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Morgan Corp. ***and*** **Russell Paul Bannan.** Case 10–CA–250678

September 27, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS RING AND WILCOX

On September 25, 2020, Administrative Law Judge Sharon Levinson Steckler issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

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

The issue presented here is whether the Respondent violated Section 8(a)(1) of the National Labor Relations Act when it discharged employee Russell Paul Bannan.[3] For the reasons that follow, we find, on grounds different than articulated by the judge, that Bannan's discharge was unlawful because it was a reprisal for the protected concerted activity of other employees. Accordingly, we need not determine whether Bannan himself engaged in such activity, nor do we pass on the legal theories relied on by the judge, or theories that might otherwise be supported by the record here, for finding the discharge unlawful.

I.

The administrative law judge's decision fully sets out the material facts, which we summarize here. The Respondent, a Duncan, South Carolina construction company that performs heavy-earth moving, hired Russell Bannan to a management-track position as a truck driver, despite his minimal construction experience, on the recommendation of his friend Ben Boland, an official of the Respondent. In August 2019, Bannan began work at the Respondent's Rockingham, North Carolina project site. He was subject to an initial 90-day probationary period. His starting wage rate was $17 per hour.

Around 8 to 10 other employees worked at the site. Bannan was assigned to work with and receive training from Jeremy Elsenpeter, an experienced truck operator. Boland told Supervisor Kenneth Weston to groom Bannan for management.

Bannan had some attendance issues during his time at the Respondent. Nonetheless, on October 3, a month-and-a-half after starting work at the Respondent, Bannan met with Vice President William Heape at Bannan's request to discuss the possibility of accelerated career progression. Heape suggested Bannan seek more management-type experiences at the Respondent and gave Bannan a $3-per-hour raise to reward him for his leadership and initiative, making his hourly rate $20 per hour. Typically, probationary employees of the Respondent did not receive raises.

Later, in a text exchange, Boland advised Bannan "not [to] tell anyone at the job," including Weston, about the raise. Shortly thereafter, despite Boland's warning, Bannan talked about his raise with one of the Respondent's supervisors, Foreman Ronnie Rust, who demurred, telling Bannan that they were not supposed to discuss wages.

On October 17, during a 45-minute phone conversation, Bannan told employee Elsenpeter that he had received a raise. Elsenpeter asked him how much. While Bannan resisted telling him at first, he eventually gave in and disclosed that his raise was $3 per hour. Elsenpeter was angry when he found out the amount of Bannan's raise relative to his own recent raise (from $17.50 to $18). He described the inequity as "messed up." Bannan expressed sympathy, telling Elsenpeter the situation "sucked." He advised Elsenpeter to seek a raise of his

[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, Inc.*, 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. In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[2] The Respondent's exceptions note that the judge's decision includes contradictory findings with respect to Ben Boland's status as an agent of the Respondent under Sec. 2(13) of the Act. It is unnecessary to resolve this issue, as it has no bearing on the outcome here.

We have modified the judge's recommended Order in accordance with our decision herein, and in accordance with our recent decisions in *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), and *Paragon Systems*, 371 NLRB No. 104 (2022). We shall also substitute a new notice to conform to the Order as modified.

[3] Sec. 8(a)(1) of the Act makes it "an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." 29 U.S.C. §158(a)(1). Sec. 7 grants employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157.

own, but that in doing so Elsenpeter should "be strategic and play his cards right." Bannan told at least two other employees about his raise in the coming days. One of them, "Leon,"[4] seemed surprised about Bannan's raise, and Bannan encouraged that employee, too, to seek a raise: "[I]f you want anything you've got to make some noise and . . . you know, you should ask management."

Subsequently, on October 20, Elsenpeter asked Supervisor Weston whether he had heard about Bannan's $3.00-per-hour raise and told Weston he thought he should receive a raise. Weston promised to check into it and get Elsenpeter more money. Elsenpeter, who was visibly upset, told Weston that he and two other employees were threatening to quit because of Bannan's raise.

For Supervisor Weston, Bannan's wage disclosure was "the last straw." Although the Respondent did not maintain a written policy against discussing wages, Weston's unwritten policy was that he "didn't allow" employees to discuss wages because of the "bad blood" it caused. Weston communicated with Vice President Heape on October 23 and 24 about Bannan's disclosure and the anger simmering among the workforce over Bannan's raise. Heape expressed worry that news of Bannan's raise was causing problems at the site, given that employees were threatening to quit as a result of the perceived unfairness.

After considering Bannan's wage disclosure in light of his record at the Respondent, Vice President Heape decided to terminate him. Specifically, in handwritten notes entitled "Explanation of letting [Bannan] go," Heape stated that Bannan was discharged because of his attendance issues and because he "[s]pread the word of the raise and now we have problems on the job site." On October 25, Heape terminated Bannan, telling him it was because of his attendance issues and because he had discussed wages with "a more senior operator," thereby "caus[ing] problems." Heape said he had an employee "mutiny" on his hands. In a summary of their meeting, Heape wrote that Bannan had "told a more tenured operator the specifics of his hourly rate increase," which "created unrest with our tenured operator because [Bannan's] hourly rate . . . was now higher than the tenured operator's rate . . . ."

II.

Applying the *Wright* Line framework governing mixed-motive discharges,[5] the administrative law judge found (1) that Bannan had engaged in protected concerted activity when he discussed his pay with other employees and encouraged them to seek higher wages, which they did; (2) that the Respondent knew that Bannan had discussed his wages with at least one other employee, Elsenpeter; and (3) that the Respondent had animus against the discussion of wages among employees generally and specifically against Bannan's discussion of wages with other employees. The judge accordingly found that the General Counsel had carried his initial burden of proof by establishing a causal relationship between Bannan's protected concerted activity and his discharge. The judge then determined that the Respondent had failed to carry its *Wright Line* defense burden to establish that it would have discharged Bannan regardless of his protected concerted activity. The Respondent's purported reliance on Bannan's attendance issues was merely a pretext, the judge found.

Separately, the judge noted that even if Bannan himself had *not* engaged in protected concerted activity, his discharge was still unlawful, inasmuch as it represented a "preemptive strike" by the Respondent against *future* protected concerted activity under the Board's decision in *Parexel International, LLC*, 356 NLRB 516, 518–519 (2011).

III.

On the facts here, we agree with the judge that employee Bannan's discharge violated Section 8(a)(1), but on a different rationale. Where the unlawful conduct is alleged in the complaint and the evidence establishes a violation under Board law, the Board is not limited by the legal theories applied by an administrative law judge or advanced by the General Counsel.[6]

A.

Discharging an employee for engaging in protected concerted activity violates Section 8(a)(1) of the Act because it "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of" their Section 7 rights. Section 7, as noted, gives employees the right to "engage in . . . concerted activities for . . . mutual aid or protection." 29 U.S.C. §157. Thus, as the Board has explained, the statutory concept of protected concerted activity has two elements: the employee's activity must be "concerted," and it must be "for mutual aid or protection." E.g., *Fresh*

[4] Leon's last name does not appear in the record.

[5] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[6] "The Board, with court approval, has repeatedly found violations for different reasons and on different theories from those of administrative law judges or the General Counsel, even in the absence of exceptions, where the unlawful conduct was alleged in the complaint." *Electrical Workers IBEW Local 58 (Paramount Industries)*, 365 NLRB No. 30, slip op. at 4 fn. 17 (2017) (emphasis omitted; collecting cases), enfd. 888 F.3d 1313 (D.C. Cir. 2018). See, e.g., *W.E. Carlson Corp.*, 346 NLRB 431, 434 (2006).

& Easy Neighborhood Market, Inc., 361 NLRB 151, 152–153 (2014).[7]

"[W]hether an employee's activity is 'concerted' depends on the manner in which the employee's actions may be linked to those of his coworkers." Id. at 153 (citing, inter alia, *NLRB v. City Disposal Systems,* 465 U.S. 822, 831 (1984)). The Board has held that concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). "Mutual aid or protection," in turn, "focuses on the *goal* of concerted activity; chiefly, whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees.'" *Fresh & Easy*, supra, 361 NLRB at 153 (emphasis in original) (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)).

As explained, the judge found that Bannan had engaged in protected concerted activity. We need not pass on that finding here, however, because it is also well established that an employee's discharge may be unlawful under Section 8(a)(1), even if the employee did *not* engage in protected concerted activity, because of the predictable effect of the discharge on other employees who may have done so. The Supreme Court has observed that

> under § 8(a)(1), an employer commits an unfair labor practice if he or she "interfere[s] with, [or] restrain[s]" concerted activity. It is possible . . . for an employer to commit an unfair labor practice by discharging an employee who is not himself involved in concerted activity, but whose actions are related to other employees' concerted activities in such a manner as to render his discharge an interference or restraint on those activities.

NLRB v. City Disposal Systems, supra, 465 U.S. at 833 fn. 10. In *Meyers II*, supra, the Board necessarily acknowledged this possibility, even as it found no "chilling effect" on other employees as a result of the discharge at issue there. 281 NLRB at 888–889. The Board's decisions since *Meyers II*, in turn, demonstrate that the possibility can be realized in a range of situations, including when an employee is discharged in retaliation for protected concerted activity undertaken by other employees. See *Parexel*, supra, 356 NLRB at 519.[8] "What is critical in those cases is not what the employee did, but rather the employer's intent to suppress protected concerted activity." Id. Thus, for example, when an employer discharges a group of employees to retaliate against protected concerted activity by some of them, the discharge of those employees who did *not* engage in protected concerted activity is unlawful just the same. Id. at 519 fn. 11 (citing *Majestic Molded Products v. NLRB*, 330 F.2d 603, 606 (2d Cir. 1964) (employer's retaliatory "power display in the form of a mass-layoff" was unlawful)). See, e.g., *City Stationery, Inc.*, 340 NLRB 523, 524 (2003).

B.

Here, the record convincingly demonstrates that by discharging Bannan, the Respondent intended to suppress protected concerted activity among his coworkers. To recall, the Respondent had an unwritten policy prohibiting employees from discussing their wages. Bannan told at least two employees that he had received a pay raise, and he advised at least one coworker, Elsenpeter, to seek his own raise. Elsenpeter complained about the raise to the Respondent's management, and in doing so he revealed that other employees were also displeased and were threatening to quit unless they, too, received higher wages. Bannan then was fired. Bannan was told by the Respondent's vice president, Heape, that he was being discharged for disclosing his raise to other employees and for the resulting activity by other employees, which Heape called a "mutiny."

The evidence is clear that Bannan's discharge was inextricably linked to the indisputably protected concerted activity of employee Elsenpeter, who complained to supervisor Weston about Bannan's raise and who told Weston that he and two other employees were threatening to quit because of it. Elsenpeter's conduct represents the core of concerted activity as described in *Meyers II*. Concerted activity, the Board said there, "encompasses . . . individual employees bringing truly group complaints to the attention of management." 281 NLRB at 887. Elsenpeter's complaint about Bannan's raise was a group complaint, shared by other employees (as Elsenpeter relayed to supervisor Weston). There can be no doubt that the element of "mutual aid or protection" is satisfied here. In advocating for higher wages, employees obviously are "seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees.'" *Fresh & Easy*, supra, 361 NLRB at 153.

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[7] Member Ring agrees that concertedness and mutual aid or protection are separate elements as stated in *Fresh & Easy Neighborhood Market*, supra, but he takes no position on whether that case was otherwise correctly decided.

[8] Member Ring agrees that an employer may violate Sec. 8(a)(1) by discharging an employee in retaliation for another employee's or other employees' protected concerted activity. He expresses no views, however, regarding *Parexel*'s "preemptive strike" theory.

Discharging Bannan, in turn, was a display of the Respondent's power. It sent a clear message to Elsenpeter and to other employees that wage-related agitation among employees would not be tolerated, reasonably tending to chill any future exercise of Section 7 rights. Whether or not Bannan himself engaged in protected concerted activity, his discharge was unlawful because, in the Supreme Court's words, Bannan's "actions [were] related to other employees' concerted activities in such a manner as to render his discharge an interference or restraint on those activities." *NLRB v. City Disposal Systems*, supra, 465 U.S. at 833 fn. 10. Bannan's discharge, then, was plainly a reprisal for other employees' protected concerted activity, whether or not he engaged in such activity himself. Under Board law, as already noted, such reprisals are unlawful.

IV.

For all of the reasons offered here, we conclude that in discharging Bannan, the Respondent violated Section 8(a)(1) of the Act, and we will order his reinstatement with backpay, along with the other standard remedies in cases like this one.

ORDER

The National Labor Relations Board orders that the Respondent, Morgan Corp., Duncan, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees as a reprisal for the protected concerted activities of other employees.

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

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

(a) Within 14 days from the date of this Order, offer Russell Paul Bannan 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.

(b) Make Russell Paul Bannan 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 the judge's decision as amended in this decision.

(c) Compensate Russell Paul Bannan for any adverse tax consequences of receiving a lump-sum backpay award, and, within 21 days of the date the amount of backpay is fixed by agreement or Board order, file with the Regional Director for Region 10 a report allocating the backpay award to the appropriate calendar year(s).

(d) File with the Regional Director for Region 10, 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 Russell Paul Bannan's corresponding W-2 form(s) reflecting the backpay award.

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

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

(g) Post at its facilities in Duncan, South Carolina and Rockingham, North Carolina, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 10, 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 notice shall be distributed electronically, such as by email, posting on an intranet or 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 notice is not altered, defaced, or covered by any other

[9] 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 notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted 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."

material. If the Respondent has gone out of business or closed 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 by the Respondent at any time since October 25, 2019.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 10 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. September 27, 2022

Lauren McFerran, Chairman

John F. Ring, Member

Gwynne A. Wilcox, Member

(SEAL) 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 discharge or otherwise discriminate against any of you as a reprisal for the protected concerted activities of other employees.

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

WE WILL, within 14 days from the date of the Board's Order, offer Russell Paul Bannan 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.

WE WILL make Russell Paul Bannan whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Russel Paul Bannan for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 10, 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).

WE WILL file with the Regional Director for Region 10, 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 Russell Paul Bannan's corresponding W-2 form(s) reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Russell Paul Bannan, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

MORGAN CORP.

The Board's decision can be found at www.nlrb.gov/case/10-CA-250678 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.

Joel White, Esq., for the General Counsel.
Richard Morgan, Esq., for Respondent.
Jake Erwin, Esq., for Charging Party.

DECISION

SHARON LEVINSON STECKLER, ADMINISTRATIVE LAW JUDGE. Counsel for the General Counsel (General Counsel) alleges that Respondent Morgan Corp. (Respondent) violated Section 8(a)(1) when it terminated Charging Party Russell Bannan (Bannan) after he discussed wages with other employees. Bannan was a probationary employee hired for possible promotion to management track. During his probationary period, he received a significant wage increase.

STATEMENT OF THE CASE

Procedural History

On October 28, 2019,[1] Charging Party filed the above-captioned charge, which was served upon Respondent by mail on the same date. General Counsel issued the complaint on January 30, 2020, and served it upon Respondent by certified mail. The complaint scheduled hearing for Spartanburg, South Carolina on March 31, 2020, but was delayed due to the COVID-19 pandemic. The hearing was rescheduled for July 14, 2020, again for Spartanburg.

By mid-March 2020, the entire nation was in the throes of the COVID-19 pandemic and the Agency canceled all in-person hearings. On June 15, 2020, the Regional Director ordered that this hearing be held by videoconference. On June 16, 2020, Respondent filed a motion in opposition to the Regional Director's order for a videoconference hearing and offered to rescheduled to September 2020. Respondent raised that credibility would be an issue in the hearing. General Counsel, on June 18, 2020, filed its opposition to the Respondent's motion. General Counsel cited the increasing number of COVID-19 cases in South Carolina as making the hearing unsafe and relied upon *Morrison Healthcare*, 369 NLRB No. 76 (2020), in which the Board approved videoconference hearings for representation cases during the COVID pandemic. On June 19, 2020, Deputy Chief Judge Arthur Amchan denied Respondent's motion and ordered a videoconference hearing via Zoom. He balanced the risks of an in-person hearing against prolonged unknown delays in conducting the hearing. He further noted that scheduling the hearing for September was speculative. After the hearing record was opened, Respondent lodged a running objection to conducting the hearing by Zoom. I overrule Respondent's continuing objection. After the hearing closed, the Board denied a respondent's special appeal for an in-person hearing, rather than the ordered videoconference hearing in an unfair labor practice case. *William Beaumont Hospital*, 370 NLRB No. 9 (2020). Also see *XPO Cartage, Inc.*, 370 NLRB No. 10 (2020). The compelling circumstances of the pandemic created a need to proceed to a video hearing. Further, the Board directed that the administrative law judge would retain discretion to determine whether due process factors were met. Id. For this hearing, Respondent presented its witnesses, cross-examined General Counsel's witnesses and developed documentary evidence. Several the case facts were not controverted. The case was not document intensive. Witnesses were separated from counsel during testimony. I was able to assess witness demeanor, including those related to contemporaneous documentation. We fortunately had few technical challenges, which were handled expeditiously. I therefore find that Respondent was denied not due process by holding this hearing via videoconferencing.

[1] All dates occurred in 2019 unless stated otherwise.

FINDINGS OF FACT[2]

I. JURISDICTION

Respondent admits, and I find, that at all material times, Respondent has been a South Carolina corporation with an office and place of business in Duncan, South Carolina, where it is engaged in construction and site preparation operations. In conducting its operations, Respondent annually provided services valued in excess of $50,000 directly to customers outside the State of South Carolina. Respondent admits, and I find, Respondent has been an employed engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. BACKGROUND

Respondent primarily provides heavy earth moving. The operations may cover nuclear power sites, mining operations or paving. It grades sites and installs utilities in the ground.

The company vice-president in charge of the Spartanburg Division is William Heape. The Spartanburg division covers

[2] The Findings of Fact include citations to the record to aid review and are not necessarily exclusive or exhaustive. The findings and conclusions are not based solely on those specific records citations, but also my review and consideration of the entire record for this case. The Findings of Fact encompass the credible testimony, evidence presented and logical inferences.

A number of the facts are uncontroverted. Where the facts are controverted, credibility determinations are made. The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, 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, 303–305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Lincoln-Mercury-Mitsubishi, Inc*., 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Contrary to Respondent's position, credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.

When a witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Testimony from current employees tend to be particularly reliable because it goes against their pecuniary interests when testifying against their employer. *Gold Standard Enterprises, Inc*., 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961); *Gateway Transportation Co., Inc.*, 193 NLRB 47, 48 (1971); *Fed. Stainless Sink Div. of Unarco*, 197 NLRB 489, 491 (1972). Where a witness was not questioned about potentially damaging statements attributed to him or her by an opposing witness, it is appropriate to draw an adverse inference and find the witness would not have disputed such testimony. *L.S.F. Transp., Inc*., 330 NLRB 1054, 1063 fn. 11 (2000); *Asarco Inc*., 316 NLRB 636, 640 fn. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996).

upstate South Carolina and includes Rockingham, North Carolina. Respondent employs 500 workers, including truck drivers, bulldozer operators, and laborers. The Spartanburg division employs 80 to 90 employees. A single large project may employ 50 to 60 employees.

In 2019, Respondent's operations in Rockingham covered a project at Vulcan Materials, which was a quarry site. At this project, Respondent was responsible for removing dirt lying on a rock layer. The superintendent at the Rockingham project was Kenneth Weston. Weston's duties included receiving calls from employees about calling in sick, disciplining employees and answering employee questions. Weston reported to a project manager, Chase Wideman, who in turn reported to Vice President Heape.

Weston's past project manager was Ben Boland. Weston stated Boland, although an estimator at the time of these events, also still managed projects "from time to time."[3] (Tr. 171–172.)[4] However, the documentary evidence reflect Boland has been an estimator before Bannan was hired. Weston also characterized Boland's positions as being in management

III. RESPONDENT HIRES CHARGING PARTY RUSSELL BANNAN

Bannan was referred to Respondent by a friend, estimator Ben Boland. Vice President Heape and Human Resources Recruiter Jeff Fields interviewed Bannan about a management position. Bannan had no construction experience, except for some in high school. (R. Exh. 11 at 3; Tr. 50.) On August 2, Heape emailed President Lynch, saying Bannan seemed to have drive and discussing Bannan's interest in project management. (R. Exh. 11 at 4.) Lynch stated Bannan could be hired as an operator and reevaluated at 90 days. Id.

Vice President Heape hired Bannan to work as a truck driver at the Rockingham project. Bannan was in a 90-day probationary period. Respondent planned to move Bannan into management but required that he learn the business from "the bottom up." On August 13, Bannan signed orientation documents, which included an acknowledgement of receipt of the Employee Conduct and Work Rules. His initial pay rate was $17.00 per hour.

On August 14, Bannan started working at the Rockingham site. Approximately 8 to 10 additional employees worked there. (Tr. 86.) For truck driver training, Respondent assigned Bannan to Jeremy Elsenpeter, a more senior truck operator. (Tr. 38.) Elsenpeter began work with Respondent on June 12 and had significant previous experience as a driver. (R. Exh. 19.) Their direct supervisor was Superintendent Weston. (Tr. 87.)

Boland asked Weston to groom Bannan for a possible management position. (Tr. 169.) On one occasion, Bannan told Weston that he needed to see Boland. Afterwards, Bannan uncontrovertibly testified that Weston ridiculed him, in front of other employees, about his relationship with Boland. (Tr. 127, 142.) Bannan talked to Elsenpeter about his goal to become a project engineer. Current employee Fulmore also asked Bannan about his goal to be project engineer. (Tr. 162.)

Bannan stated he discussed wages with other employees during his employment, but no managers were present. (Tr. 129.)[5]

IV. RESPONDENT GIVES BANNAN A RAISE AND DISCIPLINES HIM FOR A NO CALL NO SHOW

On October 3, Bannan emailed Vice President Heape to request a meeting about his career progression. On October 4, they met at Respondent's headquarters. Heape advised that Bannan needed experience in lead roles, such as foreman, to gain further experience and prove his leadership skills. Bannan and Heape did not discuss Bannan's attendance record. (Tr. 130.) Respondent contends that Bannan made no mention of his absences, but nothing in the record reflects Heape making an inquiry about his attendance. Heape gave Bannan a $3.00 per hour raise, making his hourly rate $20 per hour. Respondent usually did not give raises to probationary employees but Heape noted, "[Bannan] has taken on additional 'lead person' type duties as he seeks to expand his knowledge of construction and understand Morgan's culture." (GC Exh. 2; R. Exh. 8.)

Before leaving headquarters that day, Bannan visited with Boland. Boland and Bannan exchanged text messages later that day. Boland encouraged Bannan about working towards a management role. Boland also texted, at about 3:15 p.m.: "I would not tell anyone at the job including [Weston] about your pay raise." (GC Exh. 8.)

Beginning Monday October 7, Weston and Boland exchanged text messages regarding Bannan. Weston complained to Boland that Bannan called in sick for 2 more days. Boland told Weston not to "take it easy" on Bannan for him and offered to send a driver to the work site "if you need to give [Bannan] the rest of the week off." (R. Exh. 17 at 5-6.) Weston texted that Bannan would receive a warning for the no call no show day. Weston further complained that Bannan left his truck idling for 12 hours. (See, e.g., R. Exh. 17 at 23.) Boland expressed disappointment.

Before he received this raise, Bannan was absent on September 23 through 25. Heape did not know that Bannan had been absent from work in September. (Tr. 50-51; R. Exh. 11 at 3.) Bannan was absent again on October 7 and 8. On October 9, he failed to call in, accruing a "no call no show."[6] Bannan called in sick the following day, October 10. By this point, Bannan had been absent for 6 days. (Tr. 31.) Because Weston so requested, Bannan provided a doctor's note for the absences.

Weston testified that he told Project Manager Wideman about Bannan's absences. He at first said he made a report

[3] General Counsel contends that Boland is a statutory supervisor and/or agent pursuant to Section 2(11) and (13), respectively. Respondent provided documentation showing that Boland was moved to a different team as an estimator in October 2017. (R. Exh. 21.) The duties of estimator do not involve supervision.

[4] Transcript citations are noted by "Tr." with the appropriate page number. Citations to General Counsel and Respondent exhibits are abbreviated respectively by "GC Exh." and "R. Exh." Citations to General Counsel and Respondent briefs are abbreviated respectively by "GC Br." and "R. Br."

[5] Bannan also testified that he advocated on behalf of another employee for a wage increase to an unknown member of management and he thought the employee may have received a raise. (Tr. 134.) I discredit this claim as he could not recall with whom he spoke with in management.

[6] Weston testified that Bannan had "no call no shows." (Tr. 168.) The record shows Bannan only had 1 day of no call no show.

throughout the time Bannan was absent, then corrected himself to say he did not do so with each absence. (Tr. 183.) After discussion and Weston making a recommendation for disciplinary action, Wideman directed Weston to give Bannan a "write up." (Tr. 183–184.) On October 15, Superintendent Weston, with Foreman Ronnie Rust present, issued a written warning to Bannan for the October 9 no call no show. (Tr. 115; GC Exh. 3; R. Exh. 9.) The warning was the first step for progressive disciplinary action. (Tr. 34.) Weston testified that the written warning covered all absences Bannan incurred until October 15.[7] Weston advised Bannan that if he so again, Bannan would receive a 3-day unpaid suspension. (Tr. 115, 117; GC Exh. 3.) However, the disciplinary action form does not show that the next step would be a suspension; instead, the next step would be a second warning. (GC Exh. 3.) After receiving the written warning, Bannan worked every day until his termination on October 25. Bannan received no other disciplinary actions and no complaints about his work during that 10-day period. (Tr. 119.)

Bannan testified he discussed wages and his raise in particular with Rust, who told him that he was not supposed to discuss pay.[8]

Weston also testified that, among his drivers, he rated Bannan at the bottom of list for performance and experience. (Tr. 168-169.) On a 10-point scale, he rated him at about 5. Respondent's records are bereft of any disciplinary actions it took to remedy this alleged problem.

V. AFTER BANNAN DISCUSSES HIS RAISE WITH OTHER EMPLOYEES, RESPONDENT TERMINATES HIM

On Friday, October 17, as part of a 45-minute telephone conversation, Bannan told Elsenpeter that he received a raise and Elsenpeter asked how much. Bannan testified he at first would not disclose the amount of the raise, but Elsenpeter pursued the matter. (Tr. 140-141.) After Elsenpeter continued to apply pressure, Bannan eventually told him the raise was $3.00 per hour. Elsenpeter asked what Bannan's starting rate was, which Bannan said was $17.00 per hour. (Tr. 100, 141.) Elsenpeter told Bannan that he was peeved because Elsenpeter received only a 50-cent per hour raise and he was Bannan's trainer. (Tr. 147.) Bannan said that "sucked." (Tr. 147.) Bannan testified that he told Elsenpeter he should request a raise, "be strategic and play his cards right." (Tr. 101.)

Elsenpeter testified vaguely that Bannan said he brought up Elsenpeter's name while talking to Heape. At first Elsenpeter testified that Bannan said nothing else about him to Heape, but responding to the next question, Elsenpeter testified that Bannan said he told Heape that Elsenpeter was an excellent trainer. (Tr. 146.)

Bannan testified that he also separately told at least two other employees about his raise. The first employee discussion, with employee L___, was held at the check-in at the hotel in Rockingham where the employees stayed. (Tr. 101.) Bannan could not recall whether another employee was present for the conversation. L___ recently finished his probationary period, on which Bannan commented. Bannan asked if L___ received a raise after his probationary period and L answered yes. (Tr. 103.) To Bannan, L____ "seemed surprised." (Tr. 104.) Bannan encouraged L____ to ask for a raise.

About October 21, Bannan talked about his raise with a second employee, DL. This conversation took while they walked from their parking area to the equipment. (Tr. 104-105.)

The following Monday, October 20, Elsenpeter had a 6- to 7-minute conversation about what he learned with Superintendent Weston, in Weston's pickup truck. Elsenpeter asked Weston whether he heard about Bannan's $3.00 per hour raise and others had commented about it.[9] (Tr. 176.) Elsenpeter testified that he told Weston he thought he should have a raise. (Tr. 156.) Weston promised to check into it and get Elsenpeter more money.[10] Wideman later told Elsenpeter that he was at the top of his pay level for his position and Respondent would try to make it up at Elsenpeter's next evaluation. (Tr. 157.) Weston testified that Elsenpeter, who was visibly upset, told him that Elsenpeter and two other employees were threatening to quit because of Bannan's raise. (Tr. 176, 185.)

Weston testified that, with a small crew, losing employees would be a difficult situation. (Tr. 185.) For Weston, Bannan's wage discussion was "the last straw." (Tr. 185.)

On October 23, Weston emailed Vice President Heape about Bannon and the conversation he had with Elsenpeter. Heape emailed back, asked Weston to call him about Bannan "and the issues that are festering just below the surface and me not wanting to possibly lose [sic] some of the crew." (R. Exh. 11 at 9.)

On October 24, Heape and Weston spoke by phone about what might cause loss of crew members. Heape also took notes of the conversation. (GC Exh. 6.)[11] Heape's undated notes reflect attendance issues and that Bannan "spread the word of the raise and we now have problems on the job site. The raise [was] not a truck driver raise . . . a progression raise." (R. Exh. 11.) Weston testified he told Heape by telephone that he had

[7] Weston also testified that anyone else who missed 6 days of work in a probationary period would have been terminated. This explanation is not credible: If that was the case, Weston could have terminated Bannan on October 15, but did not do so. Weston also admitted recommending to Weston only discipline, not termination.

[8] As Respondent did not call Foreman Rust to testify, Bannan's testimony is uncontradicted and credited.

[9] According to Elsenpeter, Weston said he could not understand why Bannan would receive a raise when he recently missed 6 days of work. (Tr. 148, 155-157.) Weston initially denied discussing Bannan's attendance with Elsenpeter. (Tr. 176.) He then testified, to a leading question on redirect, that he toId Elsenpeter than Bannan had problems with attendance. (Tr. 186.)

[10] Elsenpeter testified that he also raised that Bannan talked about an upcoming promotion and that he knew "Ben." However, when first questioned about whether Bannan was talking about his connections, Elsenpeter had to be prompted about whether he recalled any discussions about Ben Boland. (Tr. 155-156.)

[11] Heape later testified that Weston only told him that Bannon told Elsenpeter about the raise and that a concern had been raised. (Tr. 39.) However, based upon the email from Weston, I find it unlikely that the conversation was limited to those two concerns and instead included dissention in the ranks, specifically Elsenpeter. At hearing Heape characterized Bannon's discussion as "taunting" Elsenpeter (Tr.42), but neither Elsenpeter nor Weston testified to any taunting; Heape did not speak with Elsenpeter directly. Therefore, this speculative characterization is not credited.

"potential" employees threatening to quit because Bannan received a raise and he was trying to keep employees from quitting. (Tr. 176.)

Heape asked about Bannan's performance as a truck driver; Weston said Bannan was fourth among four for performance. Weston testified that he rated Bannan's performance as a 5 or 6.

On October 24, Heape talked to HR Recruiter Jeff Fields. (Tr. 39-40.) Heape decided to terminate Bannan's employment. Heape made notes as an "Explanation of letting [Bannan] go," with 4 points:

> -A couple of no shows. Could have released him then.
> -One week sick. Difficult for Ben, Chase and Kenny to get a hold of.
> -Spread the word of the raise, and now we have problems on the job site. The raise was not a truck driver raise. It was a progression raise.
> -We have the option to part if he is not a good fit within 90 days.

(GC Exh. 7; R. Exh. 11 at 12.)

On October 24, Weston directed Bannan to meet with Heape on October 25. (Tr. 134.) On October 25, at Respondent's headquarters, Heape and Fields met with Bannan to terminate him. Heape discussed that he had a no call no show and some absences. Heape had a typewritten document outlining the reasons for termination and documenting his conversation with Bannon. Heape testified he told Bannan that he discussed wages with "a more senior operator" and that conversation caused problems. Bannan testified that Heape said Bannan had discussed wages with more than one person and that "he had a mutiny on his hands in Rockingham." (Tr. 135.) However, when Bannan asked whether he was terminated for discussing wages, Heape denied it. (Tr. 57-58; R. Exh. 12.)

Heape summarized Bannan's employment history and the discussion with Bannan. Heape's summary included that Respondent did not see a way forward for Bannan to proceed to management. At the time of his termination, Bannan was still a truck driver and not in management.

In addition to writing about Bannan's absences occurring before and after the raise, Heape wrote:

> Upon [Bannan]'s return, it was reported to me that Russell told a more tenured operator the specifics of his hourly rate increase. This knowledge created unrest with our tenured operator because Russell's hourly rate (adjusted for progress towards a future salaried position) was now higher than the tenured operator's rate (who's rate is in keeping with our established range of off road truck drivers).

(R. Exh. 11 at 13.)

Heape also completed a separation notice for Bannan's termination. In the section entitled "Final Employee Evaluation," Heape identified as satisfactory the following areas: quality; productivity; independence; creativity; and initiative. He marked the following categories were marked as unsatisfactory: job knowledge; reliability; attendance; adherence to policy; interpersonal relationships; and judgment. (R. Exh. 10.)

Although Respondent did not maintain a written policy against discussing wages, Weston testified that Bannan did not make any comments in a group meeting about wages, nor did he tolerate groups discussing wages. Weston testified it was no one's business who made what in pay. Had he observed anyone talking about wages in a group, Weston testified he would have stopped any such discussion because it made for "bad blood." Weston further testified that he "didn't allow that kind of talk . . . ." (Tr. 178.)

On November 12, during the unfair labor practice investigation, Respondent obtained a notarized statement from Elsenpeter. About the same time Respondent also interviewed Ralph Fulmore, Jr., who was employed at Rockingham during the time Bannan was employed there. Fulmore, a current employee, denied that Bannan spoke with him about wages. Fulmore saw Bannan in passing as part of the employee group that evacuated the project site for blasting. However, Fulmore only learned of Bannan's desire to become a project engineer from another employee and not from Bannan directly. (Tr. 163.)

Respondent presented evidence that it claimed it did not treat Bannan disparately. Weston testified that he did know of any other probationary employee who was absent 6 days and did not lose his job. (Tr. 179.) He gave no specific examples. Respondent also presented a table of Rockingham employees who were terminated. In addition to Bannan, the table listed 12 other employees who were terminated. Bannan's termination is listed for conduct. Four employees were terminated for "no call no show," but Respondent does not provide information regarding how many times these employees failed to call in for absences. Four were terminated for policy violations: One was a violation of the drug and alcohol policy and the remaining 3 were for unsafe practices while operating equipment.[12] Yet another employee was terminated for "performance," which consisted of neglecting equipment inspections and receiving a warning the fueling dispensing pump on after leaving the area twice in two weeks. Two left for "other employment" and one for "personal reasons." (R. Exh. 14.)

VI. CREDIBILITY

The evidence shows Respondent believed Bannan spoke about wages with Elsenpeter and other employees, not just a single employee. At the onset of its discussion, Heape and Weston discussed potential loss of "some" crew members, not loss of "a crew member." Weston's testimony reflects that he had problems from a number of employees about wages. Respondent later shifts its focus only to Elsenpeter. Heape's later documentation reflects that Bannan spoke with a more senior operator only. Weston inconsistently denied that Elsenpeter asked for a pay raise. Because the original statements reflect concern with more than 1 crew member reacting to Bannan's wage increase, these statements demonstrate Respondent's knowledge that Elsenpeter and others were involved with wage discussions and the group asking for pay raises. I further credit Bannan regarding the termination interview in which Heape said he had a mutiny on hands, which is consistent with Wes-

[12] The infractions included speeding and using a cell phone while operating the equipment.

ton's expressed concerns about employees possibly leaving the Rockingham project.

Similarly, I also do not credit Heape's denials that he did not terminate Bannan for discussions of wages. The memorandum Heape drafted, which Fields approved, includes that Bannan's wage discussions as a part of the rationale for his termination.

Elsenpeter's testimony is partially credited. His recollection of the conversations with Bannan and with Weston the following Monday relied upon broad swaths of "basically" stating what happened. For example, Elsenpeter provided little detail about his conversation with Bannan about Bannan's pay increase. He admits to being "peeved" about it; Bannan testified Elsenpeter was angry. I therefore credit Elsenpeter's version of the conversation with Bannan only to the extent that Bannan told Elsenpeter about the raise and he was unhappy about it.

Regarding the conversation between Elsenpeter and Weston in the truck, Elsenpeter initially did not testify that Elsenpeter complained about Bannan "name dropping" or "bragging." It was only upon significant probing that he suddenly had a recollection about telling Weston about it. Elsenpeter only was able to testify that Bannan knew Heape and needed prompting to recall Boland's name. he was then able to recall that he told Weston about the Bannan's alleged bragging. Weston did not testify to anything about Elsenpeter including complaints other than the pay in his conversation with Elsenpeter. Respondent presents no evidence that either Heape or Weston questioned employees about the name dropping before terminating Bannan. For these reasons, I do not credit that Elsenpeter told Weston that he and others wanted to quit because of the name dropping.

The 2 sworn statements Elsenpeter gave to Respondent during the unfair labor practice investigation state, "I was not asked for, nor did I volunteer, any information concerning my person feelings or activities with respect to the union." (R. Exh. 19 at 11 and 13.) While this language reflects the *Johnnie's Poultry* requirements it is not consonant with the facts of this case because no union is involved. Elsenpeter's second sworn statement discussed Bannan's "name dropping" and how it was getting on his nerves. It also includes a statement that some employees were tired of "his mouth" and were going to quit. Again, nothing in initial adduced hearing testimony about Elsenpeter's conversation with Weston bears out this claim. The affidavit also maintains that Bannan did not attempt to talk to him about wages or to his knowledge, any other employee, about wages. Weston's testimony makes clear that Elsenpeter and others were angry that Bannan received a wage increase and were willing to quit over it; nothing in the testimony reflects the "name dropping" claim. As Elsenpeter gave this affidavit while in Respondent's employ and contains inconsistencies, I discredit its value.

Weston denied that any other employee, after October 4, requested a pay raise. (Tr. 179.) Elsenpeter clearly discussed his wages and desire for another raise with Weston. Weston's testimony is tempered with his admission that Elsenpeter told him other employees were considering quitting. I also credit that Weston so informed Heape.

Weston complained about Bannan to Boland, who was not in Bannan's chain of supervision. If one believes that Bannan was not a supervisor, as Respondent contends, Weston's complaints to Boland held no notification to other managers that Bannan was having difficulties. Weston also said he complained to his superior, Chase Wideman, about Bannan's attendance and performance. This testimony was not corroborated as Respondent did not call Wideman and I credit it only to the extent that Weston issued disciplinary action limited to the no call no show. Even if Weston discussed the alleged performance with Wideman, neither took any action, including disciplinary action or redirection to Bannan, to improve Bannan's alleged performance deficiencies. I therefore find that Bannan's performance was not a significant issue before Respondent decided to terminate him.

Respondent did not ask Fulmore about Bannan's alleged name dropping and I find that, as a witness called by Respondent, Fulmore would have testified adversely to Respondent. Respondent also contends that Fulmore's testimony reflects that he knew that Bannan was talking about going into management. However, Fulmore's testimony is that he found out

Bannan intended to go into management; no source was given for the knowledge and I do not reach Respondent's inference.

Bannan claimed he advocated, at an unknown time, for a wage increase on behalf of another employee with an unknown person in management. I do not credit this explanation due to lack of detail. Further, given Respondent's animus, particularly Weston's, toward discussion of wages, I find this incident unlikely.

VII. ANALYSIS

This portion deals with whether Ben Boland is a supervisor and/or agent and the alleged unfair labor practice. I find that Boland is an agent. I further find that Respondent terminated Bannan because of the protected activity of discussing his raise.

A. Status of Ben Boland

General Counsel contends that Boland is a statutory supervisor under Section 2(11) and/or an agent under Section 2(13) of the Act.

I find that Boland is not a statutory supervisor under Section 2(11) of the Act. Section 2(11) defines a supervisor as any individual having the authority, in the interest of the employer, to hire, fire, assign, or responsibly direct employees (among other functions), so long as the individual exercises independent judgment in doing so. The burden of establishing supervisory status lies with the party asserting it. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712 (2001). Conclusory evidence, in the absence of specific examples of the exercise of supervisory authority, does not satisfy that burden. See, e.g., *Lynwood Manor*, 350 NLRB 489, 490-491 (2007); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

The party asserting supervisory status must show that the individuals in question have the authority to engage in at least one of the supervisory functions set forth in Section 2(11), that their exercise of that authority is not simply routine or clerical but requires the use of independent judgment, and that the authority is exercised in the interest of the employer. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). Supervisory

status is not proven where the record evidence "is in conflict or otherwise inconclusive." *Republican Co.*, 361 NLRB 93, 97 (2014) (citing *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989)).

According to Weston, an admitted supervisor, Boland continued to act as a project manager, the same position as Weston. However, the record does not inform how often Boland acts in this capacity or give specific examples. General Counsel, by failing to give specific examples, does not carry its burden of proof.

Regarding 2(13) agency, Boland's position as an estimator does not provide actual or apparent authority. The test analyzes whether, under all circumstances, the employees would reasonably believe that the alleged agent was reflecting company policy and was speaking and acting for management. *Meisner Electric, Inc.*, 316 NLRB 597, 600 (1995), affd. 83 F.3d 436 and 83 F.3d 437 (11th Cir. 1996). Boland's text about not discussing wages is consistent with Weston's position and therefore reflects company policy. However, as a former supervisor, it is less likely to have apparent authority. I therefore find that Boland was not an agent under Section 2(13) of the Act.

B. Applicable Law for Analysis of Bannan's Termination

The complaint alleges that Respondent terminated Bannan due to protected concerted activity, specifically discussing wages.

The appropriate test for a mixed motive termination is directed by *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).[13] General Counsel must first prove, by a preponderance of the evidence, that the employee's protected activities were a motivating factor in the employer's decision to take adverse action against the employee. *MCPc*, 367 NLRB No. 137 (2019), citing, e.g., *Mesker Door, Inc.*, 357 NLRB 591, 592 (2011). The elements required to show protected activity was a motivating factor are that the employee engaged in protected concerted activity, employer knowledge of that activity on the employer's animus. See generally *Richfield Hospitality, Inc. as Managing Agent for Kahler Hotels, LLC*, 368 NLRB No. 44, slip op. at 30 (2019). The evidence of animus must be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the alleged discriminatee. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 7 (2019).

If General Counsel presents a prima facie case, the burden shifts to the respondent employer to demonstrate by a preponderance of the evidence that alleged discriminatee would have been fired for legitimate reasons, regardless of the protected concerted activity or belief that the employee engaged in those activities. See, e.g., *NLRB v. Overseas Motor, Inc.*, 721 F.2d 570, 571 (6th Cir. 1983); *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1205 (2014). The employer cannot meet its burden if it submits reasons that are pretextual, meaning false or not actually relied upon. *Alternative Energy Applications*, 361 NLRB at. 1205. When a respondent's justifications are deemed pretextual, the inquiry is over---the Board is not required to consider if that respondent would have followed the same route, regardless of the protected concerted activity. *Airgas USA, LLC*, 366 NLRB No. 104, slip op. at 1 fn. 2 (2018), enfd. 916 F.3d 555 (6th Cir. 2019).

C. Parties' Positions

General Counsel contends that Bannan was engaged in protected concerted activity by discussing his raise with other employees. Further, Respondent terminated Bannan as a preemptive strike to prevent him or other employees from engaging in other concerted activities. *Parexel Int'l*, 356 NLRB 516, 519 (2011).

Respondent, using a mixed motive analysis, contends that no evidence supports finding that Bannan was terminated for discussing pay. Further, Bannan's wage statements were not protected concerted activity as he did nothing to prepare for group action. Respondent denies that Bannan urges anyone else to ask for a raise and that the employees had no interest in Bannan's comments. Respondent also maintains it had legitimate business reasons to terminate Bannan, including absenteeism, poor performance and name-dropping.

D. General Counsel's Prima Facie Case

I first examine the case under the mixed motive theory. We first turn to an analysis of protected concerted activity, then employer's knowledge and finally, animus. In addition, I also find that under a mixed motive analysis, General Counsel still presents a prima facie case. Lastly, I agree with General Counsel that, pursuant to *Parexel*, supra, Respondent acted in a preemptive strike to hush up discussions about pay.

1. Bannan engaged in protected concerted activity when he discussed his pay

In examining whether the matter was protected concerted activity, I first examine the topic of the discussion, pay, and then whether Bannan's actions were concerted.

a. Pay is a protected subject of discussion

Section 7 of the Act clearly lays out that wages are a topic in which employees may join together for mutual protection, or in the employees' choice, choose not to join. "Few topics are of such immediate concern to employees as the level of their wages." *Eastex, Inc. v. NLRB* 437 U.S. 556, 569 (1978). Discussion of wages are inherently concerted. *Novelis Corp.*, 364 NLRB No. 101 (2016), enfd. in rel. part 888 F.3d 100 (2d Cir. 2018); *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1205–1206 (2014). The communications about wages must occur with more than one employee "even if only one employee is the speaker while the other is merely a listener." *Belle of Sioux City, L.P.*, 333 NLRB 98, 101 (2001). When an employer acts to "nip in the bud" protected activity, such as wage discussions, the employer violates Section 8(a)(1) of the Act. *Parexel Int'l*, 356 NLRB 516, 519 (2011).

Respondent contends that the subject matter alone is insufficient to have concerted activity. R. Br. At 13-14, citing *Koch Supplies, Inc. v. NLRB*, 626 F.2d 1257, 1258 (8th Cir. 1981) and

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[13] Compare *Matsu Corp. d/b/a Matsu Sushi Restaurant*, 368 NLRB No. 26 (2019) (where no other reasons asserted for termination, *Wright Line* not appropriate).

Adelphi Institute, 287 NLRB 104 (1988). It also contends that Bannan's discussions fell on disinterested ears. Respondent relies upon *Alstate Maintenance*, 367 NLRB No. 68 (2019). The Board in *Alstate* found that the pay issue of tips was not controlled by the employer and could not have changed the employer's "policies or practices. . . . Thus, the evidence does not support a finding that [the alleged discriminatee] was seeking 'to improve terms and conditions of employment.'" Id. slip op. at 8-9 (citation omitted). In comparison, Bannan's credited testimony reflects that he was discussing a raise he received from Respondent, not a third party, and that raise was within Respondent's control of terms and conditions of employment.[14] On that basis, I find *Alstate* distinguishable from the present case.

This long-held principle still rings true today:

> [D]issatisfaction due to low wages is the grist on which concerted activity feeds. Discord generated by what employees view as unjustified wage differentials also provides the sinew for persistent concerted action. The possibility that ordinary speech and discussions over wages on an employee's own time may cause 'jealousies and strife among employees' is not a justifiable business reason to inhibit the opportunity for an employee to exercise section 7 rights.

Jeannette Corp. v. NLRB, 532 F.2d 916, 919 (3d Cir. 1976), enfg. 217 NLRB 653 (1975).

Therefore, based upon Section 7 of the Act, I find that the subject matter of a pay raise, which Bannan discussed with Elsenpeter and others, is protected.

b. Bannan engaged in concerted activity

"While 'mere talk is sufficient to put a worker in contact with fellow employees' it presumes group action to come within the protection of Section 7." *St. Margaret Mercy Healthcare Centers*, 350 NLRB 302, 211–212 (2007), citing *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied mem. 474 U.S. 971 (1985). See generally *Remington Lodging & Hospitality, LLC v. NLRB,* 847 F.3d 180, 184–185 (5th Cir. 2017), enfg. 363 NLRB No. 112 (2016) (employer not permitted to make preemptive strike to eliminate possibility of employee's protected activities). Even if the discussion does not lead to organizing activity or taking steps in presenting demands, the lack of group action does not cause the discussion to be unprotected. *Noland Co.*, 269 NLRB 1088 (1984), citing *Jeannette Corp.*, supra, and *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964). Weston admitted that Bannan's wage discussion was what prompted his call to Heape, as the "last straw." I therefore find that Bannan's wage discussions about his raise were the triggering event leading to Bannan's termination.

Respondent claims Bannan created a morale problem by his talking about wages. Creating a "morale issue" by discussion of wages does not remove Bannan from the protection of Section 7 of the Act. *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204 (2007), rev. denied and enfd. 519 F.3d 373 (7th Cir. 2008). The present case is differentiated from *Noland Co*., 369 NLRB 1088, 1089 (1984). General Counsel there presented a prima facie case that the alleged discriminatee discussed confidential wage information, which was protected activity and the respondent stated she caused "bad morale." However, the respondent employer provided sufficient evidence that it would have terminated the alleged discriminatee for failing to write cash receipts, which was a serious error found during an audit and one in which the alleged discriminatee had repeated instructions. Id. at 1089–1090.

Respondent contends that Bannan was only bragging about his pay increase and not working in concert with other employees. Similarly, it contends it could not be protected when he was only acting on behalf of himself and did not exhort others to action. Respondent relies upon the Board's recent decision in *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019). In *Alstate*, the Board overruled *WorldMark by Wyndham*, 356 NLRB 765 (2011), and narrowly applied *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*). The test finds protected concerted activity in the following scenarios: (1) the change or refusal to changed is announced at a meeting called by the employer; (2) an employee protests, which is not just an inquiry; (3) a change affects a group of employees; or (4) it is the first opportunity to protest. *Alstate*, 367 NLRB No. 68, slip op. at ___. The determination is based upon the facts based upon the totality of record evidence. *Alstate*, supra, at fn. 41, citing *Meyers II*, 281 NLRB at 886.

The *Alstate* Board, relying on *Mushroom Transportation*, supra, instructs that the claimed activity, if mere talk, must anticipate group action to be protected. *Alstate*, supra. Bannan's credited testimony is that he tells Elsenpeter to move on a request for a raise. This statement takes the discussion about Bannan's pay raise beyond a plain Jane remark to a protected status: Under *Alstate*, scenario 2 applies as based upon Bannan's remarks. Elsenpeter engages in a verbal protest plus others join by threatening to quit. *Alstate* scenario 3 also applies, as the pay change for Bannan affects the other employees at the site to the point that, according to Elsenpeter's report to Weston, additional employees are willing to quit over the issue. The totality of this evidence reflects the concerted nature of not only the discussions, but the actions of the employees on the group concern of pay equity.

Respondent claims that Bannan's wage discussions fell upon uninterested ears, so the the wage discussions were not concerted. The present case contrasts with Respondent's cited case, *Koch Supplies, Inc. v. NLRB*, 646 F.2d 1258 (8th Cir. 1981). The record in *Koch* show that an employee complained about a promise of vacation benefits to a new employee but failed to promote any group action. That record did not reflect that any group action was even contemplated. Id. at 1259. *Koch*, however, is instructive that a conversation by itself can constitute concerted activity so long as the employees "intends or contemplated, as an end result, group activity which also benefit some other employees." Id. Here, the chain of events does not support a finding that the wage discussions fell upon uninterested ears: If Elsenpeter was uninterested, he would not been "peeved" during the conversation with Bannan upon learning

[14] But see Member McFerran's dissent, in which she would find tips part of the shared interest of employee pay. *Alstate*, 367 NLRB No. 68, slip op. at 15-17.

about the raise, nor would he have had the in-truck discussion with Weston about Bannan's wage increase, much less would he have requested a raise. Here, Bannan encouraged other employees to seek pay raises, which was the common grounds for group action.[15]

Bannan therefore engaged in protected concerted discussions about pay raises.

2. Respondent knew that Bannan discussed wages with at least one other employee

The record is replete with Respondent's knowledge, which starts when Elsenpeter reported to Weston that Bannan talked about his raise. Weston transmits the information to Heape. Heape and Weston discuss that Bannan shared pay information. The termination summary, written by Heape and approved by Fields, states specifically that Bannan told "a more tenured the specifics of his hourly rate increase." Respondent's documentation finds that Bannan's protected concerted pay discussions led to turmoil among the employees, which leads us to a discussion of animus.

3. Respondent's animus towards Bannan's activities

Proof 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." *Tschiggfrie Properties*, 368 NLRB No. 120, slip op. at 1. Proof of animus and discriminatory motive may be based on direct evidence or inferred from circumstantial evidence. Id., slip op. at 8; *Richfield Hospitality*, supra, slip op. at 30, citing *Robert/Orr/Sysco Food* Services, 343 NLRB 1183, 1184 (2004) and *Purolator Armored, Inc v. NLRB*, 764 F.2d 1423, 1428-1429 (11th Cir. 1985). The record demonstrates Respondent maintained animus towards discussing wages in general and animus towards Bannan for discussing wages, plus direct and indirect evidence of animus towards Bannan's protected concerted activities

a. General animus towards pay discussions

Respondent had animus towards employees discussing wages, particularly in groups. Weston made clear that he would not tolerate it as it caused "bad blood" among the employees and stopped employees if they had wage discussions in a group. Weston's reliance on the "bad blood" it created between employees does not provide Respondent a business justification to stop statements among employees about pay. *Scientific-Atlanta, Inc.*, 278 NLRB 622, 625 (1986). Even Boland, a former project manager, told Bannan not to talk about wages and singled out Weston as someone not to tell. In uncontradicted testimony, Bannan relayed that Rust, an admitted statutory supervisor, also advised him not to talk about wages.

b. Direct evidence of animus towards Bannan's pay discussions

Respondent admittedly terminated Bannan because the "wage disclosure was featured as the first basis for the Respondent's claim that [the alleged discriminatee] had undercut morale." *Alternative Energy Applications,* 361 NLRB at 1205. Respondent's reliance upon this reason is unlawful. As discussed above, the present case does not reflect that Bannan ignored instructions, nor were problems Respondent claimed to be serious until after Bannan discussed wages.

This finding is supported by other factors mentioned in Respondent's termination notes, which also reflect that wage discussions were a reason it decided to terminate Bannan. Despite Respondent's denials that the wage discussions were an overriding reason to terminate Bannan and that it did not make such a statement during the termination interview, Heape's notes, coupled with the course of events, demonstrate otherwise. *In re Phillips Petroleum Co.*, 339 NLRB 916, 919 (2003) (although employer disavowed protected activity as cause for termination, termination letter with additional emails reveals animus).

c. Indirect evidence of animus towards Bannan's pay discussions

Respondent contends that "the last straw" is increasingly bad performance from Bannan. Here the "bad behavior" is not as Respondent presents. However, the "increasingly" bad behavior, or last straw, was discussion of wages, which was a protected subject. Respondent acted upon the discussion of wages, not the supposed problems in performance, attendance or name dropping. Considering these factors, which also show pretext, General Counsel established substantial evidence of animus. See generally *Wendt Corp.,* 369 NLRB No. 135, slip op. at 3-4 (2020), citing *Tschiggfrie Properties,* supra, slip op. at 2-3. I discredited evidence from Elsenpeter regarding the name dropping, and the uncontested evidence shows Weston was the one ridiculing Bannan about his relationship with Boland.

Timing[16] demonstrates Respondent took action based on animus. See *Airgas, USA, LLC v. NLRB*, 816 F.3d 555, 563–564 (6th Cir. 2019), enfg. 366 NLRB No. 104 (2018). Once Respondent learned of Bannan's protected conversations, it took less than a week to terminate him.

Lack of a prior warning and a hasty response without an investigation give rise to an inference that Bannan's termination arose from Respondent's unlawful motivation. *GATX Logistics, Inc.*, 323 NLRB 328, 335-336 (1997). Nowhere in the record is there evidence that any of Respondent's supervisors talked to Bannan or disciplined him for poor production. Weston's complaints about Bannan's performance did not become an issue for discipline until he discussed his pay raise. Weston's complaints to Bannan were to an employee, not a supervisor, and therefore have little effect in notifying Bannan that his performance was not up to Weston's standards.

[15] Respondent also points to the alleged discriminatee Mark George in *Plastic Composites Corp.*, 210 NLRB 728, 727-728 (1974). The case precedes *Meyers*, supra, and more recent cases. Employee George discussed, inter alia, his wages at a prior employer. He was terminated for a "poor attitude" and for mentioning his pay at another employer. The hearing officer found that George's discussion of wages was brief and casual, making it unconcerted. Id. at 738. In comparison, Bannan had a 45-minute conversation with Elsenpeter in which Elsenpeter pressed to discover what was the pay increase. I cannot find the conversation as brief or casual.

[16] I do not rely upon the case cited by General Counsel, *Frye Electric, Inc.*, 352 NLRB 345 (2008). That case was decided by a 2-person Board and is not given precedential weight. *New Process Streel, L.P. v. NLRB*, 560 U.S. 674 (2010).

Similarly, in its haste Respondent also failed to conduct a complete investigation into other allegations, which leads to evidence of both animus and pretext. First, Respondent never talked with Bannan to explain what happened, which reflects discriminatory intent. *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 2 (2020); *Andronaco*, 364 NLRB No. 142, slip op. at 14 (2016). It waited until after the unfair labor practice charge was filed to obtain its evidence from Elsenpeter and Fulmore, not before the termination. Respondent's efforts here are attempts to obtain evidence to support its knee jerk reaction to terminate Bannan. *Sysco Grand Rapids, LLC*, 367 NLRB No. 111, slip op. at 28, reconsideration denied (2019), enfd. in rel. part sub nom. *Sysco Grand Rapids, LLC v. NLRB*, __ Fed. Appx. __ (6th Cir. 2020).

Inconsistent rationales are probative of animus. *Mondelez*, supra, slip op. at 2, citing, e.g., *GATX Logistics, Inc.*, 323 NLRB 328, 335-336 (1997), enfd. 160 F.3d 353 (7th Cir. 1998). For example, Respondent suddenly found Bannan to be a "name dropper." Respondent failed to ask employee Fulmore about whether Bannan was an irritant, either in his affidavit or in his testimony. Because Respondent failed to ask, I conclude that Fulmore never heard Bannan doing so. Weston did not testify that Elsenpeter told him the name dropping was why employees were upset and it only becomes an issue after Weston's conversation with Elsenpeter.

In Heape's four points of why Bannan would be terminated, two points related to attendance, one to spreading word about the raise, and the last was "not a good fit." Nothing was said about the productivity issues.

Regarding the attendance issues, Heape stated Bannan had "a couple of no shows." Weston, who directly supervised Bannon, testified that Bannon had attendance problems and gave him the written warning for Bannon's no call no show on October 15. Only 10 days later, Respondent found the absences could not be tolerated. By the time this case reached hearing, both Weston and Heape testified Bannan incurred no call, no shows, rather than the one no call no show for which Weston gave a first written warning. At the least, Respondent's embellishment for Bannan's no call no shows are "leap frogging," or increasing the number of disciplines when it had no basis to do so. Leap frogging demonstrates animus. *Richfield Hospitality*, 368 NLRB No.44, slip op at 33. As General Counsel points out, Respondent's own table of Rockingham terminations shows Bannan was terminated for "conduct," not absences. These inconsistencies demonstrate absenteeism was not the reason for termination: Instead, Bannan's discussions of his wage increase was the source of Respondent's action.

Respondent takes contradictory positions regarding Bannan's value to its organization. Heape documented Bannan as an asset, learning the ropes, and gave him a significant raise. In about 3 weeks, shortly after Bannan spoke to other employees about his raise, he was no longer a "good fit." Heape's use of the phrase "not a good fit" is a euphemism for pretext of a discriminatory motive. See, e.g., *FES, a Div. of Thermo Power*, 331 NLRB 9, 33 (2000) (refusal to hire salts because "not a good fit" pretextual), after remand 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002

These reasons explain that Respondent maintained animus towards Bannan's protected concerted pay discussions. Accordingly, a mixed-motive analysis demonstrates that General Counsel presented a strong prima facie case.

4. Respondent's made a pre-emptive strike by terminating Bannan

Even if the pay discussions were not concerted, Respondent acted as a "pre-emptive strike" to stop further such activities. *Parexel Int'l*, 356 NLRB at 517. Restrictions on wage discussions, as those Respondent maintained, violate Section 8(a)(1). Notably, "the suppression of future protected activity is exactly what lies at the heart of most unlawful retaliation against past protected activity." Id. at 519, citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 117 (1941). The Board concluded that the respondent employer erected "'a dam . . . at the source of supply' of potential, protected activity." Id. Similarly, Respondent stopped Bannan from further discussion and alleged discord because he discussed his pay raise. Pursuant to a "pre-emptive strike" theory, the termination violated Section 8(a)(1) of the Act. Also see *Remington Lodging & Hospitality*, 847 F.3d at 185-186.

E. Respondent's Proffered Non-Discriminatory Reasons Are Pretextual

When General Counsel makes a strong showing of unlawful motivation, Respondent's rebuttal burden is "substantial." *East End Bus Lines, Inc*., 366 NLRB No. 180 (2018). Accord: *Sysco Grand Rapids, LLC*, 367 NLRB No. 111, slip op. at 27; *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991) (union activity). Indeed, when pretext is found, this part of the *Wright Line* analysis is unnecessary. *Airgas USA*, 366 NLRB No. 104, slip op. at 1 fn. 2. For a number of reasons, I find that Respondent does not meet this burden because Respondent's reasons are pretextual. Most of these reasons are reflected in animus but will be covered again here.

Respondent must demonstrate that it would have disciplined Bannan for legitimate reasons regardless of the protected activity. *Wendt Corp.*, 369 NLRB No. 135, slip op. at 3. The comparison should reflect that Respondent disciplined other employees for like offenses. *Richfield Hospitality*, 368 NLRB No. 44, slip op. at 34. The no call no show examples in the table do not identify how many times those employees failed to call in and whether they had previous warnings. The examples of terminating employees for safety violations and a drug offense are dissimilar to the present situation. Weston's testimony that he knew of no other employee with 6 absences during probation who was not fired is conclusory, giving no context. If Respondent did not retain employees who incurred 6 or more absences during a probationary period, Respondent logically would have terminated Bannan by October 15, the date on which Bannan received discipline for the no call no show. Instead, Weston gave a written warning. This evidence does not support a finding that Respondent acted similarly for similar attendance violations.

Respondent shifted reasons for its actions, which leads to a finding of pretext. *Sysco Grand Rapids*, supra, slip op. at 5. One such shift was Respondent increasing the number of no call no shows. As noted before, Bannan was disciplined only once and incurred no further absences after his discipline.

Timing also supports pretext. Once Weston found out about Bannan's revelation to Elsenpeter, he took 2 days to report it to Heape. By the end of the same week, Heape, with Fields present, terminated Bannan. What set the events in motion was Weston's knowledge and lack of tolerance for discussion of pay.

Respondent also emphasizes that it could see no path forward into management for Bannan. However, at the time of termination, Bannan was a truck driver, not in management. Management indeed was Bannan's aspiration but Bannan was not a supervisor. Bannan was supposed to learn all aspects of the business from bottom up. Respondent had turnover at the facility. Respondent never offered Bannan the option to stay as a truck driver but determined an employee who shared pay information was not an asset to the organization.

Pretext is evident through Respondent's tardy investigation, which constituted obtaining statements from two employees employed by their employer at the time.

Respondent therefore has not met its rebuttal burden to show it would have taken the same action regardless of Bannan's protected activities. It failed to conduct a reasonable investigation before terminating Bannan. *Sysco Grand Rapids*, supra. Because Respondent failed to give "'a clear, consistent and credible explanation'" for terminating Bannan, its reasons are pretextual. *Airgas USA,* 916 F.3d at 556, citing *NLRB v. Inter-Disciplinary Advantage, Inc.*, 312 Fed. Appx. 737, 751 (6th Cir. 2008). Respondent therefore violated Section 8(a)(1) when it terminated Bannan for speaking with other employees about wages.

CONCLUSIONS OF LAW

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

2. The following persons are supervisors of Respondent within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act:

William (Bill) Heape	Vice President
Kenneth Weston	Superintendent
Chase Wideman	Project Manager
Ronnie Rust	Foreman

3. The following persons are agents of Respondent within the meaning of Section 2(13) of the Act:

Jeff Fields	Human Resources Recruiter

4. By terminating its employee Russell Paul Bannan for discussing wages with other employees, Respondent violated Section 8(a)(1) of the Act.

5. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and 2(7) of the Act.

REMEDY

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

Specifically, having found that Respondent violated Section 8(a)(1) of the Act by discharging Russell Paul Bannan, Respondent is ordered to offer him full reinstatement to his former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F.W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, Respondent is ordered to compensate Bannan for any adverse tax consequences of receiving a lump-sum backpay award and to file, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report with the Regional Director for Region 10 allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 146 (2016). In accordance with the Board's decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in rel. part 859 F.3d 23 (D.C. 2017), Respondent is ordered to compensate Bannan for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earning. Search-for work and interim employment expenses shall be calculated separate from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River*, supra. Respondent is also required to remove from its files any references to the unlawful discharge of Bannan and to notify him in writing that this has been done and that the discharge will not be used against him in any way.

On the findings of facts and conclusions of law, and upon the entire record in this case, I use the following recommended

ORDER[17]

The National Labor Relations Board order that Respondent Morgan Corp., its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for discussing wages or otherwise engaging in protected concerted activities.

(b) 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 actions necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Russell Paul Bannan 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.

(b) Make Russell Paul Bannan 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 the decision.

(c) Compensate Russell Paul Bannan for the adverse tax

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

consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 10, 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).

(d) Within 14 days from the date of this Order, remove from its files any refence to the unlawful discharge, and within 3 days thereafter, notify Russell Paul Bannan in writing that this has been done and that the discharge will not be used against him in any way.

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

(f) Within 14 days after service by the Region, post at its headquarters and at its Rockingham, North Carolina job site copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by Respondent's authorized representative, shall be posted by 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 Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent has gone out of business or closed the facility 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 Respondent at any time since October 25, 2019.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated Washington, D.C. September 25, 2020

[18] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. 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.

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 discharge or otherwise discriminate against you for discussing wages or otherwise engaging in protected concerted activities.

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

WE WILL, within 14 days from the date of this Order, offer Russell Paul Bannan 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.

WE WILL make Russell Paul Bannan whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL make Russell Paul Bannan whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Russell Paul Bannan for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 10, 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).

WE WILL, within 14 days from the date of the Order, remove from our files any reference to the unlawful discharge of Russell Paul Bannan, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

MORGAN CORPORATION

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/10-CA-250678 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.