaining infractions involving safety and performance matters, the record demonstrates, and Kelly does not dispute, that he committed a series of such infractions. On May 7, Kelly was issued a performance-related discipline for failing to diligently perform his assigned work and instead visiting the shop to talk to other employees. Also on May 7, Kelly was issued a safety-related discipline for using a cell phone while in a company vehicle in violation of the Respondent's cell phone use policy. In addition, on May 9, Kelly was issued another safety-related discipline for improper use of a portable welder and causing damage to the welder, and on July 10, the Respondent issued Kelly a final written warning for failing to follow lockout-tagout safety protocols for the conveyor belt he was operating. Kelly admitted to engaging in the conduct underlying these infractions and offered only a meager defense of his conduct. Further, the Respondent's discipline of Kelly for these infractions was largely consistent with the Respondent's disciplinary guidance for safety and performance matters, and the Respondent presented evidence that it had disciplined numerous other employees for similar violations.[31] Again, on these facts, we find that the Respondent has established that it would have disciplined Kelly for these infractions even absent his union activity.

In finding to the contrary, the judge found only that the Respondent's reasons for disciplining and discharging Kelly were pretextual, and she did not engage with the Respondent's evidence and arguments regarding its *Wright Line* defense burden. As to her pretext findings, the judge relied on Kelly's credited testimony that he did not receive copies of his disciplinary notices at issue until August, and she also found that the Respondent provided shifting explanations for Kelly's discharge. We find both grounds

[28] Member Ring would find that the General Counsel failed to meet his initial burden of proof under *Wright Line*, but he agrees that even assuming otherwise, the Respondent met its *Wright Line* defense burden by demonstrating that it would have disciplined and discharged Kelly even in the absence of his union activities.

[29] Although these inconsistent statements were not cited in Kelly's final discharge notice on August 14, 2019, they were cited in his initial suspension notice issued earlier the same day. We therefore view those inconsistent statements as included in the Respondent's motivation for the discharge.

[30] Specifically, the Respondent presented evidence that one of its employees committed successive attendance infractions in 2019 and that the Respondent issued progressive disciplines to the employee for his infractions.

[31] In this regard, the Respondent presented evidence that it had disciplined employees for violating the Respondent's cell phone use policy, damaging company property, failing to diligently perform work, and committing safety violations.

unpersuasive. Kelly does not dispute that he committed the infractions for which he was disciplined and ultimately discharged. In addition, for nearly every discipline, the record demonstrates that Skerston counseled Kelly about the infraction either on the spot or shortly thereafter, and Kelly acknowledges that he either signed the disciplinary notice or was aware of it.[32] In these circumstances, we do not find the mere fact that Kelly did not receive copies of his disciplinary notices sufficient to demonstrate pretext.[33] Moreover, although the Respondent disciplined Kelly for multiple attendance and safety violations between May and August 2019, the record demonstrates that the Respondent consistently asserted that it discharged Kelly under its progressive discipline policy for his multiple, undisputed attendance infractions during this period. Thus, contrary to the judge, the Respondent did not provide shifting explanations for Kelly's discharge.

Based on the foregoing, we find that even assuming the General Counsel met his initial burden under *Wright Line*, the Respondent nonetheless met its burden of proving, by a preponderance of the evidence, that it would have disciplined and ultimately discharged Kelly even absent his union activity.[34] As a result, we dismiss the related complaint allegations.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 3:

[32] The judge found that Kelly gave conflicting testimony as to when he received copies of his disciplinary notices, but ultimately credited Kelly's testimony that he did not receive copies of the notices until sometime in August. Even so, the record is clear that Skerston timely counseled Kelly about his infractions and, in several instances, Kelly even signed the disciplinary notice or testified that he was aware of it. Specifically, with respect to the attendance infractions underlying Kelly's discharge, as the judge found, Kelly testified that Skerston discussed the May 8 attendance infraction with him that day. In addition, as to the August 7 and August 14 attendance infractions, Kelly testified that Skerston discussed the infractions with Kelly that day and showed Kelly the disciplinary forms, though Kelly refused to sign them. Regarding the remaining infractions, Kelly testified that Skerston discussed the July 10 safety infraction with Kelly that day and provided Kelly with the disciplinary notice, which Kelly signed. Further, Kelly does not dispute Skerston's assertion that he addressed the May 7 cell phone infraction with Kelly and, as to the May 9 infraction where Kelly damaged company property, Skerston testified that he addressed the matter with Kelly at the time of the incident, and Kelly acknowledges that he and Skerston had a conversation about the infraction that day. In these circumstances then, it is not a "misreading of the record," as our dissenting colleague asserts, to conclude that Kelly was aware of, and repeatedly counseled about, his numerous and admitted attendance, safety, and performance infractions.

[33] In some cases, the Board has pointed to a respondent's failure to timely provide employees with disciplinary notices in finding that the respondent failed to meet its *Wright Line* defense burden. In those cases, however, the respondent's failure to timely provide the notices has been accompanied by other actions – such as the "discriminatory manipulation of the progressive disciplinary policy" or a failure to adhere to a progressive disciplinary policy or established practices. See, e.g., *Mid-Wilshire Health Care Center*, 342 NLRB 520, 526–527 (2004); and *Le Madri Restaurant*, 331 NLRB 269, 279 (2000). We find that no such circumstances are presented here. Indeed, as explained above, the Respondent acted consistent with its disciplinary policy, and the record supports the conclusion that Kelly was aware of, and repeatedly counseled about, his workplace infractions.

In finding that the Respondent's failure to provide Kelly with copies of the disciplinary notices does not demonstrate pretext, Member Ring agrees with the foregoing and additionally notes that, with the possible exception of the May 6 disciplinary notice, all the notices that the Respondent failed to timely provide Kelly were prepared after Kelly had notified the Respondent of his intention to quit. In Member Ring's view, the rationale for utilizing progressive discipline is to put employees on notice that their misconduct or poor performance is jeopardizing their job and to give them an opportunity to correct their misbehavior and/or improve their performance. As a practical matter, an employee who has given notice has one foot out the door, and the employer understandably may be indifferent to whether the employee's conduct or performance improves. It would therefore not be surprising for the supervisor of such an employee to conclude that it is pointless to include a written warning with the employee's final paycheck. In Member Ring's view, these circumstances furnish yet another ground for distinguishing the cases cited above where the Board has found that the failure to timely provide employees with disciplinary notices prevented employers from satisfying their *Wright Line* defense burden.

[34] Our dissenting colleague would find the Respondent's disciplines and discharge of Kelly to be unlawful. In so doing, she acknowledges that Kelly admitted the infractions for which he was disciplined and discharged, and that Kelly's actions provided the Respondent a lawful basis for disciplining and discharging him. She states, correctly, that the Respondent's defense burden under *Wright Line* is to show that it "*would* have taken the challenged adverse action in the absence of protected activity, not just that it *could* have done so[,]" and then finds that, in her view, the Respondent failed to meet that burden here. As support, she contends that the Respondent did not discipline Kelly for his workplace infractions until he engaged in union activity, it presented no evidence that it had previously disciplined employees for similar infractions, and it failed to provide Kelly with copies of his disciplinary notices.

While we agree with our colleague that the Respondent's defense burden under *Wright Line* is to demonstrate that it would have disciplined and discharged Kelly for his infractions even absent his union activity, we have found, for the reasons explained above, that the Respondent has met that burden here, and our dissenting colleague's arguments do not warrant a different result. In this regard, the judge found that the Respondent first disciplined Kelly for a workplace infraction in January 2019 (several months before his union activity), and, as set forth above, the Respondent provided examples of disciplines it had issued to other employees for attendance, safety, and performance matters similar to those for which the Respondent disciplined Kelly. Moreover, as explained above, in the circumstances of this case, the judge's finding that Kelly did not receive copies of the disciplinary notices until August is not, by itself, sufficient to support a finding that the Respondent failed to sustain its defense burden.

At bottom, Kelly did not dispute that he committed the numerous attendance, safety, and performance infractions for which he was disciplined and, ultimately, discharged; the record demonstrates that Kelly was aware of, and repeatedly counseled about, his workplace infractions; and the Respondent demonstrated that its discipline and discharge of Kelly for his infractions was consistent with its disciplinary procedures, as well as disciplines it had issued to other employees for similar violations. In these circumstances, the Respondent has met its burden of establishing, by a preponderance of the evidence, that it would have disciplined and, ultimately, discharged Kelly for his workplace infractions even absent his union activity.

"By changing the punch-in policy applicable to unit employees (excluding those hired as strike replacements) without providing the Union with notice and opportunity to bargain, Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act."

Delete the judge's Conclusion of Law 6 and renumber the remaining paragraphs accordingly.

ORDER

The National Labor Relations Board orders that Respondent, Troy Grove, a Division of Riverstone Group, Inc., and Vermillion Quarry, a Division of Riverstone Group, Inc., Moline, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

(b) Requiring returning strikers to sign a preferential hiring list as a condition of exercising their reinstatement rights.

(c) Removing union picket signs from public property.

(d) Denying employees' requests for union representation at investigatory interviews that they reasonably believe might result in discipline.

(e) 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) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> The employees described in Article 1, Section 1 of the collective bargaining agreement between the Respondent [Troy Grove, a Division of Riverstone Group, Inc., and Vermillion Quarry, a Division of Riverstone Group, Inc.] and the Charging Party [International Union of Operating Engineers Local 150, AFL-CIO] which was effective from July 30, 2014 to May 1, 2016.

(b) Rescind the punch-in policy that was unilaterally implemented in January 2019 insofar as it applies to employees who were not hired as strike replacements.

(c) Make employees, other than those hired as strike replacements, whole for any loss of earnings and other benefits suffered as a result of the unilateral implementation of the punch-in policy in January 2019, in the manner set forth in this decision.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s) for each employee.

(e) File with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

(f) If it has not already done so, place Joe Ellena on its preferential hiring list, effective July 10, 2019.

(g) Post at its facilities in Oglesby and Utica, Illinois, copies of the attached notice marked "Appendix."[35] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed either or both of the facilities 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

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

by the Respondent at the closed facility or facilities at any time since January 2, 2019.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 25 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

Dated, Washington, D.C. September 14, 2022

Lauren McFerran, Chairman

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WILCOX, dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(1) of the Act by removing a union picket sign from public property, by requiring a striker who made an unconditional offer to return to work to sign a preferential hiring list in order to be reinstated, and by denying employee Matthew Kelly's request that his union steward be present at a meeting at which Kelly was suspended and ultimately discharged for violating the Respondent's attendance policy. Contrary to my colleagues, however, I would adopt the judge's finding that the Respondent also violated Section 8(a)(3) and (1) by disciplining and discharging Kelly because of his protected union activity and support. Accordingly, I dissent.

I.

The Respondent operates two quarries in LaSalle County, Illinois: Vermillion Quarry, located in Utica, and Troy Grove Quarry, located in Oglesby. International Union of Operating Engineers, Local 150 (the Union) represents a unit of employees at both quarries. In March 2018, the Union's members voted to strike, and the strike was ongoing in 2019, during the events at issue in this case. Employee Matthew Kelly began working at the Respondent's Vermillion quarry as a replacement worker for a striker in early May 2018. He was employed as an operator and maintenance worker. On May 6, 2019, Kelly revealed his union support by wearing a union shirt to an employee meeting held at 6 a.m., the start of the workday.[1] Superintendent Scott Skerston commented on Kelly's union shirt, stating "Oh geez, you've got to be kidding me. Are you taking Joe Ellena's place?" Ellena was a replacement employee who had previously joined the strike.

From May 2018 to May 2019, Kelly was disciplined only once, for engaging in a snowball fight. However, after Skerston saw Kelly wearing a union shirt for the first time on the morning of May 6, Skerston quickly generated five written warnings documenting alleged problems with Kelly's attendance and performance. These entailed:

- a May 6, first written "attendance" warning for reporting to work 16 minutes late on May 2;
- a May 7, first written "safety" and "conduct" warning for using a cell phone while driving a company truck;
- a May 7, first written "performance" warning for going into the shop area five times during a 4-hour period;
- a May 8, second written "attendance" warning for reporting to work 30 minutes late; and
- a May 9, second and final "safety" warning for damaging equipment and wearing earbuds.

On May 9, Kelly hand-delivered a notice to Skerston stating that he was joining the strike. On June 26, Kelly made an unconditional offer to return to work. On July 8, Kelly returned to work. Two days later, on July 10, Skerston issued a final "safety" warning to Kelly for failing to lock and tag out a machine. On August 7, Skerston issued a final "attendance" warning to Kelly for arriving 54 minutes late to work.

On August 14, Kelly blew a tire on his motorcycle and again arrived late to work. Kelly was discharged the same day, after attending an investigatory meeting at which the Respondent unlawfully denied his request for union representation. Kelly's discharge notice cites "attendance" as the reason for his termination. The notice lists Kelly's prior attendance warnings, dated May 6, May 8, and August 7. Under the Respondent's progressive discipline policy, an employee may be discharged after accumulating four attendance violations in a 12-month period.

II.

Applying *Wright Line*,[2] the judge found that the General Counsel met her initial burden of establishing that Kelly's protected union activity was a motivating factor in the

[1] Unless otherwise noted, all dates are in 2019.

[2] 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).

Respondent's decision to discipline and discharge Kelly. The judge found that Kelly engaged in union activity, the Respondent was aware of his union activity, and the Respondent bore animus toward Kelly's union activity and toward the Union in general. In finding animus, the judge relied on the following:

The Respondent's retention of a consultant to discourage union activity.

Skerston's comment when he saw Kelly wearing a union shirt for the first time: "Oh geez, you've got to be kidding me. Are you taking Joe Ellena's place?"

The timing of Kelly's discipline. The judge noted that Kelly had been disciplined only once from May 2018 to May 2019. Then, between May 6, the first day Kelly wore a union shirt at work, and May 9, Skerston prepared 5 written warnings for Kelly. Further, after Kelly returned to work on July 8, Skerston issued written warnings to Kelly on July 10 and August 7, and discharged Kelly on August 14.

The unprecedented volume of Kelly's discipline. The judge observed that during the period between May 6 and August 14, Kelly was present at the worksite (and not on strike) just under 8 weeks, and during that timeframe, Skerston prepared seven written warnings for Kelly and then discharged Kelly. The judge further observed that, from March 20, 2018, through August 14, 2019, the Respondent disciplined Kelly 8 times and disciplined all other employees 12 times. Thus, Kelly received 40 percent of the disciplinary notices issued between March 20, 2018, and August 14, 2019. The judge also noted that Kelly was the only employee discharged by the Respondent from March 2018 to August 2019.

The Respondent's failure to follow its own policies in disciplining Kelly. The judge noted that Skerston issued Kelly two final "safety" warnings, on May 9 and July 10, even though the Respondent's own disciplinary policies call for termination of employment after a final warning for safety. The judge also noted that Kelly's written warnings fail to mention his prior warnings, contrary to the Respondent's disciplinary policy.

Turning to the Respondent's defense burden under *Wright Line*, the judge found that the Respondent's asserted reasons for disciplining and discharging Kelly were pretextual and that the Respondent therefore failed to establish that it would have disciplined or discharged Kelly in the absence of his protected conduct. In finding pretext, the judge relied on Skerston's failure to cite Kelly's safety, performance, and conduct violations, in addition to his attendance violations, in Kelly's discharge notice. The judge also relied on Skerston's failure to timely present the five written warnings that he allegedly prepared between May 6 and 9 to Kelly. Thus, on each of the written warnings that Skerston allegedly prepared between May 6 and May 9, Skerston checked a box indicating that Kelly was given a copy. Additionally, on the first four warnings, Skerston made a handwritten notation stating that Kelly refused to sign the warnings. Skerston also testified at the hearing that he presented the warnings to Kelly and Kelly refused to sign them. However, the judge credited Kelly's contrary testimony and found that Skerston did not present any of the written warnings he allegedly prepared for Kelly between May 6 and May 9 to Kelly. The judge noted that two of the written warnings that Skerston failed to present to Kelly (the May 6 and May 8 attendance warnings) formed the basis for his discharge under the Respondent's progressive discipline policy.

The judge therefore found that the Respondent violated Section 8(a)(3) and (1) by disciplining Kelly on May 6, 7, 8, 9, July 10, and August 7, and by discharging him on August 14.

III.

The majority reverses the judge and finds that the Respondent lawfully disciplined and discharged Kelly. The majority finds that, even assuming the General Counsel met her initial burden under *Wright Line*, the Respondent met its burden of proving that it would have disciplined and ultimately discharged Kelly even absent his union activity. Thus, the majority finds that the record does not support the judge's conclusion that the Respondent's asserted reasons for disciplining and discharging Kelly were pretextual. The majority notes that Kelly does not dispute that he committed the infractions for which he was disciplined and ultimately discharged. The majority also states that for nearly every discipline, the record demonstrates that Skerston counseled Kelly about the infraction on the spot or shortly thereafter, and that Kelly acknowledges that he either signed the disciplinary notice or was aware of it. The majority notes, moreover, that although the Respondent disciplined Kelly for various attendance, conduct, performance, and safety violations between May and August 2019, the Respondent consistently asserted that it discharged Kelly under its progressive discipline policy for his multiple attendance infractions. Thus, the majority finds that, contrary to the judge, the Respondent did not provide shifting explanations for Kelly's discharge.

Contrary to the majority, I find that the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) by disciplining and discharging Kelly is well supported by the record and the credited testimony.

First, the judge correctly found that the General Counsel met her initial burden under *Wright Line*. It is undisputed that Kelly engaged in union activity and that the Respondent was aware of his union activity. The record amply demonstrates the Respondent's antiunion animus for the

reasons stated by the judge, i.e, the "stunningly obvious" timing of the discipline, which began the same day that Kelly revealed his support of the Union;[3] the unprecedented volume of discipline in quick succession; and Skerston's failure to present Kelly with the five written warnings that Skerston allegedly prepared for Kelly from May 6 to May 9. In addition, although not mentioned by the judge, animus can be inferred from Skerston's false handwritten notations on four of the five written warnings that he allegedly prepared from May 6 to 9 stating that Kelly refused to sign the warnings, and from Skerston's false or misleading testimony at the hearing that he presented the warnings to Kelly and Kelly refused to sign them.[4]

In addition, the judge correctly found that the Respondent failed to satisfy its *Wright Line* defense burden. As noted by the majority, Kelly admits that he committed the infractions for which he was disciplined, including punching in late on May 2, May 8, August 7, and August 14. Under the Respondent's progressive discipline policy, therefore, a lawful basis existed for the Respondent to discharge Kelly. However, an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that it would have taken the same action even in the absence of the protected activity. *Rhino Northwest, LLC*, 369 NLRB No. 25, slip op. at 3 (2020). "In other words, a respondent must show that it *would* have taken the challenged adverse action in the absence of protected activity, not just that it *could* have done so." Id. (emphasis in original). For the reasons discussed below, the Respondent did not make that showing with respect to Kelly.

The evidence indicates that the Respondent tolerated the conduct for which Kelly was allegedly disciplined until Kelly revealed his union support on May 6. With regard to Kelly's attendance infractions, Kelly credibly testified that he was late to work prior to May 6 but was not disciplined. In addition, Skerston testified that he prepared Kelly's first written warning for "attendance" on May 6 because he checked Kelly's timecard on that date and noticed that, on May 2, Kelly had punched in 16 minutes late. Skerston further testified that he had been employed by the Respondent as a superintendent since 1992; in that position he was responsible for managing the activities of the Respondent's rock quarries and mine sites, including, among other things, checking and signing off on employees' timecards; and he checked the employees' timecards "every day" or "at least a couple times a week." Incredibly, however, there is no evidence that Skerston (or any other official of the Respondent) had ever issued a written warning to an employee for any type of "attendance" infraction, including tardiness, prior to May 6.[5]

With regard to Kelly's May 7 first written "performance" warning for excessively entering the shop, the judge credited Kelly's testimony that he entered the shop on May 7 to get parts or tools and that entering the shop is "normal." Specifically, Kelly credibly testified that employees went in and out of the shop all day long to get parts or tools or to use the restroom, and he typically entered the shop 10 or 15 times a day. Yet, the Respondent produced no evidence that it had ever warned or even counseled an employee for entering the shop too many times prior to May 6. Similarly, Kelly testified that he had used a cell phone while driving a company vehicle prior to May 6. Yet, the Respondent presented no evidence that it had ever warned or counseled an employee for *any* "safety" violation, including using a cell phone, prior to May 6.

In addition, as found by the judge, Skerston's failure to provide Kelly with copies of the written warnings that Skerston allegedly prepared for him between May 6 and May 9 supports a finding of pretext and unlawful motivation.[6] The majority's contrary position is based on a misreading of the record. The majority states that Kelly acknowledged that he either signed or was aware of

[3] *NLRB v. Long Island Airport Limousine Service*, 468 F.2d 292, 295 (2d Cir. 1972); see also *Lucky Cab Co.*, 360 NLRB 271, 274 (2014) ("The Board has long held that the timing of adverse action shortly after an employee has engaged in protected activity . . . may raise an inference of animus and unlawful motive."), enfd. mem. per curiam 621 Fed. Appx. 9 (D.C. Cir. 2015).

[4] See, e.g., *Airgas USA, LLC*, 366 NLRB No. 104, slip op. at 3 (2018) (asserted reasons for issuance of a warning letter not credible and instead were a pretextual attempt to mask an unlawful motivation), enfd. 916 F.3d 555 (6th Cir. 2019).

Unlike the judge, I find it unnecessary to rely on the Respondent's hiring of an antiunion consultant and Skerston's comment when he first saw Kelly wearing a union shirt, as the record amply demonstrates the Respondent's animus for the other reasons stated by the judge and discussed above.

[5] *Bannum Place of Saginaw, LLC*, 370 NLRB No. 117, slip op. at 4 (2021) (employer failed to meet its *Wright Line* defense burden where it presented no evidence that it had previously disciplined employees for similar conduct) (citing *Septix Waste, Inc.,* 346 NLRB 494, 496-497 (2006) (holding that, in order to establish a valid *Wright Line* defense, an employer must establish that it has applied its disciplinary rules regarding the conduct at issue consistently and evenly)), enfd. 41 F.4th 518 (6th Cir. 2022).

The Respondent presented evidence that Skerston issued successive written warnings to another employee, Ben Gibson, for multiple attendance infractions. However, Gibson's first written warning for attendance was issued more than a month after Kelly's first and second written warnings for attendance on May 6. Moreover, Gibson's first written warning, dated June 13, indicates that he had received a prior verbal warning. In contrast, the Respondent presented no evidence that Kelly was given a verbal warning before his first written attendance warning on May 6.

[6] See, e.g., *Toll Manufacturing Co*., 341 NLRB 832, 833–834, 847 (2004) (finding that failure to notify employee of, or to impose, warnings and suspension until they were used to support employee's discharge evidenced unlawful motive and pretext); *Lord Industries, Inc*., 207 NLRB

"nearly every" written warning. However, it is undisputed that Kelly signed only one of the seven written warnings that Skerston prepared between May 6 and August 14: the July 10 final safety warning. Further, the judge found that Skerston did not present Kelly with the five written warnings that he allegedly prepared for Kelly between May 6 and 9, and there is no evidence that Kelly was notified of the warnings or advised that the matters were considered so serious as to merit progressive discipline.

The majority acknowledges that in some cases, the Board has relied on a respondent's failure to timely provide employees with disciplinary notices in finding that the respondent failed to meet its *Wright Line* defense burden, citing *Mid-Wilshire Health Care Center*, 342 NLRB 520, 526–527 (2004) and *Le Madri Restaurant*, 331 NLRB 269, 279 (2000). The majority asserts these cases are distinguishable because, in each instance, the failure to timely provide the employees with disciplinary notices was accompanied by other actions—such as the "discriminatory manipulation of the progressive disciplinary policy" or a failure to adhere to a progressive disciplinary policy—circumstances which the majority asserts are not presented here. Contrary to the majority's assertion, however, there is overwhelming evidence that the Respondent both failed to adhere to, and manipulated, its progressive disciplinary policy in order to rid itself of a known union supporter.

Under the Respondent's progressive disciplinary policy, employees receive a "first," "second," and "final" written warning for their first three attendance infractions in a 12-month period. If, after receiving a "final" written warning, an employee incurs a fourth attendance infraction in a 12-month period, the employee is discharged. The Respondent discharged Kelly under its progressive discipline policy for accumulating four attendance infractions in a 12-month period. As found by the judge, however, the Respondent never presented Kelly with a "first" or "second" written warning for attendance before discharging him. Further, the Respondent's intentional manipulation of its progressive discipline policy is evinced by the suspicious timing of Kelly's discipline, starting May 6, the day Skerston first saw Kelly wearing a union shirt; the unprecedent volume of the discipline (five written warnings in four days); Skerston's false handwritten notations on the written warnings he allegedly prepared between May 6 and 8 stating that Kelly refused to sign the warnings; and Skerston's false testimony that he presented the five warnings he allegedly prepared from May 6 to 9 to Kelly and Kelly refused to sign them.[7]

In sum, the credited evidence supports the judge's finding that the Respondent disciplined and discharged Kelly because of his union activity and support. Accordingly, the Board should adopt, not reverse, the judge's finding of a violation.

Dated, Washington, D.C. September 14, 2022

____
Gwynne A. Wilcox, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT require returning strikers to sign preferential hiring lists as a condition of exercising their reinstatement rights.

WE WILL NOT remove union picket signs from public property.

WE WILL NOT deny your requests for union representation at interviews that you reasonably believe can result in discipline.

419, 422 (1973) (finding that failure to present employees with copies of written discipline or tell them it was contained in their personnel files prior to discharging employees evidenced unlawful motive and pretext), enfd. 498 F.2d 1342 (6th Cir. 1974).

[7] Given Skerston's testimony, moreover, Member Ring's suggestion, that Skerston failed to provide Kelly with the warning notices because Kelly had already announced he was quitting on May 9, is unpersuasive. Indeed, the Respondent never asserted that it failed to provide Kelly with the warnings because he had "one foot out the door." Rather, the Respondent consistently maintained that Skerston gave Kelly copies of the five written warnings that Skerston prepared for him from May 6 to 9 and that Kelly refused to sign them.

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

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> The employees described in Article 1, Section 1 of the collective bargaining agreement between Respondent [Troy Grove, a Division of Riverstone Group, Inc., and Vermillion Quarry, a Division of Riverstone Group, Inc.] and the Charging Party [International Union of Operating Engineers Local 150, AFL-CIO] which was effective from July 30, 2014 to May 1, 2016.

WE WILL rescind the punch-in policy that was unilaterally implemented in January 2019 insofar as it applies to employees who were not hired as strike replacements.

WE WILL make employees, other than those hired as strike replacements, whole for any loss of earnings and other benefits suffered as a result of our unlawful unilateral implementation of the punch-in policy in January 2019, plus interest.

WE WILL compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

WE WILL file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

WE WILL, if we have not already done so, place Joe Ellena on the preferential hiring list.

TROY GROVE, A DIV. OF RIVERSTONE GROUP, INC., AND VERMILLION QUARRY, A DIV. OF RIVERSTONE GROUP, INC.

Raifael Williams, Esq. and *Ashley Miller, Esq.,* for the General Counsel.
Arthur Eggers, Esq. and *Carmen Green, Esq.,* for the Respondent.
Steven Davidson, Esq., James Connolly, Jr., Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in Peoria, Illinois, on March 10 and 11, 2020. The International Union of Operating Engineers Local 150, AFL–CIO (Union or Local 150) filed the charge in Case 25–CA–234477 on January 22, 2019, and a first amended charge on April 30, 2019, filed the charge in Case 25–CA–242081 on May 24, 2019, filed the charge in Case 25–CA–244883 on July 15, 2019, and a first amended charge on December 26, 2019, and filed the charge in Case 25–CA–246978 on August 22, 2019, a first amended charge on October 8, 2019, and a second amended charge on December 20, 2019. (GC Exh. 1(a), (c), (e), (k), (m), (r), (v), (x).) The General Counsel issued a complaint on June 28, 2019, a consolidated complaint on August 28, 2019, another consolidated complaint on January 24, 2020, and an amended consolidated complaint on February 12, 2020. (GC Exh. 1(g), (o), (z), (cc).) Respondent timely filed answers and affirmative defenses to the various complaints, denying the relevant allegations. (GC Exh. 1(i), (j), (q), (bb), (ee).

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including my own observation of the demeanor of the witnesses,[1] and after carefully considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Troy Grove, a Div. of Riverstone Group, Inc., Vermillion Quarry, a Div. of Riverstone Group, Inc., a corporation, has been engaged in operating sand and stone quarries, at its facilities in Utica, Illinois, and Oglesby, Illinois, where it annually performs services valued in excess of $50,000, in States other than the State of Illinois. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 1(ee).)

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Business and Labor Relations

Riverstone Group, Inc., (Riverstone) is a mining aggregate company with its headquarters in Davenport, Iowa. (Tr. 15.) Riverstone operates quarries in Illinois, Iowa, and Missouri. (Tr. 16.) Relevant here, Riverstone operates two quarries in LaSalle County, Illinois: Vermillion Quarry located in Utica and Troy Grove Quarry located in Oglesby. (Tr. 16.) These two quarries are about 17 miles, or about 25 minutes, apart from each other. (Tr. 26–27.)

Scott Skerston has been an employee of Riverstone since 1992. (Tr. 14.) In April and May 2018, Skerston held the position of Respondent's Superintendent at both the Vermillion

[1] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

Quarry and the Troy Grove Quarry. (Tr. 86–87, 303–304.) In 2018, Tom Becker was hired as the superintendent at the Troy Grove Quarry. (Tr. 24.) After Becker's arrival, Skerston was the superintendent only at the Vermillion Quarry. (Tr. 86—87.) In November 2019, Skerston transferred to become the superintendent at another Riverstone quarry. (Tr. 17.) Respondent admits, and I find, that Skerston is a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. (GC Exh. 1(ee).)

Since at least 2018, Respondent has employed James Misercola as a "persuader," who provides people with information in order to secure no votes in union elections. (Tr. 311.) Respondent admits, and I find, that James Misercola is an agent of Respondent within the meaning of Section 2(13) of the Act. (GC Exh. 1(ee).)

Furthermore, Respondent admits, and I find, that International Union of Operating Engineers, Local 150, AFL–CIO (Union or Local 150) is a labor organization within the meaning of Section 2(5) of the Act. (GC Exh. 1(ee).) Respondent admits, and I find, that the Union represents the following appropriate unit of its employees:

> The employees described in Article 1, Section 1 of the collective bargaining agreement between Respondent and the Charging Party which was effective from July 30, 2014 to May 1, 2016.

(GC Exh. 1(ee).) Local 150 represents employees at both of Respondent's quarries. (Tr. 32.) Stephen Russo is an organizer/business agent for the Union. (Tr. 128.) Since October 24, 2018, Lyle Calkins has served as the only union steward for employees at both locations. (GC Exh. 3; Tr. 145.) The letter appointing Calkins as union steward states that the steward is to assist employees during investigatory interviews which might result in disciplinary action. (GC Exh. 3.)

The most recent contract between Respondent and the Charging Party expired on May 1, 2016. (GC Exh. 2.) The parties met to negotiate for a successor collective-bargaining agreement, however, one was never reached. (Tr. 34, 129.) The Union's members voted on a contract proposal, but did not approve it. (Tr. 129.) Instead, the Union's members voted to go on strike for what the Union deemed unfair labor practices.[2] (Tr. 129.)

B. Respondent's Safety and Disciplinary Policies

Respondent maintains a progressive disciplinary policy. (Tr. 27–28.) Skerston received training on Respondent's disciplinary policy at a supervisor's training on February 29, 2019. (R. Exh. 4; Tr. 243, 285.)

Respondent's policy enumerates four categories of infractions: Safety; Performance; Attendance, and; Conduct. (R. Exh. 4; Tr. 29–31, 244–245.) For safety violations, employees receive a first written warning, then a final warning or suspension, followed by termination. (R. Exh. 4.) For performance and attendance issues, Respondent gives a first warning, a second written warning, a final warning or suspension, and then terminates the employee. (R. Exh. 4.) Attendance violations are tracked for a 12-month period. (R. Exh. 4.) Supervisors were told to consider the full picture of the employee's performance and length of service before going to the third or fourth step for attendance violations. (R. Exh. 4.) For conduct violations, employees first receive a first warning, then a final warning or suspension, and then are terminated. (R. Exh. 4.) A suspension for conduct may be from 1 to 5 days, depending on the severity of the offense. (R. Exh. 4.)

Respondent provided its supervisors with an employee warning notice form at the February 2019 training. (R. Exh. 4.) For repeated offenses, Respondent's supervisors were trained to list previous infractions chronologically. (R. Exh. 4.) In addition, if an employee violated Respondent's policies, supervisors were told to state when the employee was made aware of the policy. (R. Exh. 4.)

Respondent also maintains a policy concerning cell phone use. (R. Exh. 3; Tr. 263.) Cell phone use is not allowed outside of the shop or office areas, except in emergencies. (Tr. 263, 308.)

C. Strike and Ellena's Offer to Return to Work

Respondent's employees went on strike on March 8, 2018. (R. Exhs. 1, 2; Tr. 24.) Strike notices sent to Respondent indicated that the employees were on strike to protest Respondent's unfair labor practices. (R. Exhs. 1, 2.) Respondent began hiring permanent replacement employees in April 2018. (Tr. 34.) All of the replacement workers signed a "Notification of Employment," stating that they understood they were being hired as permanent replacement workers and would not be terminated solely to make room for a returning striker, unless required as part of a negotiated agreement or if required under the Act. (R. Exh. 7.)

Joe Ellena began working for Respondent at the Troy Grove Quarry as a replacement worker on May 21, 2018. (Tr. 37–39, 159.) Ellena is a member of Local 150. (Tr. 159.) He first indicated his support for the Union in July 2018 by wearing a union t-shirt to work. (Tr. 160.) He continued to wear the shirt about once a week for the rest of his time he was employed by Respondent. (Tr. 160.) Ellena also had union stickers on his lunchbox, hard hat, and truck. (Tr. 160.) Skerston was aware of Ellena's union support. (Tr. 38.)

On May 20, 2019, Ellena went on strike. (GC Exh. 4.) In his strike notice, Ellena indicated that he was protesting Respondent's unfair labor practices. (GC Exh. 4.) Ellena made an unconditional offer to return to work on July 10, 2019, by way of a letter to Skerston. (GC Exh. 5.) On July 12, Skerston sent a letter back to Ellena, informing him that he would need to sign a preferential hiring list because there were no jobs available. (GC Exh. 6(a).) The letter further stated that the preferential hiring list was located at Respondent's Vermillion Quarry facility. (GC Exh. 6(a).) Skerston's letter attached a preferential hiring list. (GC Exh. 6(b).) The list indicated that by signing it, Ellena was making an unconditional offer to return to work and that employees would be recalled to work based on the dates and times of their offers to return to work. (GC Exh. 6(b).) The list has one

[2] Russo did not describe these unfair labor practices, instead testifying, "We . . . explained to them about some of the, what we felt were [u]nfair [l]abor [p]ractices, so we took a strike vote . . . and then we ended up going out on strike." (Tr. 129.)

column for employee names and one column for the date and time the form was signed by the employee (GC Exh. 6(b).) Ellena never signed the list and he has not been called back to work. (Tr. 167, 236.)

D. Removal of Picket Sign

On January 2, 2019,[3] Thomas Brown and Shane Bice were manning a Union picket line at the Troy Grove Quarry. (Tr. 100.) Brown and Bice are former employees of Respondent and members of the Union. (Tr. 95–96, 113.) The Troy Grove Quarry has two driveways used for entrance and egress. (Tr. 22, 99.) Brown and Bice had signs stating, "I.U.O.E. LOCAL #150 AFL–CIO ON STRIKE AGAINST Troy Grove Stone Quarry, a division of Riverstone Group Inc FOR UNFAIR LABOR PRACTICES." (Emphasis in original.)(GC Exh. 27; Tr. 98.) The signs were approximately 15 inches by 24 inches and were attached to 3- or 4-foot long strips of wood. (Tr. 98, 116.)

Brown and Bice had placed four 10-inch long pieces of PVC pipe into the ground, one on each side of the two driveways. (Tr. 99.) They often placed the signs into the pieces of pipe in the ground when they arrived in the morning and would remove them when they went home for the day. (Tr. 99–100; 115–116.) Sometimes the men would walk back and forth at the site and other times they would sit in their trucks with the signs in the PVC pipe in the ground. (Tr. 97, 115.)

At about 1:30 p.m. on January 2, Brown and Bice observed a vehicle driven by Misercola exiting the quarry using the other driveway. (Tr. 100, 117.) They observed the vehicle drive forward and backward a few times and then stop before exiting the driveway. (Tr. 102, 117.) Brown and Bice estimated that they were 50 to 80 yards away from Misercola's vehicle at the time of this incident. (Tr. 102–103, 118.)

After Misercola's vehicle left the area, Brown and Bice noticed that one of their picket signs was gone. (Tr. 103–140, 118.) Bice walked over to the other driveway to look for the sign but couldn't find it. (Tr. 103–104, 120.) The PVC pipe was still in the ground, but the sign was gone. (Tr. 121.) Bice photographed tire tracks off the driveway in the area where the sign had been. (GC Exh. 25; Tr. 118.) Bice then called Russo to notify him of the missing sign. (Tr. 104, 120.) Russo called the LaSalle County Sheriff's Department to report what had happened. (Tr. 120, 130.) When a deputy came to the Troy Grove Quarry the next day, Brown talked to him. (GC Exh. 24; Tr. 105.) Russo brought a replacement sign to Brown and Bice the next day. (Tr. 122, 131.)

Bice and Brown both testified that the sign did not blow away because its handle had been inside of the PVC pipe buried in the ground. (Tr. 107, 121.) Misercola denied removing the sign. (Tr. 312.)

E. Employer's Policy on Punching In

Employees at the Troy Grove Quarry worked from 6 a.m. to 4 p.m., Monday through Thursday. (Tr. 136, 144, 153, 161, 223.) Employees punched in at various times, from 5:35 until 6 a.m. (Tr. 138, 147, 161, 185-186, 223.) Prior to January 2019, many employees punched in for work whenever they arrived at the quarry. (Tr. 163.) These workers were paid overtime for this extra time. (Tr. 137–138, 147.) Timecards presented at the hearing show that Ellena and another employee often punched in 10 to 20 minutes early and that Ellena punched in early as far back as June 2018. (GC Exhs. 29, 30, 31, 32; Tr. 293—302.)

In January 2019, Lower had a conversation with Calkins, Currie, and Ellena about punching in early. (Tr. 137, 146, 154–155.) All of them noticed that another employee at the Vermillion Quarry had been punching in early.[4] (Tr. 137–138, 146, 155.) Lower decided that he was going to start punching in early and would see if he would be paid overtime. (Tr. 138, 146, 155.)

Lower punched in 30 minutes early on 3 consecutive days starting in mid-January 2019. (Tr. 139, 237–241.) Lower was paid overtime for the time he punched in early. (Tr. 139.) The third day was a Thursday. (Tr. 139.) When he returned to work the following Tuesday, a new policy was posted. (Tr. 139.)

Around January 22, Skerston posted a notice to employees near the timeclock in the employee breakroom stating that employees could not punch in more than 5 minutes before the start of their shifts. (GC Exh. 27; Tr. 132, 139, 164–165, 185, 242.) Calkins notified Russo when the policy was posted. (Tr. 132.) All the witnesses agreed that prior to the posting of this policy, they were unaware of any policy regarding punching in early. (Tr. 139, 148, 156–157, 162, 188.)

After the strike began in 2018, the Union made information requests for all of Respondent's policies. (Tr. 133–134.) The Union did not receive a copy of any policy or rule regarding punching in early. (Tr. 134.) Russo testified that he did not negotiate over any policy regarding punching in early and was not made aware of the policy posted by Skerston in January 2019 until Calkins sent him a picture of the posted policy. (GC Exh. 27; Tr, 132–134.)

F. Employment of Matt Kelly

Matt Kelly was hired as a replacement worker at the Vermillion Quarry in May 2018. (R. Exh. 2; Tr. 45, 215.) He was eventually terminated on August 14, 2019, for what Respondent asserts were attendance infractions. (GC Exh. 22.)

On January 17, 2019, Kelly was disciplined for engaging in a snowball fight with Ellena. (GC Exh. 7.) Ellena was disciplined for the same incident. (GC Exh. 8; R. Exh. 6.) Skerston spoke to other employees who witnessed the incident before disciplining Kelly and Ellena. (Tr. 46.) Skerston said that the decision to issue discipline for this incident was made in consultation with his supervisor, Marshall Guth. (Tr. 46.) Kelly signed the warning notice at the bottom. (GC Exh. 8.) This was the first time that Kelly was disciplined while employed by Respondent.

On May 6, 2019, Kelly revealed himself as a union supporter. He removed his sweatshirt at a work meeting and showed that he had a union shirt on underneath. (Tr. 189, 224.) Kelly asked Skerston what he thought of his shirt. (Tr. 49.) Skerston thought Kelly was joking. (Tr. 49, 257.) According to Kelly and Gibson, Skerston asked Kelly if he was taking Joe's [Ellena's] place and said, "you've got to be kidding me." (Tr. 190, 224.) Kelly began

[3] All dates herein are in 2019, unless otherwise noted.

[4] Calkins also admitted to punching in 10–15 minutes early, once or twice a week. (Tr. 147.) Ellena did not testify about this conversation.

wearing a union shirt to work and wearing union stickers on his hardhat after that day. (Tr. 189.) He also placed union stickers on his lunchbox and truck. (Tr. 189–190.)

On Monday, May 6, Kelly informed Skerston that he would be quitting effective Thursday, May 9 to take another job. (Tr. 249.) Kelly filled out paperwork and Skerston sent notice to Respondent's human resources department that Kelly had quit. (R. Exh. 10; Tr. 250–252.) Kelly signed a release of information for references on May 9, verifying that he had quit. (R. Exh. 10; Tr. 252.)

On May 6, Kelly reported to work 16 minutes late. (GC Exh. 9.) Skerston prepared a warning notice for Kelly. (GC Exh. 9.) A copy of Kelly's timecard indicating his lateness is attached to the warning notice. (GC Exh. 9.) The warning notice indicates that Kelly refused to sign it. (GC Exh. 9; Tr. 52.) Kelly does not dispute that he was late that day, however, he testified that he did not receive a copy of the warning notice until around the time he was discharged in August 2019. (Tr. 192.)

On May 7, Skerston observed Kelly taking a cell phone video while driving a company truck. (GC Exh. 10; Tr. 54–55.) Kelly admits making a video but claims that the truck was parked at the time. (Tr. 192–193, 217.) Skerston completed another employee warning notice for Kelly regarding this incident. (GC Exh. 10.) Skerston did not investigate before deciding to discipline Kelly because he observed the incident himself. (Tr. 54.) Skerston testified that he spoke with Kelly when he met with him to issue the discipline. (Tr. 54.) Skerston told Kelly it was inappropriate and unsafe to violate the company's cell phone policy while driving. (Tr. 55.) The warning notice again indicates that Kelly refused to sign it. (GC Exh. 10.) Kelly stated that he did not see this warning notice until August. (Tr. 192.)

Later on May 7, Skerston decided to discipline Kelly for entering the shop 5 times when he was supposed to be in the pit working. (GC Exh. 11; Tr. 56.) Earlier that day, Skerston went to see what Kelly was supposed to be working on and saw that there was very little progress being made. (Tr. 57.) Kelly admits that he went to the shop multiple times, but claims it was to get parts or tools, and that entering the shop multiple times is normal. (Tr. 193–194.) The warning notice indicates that Kelly refused to sign. (GC Exh. 11.) However, Kelly again testified that he did not see this warning notice until August. (Tr. 193.) Kelly also testified that Skerston did not talk to him about this incident on May 7. (Tr. 193–194.)

On May 8, Kelly failed to punch in on time. (GC Exh. 12; Tr. 59.) Skerston saw Kelly sleeping in his truck outside the gate that morning and reviewed his timecard to verify that he punched in late. (Tr. 59.) A copy of Kelly's timecard is attached to the warning notice. (GC Exh. 12.) Skerston did not interview anyone prior to issuing this warning. (Tr. 59.) Kelly does not dispute that he was late on May 8. (Tr. 194–195.) The warning notice again indicates that Kelly refused to sign. (GC Exh. 12.) Kelly testified that Skerston talked to him about the incident on May 8, but that he did not see the employee warning notice until August. (Tr. 194.)

On May 9, Kelly dragged a portable welder with the jack leg down, causing damage to company property. (GC Exh. 13.) Skerston observed this incident. (Tr. 61.) Skerston yelled and waved at Kelly to stop, but Kelly did not hear him.[5] (Tr. 282–283.) The jack leg needed to be replaced as a result of this incident. (Tr. 61.) Kelly acknowledged that he dragged the welder while the jack leg was still down. (Tr. 196.) Kelly did not sign the warning notice. (GC Exh. 13.) Skerston instead noted, "EMPLOYEE MATT KELLY QUIT TODAY," on the line for employee signature.[6] (GC Exh. 13.) Kelly denied receiving the employee warning notice until August. (Tr. 197.)

Kelly went on strike on May 9. (GC Exh. 14) His strike notice indicated that he was protesting Respondent's unfair labor practices. (GC Exh. 14.) On June 26, 2019, Kelly made an unconditional offer to return to work by way of a letter to Skerston. (GC Exh. 15.) Skerston sent an email in reply to Kelly's offer indicating that he was on vacation. (GC Exh. 16.) Kelly returned to work on July 8. (R. Exh. 9.)

On July 10, Kelly was issued a final written warning for a safety violation. (GC Exh. 17.) Skerston witnessed Kelly working on a conveyor without a lock out or tag out on the breaker. (GC Exh. 17.) Kelly admits that he was working on the conveyor without a lockout/tagout. (Tr. 199.) Skerston presented the warning notice to Kelly then next day. (Tr. 199.) The notice does not mention any of Kelly's prior discipline. (GC Exh. 17.) Kelly signed the disciplinary notice but testified that he did not realize that it was a final written warning. (GC Exh. 17; Tr. 199.)

On August 7, Kelly was late to work again. (GC Exh. 18.) He punched in at 6:54 a.m., although his shift started at 6 a.m. (GC Exh. 18.) A copy of Kelly's timecard is attached to the employee warning notice. (GC Exh. 18.) The warning notice indicates that it is a final written warning for attendance. (GC Exh. 18.) Skerston looked at Kelly's timecard, but did not interview anyone, including Kelly, before issuing the discipline. (Tr. 70.) Kelly did not sign this warning notice because it said, "final warning" and he had not received prior disciplinary notices for attendance. (GC Exh. 18; Tr. 200.)

Kelly texted Russo after being disciplined on August 7. (GC Exh. 28.) Kelly asked Russo if he had copies of all of his writeups. (GC Exh. 28.) Kelly stated, "that last week Scott never showed me any writeups." (GC Exh. 28.) Russo indicated that he had the disciplinary forms and one said that Kelly had quit. (GC Exh. 28.) Kelly stated, "we need to fight them," and that he would see Russo at the union hall later. (GC Exh. 28.)

On August 14, Kelly was again late to work. (GC Exh. 20.) Kelly was supposed to report to work at 6 a.m., but did not arrive until 11:30 a.m. (Tr. 202–203.) Kelly called Skerston that morning to tell him he had a flat tire on his motorcycle. (Tr. 203.) He was issued a notice of suspension pending investigation. (GC Exh. 20.) Skerston did not interview anyone prior to issuing this discipline, but emailed Respondent's human resources department at 6:25 a.m. that morning stating his intention to discipline Kelly. (GC Exh. 19; Tr. 74.)

Kelly denied receiving many of the employee warning notices listed above until August, when he was provided copies by the

[5] Skerston stated that Kelly was wearing earbuds at the time of this incident, but Kelly denies wearing earbuds. (Tr. 217–218; 282.)

[6] As noted above, Kelly had given notice to Skerston on May 6 that May 9 would be his last day.

Union.[7] (Tr. 212.) Skerston always checked the box indicating that the notice was given to the employee whether or not the employee received the notice. (Tr. 62–63.)

In the 2 years prior to Kelly's termination, the following other employees were disciplined by Respondent: J. Fitzgerald for not keeping company information confidential on March 20, 2018 (GC Exh. 23(e); R. Exh. 7); J. Webber for harassment of a pro-union employee on June 15, 2018 (GC Exh. 23(a); R. Exh. 7); C. Parsons for damaging company property on September 27, 2018 (GC Exh. 23(b); R. Exh. 7); J. Webber for pushing another employee on January 7, 2019 (GC Exh. 23(c); R. Ex. 7); J. Ellena for conduct on January 17, 2019 (R. Exh. 6); B. Gibson for performance on April 30, 2019 (GC Exh. 23(d); R. Exh. 7); B. Gibson for conduct on May 7, 2019 (R. Exh. 7; Tr. 68.); B. Gibson attendance/tardiness on June 13, 2019 (R. Exh. 7); B. Gibson for attendance/tardiness on July 1, 2019 (R. Exh. 7); H. Lewis for damaging company equipment on July 1, 2019 (R. Exh. 7); H. Lewis for cell phone use on July 2, 2019 (R Exh. 7); and J. Fitzgerald for performance on July 9, 2019 (R. Exh. 7). For the period from March 20, 2018 through August 14, 2019, Respondent disciplined Matt Kelly 8 times and disciplined other employees 12 times. There is no evidence that any other employee was terminated for attendance, or any other reason, during this time period.

G. August 14 Interview of Matt Kelly

On August 14, Skerston conducted an in-person interview of Kelly concerning his tardiness. (Tr. 76.) Skerston used a prepared list of questions for his interview of Kelly. (GC Exh. 21.) On the list of questions, Skerston noted that Kelly asked for a witness, so he waited to start the interview. (GC Exh. 21.) Kelly asked for Lyle Calkins to be present at the beginning of the meeting.[8] (Tr. 77, 204–205.) Skerston said no because Calkins was at the other quarry and was too far away. (Tr. 77, 205.) Skerston said they could get someone else and said, "How about Ben Gibson?" (Tr. 78, 205.) Gibson does not have any position with the union. (Tr. 78, 206.) Gibson came into the office and sat in on Kelly's interview. (Tr. 226.) Gibson also asked for Calkins to be present for the interview. (Tr. 77–78.) Tom Becker, the site superintendent from the Troy Grove Quarry, was also present for the interview.[9]

Skerston asked Kelly questions about his tardiness on August 14. (GC Exh. 21.) Kelly admitted calling Skerston on August 14 at about 5:46 a.m., informing Skerston that he had a flat tire. (GC Exh. 21.) Kelly further admitted that he was supposed to start work at 6 a.m. that day. (GC Exh. 21.) Skerston asserted that Kelly made conflicting statements about the location of his motorcycle at the time he got the flat tire. (GC Exh. 21.)

At the end of the interview, Skerston gave Kelly a notice of suspension pending investigation and asked him to sign it. (GC Exh. 20; Tr. 206, 227.) The notice indicated that Kelly was suspended for attendance and what he told Skerston on August 14. (GC Exh. 20.) Kelly initially signed the form, but later crossed out his signature and initialed it. (Tr. 206–207, 228.) Kelly said that he crossed out his signature because he had not received the write-ups mentioned on the form. (Tr. 207, 228.) On the form, Skerston indicated, "Matt says he hasn't seen any write ups and didn't sign final warning. Saw lock out tag [out] and saw final warning. Said wanted this noted." (GC Exh. 20.) Skerston said he could not give Kelly copies because he had thrown the write-ups away.[10] (Tr. 207, 228.) Skerston told Kelly that he had sent copies of the disciplinary forms to the Union. (Tr. 228.) Kelly was allowed to leave, and Gibson was sent back to work. (Tr. 208, 229.)

H. Discharge of Matt Kelly

On August 14, Respondent issued a notice of termination to Kelly by way of a letter from Skerston to Kelly. (GC Exh. 22.) The reason given for the termination in the letter was that he had been late 4 times (on August 7 and 14, May 6 and 8). (GC Exh. 22.) The decision to terminate Kelly's employment was made by Skerston soon after the interview of August 14 and the notice was sent to him via certified mail. (Tr. 79–80.)

Discussion and Analysis

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group,* 339 NLRB 303, 305 (2003); *Daikichi Sushi,* 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi,* 335 NLRB at 622. Some of my credibility findings are incorporated into the findings of fact set forth above.

I found Skerston to be a generally credible witness. He appeared forthright and steady while testifying and his testimony did not waver on cross-examination. Specific variances between Skerston's testimony and that of other witnesses are resolved above.

However, I did not credit Skerston's testimony that he did not say that he threw away Kelly's employee warning notices, as his testimony was contradicted by Gibson and Kelly. Furthermore,

[7] Kelly gave conflicting testimony on receiving copies of his warning notices. In his affidavit to the Board, he indicated that he did not receive any of the disciplinary notices until after his termination in August 2019. (Tr. 213.) At the hearing, he testified that the saw the warning notices on August 7 but did not receive copies until August 14. (Tr. 212.) He was not sure when Russo received the disciplinary forms. (Tr. 213.) Regardless of when Kelly ultimately received copies of the employee disciplinary notices, which I find was on August 7 or 14, I do not find that this minor contradiction detracts from his overall credibility.

[8] Kelly did not request his union steward, but instead asked for Calkins by name.

[9] No effort was made to explain how Becker was able to come from the Troy Grove Quarry for the interview, but Calkins could not. Becker did not testify at the hearing.

[10] Skerston denied stating he had thrown away the copies of Kelly's write-ups. (Tr. 282.) I do not find this variance in his testimony from that of Kelly and Gibson to be material.

although he checked a box on each of Kelly's disciplinary forms indicating that Kelly had received copies of the forms, I find that Kelly did not receive them. Skerston later revealed that he always checked that box and suggested that Kelly had not received copies of the forms, as he testified that he had sent the forms to Russo. Thus, I find that Skerston did not issue any of the employee warning notices that he prepared for Kelly between May 6 and 9, 2019, to him despite checking a box that he had done so.

I found Thomas Brown to be a credible witness. His brief testimony was given without hesitation or exaggeration. He candidly testified that he was about 80 yards away from Misercola when he observed the latter's truck pull up and back several times. The evidence shows that he and Bice took prompt action after this incident by calling Russo and speaking with law enforcement. Therefore, I credit Brown's testimony.

I also found Shane Bice to be a credible witness. His testimony was given in a forthright and sure manner. On cross-examination, he candidly answered that he did not like Misercola and wants to see the Union prevail in its labor dispute with Respondent. He also honestly admitted that he was at least 50 yards away from Misercola's vehicle and did not see Misercola steal the sign. As such, I credit Bice's testimony.

Stephen Russo also presented credible testimony. His testimony consisted mostly of a description of the picket signs used in the labor dispute between the Union and Respondent and his actions following the incident of January 2, 2019, when a picket sign went missing. Respondent did not cross-examine Russo. As such, I credit Russo's testimony.

I found Brad Lower to be a credible witness. He is a current employee of Respondent and, as such, his testimony is likely to be particularly reliable because he is testifying adversely to his pecuniary interest.[11] *Advocate South Suburban Hospital,* 346 NLRB 209 fn. 1 (2006), citing *Flexsteel Industries,* 316 NLRB 745 (1995), affd. mem. *NLRB v. Flexsteel Industries,* 83 F.3d 419 (5th Cir. 1996); see also *American Wire Products,* 313 NLRB 989, 993 (1994) (Current employee providing testimony adverse to his employer is at risk of reprisal and thus likely to be testifying truthfully). Lower testified in a frank and sound manner. He candidly testified that he punched in early to test Respondent's practice of paying overtime for those who punched in early. Respondent did not cross-examine Lower. Therefore, I credit Lower's testimony.

I found Lyle Calkins to be a credible witness. Like Lower, Calkins is a current employee of Respondent. His brief testimony was given in an earnest manner. Respondent did not cross-examine him. Therefore, I credit Calkins' testimony.

I found Scott Currie to be a credible witness. He is a current employee of Respondent. His brief testimony was given in an authentic manner. Respondent did not cross-examine him and, thus, I credit Currie's testimony.

I also found Joe Ellena to be a credible witness. He is a current employee of Respondent. Respondent did not cross-examine Ellena. I found him to be sincere while testifying. Therefore, I credit Ellena's testimony.

I found Matt Kelly to be generally credible. Kelly candidly admitted to committing all of the disciplinary, safety, and attendance infractions alleged by Respondent. Although his hearing testimony slightly contradicted his affidavit testimony about when he received copies of his employee warning notices, I do not find that this minor misstep detracts from his overall credibility. His testimony was largely corroborated by other witnesses and evidence. Therefore, I credit Kelly's testimony.

I found Ben Gibson to be a credible witness. Gibson is a current employee of Respondent. His brief testimony was given without hesitation and in a direct manner. Respondent did not cross-examine him. Therefore, I credit his testimony.

I did not find James Misercola to be a credible witness. His testimony was given in an equivocal and indirect manner. He refused to answer even most basic questions, including when he started working for Respondent and at which of Respondent's quarries he was working on January 2, 2019, the date of the picket sign incident. On direct examination he testified that he did not remove a picket sign from Respondent's property or the public right-of-way. However, on cross-examination he testified only that he did not remember doing so. (Tr. 312, 315.)

Misercola also quibbled with the Union's counsel on cross-examination. For example, Misercola gave the following testimony

> Q: On January 2nd, 2019, do you recall leaving one of those quarries and actually driving off the road and onto the right of way?
>
> A: I don't recall that exactly but if I was there and I drove off, it would have been one of several times over the course of the past two years that I've been on that property.

(Tr. 315–316.) He further testified that he did not remember what he was doing on January 2, 2019 because, "[T]hat was a long time ago." (Tr. 315.) When asked whether he spoke to a law enforcement officer, Misercola said yes, but when asked what the conversation was about he replied, "The law enforcement officer was on the property and had asked to speak to me." (Tr. 317.)

Given his demeanor on the witness stand and his limited recall of the events at issue, I do not credit Misercola's testimony unless it constitutes an admission against interest or is corroborated by a more credible witness or other evidence.

B. Change to Respondent's Punch-Policy (Complaint Pars. 8(a), (b), and (c))

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by changing its punch-in policy to require that unit employees punch in no more than 5 minutes before the start of their scheduled shifts, without affording the Union notice or an opportunity to bargain. I find that the General Counsel has proven this violation.

The most recent collective-bargaining agreement between Respondent and the Union expired on May 1, 2016. (GC Exh. 2.)

[11] A witness' status as a current employee is among the factors that a judge may utilize in resolving credibility issues. See, e.g., *DHL Express, Inc.*, 355 NLRB 1399, 1404 fn. 13 (2010).

Although the parties met to bargain, a successor agreement was never reached. However, there is no evidence that the parties ever reached a valid impasse.

As I have found, prior to January 2019, employees punched in for work whenever they arrived at the quarry and these workers were paid overtime for this extra time. The witnesses agreed that prior to the posting of this policy, Respondent had no policy regarding punching in early.

Around January 22, 2019, Skerston posted a notice to employees near the timeclock in the employee breakroom stating that employees could not punch in more than 5 minutes before the start of their shifts. Calkins notified Russo when the policy was posted, but there is no evidence that Respondent notified the Union of the policy either before or after it was posted or that Respondent offered the Union an opportunity to bargain over the new policy.

An employer's duty to bargain under Section 8(a)(5) includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' bargaining representative concerning the contemplated changes. *NLRB v. Katz*, 369 U.S. 736 (1962). However, after a collective-bargaining agreement expires, different principles govern the obligations of parties to a bargaining relationship. *Nextstar Broadcasting, Inc.,* 369 NLRB No. 61, slip op. at 4 (2020). In *MV Transportation, Inc.,* the Board adopted the contract coverage standard and applied it retroactively to all pending cases. 368 NLRB No. 66, slip op. at 2 (2019). Under the contract coverage standard, the Board will "examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally." *Nextstar Broadcasting* at 3, quoting 368 NLRB No. 66, slip op. at 2.

The Board applies ordinary principles of contract interpretation in conducting its analysis. Id. Where contract language covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally, and the employer will not have violated Section 8(a)(5). *Nextstar Broadcasting* at 3, citing *MV Transportation* at 11. Furthermore, provisions in an expired collective-bargaining agreement do not cover post-expiration unilateral changes unless the agreement contained language explicitly providing that the relevant provision would survive contract expiration. *Nextstar Broadcasting* at 3.

In this case, the parties' most recent collective-bargaining agreement expired in 2016. It is not clear from the record when the parties last met and bargained. However, there is no evidence in the record that the parties have reached impasse. There is no provision in the expired contract concerning punching in early. (GC Exh. 2.) There is further no language in the expired contract indicating that any of its provisions would survive its expiration. (GC Exh. 2.) Given the lack of evidence regarding impasse and the absence of language in the expired collective-bargaining agreement concerning punching in early, Respondent's ability to act unilaterally regarding punching in, or that any such right, if it existed, would survive the agreement's expiration, I find Respondent's unilateral implementation of a punch-in policy in January 2019 violated Section 8(a)(5) and (1) of the Act.

C. Ellena's Offer to Return to Work (Complaint Pars. 6(a), (b), and (c))

Respondent's employees commenced a strike on March 8, 2018. Joe Ellena was hired as a replacement worker in May 2018. On May 20, 2019, Ellena went on strike. On July 10, he made an unconditional offer to return to work. The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act when it required Ellena to sign a preferential hiring list in order to return to work. I find that the General Counsel has proven this violation.

The Board requires that if striking employees make an unconditional offer to return to work but there are no jobs available, employers must maintain a nondiscriminatory recall list, so that when openings become available, the un-reinstated striker could be recalled to his or her former or a substantially equivalent position. *Laidlaw Corp.,* 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). As correctly pointed out by counsel for General Counsel on brief, requiring former strikers to take steps beyond making an unconditional offer to return, such as completing additional paperwork, violates the Act. *NTN Bower Corp.,* 356 NLRB 1072, 1123 (2011), citing *Peerless Pump Co.*, 345 NLRB 371, 375 (2005). Imposing prerequisites on strikers to preserve their rights to their pre-strike jobs violates employees' Section 7 rights, absent a legitimate and substantial business justification. *Peerless Pump Co.,* 345 NLRB at 375, citing *Pirelli Cable Corp.*, 331 NLRB at 1539 (employer violated Sec. 8(a)(3) by unilaterally imposing requirement that former strikers advise employer of desire and availability for reinstatement as condition precedent to placement on preferential hiring list).

Similarly, in this case, Respondent's requirement that Ellena sign a preferential hiring list violates Section 8(a)(3) and (1) of the Act. Respondent adduced no substantial business justification for asking Ellena to sign the preferential hiring list. In its brief, Respondent asserts that it did not tell Ellena that he was required to sign the preferential hiring list. (R. Br. at 18.) However, in its letter to Ellena of July 12, 2019, Respondent indicated that it had no job openings, had established a preferential hiring list that Ellena was welcome to sign if he wished to do so, and that the list was located at the Vermillion Quarry. Clearly, the import of this statement was that, in the absence of job openings, Ellena should get his name on the list in order to be recalled. The copy of the preferential hiring list attached to the letter stated that signing the list constituted an unconditional offer to return to work and that employees, "will be recalled to work based on the date and time of their offer to return to work." (GC Exh. 6(b).) Furthermore, the list has a column for the date and time the employee signed the form. (GC Exh. 6(b).) This column clearly implies that the date the form was signed was the date that Respondent would consider as the date that employee made his offer to return to work. Ellena had already transmitted his unconditional offer to return to work to Respondent at the time he received Respondent's letter and form. Thus, Respondent was asking Ellena to come to Respondent's facility to complete additional paperwork. These additional requirements imposed by Respondent on Ellena in order to return him to work violated Section 8(a)(3) and (1) of the Act.

D. Removal of Picket Sign (Complaint Par. 5(a))

The General Counsel alleges that on January 2, 2019, Respondent violated Section 8(a)(1) of the Act when Joe Misercola removed union picket signs from public property. I find that the General Counsel has proven this allegation.

At about 1:30 p.m. on January 2, Brown and Bice observed a vehicle driven by Misercola exiting the quarry. They observed the vehicle drive forward and backward a few times and then stop before exiting the driveway. When the picketers looked over again, their sign was gone and they could not find it. I have already declined to credit Misercola's general and hedging denial of this incident. Therefore, I find that, Misercola removed or destroyed the sign.

Both Brown and Bice testified without embellishment or hesitation. Both men candidly testified that they did not see Misercola remove the sign. However, both saw Misercola pull his vehicle up and back repeatedly in the area of the sign, then stop and exit his vehicle. Before Misercola came, the sign was there. After he pulled away, the sign was missing, and tire tracks were seen in the area where the sign had been located. Therefore, I find, by a preponderance of the evidence, that Misercola removed the picket sign.

Misercola's conduct impermissibly interfered with the Section 7 rights of the employees to place picket signs in support of the strike. Removing or destroying picket signs violates Section 8(a)(1) of the Act. *Slapco, Inc.,* 315 NLRB 717, 720; *Muncy Corp.,* 211 NLRB 263, 272 (1974). See also, *Florida Wire & Cable, Inc.,* 333 NLRB 378, 382 (2001)("Confiscation of picket signs . . . violated Section 8(a)(1).") Therefore, I find that Respondent violated Section 8(a)(1) of the Act by removing the Union's picket sign.

E. Discipline and Discharge of Matt Kelly (Complaint Pars. 6(d), (e), (f), (g), (h), (i), and (j))

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act when it disciplined employee Matt Kelly on May 6, 7, 8, 9, July 10, and August 7, 2019, and when it terminated Kelly's employment on August 14, 2019. I find that the General Counsel has proven these allegations.

Section 8(a)(3) of the Act prohibits employers from discriminating in regard to an employee's tenure of employment . . . to encourage or discourage membership in any labor organization. *Roemer Industries, Inc.,* 367 NLRB No. 133 slip op. at 20 (2019), enfd 824 Fed.Appx. 396 (6th Cir. 2020). In order to establish a violation of Section 8(a)(3) and (1) in cases where discipline and discharge are alleged, the General Counsel has the burden to prove that the disciplinary action and/or discharge was motivated by employer antiunion animus. Id.

In determining whether adverse employment actions are attributable to unlawful discrimination, the Board applies the analysis set forth in *Wright Line*, 251 NLRB 108 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel has the initial burden of establishing, by a preponderance of the evidence, that the employee's protected activity was a motivating factor in the decision to issue discipline or to discharge the employee. *Volvo Group North America, LLC,* 370 NLRB No. 52, slip op. at 2 (2020). The Board has most often summarized the elements commonly required to support the General Counsel's initial burden as (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) antiunion animus, or animus against protected activity, on the part of the employer. Id. But the General Counsel does not invariably sustain his burden by producing any evidence of animus or hostility toward union or other protected concerted activity. Rather, the evidence must be sufficient to establish a causal relationship between the employee's protected activity and the employer's adverse action against the employee. Id., citing *Tschiggfrie Properties, Ltd*., 368 NLRB No. 120, slip op. at 6–8 (2019).

Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428-1429 (11th Cir. 1985). Direct evidence of unlawful motivation is seldom available, and, therefore, the General Counsel may rely upon circumstantial evidence to meet the burden. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Circumstantial evidence is used frequently to establish knowledge and animus because an employer is unlikely to acknowledge improper motives in discipline and termination. *NLRB v. Health Care Logistics*, 784 F.2d 232, 236 (6th Cir. 1986), enfg. in part 273 NLRB 822 (1984); see also *Overnite Transportation Co*., 335 NLRB 372, 375 (2001) ("The Board has long recognized that direct evidence of an unlawful motive, i.e., the proverbial smoking gun, is seldom obtainable. Hence, an unlawful motive may be inferred from all of the surrounding circumstances.").

If the General Counsel makes the initial showing, the burden shifts to the Respondent to establish that it would have disciplined or discharged the employee for a legitimate, nondiscriminatory reason. *Tschiggfrie Properties,* 368 NLRB No. 120, slip op. at 3 (2019). An employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *Manno Electric, Inc*., 321 NLRB 278, 280 fn. 12 (1996), and *T & J Trucking Co*., 316 NLRB 771 (1995).

In this case, the evidence clearly establishes that Kelly engaged in union activity and that Respondent was aware of this activity. Kelly began wearing union shirts and displaying union stickers at work beginning on May 6, 2019. (Tr. 188.) Skerston saw Kelly wearing the union shirt and asked him about it. Furthermore, Skerston was well aware of Kelly's strike activity beginning in May 2019. Thus, the General Counsel has established that Kelly engaged in union activity and that Skerston was aware of this activity.

The evidence further establishes that Respondent bore animus toward Kelly's union activity and toward the Union in general. Respondent hired Misercola to discourage union activity by its employees. With regard to Kelly specifically, when Skerston saw Kelly wearing a union shirt at work for the first time, he asked, "Are you kidding me?" He further compared Kelly to Joe Ellena, another replacement worker who had gone on strike in support of the Union.

Moreover, animus can be inferred from other evidence, such as "suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past

practices, tolerance of behavior for which the employee was allegedly [disciplined], and disparate treatment." *Medic One, Inc.*, 331 NLRB 464, 475 (2000). See also *Temp Masters, Inc.,* 344 NLRB 1188, 1193 (2005) (timing); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999) and *Roadway Express*, 327 NLRB 25, 26 (1998) (disparate treatment); *Baptist Hospital, Orange,* 328 NLRB 628, 635 (1999) (failure to follow established procedures).

The timing of Respondent's discipline of Kelly provides strong evidence of animus. Skerston prepared a disciplinary notice for Kelly on the very same day that Kelly first wore a union shirt at work. In fact, Skerston prepared 5 disciplinary notices for Kelly that were dated between May 6 and 9. The timing of these disciplinary actions provides evidence of animus.

Furthermore, Kelly went on strike from May 9 until he returned to work on July 8. Two days later, on July10, Skerston prepared another employee warning notice for Kelly. Less than a month later, on August 7, Skerston prepared a disciplinary notice for Kelly for being late to work. One week later, on August 14, when Kelly was again tardy, Skerston decided to terminate his employment. During the period between May 6 and August 14, Kelly was present at the Vermillion Quarry (and not on strike) for just under 8 weeks. During this timeframe, Skerston prepared seven employee warning notices for Kelly. For the period from March 20, 2018 through August 14, 2019, Respondent disciplined Matt Kelly 8 times and disciplined other employees 12 times. Thus, of the 20 disciplinary records provided at the hearing for this time period, Kelly accounted for 40 percent.

The evidence establishes that Kelly was the only employee discharged for attendance, or any other reason between March 2018 and August 2019. Furthermore, he received 40 percent of all discipline issued by Respondent during that period.

Respondent further failed to follow its own policies in disciplining Kelly. Respondent allegedly disciplined Kelly for a lock out/tag out (safety) violation, excessively entering the shop (performance), using a cell phone while driving a truck (safety), and damaging company equipment (safety) between May 7 and July 10. Skerston indicated that the damage to company equipment on May 9 was Kelly's final warning for safety. (GC Exh. 13.) Despite this final warning, Kelly was issued another final warning for safety on July 10. (GC Exh. 17.) Respondent's own disciplinary policies call for termination of employment after a final warning for safety. Kelly's warning notices also fail to mention his prior infractions. Failure to follow established disciplinary procedures provides support for a finding of unlawful motivation. *Baptist Hospital, Orange,* 328 NLRB at 635. In this instance, Skerston failed to follow Respondent's disciplinary policies and I find this supports a finding of unlawful motivation on the part of Respondent.

The burden now shifts to Respondent to establish that it would have discharged Kelly in the absence of his protected conduct. *Monroe Mfg*., 323 NLRB 24, 27 (1997); *T & J Trucking Co.*, 316 NLRB 771, 771 (1995), enfd. mem.86 F.3d 1146 (1st Cir. 1996). ". . . [A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp*., 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). A number of factors point out that Respondent's defenses are pretextual, and Respondent therefore failed to meet its burden.

Respondent asserts that it discharged Kelly for his attendance violations. When an employer is unable to maintain a consistent explanation for its conduct, but rather resorts to shifting defenses, "it raises the inference that the employer is 'grasping for reasons to justify' its unlawful conduct." *Meaden Screw Products Co.*, 336 NLRB 298, 302 (2001), citing *Royal Development Co. v. NLRB,* 703 F.2d 363, 372 (9th Cir. 1983). See also *Master Security Services*, 270 NLRB 543, 552 (1984) (animus demonstrated where an employer used a multiplicity of reasons to justify disciplinary action). In this case, despite writing up Kelly for a multiplicity of reasons, over a short period of time, Skerston only relied on the attendance violations as the reason for discharging Kelly.

Although Kelly was written up 5 times between May 6 and 9, he was not provided with copies of the warning notices allegedly issued to him until August. Failure to present employees with copies of written disciplines supports finding of pretext. *Lord Industries, Inc.,* 207 NLRB 419, 422 (1973). Skerston's failure to present Kelly with his employee warning notices is supported by Kelly's reacting at his interview on August 14 and his text message to Russo on August 7. In both instances, Kelly indicated that he had not received the notices. It is also supported by Skerston's statement on August 14 that he had supplied the disciplinary forms to Russo. Two of the disciplines that Respondent failed to provide to Kelly formed the basis for his discharge. As such, I find that Respondent's asserted reason for discharging Kelly was pretextual.

The General Counsel has met his burden to establish that Matt Kelly engaged in union activity, that Respondent was aware of this activity, and that Respondent bore animus toward this activity. Respondent has not met its responsive burden to establish that it would have taken the same actions against Kelly in that absence of his union activity. Therefore, I find that Respondent violated Section 8(a)(3) and (1) of the Act when it disciplined employee Matt Kelly on May 6, 7, 8, 9, July 10, and August 7, 2019, and when it terminated Kelly's employment on August 14, 2019.

F. Interview of Matt Kelly (Complaint Pars. 5(b), (c), and (d))

The General Counsel alleges that on August 14, 2019, Respondent violated Section 8(a)(1) of the Act when it interviewed employee Matt Kelly after denying his request for a union representative during the interview, which Kelly reasonably believed could result in discipline. I find that the General Counsel has proven this violation.

Section 7 guarantees an employee the right (generally referred to as a "*Weingarten* right") to be accompanied and assisted by a union representative at an "investigatory" interview, which is one the employee reasonably believes may result in disciplinary action. *NLRB v. Weingarten*, 420 U.S. 251, 260 (1975). In *Weingarte*n, 420 U.S. 251, 256 (1975), the Supreme Court held that an employee had the right to union representation at "an interview which he reasonably fears may result in his discipline." The Court noted that a "lone employee" confronted by an employer investigating whether certain conduct deserves discipline

may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." Id. at 262-263. The presence of "[a] knowledgeable union representative" would protect the employee from being overpowered by the employer and assist the investigation. Id. at 263.

It is beyond dispute that an employer has a legitimate interest in investigating facially valid complaints of employee misconduct, such as Kelly's in this case. *PAE Applied Technologies, LLC,* 367 NLRB No. 105, slip op. at 5 (2019), citing *Fresenius USA Mfg. Inc*., 362 NLRB 1065, 1065 (2015), and *Consolidated Diesel Co*., 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345 (4th Cir. 2001). As in *PAE Applied Technologies,* Respondent here had a legitimate interest in getting Kelly's side of the story and determining what level of discipline was merited. However, the interview could have been delayed until Calkins could arrive.

While *Weingarten* rights do not apply where the sole purpose of a meeting is the imposition of predetermined discipline, if the employer goes beyond merely informing the employee of a previously made disciplinary decision the full panoply of protections accorded the employee under *Weingarten* may be applicable. *PAE Aviation & Technical Services, LLC,* 366 NLRB No. 95 slip op. at 2 (2018). Thus, if the employer seeks facts or evidence in support of its disciplinary action . . . the employee's right to union representation would attach." *Baton Rouge Water Works Co*., 246 NLRB 995, 997 (1979). In this instance, Skerston asked Kelly questions about the events surrounding his tardiness on August 14. The notice of suspension pending investigation given to Kelly indicated that he was suspended, in part, for what he told Skerston on August 14. Therefore, this meeting was an investigatory interview at which Kelly had *Weingarten* rights.

Once an employee makes a valid request for union representation, the employer is permitted one of three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all. *Washoe Medical Center, Inc.,* 348 NLRB 361, 367 (2006), citing *Consolidated Freightways Corp*., 264 NLRB 541, 542 (1982), and *General Motors Co*., 251 NLRB 850, 857 (1980). Under no circumstances may the employer continue the interview without granting the employee union representation unless the employee voluntarily agrees to remain unrepresented. *Washoe Medical Center,* 348 NLRB at 367. Respondent cites no case law in support of its assertion that *Weingarten* rights do not attach to replacement workers hiring during a strike.

The credited evidence establishes that Kelly asked for Lyle Calkins to be present for his interview. Calkins is the only union steward for employees at both of Respondent's LaSalle County quarries and his appointment letter specifically states that he should be present for any investigatory interviews of unit employees. Skerston declined Kelly's request, stating that Calkins was too far away at the other quarry. Instead, Skerston found another employee, with no position with the Union, to represent Kelly in the interview. Gibson was not "[a] knowledgeable union representative," who could protect Kelly from being overpowered by the employer. See *Weingarten,* 420 U.S. at 263. Furthermore, while claiming that Calkins was unavailable because he worked at the other quarry, Respondent offered no explanation as to how Tom Becker, the site superintendent from the other quarry, came to be present for the meeting. Instead of proceeding with the meeting, Skerston should have delayed the meeting until Calkins or another union official could be present. By proceeding with the investigatory interview after denying Kelly's request for a union representative, Respondent violated Section 8(a)(1) of the Act.

G. Respondent's Affirmative Defenses

In its answer to the complaint in this case, Respondent raised three affirmative defenses: that the allegations in the complaint are time-barred under Section 10(b) of the Act; that Matt Kelly did not have *Weingarten* rights as a permanent replacement worker; and that Respondent would have discharged Kelly regardless of his concerted activity. (GC Exh. 1(ee).) I have already addressed the second and third defenses regarding Kelly above. Respondent did not present any evidence, testimony, or citations to case law in support of its Section 10(b) defense. The proponent of an affirmative defense has the burden of establishing it. *Babcock & Wilcox Construction Co*., 361 NLRB 1127, 1140 (2014), citing *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004) (finding the burden on the party raising an untimely charge defense under Sec. 10(b) of the Act), enfd. 483 F.3d 628 (9th Cir. 2007). As Respondent presented no evidence supporting its 10(b) affirmative defense, and the affirmative defense was not raised in Respondent's brief, I will not address it further.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. International Union of Operating Engineers, Local 150, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. By changing the punch-in policy for unit employees without providing the Union with notice or an opportunity to bargain, Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act.
4. By requiring employee Joe Ellena to sign a preferential hiring list located at its Vermillion Quarry, Respondent has violated Section 8(a)(3) and (1) of the National Labor Relations Act.
5. By removing union picket signs from public property, Respondent has violated Section 8(a)(1) of the National Labor Relations Act.
6. By disciplining and discharging employee Matt Kelly for his union activity, Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act.
7. By interviewing employee Matt Kelly after denying his request for a union representative, Respondent violated Section 8(a)(1) of the National Labor Relations Act.
8. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

Respondent, having unlawfully discharged Matt Kelly, must offer him reinstatement to his former job or, if that job no longer

exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed. Respondent shall make Matt Kelly whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. The make whole remedy shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc*., 364 NLRB No. 93 (2016), the Respondent shall compensate Matt Kelly for search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate Matt Kelly for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB 1324 (2016). Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 25 a report allocating Matt Kelly's backpay to the appropriate calendar year or years. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. Respondent shall also be required to remove from its files any references to the unlawful discipline and discharge of Matt Kelly and to notify him in writing that this has been done and that the discipline and discharge will not be used against him in any way.

Furthermore, having unilaterally changed the punch-in policy for its unit employees, Respondent shall, at the request of the Union, rescind the policy.

Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Respondent's Vermillion Quarry and Troy Grove Quarry wherever notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed either or both of the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2, 2019. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 25 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3612]

ORDER

Respondent, Troy Grove, a Div. of Riverstone Group, Inc., and Vermillion Quarry, a Div. of Riverstone Group, Inc., Moline, Illinois, and its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally, and in the absence of a good-faith bargaining impasse in negotiations, implementing a change with respect to the punch-in policy, a mandatory subject of bargaining that relates to wages, hours, or other terms and conditions of employment.

(b) Requiring employees who were former strikers, as a condition of exercising their reinstatement rights, to sign a preferential hiring list located at its facility.

(c) Removing union picket signs in support of a strike by our employees from public property.

(d) Disciplining and/or discharging employees for union or other protected, concerted activity.

(e) Denying an employee request for a union representative at an investigatory interview that the employee reasonably believes might result in discipline.

(f) In any like or related manner interfering with, restraining, or coercing employees 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) Upon request of the Union, rescind the punch-in policy posted in January 2019.

(b) If it has not already done so, place Joe Ellena on its preferential hiring list, effective July 10, 2019.

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

(d) Make Matt Kelly whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(e) Compensate Matt Kelly for the adverse tax consequences, if any, of receiving a lump-sum backpay award and file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or board order, a report allocating Matt Kelly's backpay award to the appropriate calendar year or years.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline and discharge of Matt Kelly and within 3 days thereafter, notify Matt Kelly in writing that this has been done and that the discipline and discharge will not be used against him in any way.

(g) Within 14 days after service by the Region, post at its facilities in Oglesby and Utica, Illinois, copies of the attached

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

notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2, 2019.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 25 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.

Dated, Washington, D.C. January 11, 2021.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT, upon request, fail and refuse to bargain collectively and in good faith with International Union of Operating Engineers, Local 150, AFL–CIO (Union) as the exclusive collective-bargaining representative of our employees in the following appropriate bargaining unit:

> The employees described in Article 1, Section 1 of the collective bargaining agreement between Respondent and the Charging Party which was effective from July 30, 2014 to May 1, 2016.

WE WILL NOT, refuse to meet and bargain in good faith with your Union about any proposed changes in wages, hours, and working conditions, including our policy regarding employee punch-in times, before putting such changes into effect.

WE WILL NOT, will not require employees who make unconditional offers to return to work to come into our facility to sign a preferential hiring list.

WE WILL NOT, remove union picket signs in support of a strike by our employees from public property.

WE WILL NOT, discipline you because of your union or other protected, concerted activity.

WE WILL NOT, discharge you because of your union or other protected, concerted activity.

WE WILL NOT, deny your request for union representation during an investigatory interview at which you reasonably believe disciplinary action will be taken against you.

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

WE WILL, upon request, meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of our unit employees.

WE WILL, if requested by the Union, rescind our policy prohibiting employees from punching in more than five minutes prior to the start of their shift.

WE WILL, if we have not already done so, place Joe Ellena on the preferential hiring list.

WE WILL, offer Matt Kelly immediate and full reinstatement to his former job, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL, pay Matt Kelly for the wages he lost because we unlawfully suspended and discharged him.

WE WILL, remove from our files all references to the discipline of Matt Kelly and WE WILL notify him in writing that this has been done and that the discipline will not be used against him in any way.

WE WILL, remove from our files all references to the discharge of Matt Kelly and WE WILL notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, compensate Matt Kelly for any adverse tax consequences that may result from receiving a lump-sum backpay award.

WE WILL, file a report with the Regional Director of Region 25 allocating the backpay award to the appropriate calendar year or years for purposes of reporting to the Social Security Administration.

TROY GROVE, A DIV. OF RIVERSTONE GROUP, INC., AND VERMILLION QUARRY, A DIV. OF RIVERSTONE GROUP, INC.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/25-CA-234477 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202)273-1940.

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