Garten Trucking LC[1] ***and*** **Association of Western Pulp and Paper Workers.** Cases 10–CA–279843, 10–CA–280804, 10–CA–281786, 10–CA–282554, 10–CA–296060, and 10–RC–279259

September 17, 2024

DECISION, ORDER, AND ORDER REMANDING IN PART

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND WILCOX

On February 17, 2023, Administrative Law Judge Charles J. Muhl issued the attached decision. The Respondent filed exceptions and a supporting brief, to which the General Counsel and the Charging Party filed answering briefs. The General Counsel also filed exceptions and a supporting brief, to which the Respondent and the Charging Party each filed answering briefs, and the General Counsel filed a reply to the Respondent's answering brief. Additionally, the Charging Party filed cross-exceptions and a supporting brief, to which the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this matter 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,[2] and conclusions,[3] to amend the remedy, and to adopt the recommended Order as modified and set forth in full below.[4]

UNLAWFUL INTERROGATION OF MORGAN

When deciding unlawful interrogation allegations, the Board applies a totality of the circumstances analysis in determining whether the interrogation was coercive. That analysis includes consideration of the factors set forth in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964), which have been adopted by the Board. See, e.g., *Rossmore House*, 269 NLRB 1176, 1178 & fn. 20 (1984), affd. sub nom *HERE, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Applying those principles here, we affirm the judge's conclusion that the Respondent, through manager George Rose, violated Section 8(a)(1) by interrogating employee Shannon Morgan on June 23, 2021.

The first *Bourne* factor, which asks whether the employer has a history of hostility toward or discrimination against union activity, weighs against the violation. The Respondent's interrogation of Morgan represented the first alleged violation, chronologically, directly related to union activity. The second factor looks at the nature of the information sought. Here, Rose's inquiry asked Morgan to identify the specific individual who organized the union campaign. The Board has found that such specific inquiries support a finding that an interrogation was coercive. Cf. *John W. Hancock Jr., Inc.*, 337 NLRB 1223, 1224–1225 & fn. 9 (2002) (finding no unlawful interrogation in part because the questioner only asked about "the overall level of union interest in the entire work force as a whole" rather than names of specific individuals who supported the union), enfd. 73 F. App'x 617 (4th Cir. 2003). The third factor—the identity of the interrogator and his placement in the Respondent's hierarchy—weighs in favor of finding the violation because Rose was Morgan's direct supervisor. See, e.g., *River City Asphalt*, 372 NLRB No. 87, slip op. at 3 (2023) ("[T]he Board has found that questioning from a direct supervisor tends to make questioning more threatening."). The fourth factor—the place and method of the interrogation—weighs in favor of finding the violation. Rose called Morgan, who was not an open union supporter, into his office for a one-on-one meeting. During the meeting, Rose brought up the union organizing campaign and, after Morgan indicated that she did not want to discuss it, continued pressing her for information. The fifth factor—the truthfulness of the employee's reply—is not directly applicable here because Morgan did not answer Rose's inquiry. Nevertheless, the Board has found that an employee's refusal to provide information can be an indication that the interrogation was coercive. See, e.g., *Nestlé USA, Inc.*, 370 NLRB No. 53,

[1] We have amended the caption to reflect the correct name of the Respondent.

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

Additionally, the General Counsel has asked the Board to overturn numerous prior decisions. We decline the General Counsel's request to revisit extant precedent in this case.

[3] For the reasons stated by the judge, we affirm: (1) the judge's conclusion that the Respondent, through manager George Rose, violated Sec. 8(a)(1) by creating an impression of surveillance of employees' union activities during his June 23, 2021 conversation with employee Shannon Morgan; (2) the judge's conclusions that the Respondent violated Sec. 8(a)(1) when its supervisors and owners threatened employees on numerous occasions that it would close its business and they would lose their jobs if they selected the Union and informed them that selecting the Union would be futile because the Respondent would not deal with the Union; and (3) the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(3) and (1) when it suspended and discharged employee Jeff Baker and when it disciplined employee Theresa Horne.

[4] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and the amended remedy. We shall substitute a new notice to conform to the Order as modified.

slip op. at 14 fn. 47 (2020) (finding the employee's refusal to answer the supervisor's questions weighed in favor of finding a violation because "[s]uch a refusal objectively conveys the coercive impact of the questioning"); *Chipotle Services*, 363 NLRB 336, 346 (2015) ("The coerciveness of the interrogation is also evident from the fact that [the employee] did not answer [the manager's] question."), enfd. 849 F.3d 1161 (8th Cir. 2017). Accordingly, based on a consideration of a totality of the circumstances and the *Bourne* factors, we affirm the judge's finding that the Respondent's interrogation of Morgan was unlawful.

UNLAWFUL INTERROGATION OF BAKER

We also affirm the judge's finding that the Respondent, through Rose, violated Section 8(a)(1) by interrogating employee Jeff Baker on June 23, 2021. As with the interrogation of Morgan, the balance of the *Bourne* factors weighs in favor of finding the violation. The first factor weighs against finding the violation, as no violations directly related to union activity had occurred prior to June 23, and Rose's interrogation of Morgan earlier that same day—which Baker did not know anything about—does not constitute a "history of hostility" toward union activity.[5] The second factor weighs in favor of finding the violation because Rose asked Baker to identify who specifically initiated the union campaign as well as which specific employees were talking about unionizing. The third factor weighs in favor of finding the violation because Rose was Baker's direct supervisor. The fourth factor weighs in favor of finding the violation because, even though the conversation began casually as they walked outside the trailers, Rose initiated a one-on-one discussion about the union campaign—despite Baker not being a known supporter—and, even after Baker refused to identify who initiated the campaign, continued to ask for that information. The fifth factor weighs in favor of finding the violation because Baker lied when he said that he did not initiate the organizing campaign, indicating that he did not feel comfortable telling Rose the truth or identifying himself as the initial organizer.

UNLAWFUL DISCIPLINE OF HUMPHRIES AND PULLIN

Applying the framework articulated in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), the judge found that the Respondent violated Section 8(a)(3) and (1) when it disciplined employees Allen Humphries and Ray Pullin for discussing the organizing campaign with other employees. Under that framework, "[t]he respondent employer has the burden of showing that it held an honest belief that the [disciplined] employee engaged in misconduct. If the employer meets its burden, the burden shifts to the General Counsel to show that the employee did not, in fact, engage in the asserted misconduct." *Roadway Express*, 355 NLRB 197, 204 (2010), enfd. 427 F. App'x 838 (11th Cir. 2011). Even assuming arguendo that the Respondent met its burden to show that it held an honest belief Humphries and Pullin had engaged in misconduct by soliciting authorization cards during working time, we find that the General Counsel clearly met her burden of proving that the misconduct did not actually occur. Because the credited testimony establishes that the relevant conversations took place during breaks, rather than during working time, the record establishes that neither Humphries nor Pullin violated the Respondent's rules.[6]

EMPLOYEE HANDBOOK RULES

For the reasons stated in the judge's decision and for the reasons that follow, we affirm the judge's finding that the employee handbook's solicitation and distribution policy violated Section 8(a)(1). We observe that the rule states, "Employees may not solicit . . . to other employees during their own work time, to other employees who are working, or [in] areas where customers are present." This rule is overbroad and presumptively invalid because it lists, in the disjunctive, "areas where customers are present." Because of that phrase, the rule could reasonably be interpreted as disallowing solicitation in working areas during nonworking time. Even though the Respondent did not enforce the rule in that manner, it is unlawfully overbroad. See, e.g., *Harbor Freight Tools USA, Inc.*, 373 NLRB No. 2, slip op. at 1–3 (2023) (finding that the employer's solicitation and distribution rule was overbroad as written because it failed to clarify that the solicitation ban does not extend to employees' working areas during their nonworking time); *Medic Ambulance Service, Inc.*, 370 NLRB No. 65, slip op. at 22–23 (2021) ("Given the rules' use of the disjunctive, the [r]espondent has banned union solicitation during nonwork time.").

[5] Unlike the judge, we find that because there is no evidence that Baker knew about the prior unlawful interrogation of Morgan, that interrogation could not have influenced how an objective employee in his position would view Rose's questions.

[6] We also affirm the judge's finding that the Respondent violated Sec. 8(a)(1) when Ben Strozier, the general manager and financial controller, told Pullin that he was being written up for talking about the Union and soliciting signatures while he was working.

Unlike his colleagues, Member Kaplan would not find this additional 8(a)(1) violation. In his view, informing an employee about a disciplinary decision does not constitute a separate violation from the act of imposing that discipline. See *Triple Play Sports Bar & Grill*, 361 NLRB 308, 316 fn. 2 (2014) (Member Miscimarra, dissenting in part) (declining to find the additional 8(a)(1) violation because "[m]erely advising employees of the reason for their discharge is 'part of the res gestae of the unlawful termination, and is subsumed by that violation'") (quoting *Benesight, Inc.*, 337 NLRB 282, 285 (2001) (Chairman Hurtgen, dissenting in part)).

Applying the legal framework established in *The Boeing Co.*, 365 NLRB 1494 (2017), the judge also found that the employee handbook's introductory statement, social networking rule, conduct after separation rule, and part 1 of the protection of confidential information rule violated Section 8(a)(1). The judge also found that the employee handbook's personal and work area appearance rule, return of property upon termination of the employment relationship rule, and part 2 of the protection of confidential information rule did not violate Section 8(a)(1). After the judge issued his decision, the Board issued its decision in *Stericycle, Inc.*, 372 NLRB No. 113 (2023), which overruled *The Boeing Co.* and adopted a modified version of the framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), for assessing these types of work rules allegations. Therefore, we shall sever and remand these remaining employee handbook allegations for a new determination under *Stericycle*, which has been the Board's routine practice since adopting the new standard. See, e.g., *Harbor Freight Tools*, above, 373 NLRB No. 2, slip op. at 3; *Phillips 66 Co.*, 373 NLRB No. 1, slip op. at 1 fn. 3 (2023); *West Shore Home, LLC*, 372 NLRB No. 143, slip op. at 1 (2023).[7]

AMENDED REMEDY

I. GISSEL BARGAINING ORDER

The Board grants the General Counsel's request for a bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).[8] The Supreme Court held in *Gissel* that, where a union has at some point achieved majority support and a respondent has engaged in unfair labor practices which "have the tendency to undermine majority strength and impede the election processes," the Board "should issue" an order for the respondent to bargain with the union without an election if "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order" than by a second election. *Gissel*, above, 395 U.S. at 614–615.[9] The Court emphasized that the Board "can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future." Id. The Board accordingly considers a respondent's entire course of conduct, both before and after the election, in determining whether a bargaining order is warranted.[10] Here, for the reasons explained below, we find that an affirmative bargaining order is warranted because a majority of the Respondent's employees supported the Union before the Respondent engaged in unfair labor practices that had a tendency to undermine majority strength and impede the election process, and the possibility of erasing the effects of these unfair labor practices and ensuring a fair election by the use of traditional remedies is slight, so that the sentiments of the Respondent's employees once

[7] Member Kaplan does not join his colleagues in remanding the remaining employee handbook allegations. Whether these handbook provisions violate the Act under *Stericycle* is a legal question, and his colleagues do not indicate what factual determinations remain to be made by the judge, nor have they provided any guidance regarding what possible evidence the Respondent could produce that would be sufficient to satisfy the seemingly impossible rebuttal burden formulated in *Stericycle*. Because remand will not materially benefit either the parties or the Board, there is no justification for the inherent delay and expense resulting from remand. Accordingly, rather than remanding these allegations, Member Kaplan would issue a Notice to Show Cause to inquire whether the parties would even welcome a remand. See *Home Depot, USA*, 373 NLRB No. 25, slip op. at 21–22 fn. 6 (2024) (Member Kaplan, dissenting); *West Shore Home*, 372 NLRB No. 143, slip op. at 1–3 (Member Kaplan, dissenting).

[8] We agree with the judge, for the reasons set forth in his decision, that the Respondent's coercive and unlawful misconduct, including threatening to close its business if employees selected the union and disciplining two union supporters for their protected union activity during the critical period between the filing of the petition and the election requires setting aside the results of the election. See, e.g., *Bon Appetit Mgmt. Co.*, 334 NLRB 1042, 1044 (2001).

In her exceptions, the General Counsel requested a *Gissel* bargaining order, but shortly afterwards, the Board issued its decision in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023). In *Cemex*, the Board held that an employer violates Sec. 8(a)(5) and (1) by refusing to recognize, upon request, a union that has been designated as a Sec. 9(a) representative by the majority of employees in an appropriate unit unless the employer promptly files a petition for an election pursuant to Sec. 9(c)(1)(B) of the Act (an RM petition). 372 NLRB No. 130, slip op. at 25. However, if the employer then commits unfair labor practices that would require setting aside the election, the Board will rely on the prior designation of a representative by the majority of employees by nonelection means to conclude that the employer's refusal to recognize the Union violated Sec. 8(a)(5), and will, as a remedy for that violation, order the employer to recognize and bargain with the union. 372 NLRB No. 103, slip op. at 26. In her answering brief, the General Counsel requested that the Board issue a *Cemex* bargaining order. But because the General Counsel did not allege or argue that the Respondent violated Sec. 8(a)(5), a bargaining order is not warranted in this case under the standard announced in *Cemex*. See 372 NLRB No. 130, slip op. at 35 ("[A] bargaining order under the new [*Cemex*] standard" can issue "only as a remedy for an employer's violation of Sec[.] 8(a)(5) by refusal to bargain with a union."); see also *Spike Enterprise, Inc.*, 373 NLRB No. 41, slip op. at 8 fn. 26 (2024).

[9] This is the *Gissel* "Category II" standard.

[10] See, e.g., *Aldworth Co.*, 338 NLRB 137, 150 (2002) (finding "pernicious effects of the [r]espondent's preelection unfair labor practices were exacerbated and renewed by independent unlawful postelection conduct"), enfd. sub nom. *Dunkin' Donuts Mid-Atlantic Distribution Center v. NLRB*, 363 F.3d 437 (D.C. Cir. 2004); *General Fabrications Corp.*, 328 NLRB 1114, 1115 (1999) ("An employer's continuing hostility toward employee rights in its postelection conduct 'evidences a strong likelihood of a recurrence of unlawful conduct in the event of another organizing effort.'") (quoting *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993)), enfd. 222 F.3d 218 (6th Cir. 2000).

expressed through authorization cards are better protected by a bargaining order.

A. The Union's Majority Status

On June 30, 2021, the Union sent the Respondent a voluntary recognition agreement and signed authorization cards from 61 out of 109—or over 55 percent of—unit members, and it also attached the cards to its Certification of Representation (RC petition) filed the same day. This is sufficient to prove majority support. In disputing the Union's majority status, the Respondent challenges six of the signed authorization cards and argues that they should not be counted. The Respondent also argues that without these six cards, the Union would not have had majority support, as there were actually 110 unit members instead of 109. For the reasons explained below, both arguments are without merit.

In advancing its first argument, the Respondent points to evidence that two employees, Laura Lawhorn and Mark Carey, supposedly wanted their cards back. But the record does not establish that either of these employees asked for their cards back before the Union filed its RC petition, let alone before the Respondent repeatedly threatened to shut down the company if employees unionized (as discussed in more detail below). See, e.g., *Grey's Colonial Boarding Home*, 287 NLRB 877, 887 & fn. 36 (1987) (counting a challenged authorization card because there was no evidence that the employee who signed it made up her mind to ask for it back before the employer began unlawfully discharging employees, as she did not "discard[] her union adherence" until "immediately after her four fellow employees were discharged" for their union activities). Additionally, neither of the two employees who supposedly wanted their cards back actually testified. Instead, two other employees—including Theresa Horne, whose testimony the judge discredited in large part—claimed that Lawhorn and Carey supposedly wanted their cards back. But even accepting arguendo this evidence for the truth of the matter asserted, that would mean 59 out of 109 unit employees signed cards, which would still have given the Union support from over 54 percent of unit members.

The Respondent's argument that four additional cards were not properly authenticated is also without merit, as the judge correctly admitted all 61 authorization cards into evidence. The fact that Horne did not witness each unit member sign their card in her presence is not grounds for excluding the cards. See *McEwen Mfg. Co.*, 172 NLRB 990, 992 (1968) (setting forth the Board's long-held principle that it "will . . . accept as authentic any authorization cards which were returned by the signatory to the person soliciting them even though the solicitor did not witness the actual act of signing"), enfd. sub nom. *Amalgamated Clothing Workers of America v. NLRB*, 419 F.2d 1207 (D.C. Cir. 1969). The fact that she was not entirely certain who every employee was who returned a card to her does not warrant exclusion either. See, e.g., *Evergreen America Corp. v. NLRB*, 531 F.3d 321, 330 (4th Cir. 2008) ("[N]either [the solicitor's] failure to witness the signing of the cards nor his lack of personal acquaintance with [the signers] precludes his authentication of their cards. The Board has long held that it will accept as authentic any authorization card returned by the signer to the solicitor.") (citing cases), enfg. 348 NLRB 178 (2006). The Respondent never disputed that these employees were on the payroll, and nothing in the record suggests that someone else fraudulently signed these cards. But even assuming arguendo that the Board should exclude those four cards, the Union still would have had majority support from over 52 percent of unit members (57 out of 109, including Lawhorn's and Carey's cards).

The Respondent also claims there were actually 110 unit members, but the judge correctly found that there were only 109.[11] The Respondent provides no support for its contention that there were 110 unit members. The record evidence, including the voluntary recognition agreement and corresponding list of unit employees as well as the charging documents, shows 109 unit members, not 110. This means that even if the Board were to exclude *all six* of the challenged cards—the two cards that Lawhorn and Carey supposedly wanted back *and* the four cards that the Respondent claims were not properly authenticated—the Union still would have had majority support by one unit member (55 out of 109).

B. Propriety of a Bargaining Order

As stated above, the Board considers a respondent's entire course of conduct, both before and after the election, in determining whether a *Gissel* bargaining order is warranted. In particular, the Board considers "the seriousness of the violations and their pervasive nature, as well as such factors as the number of employees directly affected, the identity and position of the individuals committing the unfair labor practices, and the size of the unit and extent of dissemination of knowledge of the Respondent's coercive conduct among unit employees."[12] For the reasons stated below, we find that the Respondent's violations were sufficiently numerous, serious, and extensive to warrant a bargaining order.

[11] At one point in his decision, the judge did inaccurately state that there were 110 unit members, but he used the correct number throughout the rest of the decision.

[12] See, e.g., *Cemex Construction Materials*, above, 372 NLRB No. 130, slip op. at 12; *Garvey Marine, Inc.*, 328 NLRB 991, 993 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001).

Particularly significant in this regard is the fact that, of the Respondent's numerous violations, several were of the variety that the Board and the courts have recognized as "hallmark" violations, meaning that they are particularly coercive because of their tendency to destroy election conditions and to persist for longer periods of time than other unfair labor practices.[13] Violations of this type tend to have such a coercive and long-lasting effect on employees' free choice in a potential rerun election that, absent "some significant mitigating circumstance," they generally warrant a bargaining order "without extensive explication."[14]

Here, as the judge found, and we have affirmed, the Respondent committed numerous hallmark violations of Section 8(a)(1) when two of its owners and a supervisor repeatedly threatened to shut down the company if employees unionized, that employees would lose their jobs, and told employees that selecting the Union would be futile because the Respondent would not bargain with the Union. Specifically, on the evening of June 24, 2021, Tommy Garten and Matt Garten—two of the Respondent's owners—along with two other managers held a mandatory employee meeting at which Tommy Garten told the employees that the company only had 14 months left on their contract with WestRock Company, and if employees unionized, the Respondent would not renew the contract at the end of 14 months. Because the Respondent's business was based solely on its contract with WestRock, Tommy Garten was threatening to shut down the entire company if employees unionized. Later in the meeting, Matt Garten reiterated this threat, telling the employees that the Gartens would "take their ball to a new court" when the contract expired if employees voted for the Union. Tommy Garten specifically tied any closure decision to employees' election decision by emphasizing that if employees rejected the Union, the Respondent would likely renew the contract. Additionally, Tommy and Matt Garten each separately told the employees that the Respondent would not deal with the Union if it were voted in, suggesting that employees' selection of the Union would be futile. The Gartens further emphasized their threat of futility when they said that if employees "were to push the Union in . . . the Union would have to bargain with WestRock. Not [them]."[15]

The Respondent repeated these extremely coercive unlawful threats a few weeks later on the evening of July 9 when Tommy Garten, Matt Garten, and supervisor George "Stick" Austin held another mandatory meeting. Tommy Garten repeated his June 24 statements about only having 14 months left on the WestRock contract and how he would not renew it if employees unionized; instead, another company such as Swift Transportation or Amazon Transportation would come in and take over. But, according to Tommy Garten, that new company would not be allowed to use any of the Respondent's equipment or facilities, and that new company would bring in their own workers, putting the Respondent's employees out of a job. Austin reiterated that, if the Union came in, Tommy Garten would have to deal with the Union for 14 months, but after that, he would not renew the contract. Tommy Garten further threatened that if the Union came in, the Respondent would no longer be involved in employees' health insurance or 401(k)s, and the Union would have to provide those benefits. He further stated that the Union would be useless to employees and that the Union was just after employees' money.

The Board and the courts have long emphasized that threats of job loss or shutdowns in response to unionization "are among the most flagrant of unfair labor practices and are likely to affect the election conditions negatively for an extended period of time." *Evergreen America Corp.*, 348 NLRB 178, 180 (2006) (quoting *Cardinal Home Products*, 338 NLRB 1004, 1011 (2003)), enfd. 531 F.3d 321 (4th Cir. 2006).[16] Because the June 24 and July 9 threats to close the Respondent's business implicated a potential loss of work for the entire unit, they directly affected all employees who learned of them. Both meetings at which the Respondent's owners explicitly threatened job loss and total shutdown were mandatory, and although witness accounts differed slightly in their approximations of how many employees were present, they estimated that anywhere from 20 to 30 employees were present at each

[13] See, e.g., *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212–213 (2d Cir. 1980) ("Certain violations have been regularly regarded by the Board and the courts as highly coercive. These . . . so-called 'hallmark' violations . . . . include such employer misbehavior as . . . threats of plant closure or loss of employment[.]").

[14] Id.

[15] While the June 24 threats occurred before the critical period between the Union's June 30 petition and the August 6 election, it is well established that the Board considers the appropriateness of a *Gissel* order in light of the Respondent's entire course of conduct, both before and after the election, and not just its unfair labor practices committed during the critical period. See, e.g., *Gissel*, above, 395 U.S. at 614; *Alumbaugh Coal Corp.*, 247 NLRB 895, 914 fn. 41 (1980) (observing that the Board considers all unfair labor practices, not just those during critical period), enfd. in relevant part 635 F.2d 1380 (8th Cir. 1980). Moreover, the Respondent repeated these unlawful statements from the June 24 meeting at the July 9 meeting described below, which did occur during the critical period.

[16] See also, e.g., *Gissel*, above, 395 U.S. at 611 fn. 31 ("[C]ertain unfair labor practices [(for instance, threats to close or transfer plant operations)] are more effective to destroy election conditions for a longer period of time than others."); *Garvey Marine*, above, 328 NLRB at 994 ("[T]he Board deems [threats of loss of jobs and business closure] 'hallmark' violations with effects on bargaining unit employees that cannot be underestimated.").

meeting. These accounts also suggest that while there may have been some overlap among attendees at these meetings, different work crews were present at the two separate meetings. Thus, while the unit involved was relatively large, the Respondent's threats were directly communicated to a substantial percentage of the unit employees, a factor particularly supportive of a bargaining order. See, e.g., *Cogburn Healthcare Center, Inc.*, 335 NLRB 1397, 1399 (2001) ("The Board has held that, where a substantial percentage of employees in the bargaining unit is directly affected by an employer's serious unfair labor practices, the possibility of holding a fair election decreases.") (citing cases), revd. on other grounds 437 F.3d 1266 (D.C. Cir. 2006).[17]

Furthermore, the coercive and lasting effect of the Respondent's unlawful conduct was magnified by the fact that these threats came directly from the Respondent's owners, who have complete control over whether to shut the company down. See *Evergreen America*, above, 348 NLRB at 181; *Consec Security*, 325 NLRB 453, 455 (1998) ("When the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten."), enfd. mem. 185 F.3d 862 (3d Cir. 1999). Therefore, this factor also strongly supports issuing a bargaining order. See *National Steel Supply*, 344 NLRB 973, 977 (2005) (finding that the "impact of the violations is heightened by . . . the direct involvement of the [r]espondent's highest ranking officers"), enfd. 207 F. App'x 9 (2d Cir. 2006); *Parts Depot, Inc.*, 332 NLRB 670, 675 (2000) (finding "[t]he severity of the [r]espondent's unlawful conduct is exacerbated by the involvement of high ranking officials"), enfd. 24 F. App'x 1 (D.C. Cir. 2001).

In addition to these hallmark violations, we rely on the coercive impact of the Respondent's other serious violations. At the outset of the organizing campaign, the Respondent immediately reacted by committing numerous unfair labor practices. On June 23, 2021, manager George Rose separately interrogated two different employees about their union activities in violation of Section 8(a)(1), and he also created an unlawful impression of surveillance during one of those conversations. Additionally, the Respondent violated Section 8(a)(3) and (1) when it disciplined two employees, Allen Pullin and Ray Humphries, for talking to coworkers about the Union, even though the credited testimony establishes that both Pullin and Humphries had these conversations on breaks when employees frequently discussed nonwork subjects and engaged in solicitation. The Respondent compounded this unfair labor practice by committing an 8(a)(1) violation when manager Ben Strozier specifically told Pullin that he was being written up for talking about the Union.

Respondent owner Tommy Garten specifically involved himself in the decision to discipline Humphries, going as far as to call Humphries and tell him to stop soliciting for the Union on company time. Strozier, who unlawfully disciplined Pullin, was a high-level management official as the Respondent's general manager, financial controller, and de facto head of human resources, further weighing in favor of a bargaining order. The Respondent committed these violations against four different employees, and the record evidence suggests that at least some of these employees told others about the Respondent's unlawful statements and actions. See *Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 827 (D.C. Cir. 2001) (finding that dissemination to employees not personally affected by unfair labor practices is a relevant factor supportive of a bargaining order), enfg. 328 NLRB 991 (1999).

Finally, the Board has held, with court approval, that a respondent's post-election unfair labor practices "reveal[ ] continued hostility toward employee rights [that] evidences a strong likelihood of a recurrence of unlawful conduct in the event of another organizing effort."[18] We accordingly take administrative notice that the Respondent again violated Section 8(a)(1) shortly after the conclusion of the hearing in this matter. Specifically, on September 29, 2022, Respondent owner Dizzy Garten unlawfully told employees that "if it wasn't for [the Union] trying to steal money out of your paychecks you would already have your raises," in a message that also referred to the Union's representatives as "worthless pieces of trash" and "idiots" and to the content of a union flyer as "pure horseshit." *Garten Trucking LC*, 373 NLRB No. 64, slip op. at 2 (2024). Dizzy Garten's unlawful message was widely disseminated to unit employees through a messaging application with which the Respondent regularly communicates with employees, and its coercive impact was magnified by his status as company owner. Although we would find that the violations in this case warrant a *Gissel* bargaining order even without this subsequent violation, this

[17] Cf. *Scott v. Stephen Dunn & Associates*, 241 F.3d 652, 665 (9th Cir. 2001) (directing entry of Sec. 10(j) interim bargaining order: "Because these violations affected the entire 97-person bargaining unit, there is no basis to contend that this violation will not continue to impact the deliberations of all of the eligible voters. The size of the bargaining unit did not lessen the impact of the unfair labor practices here.").

[18] *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), enfd. mem. 47 F.3d 1161 (3d Cir. 1995); see also, e.g., *MJ Metal Products*, 328 NLRB 1184, 1185 (1999), affd. 267 F.3d 1059 (10th Cir. 2001); *Eddyleon Chocolate*, 301 NLRB 887, 891 (1991) ("The likelihood of the [r]espondent's misconduct recurring in a rerun election is high, as the [r]espondent's postelection conduct reveals continued hostility to employee rights."); *Chromalloy Mining & Minerals v. NLRB*, 620 F.2d 1120, 1131 fn. 8 (5th Cir. 1980) (noting that post-election violations "are always relevant because they demonstrate that the employer is still opposed to unionization."), enfg. in relevant part 238 NLRB 688 (1978).

violation is further evidence that the Respondent remains intent on avoiding a collective-bargaining obligation even at the cost of continuing to violate the law.

Given the Respondent's numerous unfair labor practices, especially the repeated hallmark threats to close the company that came directly from the Respondent's owners, the Respondent's antiunion message is "unlikely to be forgotten" by employees. See *Consec Security*, above, 325 NLRB at 455. We conclude that the possibility of erasing the effects of the Respondent's highly coercive misconduct and ensuring a fair rerun election by the use of the Board's traditional remedies, even with the addition of certain enhanced remedies as discussed further below, is slight, and that the majority of employees' prior free choice of the Union as their representative, as designated by authorization cards, would be better protected by the issuance of a bargaining order "unless some significant mitigating circumstance exists."[19]

The Respondent has not argued to the Board that changed circumstances, including the passage of time since its unlawful conduct, should preclude a bargaining order. The Board's traditional policy, with approval from some courts of appeals, is to consider the appropriateness of a bargaining order as of the time of the unfair labor practices, because taking into account subsequent changes incentivizes prolonged litigation, undermining the Act's goal of deterring unlawful behavior.[20] Other courts of appeals, however, including the Court of Appeals for the District of Columbia Circuit and the Court of Appeals for the Fourth Circuit (in which this case arises), have required, as a condition of enforcing a *Gissel* bargaining order, that the Board determine the appropriateness of the order in light of the circumstances existing at the time it is entered.[21]

Here, as discussed in detail above, we have found that a majority of unit employees had designated the Union as their representative by June 30, 2021. We have found that the Respondent's unfair labor practices, especially its repeated threats to close the business, had a strong tendency to undermine, and did undermine, the Union's majority support and impede the election process. We have also found that, absent mitigating circumstances, the possibility of erasing the effects of the Respondent's highly coercive misconduct and ensuring a fair rerun election by the use of the Board's traditional remedies is slight, and that the majority of employees' prior free designation of the Union as their representative by authorization cards would be better protected by the issuance of a bargaining order.

After examining the appropriateness of a bargaining order under the circumstances existing at the present time, we find that the passage of time since the Respondent's unfair labor practices does not constitute a mitigating circumstance warranting withholding a bargaining order in this case.[22]

[19] *NLRB v. Jamaica Towing*, above, 632 F.2d at 212.

[20] See, e.g., *Gissel*, above, 395 U.S. at 614 (emphasizing that, where a union has shown past majority support, a bargaining order serves the dual goals of effectuating ascertainable employee free choice and deterring employer misbehavior); *Garvey Marine*, above, 328 NLRB at 995 (explaining deterrence purpose of Board's traditional practice); *East Bay Automotive Council v. NLRB*, 483 F.3d 628, 635 (9th Cir. 2007) ("[C]hanged circumstances during intervals of adjudication 'have been held irrelevant to the adjudication of enforcement proceedings.'") (quoting *NLRB v. Bakers of Paris*, 929 F.2d 1427, 1448 (9th Cir. 1991) (observing that this rule "prevent[s] employers from intentionally prolonging Board proceedings in order to frustrate the issuance of bargaining orders")), enfg. 342 NLRB 1244 (2004); *United Dairy Farmers Cooperative Assn. v. NLRB*, 633 F.2d 1054, 1069 (3d Cir. 1980) (holding that the Board may "ignore a possible dissipation of majority support through employee turnover after the unfair labor practice [because] '[t]o require the Board to determine whether a continuing majority supports unionization . . . would be to put a premium upon continued litigation by the employer' and allow the employer 'to avoid any bargaining obligation indefinitely.'") (quoting *Hedstrom Co. v. NLRB*, 629 F.2d 305, 312 (3d Cir. 1980) (en banc)), remanding in relevant part 242 NLRB 1026 (1979).

[21] See, e.g., *Flamingo Hilton-Laughlin*, above, 148 F.3d at 1171 & fn. 4 (District of Columbia Circuit citing precedent from other courts of appeals considering changed circumstances, including passage of time and employee and management turnover). More specifically, both the District of Columbia Circuit and the Fourth Circuit have held that, in a *Gissel* "Category II" case, the Board must make detailed findings based on substantial evidence that (1) a majority of employees in an appropriate unit had, at one time, supported the Union; (2) the Respondent's unfair labor practices had a tendency to cause or caused dissipation of the Union's majority support; and (3) the possibility of erasing the effects of the Respondent's unfair labor practices and ensuring a fair rerun election is slight, so that the employees' pre-violation sentiments would be better protected by a bargaining order. See *Evergreen America v. NLRB*, above, 531 F.3d at 329–330 (Fourth Circuit); *Traction Wholesale Center, Inc. v. NLRB*, 216 F.3d 92, 104 (D.C. Cir. 2000), enfg. in relevant part 328 NLRB 1058 (1999). The Fourth Circuit has additionally required the Board to specifically consider and make findings about the likelihood of recurring misconduct, whether the residual impact of the Respondent's unfair labor practices has been or will be dissipated by the passage of time, and the efficacy of the Board's ordinary remedies. *Evergreen America v. NLRB*, above, 531 F.3d at 329–330. And the District of Columbia Circuit has required the Board to explicitly balance three considerations, as considered at the time the Board issues its order: (1) the employees' Sec. 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act. *Traction Wholesale Center*, above, 216 F.3d at 107–108.

[22] In so finding, we have duly considered the Section 7 rights of all employees involved. Consistent with the careful balancing of employee rights described by the Court in *Gissel*, we find that issuing a bargaining order in this case protects the rights of the majority of the Respondent's employees who designated the Union as their representative prior to the Respondent's unlawful coercive threats, while the rights of those employees who may be opposed to representation are safeguarded by their access to the Board's decertification procedure under Sec. 9(c)(1) of the Act, following a reasonable period of time to allow the collective-bargaining relationship a fair chance to succeed. See *Gissel*, above, 395

It has now been approximately 3 years since the Respondent's unfair labor practices at issue in this case. We cannot conclude, under the circumstances of this case, that this passage of time has made it likely that the Board's traditional remedies, even with the additional remedies discussed herein, could ensure that a fair election could be held today. As discussed above, the Board and the courts have long recognized that coercive conduct such as the Respondent's here, especially its threats to close its business, tend to impede the possibility of a fair rerun election for extended periods of time after their commission.[23] Accordingly, courts that require consideration of changed circumstances as a condition of enforcing Board bargaining orders have regularly enforced such orders after comparable or longer periods of time where other circumstances have not determinatively weighted against enforcement.[24] Here, we find that the passage of time since the Respondent's unfair labor practices in this case does not warrant concluding that the impact of the Respondent's coercive misconduct has been sufficiently dissipated to permit a fair rerun election today, especially in light of the Respondent's intervening unfair labor practice discussed above.[25] We accordingly conclude that a bargaining order under *Gissel* is warranted, necessary, and appropriate to effectuate the purposes and policies of the Act under presently existing circumstances.

II. ADDITIONAL REMEDIES

Certain additional remedies are warranted in light of the Respondent's extensive and serious unfair labor practices in response to its employees' union organizing.[26] Accordingly, we shall order the Respondent to have the attached notice read aloud to the employees so that they "will fully perceive that the Respondent and its managers are bound by the requirements of the Act." *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), rev. denied 400 F.3d 920, 929–930 (D.C. Cir. 2005). The Board has long held that the "public reading of the notice is an 'effective but moderate way to let in a warming wind of information and, more important, reassurance.'" *United States Service Industries*, 319 NLRB 231, 232 (1995) (quoting *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969)), enfd. 107 F.3d 923 (D.C. Cir. 1997). Reassurance to employees that their rights under the Act will not be violated by the Respondent is particularly important because it continues to employ the owners and supervisors who were personally and directly involved in unlawfully threatening the employees. See, e.g., *North Memorial Health Care*, 364 NLRB 770, 770 (2016) (finding notice-reading appropriate in part due to participation of high-ranking management officials in unfair labor practices), enfd. in relevant part 860 F.3d 639 (8th Cir. 2017). We shall accordingly order the Respondent, during the time the required notice is posted, to hold a meeting or meetings during work time, scheduled to ensure the widest possible attendance of

U.S. at 613–614; cf., e.g., *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB 633, 639 (2011), enfd. sub nom *Mathew Enterprise, Inc. v. NLRB*, 498 F. App'x 45 (D.C. Cir. 2012). We find, again consistent with *Gissel*, that, because a majority of the Respondent's employees in an appropriate unit have designated the Union as their representative for the purpose of collective bargaining, the Act's dual purposes of effectuating ascertainable employee free choice and of deterring employer misbehavior are aligned, so that, absent the likelihood of a fair rerun election, a bargaining order simultaneously serves both purposes without subordinating either to the other. *Gissel*, above, 395 U.S. at 614.

[23] See, e.g., *Gissel*, above, 395 U.S. at 611 fn. 31; *Stevens Creek Chrysler*, above, 357 NLRB at 638; *Evergreen America*, above, 348 NLRB at 180.

[24] See, e.g., *Evergreen America v. NLRB*, above, 531 F.3d at 332–333 (Fourth Circuit affirming Board's conclusion that passage of four years between respondent's unfair labor practices and Board order did not make *Gissel* order unacceptable), enfg. 348 NLRB 178 (2006); *NLRB v. Goya Foods of Florida*, 525 F.3d 1117, 1138 (11th Cir. 2008) (rejecting respondent's argument that enforcement of non-*Gissel* bargaining order—evaluated under *Gissel* standard—should be denied based solely on passage of 6 to 7 years between unfair labor practice conduct and Board order), enfg. 347 NLRB 1118 (2006); *Dunkin' Donuts*, above, 363 F.3d at 441–442 (District of Columbia Circuit enforcing Board order issued four years after unfair labor practices); *NLRB v. U.S.A. Polymer Corp.*, 272 F.3d 289, 293–299 (5th Cir. 2001) (enforcing Board order issued more than 4 years after unfair labor practices), enfg. 328 NLRB 1242 (1999), cert. denied 536 U.S. 939 (2002); *Garvey Marine v. NLRB*, above, 245 F.3d at 826–830 (District of Columbia Circuit enforcing Board order issued more than four years after unfair labor practices); *Parts Depot*, above, 332 NLRB at 674–676 (entering *Gissel* order more than four years after postelection unfair labor practice), enfd. 24 F. App'x 1 (D.C. Cir. 2001); but cf. *Cogburn Health Center, Inc. v. NLRB*, above, 437 F.3d 1272–1276 (District of Columbia Circuit denying enforcement to Board order on finding Board failed to consider respondent's proffered evidence of changed circumstances during five years between unfair labor practices and Board order); *Flamingo Hilton-Laughlin*, above, 148 F.3d at 1170–1173 (District of Columbia Circuit remanding for reconsideration on finding Board failed to explain necessity of order at time of issuance four years after unfair labor practices).

[25] Given the extent and severity of the Respondent's unfair labor practices, Member Kaplan joins his colleagues in ordering a *Gissel* bargaining order. He notes that the nearly three years that have elapsed since the unfair labor practices in this case would ordinarily raise concerns about the enforceability of the bargaining order. See *Cogburn Health Center v. NLRB*, 437 F.3d 1266, 1275 (D.C. Cir. 2006) (finding five-year delay between unfair labor practices and Board decision in part obviated need for bargaining order), denying enf. in relevant part to 335 NLRB 1397 (2001); see also *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1171–1172 (D.C. Cir. 1998) (four-year delay); *Stern Produce Co.*, 368 NLRB No. 31 (2019) (delay of three and a half years). However, he finds that the Respondent's subsequent 8(a)(1) violation found in *Garten Trucking LC*, 373 NLRB No. 64 (2024), mitigates those concerns.

[26] We also amend the remedy to affirmatively require the Respondent to rescind the unlawful solicitation and distribution policy in its employee handbook; the judge omitted this standard remedy.

employees, at which the attached notice marked "Appendix" will be read to the employees by a high-ranking management official of the Respondent in the presence of the following: a Board agent; managers and supervisors, including Tommy Garten, Matt Garten, Dizzy Garten, Stick Austin, Betty Mace, Mike McNeely, and George Rose; and, if the Union so desires, a union representative; or, at the Respondent's option, by a Board agent in the presence of managers and supervisors, including Tommy Garten, Matt Garten, Dizzy Garten, Stick Austin, Betty Mace, Mike McNeely, and George Rose, and, if the Union so desires, a union representative. See *Gavilon Grain, LLC*, 371 NLRB No. 79, slip op. at 2 (2022).

Additionally, the numerous unfair labor practices found in this case "amply demonstrate a general disregard for employees' fundamental Section 7 rights." *David Saxe Productions*, 370 NLRB No. 103, slip op. at 6 (2021). The numerosity and egregiousness of the Respondent's unfair labor practices warrant a broad order requiring the Respondent to cease and desist "in any other manner" from interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights. See *Hickmott Foods*, 242 NLRB 1357, 1357 (1979).

ORDER

The National Labor Relations Board orders that the Respondent, Garten Trucking LC, Covington, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a solicitation and distribution policy prohibiting employees from soliciting on nonworking time in work areas.

(b) Coercively interrogating employees about their union activity.

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

(d) Threatening to close the business and threatening employees with job loss if they select Association of Western Pulp and Paper Workers (the Union) as their bargaining representative.

(e) Threatening employees that selecting a union representative would be futile.

(f) Issuing written warnings to employees because of their support for and activities on behalf of the Union.

(g) Telling employees that they were disciplined due to their union activity.

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

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

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

> All regular full-time and part-time truck drivers, maintenance, truck wash, and dispatch employees employed by [the Respondent] at its facilities in Alleghany County, Virginia; but excluding all temporary employees, managers and supervisors, and guards as defined by the Act.

(b) Rescind the solicitation and distribution provision of its employee handbook, and furnish employees with an insert for the current employee handbook that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

(c) Within 14 days from the date of this Order, rescind the July 9 and 12, 2021 warnings issued to Ray Humphries and Allen Pullin and remove from its files any references to them, and within three days thereafter, notify Ray Humphries and Allen Pullin in writing that this has been done and that these unlawful disciplines will not be used against them in any way.

(d) Post at its facilities in Covington, Virginia, copies of the attached notice marked "Appendix."[27] 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

[27] 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."

notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 23, 2021.

(e) Hold a meeting or meetings during worktime, scheduled to ensure the widest possible attendance of employees, at which the attached notice marked "Appendix" will be read to the employees by a high-ranking management official of the Respondent in the presence of the following: a Board agent; managers and supervisors, including Tommy Garten, Matt Garten, Dizzy Garten, Stick Austin, Betty Mace, Mike McNeely, and George Rose; and, if the Union so desires, a union representative; or, at the Respondent's option, by a Board agent in the presence of managers and supervisors, including Tommy Garten, Matt Garten, Dizzy Garten, Stick Austin, Betty Mace, Mike McNeely, and George Rose; and, if the Union so desires, a union representative.

(f) 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.

IT IS FURTHER ORDERED that the election conducted in Case 10–RC–279259 on August 6, 2021, shall be set aside, and that the petition shall be dismissed.

IT IS FURTHER ORDERED that the complaint allegations that the Respondent violated Section 8(a)(1) by maintaining in its employee handbook the introductory statement, social networking rule, conduct after separation rule, protection of confidential information rule parts 1 and 2, personal and work area appearance rule, and return of property upon termination of the employment relationship rule are severed and remanded to Administrative Law Judge Charles J. Muhl for further appropriate action, including reopening the record, if necessary, and the preparation of a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. September 17, 2024

_____
Lauren McFerran, Chairman

_____
Marvin E. Kaplan, 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 maintain a solicitation and distribution policy prohibiting you from soliciting on nonworking time in work areas.

WE WILL NOT coercively question you about your union activities.

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

WE WILL NOT threaten to close the business or threaten you with job loss if you select Association of Western Pulp and Paper Workers (the Union) as your bargaining representative.

WE WILL NOT threaten you that selecting a union representative would be futile.

WE WILL NOT issue written warnings to you because of your support for and activities on behalf of the Union.

WE WILL NOT tell you that you were disciplined due to your union activity.

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

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

> All regular full-time and part-time truck drivers, maintenance, truck wash, and dispatch employees employed by [Garten Trucking LC] at its facilities in Alleghany County, Virginia; but excluding all temporary employees, managers and supervisors, and guards as defined by the Act.

WE WILL rescind the solicitation and distribution provision of our employee handbook, and WE WILL furnish you with an insert for the current employee handbook that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or publish and distribute to you revised employee handbooks that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

WE WILL, within 14 days from the date of the Board's Order, rescind the July 9 and 12, 2021 warnings issued to Ray Humphries and Allen Pullin and remove from our files any references to them, and WE WILL, within 3 days thereafter, notify Ray Humphries and Allen Pullin in writing that this has been done and that these unlawful disciplines will not be used against them in any way.

WE WILL hold a meeting or meetings during worktime at our facilities in Covington, Virginia, scheduled to ensure the widest possible attendance of employees, at which this notice will be read to you by one of our high-ranking management officials in the presence of the following: a Board agent; managers and supervisors, including Tommy Garten, Matt Garten, Dizzy Garten, Stick Austin, Betty Mace, Mike McNeely, and George Rose; and, if the Union so desires, a union representative; or, at our option, by a Board agent in the presence of managers and supervisors, including Tommy Garten, Matt Garten, Dizzy Garten, Stick Austin, Betty Mace, Mike McNeely, and George Rose; and, if the Union so desires, a union representative.

GARTEN TRUCKING LC

The Board's decision can be found at https://www.nlrb.gov/case/10-CA-279843 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.

Jordan Wolfe, Esq., Anthony Fitzpatrick, Esq., for the General Counsel.

King Tower, Esq. and *Agnis Chakravorty, Esq.,* for the Respondent.

David Rosenfeld, Esq., for the Charging Party.

DECISION

CHARLES J. MUHL, Administrative Law Judge. In early June 2021, Jeff Baker and another individual initiated an organizing campaign with the Association of Western Pulp and Paper Workers (the Union). The two employees sought to have the Union represent them and other employees of Garten Trucking, LLC (the Respondent) in Covington, Virginia. Those employees transport paper and other products pursuant to the Respondent's contract with WestRock Company, which operates a paper mill in the same city. On June 21, Baker held a meeting at his house with roughly 30 employees where a union representative spoke via videoconference about organizing. Nearly all of the attendees, including Baker, signed union authorization cards. Shortly thereafter, the Respondent began holding meetings with employees to express its opinions concerning why employees should reject unionizing. At a meeting on June 24, Baker spoke out when one of the Respondent's owners, Tommy Garten, was addressing employees. On June 29, the Respondent suspended Baker. The next day, the Union filed a petition seeking an election in a bargaining unit of approximately 110 employees. On July 12, the Respondent discharged Baker. Ultimately, on August 6, the Union lost the election by a count of 30 to 65.

The story of Baker's discharge is not as clear cut as that sequence of events might initially sound, though. At work on June 18, 3 days prior to the union meeting at his house, Baker told a coworker, Scarlett Ledford, to make numerous copies of a union organizing handbook for him. The only copier Ledford could use to do so without alerting management was owned by WestRock. Ledford made the copies, totaling over 1000 sheets of paper. Then on June 26, Ledford filed a sexual harassment complaint against Baker. The Respondent initiated an investigation into that complaint, interviewed Baker, Ledford, and other employees, then suspended Baker on June 29 to complete the investigation. In addition to the sexual harassment complaint, Ledford also volunteered to the Respondent that Baker had directed her to make a large number of copies for personal use on June 18. The Respondent verified with WestRock that an atypical number of copies had been made using the Westrock copier on that date. Fearing the cancellation of its contract with WestRock and having previously discharged other employees for misuse of WestRock property, the Respondent discharged Baker.

The General Counsel's complaint alleges the Respondent committed numerous unfair labor practices during the Union's organizing campaign. As will be discussed fully herein, I conclude that the Respondent violated Section 8(a)(1) by unlawfully threatening employees with business closure and job loss if they chose the Union as their bargaining representative; creating the impression that employees' union activities were under surveillance; interrogating employees about their union activities; telling employees that they received a written warning due to their union activity; and maintaining numerous unlawful handbook rules. I also find that the Respondent violated Section 8(a)(3) and (1) by issuing warnings to employees Ray Humphries and Allen Pullin due to their union activity. Given this, I conclude that the first election should be set aside and a new election held. However, I find that the remaining allegations in the General Counsel's complaint should be dismissed. In particular, I conclude that the Respondent's discharge of Baker was lawful.[1]

From August 22–26, 2022, and September 12–14, 2022, I heard this case via videoconference.[2] On November 16, 2022, the General Counsel and the Respondent filed posthearing briefs, which I have read and carefully considered.[3] On the entire record, I make the following findings of fact and conclusions of law.[4]

FINDINGS OF FACT

ALLEGED UNFAIR LABOR PRACTICES

I. BACKGROUND

The Respondent is engaged in the business of transporting paper products and other goods to and from facilities located in and around Covington, Virginia.[5] It was formed in 2012 and employs approximately 180 people. The transportation business is conducted pursuant to a contract the Respondent has with WestRock Company, which operates a paper mill in Covington. The Respondent refers to this business as the "local mill shuttle run." The basic function is for drivers to transport loaded and empty trailers from the paper mill to other lots and warehouses owned by the Respondent in the Allegheny County, Virginia area.[6]

Garten Trucking is a family-run business owned by four members of the Garten family. They include George "Tommy" Garten, his wife Marybeth Garten, and his two sons, Matt Garten and Robert "Dizzy" Garten. Tommy Garten oversees the Respondent's day-to-day operations. In the summer of 2021, Ben Strozier was the general manager and financial controller of the Respondent. He also handled the human resource functions at that time. Betty Mace was the yard manager. Mike McNeely was the base manager. During that timeframe, these individuals worked out of the Respondent's main office in Covington, except for Mace. She was stationed at what is called the "Pinehurst Lot" facility, also in Covington.

At the Pinehurst Lot, the Respondent has both a driver trailer and a dispatch trailer. George "Stick" Austin and George Rose are two additional supervisors who worked out of that lot in the summer of 2021. Austin was the logistics manager responsible for the operation of the local mill shuttle. He supervised the Respondent's drivers. Rose was the assistant yard manager who supervised three individuals: the load planner, dispatcher, and account service representative (ASR). At that time, the load planner was discriminatee Jeff Baker; the dispatcher was Brian Hubbard; and the ASR was Scarlet Ledford. All of these individuals worked out of the dispatch trailer. That dispatch trailer contained a shared office for Baker and Brian Hubbard, as well

[1] On June 15, 2022, the General Counsel, through the Regional Director for Region 10, Subregion 11 of the National Labor Relations Board (the Board), issued an order consolidating Cases 10–CA–279843, 10–CA–280804, 10–CA–281786, and 10–CA–282554, as well as a consolidated complaint (and notice of hearing) against Garten Trucking LLC (the Respondent). The complaint was premised upon unfair labor practice charges filed, and in some cases amended, by the Association of Western Pulp and Paper Workers (the Union) from July 14, 2021, through May 19, 2022. On July 6, 2022, the Regional Director issued a Report on Objections in Case 10–RC–279259. The Union filed the objections following its representation election loss at Garten Trucking on August 6, 2022. The Regional Director found that numerous objections raised substantial and material issues of fact best resolved by a hearing. The Regional Director consolidated the RC case with the four prior CA cases. On July 25, 2022, the General Counsel issued a second complaint against the Respondent in Case 10–CA–296060 and subsequently consolidated that case with the prior CA and RC cases. On June 27 and August 3, 2022, the Respondent filed answers denying the substantive allegations and asserting numerous affirmative defenses.

[2] Prior to the hearing, I granted the Respondent's motion to conduct the hearing in person in Roanoke, Virginia. However, shortly thereafter, issues caused, in part, by the COVID-19 pandemic resulted in compelling circumstances under Sec. 102.35(c) of the Board's Rules and Regulations for my approving the parties' joint request to conduct the hearing by videoconference.

[3] Prior to the hearing, the Charging Party filed a request for special remedies. I also have read and carefully considered that request.

[4] In order to aid review, I have included citations to the record in my findings of fact. The citations are not necessarily exclusive or exhaustive. My findings of fact are based upon consideration of the entire record. In assessing witnesses' credibility, I primarily relied upon witness demeanor. I also have considered the context of their testimony, the quality of their recollections, testimonial consistency, the presence or absence of corroboration, 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. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom. 56 F. App'x 516 (D.C. Cir. 2003). Of course, credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008) (citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), reversed on other grounds 340 U.S. 474 (1951)). My specific credibility determinations are detailed in the findings of fact.

[5] The Respondent also is referred to in the transcript as "Garten Trucking 1," which encompasses its local mill shuttle operation with WestRock.

[6] In its answers to the General Counsel's complaints, the Respondent admitted that, in annually conducting its business operations, it purchases and receives at its Covington, Virginia facility goods valued in excess of $50,000 directly from points outside the Commonwealth of Virginia. It also admits, and I so find, that it has been a Sec. 2(2), (6), and (7) employer "for the time frames encompassed in the charges" upon which the complaints are based.

as individual offices for Rose, Austin, and Ledford.[7]

Baker's job as load planner was to answer phone calls from WestRock personnel seeking to schedule trailers to haul loads to and from the plant and warehouses. Once the call came in, Baker would utilize a computer system to assign the run to a driver and identify the equipment to be moved and the involved docks. Baker then passed that information along to Brian Hubbard, the dispatcher, who utilized a radio to convey it to the assigned driver.

The Respondent operates 24/7 utilizing four different crews, all of which work 12-hour shifts from either 6 a.m. to 6 p.m. or 6 p.m. to 6 a.m. The employees operate on a "DuPont" schedule, which results in them being moved back and forth between the two shifts and having numerous days off over a 4-week period. All employees who worked out of the Pinehurst Lot, including the drivers, Baker, Brian Hubbard, and Ledford, were required to clock in and out of work at the start and end of their work shifts using a timeclock in the drivers' trailer. In addition, employees did not have a set number of breaks or specific assigned times for them. Instead, they would take breaks when work was slow, e.g. Baker took his breaks when no phone calls were coming in. Employees did not have to ask permission to take a break, but drivers typically would let the dispatcher know when they went on one. The Respondent did not require employees to clock in or out when they took a break.[8]

II. THE UNION'S ORGANIZING CAMPAIGN AND THE RESPONDENT'S INITIAL RESPONSE

Miles Cook is the director of organizing for the Union. He typically works on the west coast of the United States. Local 675 of the Union represents certain employees who work at the WestRock paper mill in Covington. The Respondent has a number of employees working at that mill. In early June 2021, one of the members of the WestRock bargaining unit put Cook in touch with an employee of the Respondent who was interested in organizing a union there.[9] Thereafter on June 10, Baker and driver Alan Pullin attended a meeting with a representative of the Union.[10]

(a) "Tae Little Brown Book of Union Organizing"

On June 17, Cook emailed Baker "*The Little Brown Book of Union Organizing*" which, unsurprisingly, contains information on union organizing campaigns. Baker printed the book out at home and discovered the printout was 106 pages long. (The book itself was 53 pages and the file Cook sent had an English and a Spanish version.) On June 18, Baker took the printed book to work in the dispatch trailer. The ASR office, where Ledford works, has an all-purpose copier in it (the ASR copier). Baker told Ledford to make 19 copies of the book for him. He told her he was going to be passing them out when they got off of shift. He told her to hide the copies in a drawer in the ASR office and he would come and get them out of there later on. At that shift and time, Ledford understood Baker to be her acting supervisor. Thus, she made the copies for him, despite thinking that copying a union handbook on a work copier was wrong. Ledford ended up making 19 copies of the book, totaling over 1000 pages.[11]

The ASR copier is owned by WestRock, not Garten Trucking. The copier has a tag on it with WestRock's name and the copier is linked to WestRock's computer system. Baker was aware of that latter fact. WestRock provides all of the supplies necessary to operate the copier and handles any needed repairs. However, despite the WestRock tag on the computer, some employees were unaware that it was WestRock's property, including Baker. The Respondent's employees also occasionally used the ASR copier for personal business, with the knowledge and participation of at least one supervisor. However, any personal use

---

[7] This case has two witnesses with the last name "Hubbard", so I will utilize their full names in this decision. The same goes for the four members of the Garten family.

[8] Tr. 163–164, 277–278, 353–354, 410–411, 453–455, 503–505, 564–565, 587, 620–622, 636, 655–658, 715–716; GC Exh. 15, pp. 1–3.

[9] All dates hereinafter are in 2021, unless otherwise noted.

[10] Tr. 165, 411. At the hearing, the Respondent stipulated, and I so find, that the Union has been a Sec. 2(5) labor organization from January 1, 2021, to the present. (Tr. 113.)

[11] The findings of fact in this paragraph are based on Ledford's testimony, which I credit, concerning her conversation with Baker about "*The Little Brown Book,"* including that Baker told her to make him copies. (Tr. 903, 906, 916, 922–923; R. Exh. 3.) Ledford was earnest and down-to-earth when providing this testimony. She also had specific recall (despite frequent leading questions from the Respondent's counsel). Moreover, at the time of the hearing, Ledford no longer was employed by the Respondent, having voluntarily resigned in the summer of 2021. (Tr. 938.) Thus, Ledford had no incentive to testify favorably to the Respondent's case. Finally, as will be discussed later in this decision, Ledford contemporaneously reported making these copies at Baker's direction as part of the Respondent's investigation into a sexual harassment complaint she subsequently made against Baker. (R. Exhs. 4 and 5.)

I do not credit Baker's and Brian Hubbard's testimony to the contrary. (Tr. 234–237, 247–248, 257–260, 372.) Baker claimed that he asked Ledford how to make a copy of the book because he needed a copy for Brian Hubbard. He further testified that Ledford said she would do it for him, but then returned with "a big stack of papers," not just one copy. He further testified that Ledford responded that she figured he would need them and she would make even more copies if he needed more. However, at the time of this June 18 conversation, no indication exists that Ledford had any awareness of Baker and Pullin having met with union representatives prior to then or more generally that employees had initiated a union organizing campaign. Thus, Ledford would have no reason to tell Baker she "figured he would need" the copies.

The General Counsel argues that Ledford was not credible because she admitted that Austin, the Respondent's logistics manager, was present in the dispatch trailer at the time she claimed Baker directed her to make the copies. However, the argument goes, Ledford did not immediately report Baker's alleged misconduct to Austin or to any other supervisor on duty. I find no merit to this argument. Ledford credibly testified that, when Rose, her direct supervisor, was not present, she believed that Baker, the load planner, acted in that supervisory role. ((Despite the extensive evidence the parties presented concerning whether Baker actually was a Sec. 2(11) supervisor and/or in charge when Rose was not there (Tr. 226, 255–256, 335, 353, 433, 500–501, 529, 563–564, 859, 900, 1002, 1107, 1121), the issue is irrelevant and need not be resolved given Ledford's belief.)) She also believed that Austin supervised only the drivers. Based on those beliefs, Ledford's testimony that she acceded to the direction of Baker, her acting supervisor, that she make the personal copies for him is credible. That she did not report Baker's conduct to the Respondent until several days later does not alter that conclusion.

involved a minimal number of copies.[12]

(b) The June 21 union meeting at Jeff Baker's house

On June 21, Baker hosted a union organizing meeting in the garage of his home, where Cook spoke to about 30 assembled employees of the Respondent via videoconferencing. Cook told the crowd about what a union could try and do for them, the steps involved in becoming represented by a union, and the need to obtain majority support from the employees. He explained that, if they unionized, the union would negotiate for them with the Respondent and they would choose what they wanted to seek in a contract. As to authorization cards, Cook read aloud to employees the language at the top of a card he had, stating:

> I hereby authorize the Association of Western Pulp and Paper Workers to act as my collective bargaining agent in dealing with my employer in regards to wages, hours and other conditions of employment, and in proceedings before the NLRB and other government agencies. All previous authorizations made by me are revoked.

Cook told them to sign a card only if they absolutely wanted to be represented by the Union. He also told them they could obtain signed cards from other employees on company property, but only if both parties were not on worktime, such as lunches, breaks, and before and after work. Cook also told them that he wanted them to witness an employee filling out and signing a card and, after it was completed, to initial and date the card on its side. Finally, Cook told the gathered employees that signed and initialed cards were confidential and had to be returned either to him or to Baker. At the end of the meeting, Baker advised the employees that he had authorization cards for employees to sign if they were interested in showing support for the Union. He also told them that signing the card did not mean they were joining the Union or would have to pay dues. He said it was a way to keep up with how many people were interested in organizing.[13]

Baker, Brian Hubbard, and driver Brandon Jackson then sat at a table together to collect signed authorization cards. When an employee came up to them, one of the three provided a blank card, watched the employee fill it out and sign it, then initialed and dated the signed card on the side of it. Once those steps were completed, Baker collected the cards.[14]

The Respondent, through Tommy Garten and Austin, learned about the meeting at Baker's house, at some unidentified point in time either before or after the meeting.[15]

In the days thereafter, Baker, Brian Hubbard, and Jackson collected additional completed and signed authorization cards from employees. One of them was dated June 22 from Ledford.[16]

On June 22, Baker asked Ledford to make another 12 copies of the "*The Little Brown Book of Organizing"* so he could pass them out to drivers.[17]

(c) Rose's June 23 conversations with Morgan and Baker

On June 23, Rose, the assistant yard manager, was in the dispatch trailer with load planner Shannon Morgan. Rose asked Morgan if he could speak to her and they went to his office. Rose said he had heard rumors about a union and he did not want to get floored. Morgan responded that she did not want to talk about it. Rose then said that, legally, he probably could not ask her any questions but, because he still was an hourly employee, maybe he could. Rose continued that he thought he knew who started the union organizing and Morgan probably did too. Morgan responded that she did not know and again that she did not want to comment on it.

Instead, Morgan told Rose she was willing to talk to him about her opinions on how things were going at the Company. Rose said he would listen. Morgan said that lately it felt like employees were getting screwed. She noted that employees did not receive bonuses during COVID-19 even though the Company got Payment Protection Program (PPP) loans. She also said they did not get bonuses when WestRock's computer system got hacked, which was rough on them. Rose nodded in response to that comment. They briefly discussed their experience working for the prior contractor who had the WestRock contract before Garten Trucking. Then Rose told Morgan he heard that employees already had signed 47 cards for the Union and they only needed 51 percent to come in. Morgan responded that she could not tell him that because she did not know it herself. Rose concluded by saying it would be a disaster if the Union came in, especially if it was the same one they had at the prior contractor. Rose told her he just needed to talk to someone about this. Prior to this, Morgan had not discussed the Union with any supervisors.

On that same date, Morgan texted fellow employee Barry Jeffries about the conversation. She reported many of the

[12] R. Exhs. 17, 18; Tr. 229–233, 326, 378–379, 520–522, 848, 853, 856, 956, 987–988, 993. When the Respondent took over the WestRock contract in 2012, WestRock provided it with a manual containing "Contractor Site Conditions" requirements. Section 3.3 of the manual prohibits the unauthorized use of WestRock property. Section 3.1 subjects a contractor whose employees engage in prohibited activity to be declared in default of the contract and subject to removal from the worksite. Updated manuals with the same provisions were provided to the Respondent thereafter, including in 2018. However, I find the testimony of Matt Garten and Rose insufficient to establish the manual ever was given to employees. (Tr. 856, 876–878, 1098, 1143–1144.) In addition, in February 2021, WestRock was the subject of a ransomware event. Their computer system was hacked and had to be shut down, with the attackers seeking a payment from the company to restore it. (Tr. 1097.) As a result, the Respondent's employees had to perform all of their job functions by hand, instead of using the computer system. This went on for over a month. Obviously, all employees were aware of that event, but awareness of that does not automatically equate to awareness of WestRock's manual for contractors.

[13] Tr. 125–126, 165–169, 278–279, 355, 412–413, 456–457, 566, 718. To the extent any conflict in witness testimony exists concerning what Cook said at the June 21 meeting, I credit his testimony, which was assured and detailed.

[14] Tr. 169–170, 280.

[15] Austin provided the only testimony concerning the Respondent's knowledge of the meeting. (Tr. 1169.) The testimony was abbreviated, the source of Austin's information was not identified, and Austin gave conflicting testimony about when he learned of the meeting and spoke to Tommy Garten about it. Thus, the record only establishes that the Respondent knew of the meeting at some unidentified time.

[16] GC Exh. 60.

[17] Tr. 923.

comments which Rose made to her.[18]

That same day, Rose spoke to Baker as he was walking outside from the drivers' trailer to the dispatch trailer after clocking in. Rose said some people were talking to a union and wondered if he had heard anything about it. Baker told him yes, he also heard that. Rose asked how much interest they had from people who were talking about a union and Baker told him there was quite a bit of interest. Rose told him he was still an hourly employee at that point and did not want to be left out in the cold. Rose said he wanted to know what was going on in case it dealt with him. Baker responded that Rose needed to talk to Tommy Garten to find out if he was management. Rose then asked what union they were talking to and was it the USW [the United Steelworkers union}? Baker told him they were not talking to that union. Rose then asked where he had heard all this from or who brought this up. Baker responded they would be very surprised when they found out who called in a union but it was not him. Rose asked who it was but Baker would not tell him. The two went on to discuss other life topics for a total of 8 to 10 minutes. Prior to this conversation, Baker had not mentioned the Union to Rose.[19]

(d) The Respondent's June 24 meeting with employees regarding the Union's organizing campaign

On June 24 shortly before the 6 p.m. crew change at the Pinehurst Lot, Baker and several employees were walking in the parking lot on their way to clock in for the night shift. Austin came up to the group, told them all to clock in and come back out, and that Tommy Garten wanted to talk to them about some stuff. Thereafter, Tommy and Matt Garten held a meeting with employees from two crews in the parking lot. Austin and Rose also attended for management. About 20 employees were there, including Baker, lead driver Ray Hubbard, Brian Hubbard, and driver Theresa Horne. At least some of those employees were clocked in.

At the start, Austin walked around and gave an envelope to each employee. Inside the envelope was a letter from the Respondent to the employee concerning the Union's organizing campaign.[20] Tommy Garten told employees that there was talk going around that some people had been talking to a "third party." He said he did not think a third party was in the best interests of him, his family or the Company and that he wanted to discuss it with them. He stated that unions were bad for companies. He added that, if the gathered employees went that route, Garten Trucking only had 14 months left on its contract with WestRock and he would not renew the contract at the end of the 14 months. Matt Garten later reiterated the same point, telling employees that the Gartens would not deal with a union and would "take their ball to a new court" after the 14 months if one came in. One of the Gartens also said that, if the employees pushed a union in, the union would have to bargain with WestRock. Tommy Garten also said that they were not going to deal with a third party but, if the union failed to get in, they would probably renew the contract.

Baker then spoke up. He said that the handout stated that all unions were bad and destroyed companies. He asked the supervisors if that was their opinion. One of the supervisors responded that the handout contained general information that management thought they should see. Baker further stated that an authorization card on the front of the handout had "USW" on it and that was not who they were talking about. Tommy Garten responded that he did not give a damn which union it was.

At that point, Baker walked up to Tommy Garten and gave him a copy of his own handout, which he had obtained from Cook. The paper listed 35 things that an employer could not do once employees begin an organizing campaign. Baker told Tommy Garten he had a pamphlet that said what things he was not supposed to do or say to them once they started trying to organize. Baker tried to hand the paper to Tommy Garten, who responded that he did not want it and did not need to see it. Tommy Garten then gave employees the name of the Company's law firm and told them they were free to call the firm if they wanted to speak to the attorneys.[21]

[18] I credit Morgan's testimony concerning her June 23 conversation with Rose. (Tr. 507–510, 534–538; GC Exh. 84.) Morgan provided detailed and confident testimony on direct. Her testimony is corroborated by the contemporaneous text messages she sent to Jeffries the same day as her conversation with Rose. Her testimony on cross-examination was wholly consistent. I do not credit any of Rose's testimony which is in conflict with Morgan's testimony. (Tr. 1109–1112.)

[19] I credit Baker's testimony concerning his June 23 conversation with Rose and do not credit Rose's testimony where it conflicts with Baker's. (Tr. 206–208. 1096–1097, 1107–1108.) As with Morgan, Baker's testimony was assured and detailed. I further note that many of the statements Baker attributed to Rose were similar or the same as those that Rose made to Morgan the same day. Finally, under the totality of the circumstances, I find Rose's statement to Baker that he "did not want to be left out in the cold" to be in reference to knowing what was happening with the union campaign, not an expression that he wanted to join or supported the Union. Again, Rose made a similar statement to Morgan about not being "floored" by the union campaign. Rose wanted to be kept in the loop about the organizing campaign. That he was strongly opposed to unionization does not mean that he was uninterested in that campaign, but rather the exact opposite.

[20] GC Exh. 6.

[21] I credit Baker's testimony concerning what was said at this meeting. (Tr. 209–215.) Multiple employee witnesses corroborated portions of Baker's testimony. Jackson testified that one of the Gartens (either Tommy or Matt) stated that, if the Union came in, he would not renew the contract and would just close the business and take his ball to another court. He also corroborated the testimony concerning the USW. (Tr. 314–316.) Brian Hubbard corroborated the not-renewing-the-contract and ball-to-another-court comments. He also testified that one of the Gartens said they would renew the contract if the Union was not voted in. He corroborated the testimony that the Gartens said they would not deal with a union. (Tr. 365–368.) Horne testified that one of the Gartens said, if the Union came in, they would give up the WestRock contract and shut the Company down. (Tr. 741–742.) Pullin corroborated the ball-to-another-court comment. (Tr. 414–416.) Andrew McConnell corroborated the not-renewing-the-contract and not-dealing-with-the-union comments. (Tr. 659–663.) Baker and the other employee witnesses all provided their testimony about this meeting with demeanors indicating the testimony was reliable. Tommy Garten, Matt Garten, and Austin denied that any of the above statements were made. I do not credit those denials. Tommy Garten's recall of this meeting was poor and he acknowledged as much, saying he was a "little confused" and the

Also on June 24, Baker asked Ledford to make copies of a union pamphlet that was two pages long. Ledford again did so on the ASR copier owned by WestRock.[22]

III THE RESPONDENT'S SUSPENSION OF JEFF BAKER

(a) Ledford's June 27 sexual harassment complaint against Baker

On June 26, Ledford sent a text to Matt Garten asking if she could speak to him and Tommy Garten in private the next day. The three of them talked on June 27. Following the conversation in the late afternoon of June 27, Ledford sent the following email to Matt Garten:

> I am sending this email in regards to asking to be taken off the crew I am working on due to the excessive amount of sexual talk about female drivers that come into the office as well as telling me I need to eat more because my butt is too small also the excessive amount of passing gas an[d] finding it funny from Jeff Baker. From my 2 years of working on this crew I can say no woman should work on this crew . . . I asked that nothing be said to Jeff Baker due to the crew has a click an[d] are the type to retaliate.

Shortly after Ledford sent the email, she confirmed doing so with Matt Garten via text. He responded that he would forward her email to one of the Company's attorneys.[23]

On June 28, Strozier, the general manager/financial controller who also was in charge of human resources functions at that time, began an investigation into Ledford's complaint by interviewing her with Mace present as a witness. In response to Strozier's questions, Ledford told him that Baker had kicked her in the butt and told her she needed to eat more because her ass was too small. Ledford stated that Baker also made several lewd comments about employee and nonemployee females who went in and out of the dispatch office. Ledford stated specifically that Baker made a comment about a woman to a nonemployee male driver, who told Baker after the comment to "show some respect." She reported that Baker and Brian Hubbard said certain women had "turkey legs" and that others would need to put "peanut butter between their legs" in order to get men to have sex with them. She told Strozier that Baker constantly farted around other employees and laughed after doing so. Ledford also informed Strozier that Jackson had asked her if she had an "OnlyFans" page.[24]

In addition to the sexual harassment complaints, Ledford told Strozier, unsolicited, that Baker had directed her, at a time he was an acting supervisor, to make a very large run of copies of materials unrelated to business on the copier in the ASR office for his personal use. She stated that the materials were referred to as the "*Brown Book*." She reported that the run required approximately 1000 sheets of paper. She also told Strozier that she made additional copies at Baker's direction of a two- to three-page document entitled, "What, Why, Where." Strozier asked Ledford to look back on her calendar to see if she could determine the dates this occurred and try to recall what happened in more detail. He also asked for the names of witnesses to Baker's comments of a sexual nature. Ledford identified Pullin and Lee Gunter as possible witnesses.[25]

(b) The Respondent's June 29 interviews of employees and Baker

On June 29, Strozier interviewed Brian Hubbard, Jackson, and Pullin individually with Mace present at all three interviews. Strozier asked each of them if they ever had been sexually harassed or saw anyone sexually harass anyone else. He asked Pullin if he had ever sexually harassed anyone. Strozier asked each of them if they had observed anyone farting in front of someone to be funny. Finally, he asked each of them if they had seen anyone take or use office equipment for their personal use. Brian Hubbard, Jackson, and Pullin responded no to all of the questions.[26]

Then Strozier and Mace interviewed Baker. As to the sexual harassment allegations, Strozier asked Baker if he ever told a female employee that she needed to eat more because her ass was too small. Baker responded no. Strozier asked Baker if he ever stared at a female to the point it made another employee uncomfortable enough to tell Baker he needed to stop. Baker responded no. Strozier asked Baker if he ever had told a female employee she had turkey legs. Baker said no. Strozier asked Baker if he ever farted as a joke to make other people feel uncomfortable. Baker said no.[27]

As to the allegation regarding the copier, Strozier asked Baker if he ever used a copy machine for personal use. Baker said yes and that Mace had assisted him in doing so. Mace acknowledged that she previously helped Baker make copies and send faxes on multiple occasions. Baker also said he had made copies of other things if he needed them. Strozier then asked Baker specifically if he ever had instructed a subordinate employee to make copies for him for personal use. Baker asked Strozier what he meant by subordinate. Strozier answered someone who works under him. Baker responded that he did not have anyone in the dispatch office working under him and they all worked together.[28]

Strozier then told Baker he was suspended pending

---

meetings were "running together." His answers frequently were nonspecific or were being provided by counsel through leading questions. (Tr. 778–785, 792–794, 815.) Matt Garten provided very little testimony concerning what the Gartens actually said to employees at the meeting, although he did corroborate the "third-party" comment. (Tr. 832–841.) Austin's testimony was very limited and did not address the comments that employees testified were made at the meeting.

[22] Tr. 920; R. Exh. 3.

[23] R. Exhs. 1 and 2.

[24] Tr. 904, 941–942, 947, 955–956, 996–1000, 1004–1006; R. Exhs. 4 and 5. "OnlyFans" apparently is a website where people can post sexual photos or videos and get paid for them. (Tr. 944.)

I credit Ledford's testimony concerning Baker's conduct and comments of a sexual nature. (Tr. 903–908.) The testimony was detailed and specific. Moreover, Ledford's demeanor when testifying about Baker's conduct was convincing. Finally, nothing in the record suggests that Ledford had any motive to fabricate sexual harassment allegations against Baker. I do not credit Baker's denials. (Tr. 266–267.)

[25] Tr. 950, 1000–1003; R. Exhs. 4 and 5.

[26] Tr. 318–320, 375–376, 402, 427–428.

[27] Tr. 218–221.

[28] Tr. 220–221, 224.

investigation. He did not tell Baker why. Strozier said to Baker that he was not allowed back on Garten Trucking property pending completion of the investigation. Baker responded that he was being suspended for union activity. Strozier replied that he was not discussing that with him.[29]

On June 30, Ledford emailed Strozier that the date and time she made the largest run of copies of the "big packet" for Baker was June 18. She stated that each packet was 53 pages and she made 19 copies. She stated that Baker asked for a second run of the big packet on June 22 and she made "12 plus" copies then. Finally, she said that she printed a two-page pamphlet on June 24. She attached four pages of photos she had copied.[30]

Also on June 30, the Union filed with the Board its petition for an election at Garten Trucking. At the time of the filing, the Union had obtained 61 signed authorization cards from the Respondent's employees. On this date, the bargaining unit consisted of 109 employees. Cook sent an email to the Respondent, to the attention of Strozier, with the petition, a proposed voluntary recognition agreement, and other supporting documents for the petition.[31]

IV. THE RESPONDENT'S DISCIPLINE OF THREE EMPLOYEES FOR VIOLATING ITS SOLICITATION AND DISTRIBUTION POLICY

In its employee handbook, the Respondent maintains the following solicitation and distribution policy:

> Trespassing, soliciting, or distribution of literature by non-employees on GT property is prohibited at all times. Employees may not solicit or distribute to other employees during their own work time, to other employees who are working, or [in] areas where customers are present. Employees may also not distribute literature in work areas or areas where customers are present.
>
> Distribution is defined as handing out non-work related materials, leaflets, literature or printed materials of any kind. Solicitation is defined as approaching another employee for the purpose of influencing him/her to take a specific course of action concerning any outside cause, but not about regular work duties or conditions. Work time is any time during an employee's shift except for authorized breaks and lunches. Work areas include any area where work is performed except designated break rooms, restrooms or designated employee lounges.

On July 1, driver Pullin was working but not busy. He called into dispatch and informed the dispatcher he was going down to the Respondent's Low Moor facility to get his truck washed and to take a lunchbreak. When Pullin arrived there, he pulled into the wash bay. Another employee was sitting at a table nearby eating a biscuit. Pullin asked the employee if he knew they were trying to start a union. The employee responded yes. A second employee walked out of a backroom while also eating a biscuit. Pullin asked him the same question. The second employee likewise responded yes. Pullin then asked the two how they felt about it. One of the employees responded that he was happy with everything he had, including wages and insurance. The second employee did not respond and the conversation ended. The two wash-bay employees were Nolin Cox and John Simmons.[32]

On July 3, driver Marvin Ray Humphries spoke to another employee, Donald Pickett, when the two were on a break at the WestRock paper mill. Humphries asked Pickett what his opinion was on the Union. Pickett responded that he had family that was in the Union, and he wanted to discuss it with his family. Humphries responded that was really good. He also told Pickett that if he was interested in it, employees had authorization cards. The next day, Tommy Garten called Humphries. He told Humphries he had heard that Humphries was soliciting for the Union on company time. Humphries responded that he was on break, not on company time. Tommy Garten then said Humphries was on WestRock property and solicitation was not allowed there. Humphries apologized, said he did not know that, and would not do it again. Tommy Garten said he would take care of it when he returned from vacation.[33]

Cox, Picket, and Simmons all complained about what occurred. On July 6 and 8, Strozier interviewed them about their complaints. Strozier's notes of the meetings indicate he asked each individual a series of questions about being solicited while "on duty," including for "labor relations." All three answered yes and identified Pullin or Humphries as one of the solicitors. He asked Pickett and Simmons if they and the other employees were "on the clock" at the time of their discussion. They responded yes to both. He asked both individuals if the solicitation was unwanted or overly aggressive. Pickett and Simmons said it was unwanted. Cox agreed, elaborating that he and Pickett told Pullin they did not want any part of it and Pullin continued on. Cox's description of Pullin's conduct was as follows:

> A driver was asking me and [Simmons] to sign a card. We told him we wanted no part of it. He continued and wasn't taking no for an answer.

---

[29] Tr. 221–223.

[30] R. Exh. 3.

[31] GC Exh. 13, 13(a)–(f). On July 2, Cook sent a second version of the voluntary recognition agreement to Strozier correcting a typo. (GC Exh. 14.) The signed authorization cards are in GC Exhs. 16–18, 20–59, and 61–78. The list of unit employees as of June 30 is in GC Exh. 3. The Respondent objected to the admission of all the cards on the grounds they had not been properly authenticated. I overruled the objection and affirm that holding now. The Board has ruled that authorization cards can be authenticated by the signers themselves, a witness who observed the signing, or the person who solicited the signatures and received them back, even if the solicitor did not actually observe the signing. *Novelis*, 364 NLRB 1452, 1454 (2016), enf. denied in part 885 F.3d 100, 107 fn. 7 (2d Cir. 2018); *Evergreen America Corp*., 348 NLRB 178, 179 (2006), enfd. 531 F.3d 321 (4th Cir. 2008); and *McEwen Mfg. Co*., 172 NLRB 990, 992 (1968), enfd. 419 F.2d 1207 (D.C. Cir. 1969), cert. denied 397 U.S. 988 (1970), and cases cited therein. Baker, Brian Hubbard, Jackson, Horne, and Humphries all testified to their solicitation of signatures on cards, observation of the cards being signed, and receiving the cards back from employees. (Tr. 168–202, 280–313, 356–364, 457–461, 720–733.)

[32] Tr. 405–406, 409, 423–425, 442–443; R. Exh. 7, 9. Pullin testified that he did not try to get the employees to sign union authorization cards. I credit this testimony, as neither Cox nor Simmons testified at the hearing. I further note that, in a contemporaneous text Cox sent regarding the conversation, he did not mention that Pullin tried to get him to sign a card. (R. Exh. 7, p. 2)

[33] Tr. 461–462. I credit Humphries' testimony about what occurred, again because it is uncontroverted. Pickett did not testify at the hearing.

Cox also told Strozier that he sent a text to a supervisor about the conversation just after it occurred. Cox provided the text to Strozier. It read:

> [H]ey Mike, don't know if it matters but truck 77 just pulled down here to get a wash and he started talking about the union and bullshitting about how that [PPP] grant thing gave all the managers raises and talking about the contract doesn't actually end [til] like 2023 so now they're spreading lies and propaganda.

Pickett also provided Strozier with notes he had written about his conversation with Humphries shortly after it occurred. The notes stated:

> I was approached by Ray Humphries he informed me they are trying to get enough people to sign union authorization cards so they can have a vote to become unionized. He proceeded to tell me he worked for the previous trucking company and they were unionized and how bad things have become in the last 8 years since Garten took over and believes the company needs a union.

Simmons told Strozier that Pullin came to the bay to get his truck washed and asked him if he was going to sign a card. Simmons responded that he was not interested.[34]

On July 9, Pullin was called into the main office and met with Strozier and Mace. Strozier told Pullin he was being written up for solicitation, specifically for trying to get people to sign union cards while working. Pullin responded that he was not trying to get people to sign cards. He said he asked people if they were familiar with employees trying to start a union. Strozier said the guys at the wash bay had filed a complaint. He told Pullin he was not allowed to talk about the union while he was working and that is why he was being written up. Pullin responded that he was on a lunch break when he was at the shop. Strozier gave him a write up, as well as a copy of Pullin's previously signed acknowledgement of having received the Respondent's solicitation and distribution policy as part of the employee handbook. He told Pullin he would be terminated if he violated the policy again.[35]

On July 12, Humphries likewise was called into the main office. He met with Strozier, Mace, and McNeely. Strozier gave him a written warning and a copy of his signed acknowledgment of receiving the handbook with the solicitation and distribution policy.[36]

Strozier issued the warnings to Pullin and Humphries because, in his view, they were soliciting for the Union while both they and the other employees were "on duty." In addition, the complaining employees stated that the solicitations were "unwanted."[37]

Prior to the warnings to Pullin and Humphries, the Respondent permitted employees to sell numerous items at its facilities, including while they were on the clock, without being disciplined. The items included Girl Scout cookies, "tip" boards, Super Bowl boards, bait traps, raffle tickets, homemade blankets, fruit, and hoagies (for a church fundraiser). Numerous supervisors purchased items being offered for sale. Employees also often collected monetary donations for other employees who were going through difficult times. At one time, supervisor Mace opened up a trailer at the Pinehurst Lot for employees to donate items to people in a nearby community, including her mother, who suffered damage to their homes as a result of a flood. These sales and collections often were announced to employees over the Respondent's radio system.[38]

V. THE RESPONDENT'S JULY 9 MEETING WITH EMPLOYEES REGARDING THE UNION ORGANIZING CAMPAIGN

On or about July 9, Tommy Garten, Matt Garten, and Austin held another meeting with employees outside the drivers' trailer on the Pinehurst Lot. The meeting took place slightly before the shift change between crews at 6 p.m. During this meeting, Tommy Garten repeated his comment from the June 24 meeting that Garten Trucking only had 14 months left on its WestRock contract and would shut down if a union came in. He also stated that another company such as Swift Transportation or Amazon Transportation would come in and take over for Garten Trucking. He said that whoever came in would need to bring their own equipment, that they were not going to use his trucks, trailers, or warehouses. He added that the new company would have their own workers and the Garten Trucking employees would be out of a job. Tommy Garten also said that, if the Union came in, the

[34] R. Exh. 7–9; Tr. 1015–1037, 1057.

[35] Tr. 420–421; GC Exh. 87–88. Pullin resigned from his position with the Respondent in September 2021. (Tr. 405–406.)

[36] Tr. 464–467. Humphries denied that Pickett ever told him that he did not want to talk about the Union. (Tr. 479–480.)

[37] These findings of fact are based upon the testimony of Strozier (Tr. 1015–1037, 1057–1059) and Mace (Tr. 964–967), to the extent the testimony is consistent with the findings. It also is based upon the text in the warnings themselves (GC Exhs. 87–90) and in Strozier's notes of his meetings with the complaining employees (R. Exhs 7–9). Strozier testified that the warnings were based upon complaints from employees that, when they were approached about the union and responded they were not interested, they were not left alone and were being "hounded." (Tr. 1015–1018, 1021, 1030–1031, 1057.) He also testified that the solicitations were being done while "on duty." (Tr. 1019, 1024, 1030–1035.) Each of the warnings stated that "[r]eports of unwanted solicitation while on duty have been brought to our attention." Strozier's initial question to the employees during the interviews was: "Have you been approached while on duty, or solicited while on duty, by another employee (on or off duty) for nonbusiness related purposes, including labor relations?" I do not credit Strozier's testimony, elicited through leading questions during the Respondent's direct examination, that "on duty" meant "work time." During cross examination, Strozier admitted that he checked timecards to determine only if employees were "on duty" or "on the clock" and that the timecards only show the start and end times of employees' work shifts, not their breaks. (Tr. 1058–1059.) I further note that Strozier's notes of his interview with Cox, Pickett, and Simmons show that he asked those employees if they or the other employees were "on the clock." Thus, "on duty" meant "on the clock."

[38] Tr. 238–247, 321–325, 378–387, 391–394, 469, 516–520, 574–577, 593–594, 628–632, 670, 748–749, 968–970, 1154; GC Exhs. 79–82, 95. An excessive amount of cumulative evidence was presented about the sales/collections. "Tip" boards contain cards with numbers on them. Employees could buy as many "tips" or numbers as they wished. Once all the tips are purchased, the winning number is scratched off in the middle of the board. The employee who purchased that number wins whatever prize was associated with the board. (Tr. 240.)

Company would no longer be involved in their health insurance or 401(k) and the Union would have to provide it to employees and pay for it. Horne spoke up in response, telling Tommy Garten that the Union did not supply the insurance, that he was wrong about that and the Union just negotiated the insurance with the Company. Tommy Garten replied that she should ask the Union what kind of insurance it had. He also stated that there was nothing a Union could really give the employees, the Union was only after their money, and they would have to pay union dues, fines, and assessments. Finally, an employee asked about the lack of wage increases in four of the prior 5 years and why the recent wage increase was not larger. Austin responded that he put together a 5-percent increase proposal for WestRock, but WestRock only would agree to the 3-percent increase the employees received. Tommy Garten also stated that he did not have a cost-plus contract with WestRock, that he worked off of a management fee only. At one point, Horne also asked Tommy Garten if he used COVID relief money from the PPP to buy farm equipment. Matt Garten responded they used their own money for the equipment. Tommy Garten also told the employees that he had paid their wages with the PPP money and kept them from being laid off.[39]

VI. AUSTIN'S JULY 9 CONVERSATION WITH EMPLOYEES IN THE DISPATCH TRAILER

Also on or about July 9, employees Morgan, Suzanne Byer, and Stephen Rhodenizer were in the dispatch trailer. Austin joined them and said he wanted to speak to them for a bit. He said he had spoken with the Company's attorneys and knew what he could and could not say to them. He said that he knew the Union had promised them $8-per-hour wage increases and, if that was the case, they needed to get it in writing from someone higher up at the Union. Austin also stated that, if the Union came in, Tommy Garten would have to deal with the Union for 14 months, but after that, he would not renew the contract and another company would come in. He said that company would have to be willing to deal with a union. He also said Tommy Garten would not supply his trailers to the new company. He stated the Union would have to pay for their health insurance if it came in. Byer then asked Austin if management had gotten a COVID bonus. Austin responded absolutely not and told the group that employees had received a 3-percent raise, which he knew because he completed the paperwork. Byer asked if Garten Trucking was a cost-plus business. Austin replied that it was not and Tommy Garten received an administrative fee. He said WestRock had offered Tommy Garten a raise in the fee and Tommy Garten declined it. Austin also stated that he knew there were rumors that Tommy Garten had used PPP money on farm equipment. He said those rumors were false and that Tommy Garten had used his own money for the equipment. Austin told the group to think hard about a union because it was not in their best interests.[40]

VII. THE RESPONDENT'S JULY 12 DISCHARGE OF JEFF BAKER

Following Baker's suspension on June 29, Strozier conducted interviews of two other employees concerning Ledford's sexual harassment allegations against Baker. He did not interview Lee Gunter, one of the individuals whom Ledford had identified as a potential witness. Based upon the information he gathered in the investigation, Strozier determined that Ledford's harassment allegations could not be substantiated. As to Baker's alleged direction to Ledford to make copies of "*The Little Brown Book*," Strozier first verified that a large number of copies were not made on a copier in the dispatch trailer which the Respondent owned. However, Strozier did not have access to the ASR copier because it was owned by WestRock. Thus, he could not, on his own, confirm Ledford's claims about copying more than 1000 pages on one day using data from the copier. Instead, Strozier asked Matt Garten to call a WestRock representative to obtain the data. Matt Garten did so and was told that an atypically large number of copies had been made on the June 18 date identified by Ledford. When Matt Garten advised Strozier of this, Strozier recommended to him and the other Gartens that Baker be discharged for misuse of WestRock property.[41]

On July 12, Austin called Baker and told him that Strozier and Mace were in the room with Austin. At the time, Baker was with Cook at the Union hall, so Baker put the call on speakerphone. Austin told Baker that the investigation was complete and they had reached the conclusion to terminate Baker. Baker asked for what and Austin responded that he was told to call him and let him know he was terminated. Baker asked if he was terminated for union activity. Austin repeated that he was told to tell Baker that he was being terminated. Austin said he was sorry.[42]

Prior to Baker's discharge, the Respondent terminated four other employees for offenses similar to Baker's conduct. The terminations included William Meadows on June 10, 2015, and

[39] In making these findings of fact, I credit the testimony of employees Brian Hubbard, Jackson, McCormick, Pullin, and Rhodenizer. (Tr. 316–318, 370–371, 418–419, 567–571, 626–627, 642.) In combination, their testimony was detailed and convincing. Many of the statements attributed to the Respondent's supervisors during the meeting were reported by more than one witness. In contrast, I do not credit Tommy Garten's testimony to the extent it conflicts with the employees' testimony. Tommy Garten had poor recall concerning what he and others said at the meeting and his testimony was limited in that regard. (Tr. 778–794.)

[40] In making these findings of fact, I credit the almost wholly consistent testimony of Morgan and Rhodenizer concerning what Austin told them. (Tr. 514–515, 572–573.) I do not credit Austin's testimony to the contrary. (Tr. 1132, 1136–1138, 1163–1366.)

[41] Tr. 867, 885–887, 1004–1012, 1064, 1072–1074. Overall, I found Strozier to be a credible witness. His testimony was genuine, including that he appeared somewhat nervous while testifying. He acknowledged when he could not recall something. He also was retired at the time of his testimony and thus had no reason to offer false testimony that would support the Respondent's case. In particular, I credit Strozier's testimony as to his basis for recommending to the Gartens that Baker be discharged. Strozier stated: "We had an employee that put my job at risk as well as the jobs of 200 other individuals at risk to save $40 from going to Kinko's. So it was my recommendation that I—you know, you're not going to put my job at risk. My—my recommendation was termination. We've terminated other people for similar things, so." (Tr. 1012.) Strozier's demeanor when providing this testimony appeared reliable and certain.

[42] Tr. 136, 227. The Respondent's handbook contains a provision on termination stating that the Company could discharge employees "for many reasons, whether for cause (resulting from misconduct), or not for cause."

Ryan Barron on an unknown date, for hitting and destroying WestRock's timeclocks. The Respondent's termination writeup for Meadows indicated it was not "the first time that Mr. Meadows had lost his temper and has been told that we could not tolerate this in the future." They included Anthony Smith on August 9, 2017, for getting into an accident with a truck paid for by WestRock and then trying to hide it. They included Michael Webb on October 25, 2020, for stealing mud flaps owned by WestRock and putting them in his car for intended personal use. On an unidentified date at some time in the 3 years prior to Baker's discharge, the Respondent also terminated Ryan Barron for destroying a WestRock timeclock. After Baker was discharged, the Respondent also terminated Leslie Humphries on October 6, 2021, for losing a WestRock-owned remote control for a crane. The remote cost about $300 to replace. Humphries previously broke another remote.[43]

VIII. THE UNION'S AUGUST ELECTION LOSS

From August 4 to 6, Region 10 of the Board conducted an in-person election in the drivers' trailer at the Pinehurst Lot facility of Garten Trucking, based upon the petition filed by the Union on June 30. Ballots were counted on the evening of August 6. The Union lost the election by a vote of 30 to 65. Baker served as the Union's observer on all 3 days.[44]

After arriving on August 4, Baker met up outside with the Board agent conducting the election and the Respondent's observer. Baker notified the agent that two supervisors still were onsite in the dispatch trailer. Baker's knowledge was based on seeing the supervisors' cars in the parking lot shared by the drivers' and dispatch trailers. The three walked inside the drivers' trailer. When the election started, the two supervisors remained onsite. The Board agent then spoke to a company attorney and told the attorney that supervisors were onsite and were not supposed to be. Within one or 2 minutes, the two supervisors came out of the dispatch trailer and left.[45]

The two supervisors were Rose and Austin. On that same date, Rose got a call from Strozier right before the voting was scheduled to start. Strozier told Rose that his truck was parked too close to the election site and intimidating voters, so he should move it. Rose moved his truck to the other side of the trailers where no one could see it. Austin likewise received a call from an unidentified person who told him that "they" thought he was intimidating voters by having vehicles parked out front near the drivers' trailer. He moved the car but not until 7 minutes after voting had begun.[46]

When Baker arrived the next day, Rose was standing outside the dispatch trailer. Within a few minutes, he went back inside that trailer. Then Baker, the company observer, and the Board agent went inside the drivers' trailer. Baker again told the agent that a supervisor was onsite. At the start of the election, Baker texted Morgan and asked if Rose still was in the dispatch trailer. Morgan responded yes and Baker reported that to the Board agent. The agent again called a company attorney. However, Rose did not leave for 45 minutes. Also on this date, Rose went outside to talk to one of his trailer inspectors. He received another call, from an unidentified person, and was told he could not go outside but instead had to stay inside.[47]

IX. THE AUGUST 6 CONVERSATION BETWEEN RAY HUBBARD AND ANDREW MCCONNELL AFTER THE UNION'S ELECTION LOSS

Following the vote count at about 9:30 p.m. that same night, a driver sent screenshots of a Facebook message by employee Andrew McConnell about the election. The post stated:

> They've laughed off those promises they claimed before. It was a way to sway the undecideds and scare them to the no vote. Dizzy, Matt and Tommy have all used the fact that they "run" the company as intimidation and then they've used people like Hollis or complete fucking idiots like Wayne to try and persuade people to join their side. And there's other unnamed who have made promises to people because they either enjoy getting spit on by the Gartens or they are plain and simple absolute cowards.
>
> Jeff is right, this isn't over, but its gonna get a hell of a lot harder now before anything happens and we have to stick in this until the absolute end.

Robert "Dizzy" Garten texted the message to Ray Hubbard, the lead driver on duty that night with the crew that included McConnell. Dizzy Garten stated: "You want to handle this or do you want me to come handle this[?]" Shortly thereafter, Ray Hubbard called Dizzy Garten, who was driving, and asked what the message said. Dizzy Garten told him that it was a Facebook message where McConnell was going off and saying a lot of offensive things, that he was not happy about it, and he wanted Ray Hubbard to ask McConnell to take it down. Ray Hubbard called McConnell and asked if he had put something on Facebook about the Gartens. When McConnell confirmed that, Ray Hubbard said Dizzy Garten had called him and asked him to see if McConnell would take the post off of Facebook. After their conversation, McConnell modified the language in his post, but left it up on Facebook.[48]

LEGAL ANALYSIS

I. STATEMENTS OF RESPONDENT'S SUPERVISORS ALLEGED AS 8(A)(1) VIOLATIONS

(a) Did Rose interrogate Morgan and create an impression of

[43] R. Exhs. 10, 11, 12, 19; Tr. 814, 869–871, 1013–1014, 1145–1154. Some of the involved property was purchased by the Respondent and the cost then reimbursed to the Respondent from WestRock.

[44] Tr. 62–63, 268–269.

[45] Tr. 249–250.

[46] Tr. 1105, 1159–1160.

[47] Tr. 250–251, 1105.

[48] Tr. 63–70, 99; GC Exhs. 11, 12, 93, 94. I credit Ray Hubbard's testimony about his conversation with McConnell. (Tr. 1079–1082.) McConnell corroborated most of that testimony. The only conflicts were that McConnell claimed that Ray Hubbard spoke to him while all the Gartens were in the background. He further testified that Ray Hubbard told him the Gartens threatened to fire him if he did not take the post down; they would get a lawyer involved to get him to take the post down if he did not do it voluntarily; and they would come down and personally make him take the post down. (Tr. 666–670, 678–680.) The testimony appeared exaggerated. Moreover, if Ray Hubbard conveyed those messages, it is more likely than not that McConnell would have included those allegations in his revised Facebook post. However, the post does not state that he was threatened by the Gartens for the original post.

surveillance of employees' union activities on June 23?

The General Counsel's complaint alleges that, on June 23, 2021, the Respondent, by George Rose, interrogated employee Shannon Morgan and created the impression that employees' union activities were under surveillance.[49]

The Board applies a totality-of-the-circumstances test to determine whether an interrogation is coercive of employees' rights under the Act. *Bannum Place of Saginaw, LLC*, 370 NLRB No. 17 (2021), citing *Rossmore House*, 269 NLRB 1176, 1177 (1984), enfd. sub nom. *HERE, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Under this test, the Board considers, among other things, the nature of the information sought (especially if it could result in action against individual employees), the position of the questioner in the company hierarchy, the place and method of interrogation, and the truthfulness of the employee's reply. *Rossmore House*, supra; *Vista Del Sol Healthcare*, 363 NLRB 1193, 1208 (2016); *Parts Depot, Inc.*, 332 NLRB 670, 673 (2000), enfd. 24 F. App'x 1 (2001). These factors are not to be mechanically applied and it is not essential that each element be met. *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985). The Board's test utilizes an objective standard and is not based on the subjective reaction of the employee. *Multi-Ad Service*, 331 NLRB 1226 (2000), enfd. 255 F.3d 363 (7th Cir. 2001).

The test for determining whether an employer has created the impression of surveillance is whether the employee would reasonably assume from the employer's statements or conduct that their protected activities had been placed under surveillance. *Greater Omaha Packing Co., Inc.*, 360 NLRB 493, 495 (2014).

To review, Rose, the assistant yard manager and Morgan's direct supervisor, asked Morgan to talk. They went into his office in the dispatch trailer for a one-on-one conversation. Rose initiated the conversation by telling Morgan he heard rumors about a union, he thought he knew who started the organizing, and he thought Morgan knew as well. Morgan responded by telling him twice that she did not want to discuss it. Morgan then told Rose a number of complaints she had regarding how things were going at the Company. Rose listened. When the subject moved to the prior unionized contractor who had the WestRock contract, Rose then told Morgan he heard that employees already had 47 signed authorization cards and they only needed 51 percent support for a union to come in. Morgan responded that she could not tell him that because she did not know. This conversation took place 2 days after the first Union meeting at Baker's house at a time when Morgan was not an open and known Union supporter.

Under the totality of these circumstances, Rose's statements would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. First, his initial statements to Morgan, while not direct questions, implicitly sought the identity of the employee who initiated union organizing at the Respondent's facility. See *Westwood Health Care Center*, 330 NLRB 935, 941 fn. 21 (2000), citing *NLRB v. McCullough Environmental Services*, 5 F.3d 923, 929 (5th Cir. 1993) ("unlawful interrogations may occur even when remarks are not 'couched as questions' if an employer agent makes statements that are 'calculated to elicit responses from [employees] about their union sentiments.'") Had Morgan provided a name, that revelation could have resulted in the Respondent taking action against the identified employee. In response, Morgan's expressed lack of desire to discuss the Union with Rose objectively indicates a level of discomfort. Rose's statements constituted an unlawful interrogation. See, e.g., *Sorenson Lighted Controls, Inc.*, 286 NLRB 969, 976–977 (1987) (supervisor unlawfully interrogated an employee when he asked the employee "who has started the Union?"); *Corrugated Partitions West, Inc.*, 275 NLRB 894, 895–896 (1985) (supervisor unlawfully interrogated employee when he asked the employee who had called the union, thereby seeking the identity of the person who started the organizing campaign).

Second, Rose's assertion to Morgan that he heard employees already had signed 47 authorization cards for the Union would create in a reasonable employee the impression that the Respondent had been surveilling their union activities. Rose's statement came 2 days after the union meeting at Baker's house, where roughly 30 cards had been signed. Morgan was one of the individuals who signed a card at that meeting.[50] The meeting was held in a private location and no indication exists that the employees conducted any authorization card signing openly on the Respondent's property thereafter, of which Rose or any other supervisor was aware. The combination of Rose stating a specific number of cards had been signed and the lack of any open union organizing establishes the violation. See *United Charter Service*, 306 NLRB 150, 151 (1992) (employer's statements about employees' union activities created impression of surveillance where those activities were primarily conducted off the employer's premises and the statements showed knowledge of specific activities). Were that not sufficient, Rose failed to advise Morgan of where he obtained this information, leaving her to speculate about its source and causing her to reasonably conclude that it was from employer monitoring. *Stevens Creek Chrysler Jeep Dodge, Inc.*, 353 NLRB 1294, 1295–1296 (2009). Accordingly, Rose's statement that 47 employees signed authorization cards created an unlawful impression of surveillance. *Flexsteel Industries*, 311 NLRB 257, 258 (1993) (supervisor's statement that he was aware the employee may have initiated the union campaign and passed out authorization cards created an impression of surveillance).[51]

(b) Did Rose interrogate Baker on June 23?

The General Counsel's complaint also alleges that Rose unlawfully interrogated Baker during their one-on-one conversation on June 23.[52]

The Respondent argues that, even if Morgan's version of her conversation with Rose were credited, an impression of surveillance did not occur. However, the Respondent did not cite to any caselaw supporting its position.

[49] Complaint pars. 6(a) and 7.

[50] GC Exh. 57.

[51] Rose's earlier statement to Morgan that he thought he knew who initiated the organizing campaign likewise created an impression of surveillance. See *Dillingham Marine Mfg. Co.*, 239 NLRB 904, 909 (1978) (supervisor telling employees he knew who the "ringleader" of the union campaign was created impression of surveillance)

[52] Complaint par. 6(a).

In that discussion, Rose asked Baker if he had heard anything about a union; how much interest employees had in a union; what union they were talking to and whether it was the Steelworkers; and who had contacted the union. Baker answered all of Rose's questions, except for the identity of the employee who had initiated the organizing campaign. Rose also told Baker that he wanted to know what was going on in case it would impact him.

I conclude that Rose's questions and statements to Baker constitute an unlawful interrogation. In doing so, I rely upon the nature of the information sought (the organizing initiator's identity); Baker not being a known union supporter at the time of the conversation; Rose being Baker's direct supervisor; Rose committing other unfair labor practices that same day in his conversation with Morgan; and the conversation occurring just 2 days after Baker held a union meeting at his house. I acknowledge that Baker mostly answered Rose's questions freely and the two also discussed other topics during their conversation. However, I do not find those factors sufficient to outweigh the ones supporting the finding of an unlawful interrogation. This is especially so in that Rose was seeking detailed information about employees' union organizing activities. *Stevens Creek Chrysler*, supra at 1295; *Sorenson Lighted Controls*, supra; see also *Evergreen America Corp.*, 348 NLRB 178, 178 fn. 4, 206, 208 (2006) (supervisor unlawfully interrogated an employee when he asked her on a business trip if she had heard about the organizing activity).

(c) Did the Respondent threaten employees and inform them that selecting the Union would be futile during the June 24 meeting?[53]

The General Counsel's complaint alleges that, on June 24, the Respondent violated Section 8(a)(1) when its supervisors threatened to close the business if employees unionized; threatened employees with job loss if they unionized; and informed employees of the futility of selecting the Union.[54]

To summarize, the Respondent held a meeting with about 20 employees in the Pinehurst Lot parking lot around the time of a shift change on June 24, shortly after learning of the union organizing campaign. During the meeting, Tommy Garten stated he only had 14 months left on the contract with WestRock and, if employees brought a union in, he would not renew it. Matt Garten similarly stated the Gartens would not deal with a union and would "take their ball to a new court" if one came in. Finally, Tommy Garten stated that the Gartens were not going to deal with a "third party" but, if the Union failed to get in, the Gartens probably would renew the WestRock contract.

These statements conveyed to employees that, if they chose the Union as their representative, Garten Trucking would cease doing business with WestRock at its Covington facility and the employees would no longer have jobs with the Respondent. However, if they stayed nonunion, the Respondent would continue doing business with WestRock. Such threats for choosing a union violate Section 8(a)(1) and all three alleged violations have been established. See, e.g., *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 490 (1995) (supervisor's statement that employer would not deal with the union and the plant would close down); *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1093, 1096 (2004) (corporate chairman's statement to employees that, if the union came in and the home started to go downhill, he "had no problem taking his family out and shutting down the place" was unlawful);[55] *K-Mart Corp*, 336 NLRB 455, 456 (2001) (supervisor's statements during a captive audience meeting that it was considering outsourcing work at a unionized facility it operated and that employees' facility should not be treated any differently if a union came in was a threat that choosing the union would be futile); *Pacesetter Corp.*, 307 NLRB 514, 520 (1992) (supervisor's statement that the company did not have to deal with the union and, if it came to that, the company would transfer work to a different office was unlawful threat to close the business).[56]

II. DID THE RESPONDENT'S DISCIPLINE OF PULLIN AND HUMPHRIES VIOLATE SECTION 8(A)(3) AND (1)?

The General Counsel's complaint alleges the Respondent violated Section 8(a)(3) and (1) by issuing written warnings to Allen Pullin on July 9 and Ray Humphries on July 12 for their union and protected concerted activity. The Respondent issued the warnings for alleged violations of its solicitation and distribution rule. The complaint also alleges, in the alternative, that the Respondent violated Section 8(a)(1) when issuing the warnings

[53] At the hearing, I granted the General Counsel's motion to amend the complaint and add allegations (complaint pars. 8(a), (b), and (c)) that three of the Respondent's meetings with employees, including the one on June 24, were captive audience meetings and that Board law should be changed so that such captive audience meetings are unlawful simply for being held. (Tr. 702–708, 1176–1177.) An administrative law judge must follow and apply existing Board precedent that has not been overruled by the U.S. Supreme Court or the Board itself. See, e.g., *Western Cab Co*., 365 NLRB 761, 761 fn. 4 (2017); *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004). Therefore, I dismiss the three allegations.

[54] Complaint pars. 8(d)(i), (ii), (iii), 9(a), and (b).

[55] For context, the business was a nursing home and the chairman's mother was a resident, both of which employees were aware.

[56] The General Counsel's complaint also alleges that, on July 9, the Respondent violated Sec. 8(a)(1) when Tommy Garten threatened to close the business if employees chose to bring a union in. (Complaint par. 8(d)(i).) The General Counsel bases this allegation on Tommy Garten's statement at the July 9 captive audience meeting that Garten Trucking only had 14 months left on its WestRock contract and would shut down if the Union came in (as was made at the June 24 meeting).

The General Counsel's complaint also alleges that, on July 9, Stick Austin violated Sec. 8(a)(1) when he threatened employees in the dispatch trailer at the Pinehurst Lot with closure of the Respondent's business if they chose to unionize. (Complaint par. 8(d)(iv).) The General Counsel bases this allegation on Austin's statement to employees that, if the Union came in, Tommy Garten would have to deal with the Union for 14 months, but after that, he would not renew the contract. For the same reasons discussed in this section, I find that the July 9 statements of Tommy Garten and Austin also violate Sec. 8(a)(1).

Finally, the General Counsel's complaint alleges that, on August 6, Dizzy Garten and Ray Hubbard violated Sec. 8(a)(1) when Dizzy Garten directed Ray Hubbard to threaten employees with discharge and other reprisals. (Complaint pars. 10(a), (b), and (c).) The General Counsel's complaint allegation is based on alleged statements that Ray Hubbard made to employee McConnell. Based on my credibility determination discussed in the findings of fact, I concluded Ray Hubbard did not make those threats. Therefore, this complaint allegation is dismissed.

because it disparately enforced its solicitation and distribution rule. Finally, the complaint alleges four attendant 8(a)(1) violations. They involve Strozier's questioning of the employees who complained about the solicitations during his investigation of those complaints. They also involve statements Strozier made to Pullin and Humphries when issuing them the discipline.[57]

The credited facts establish that, on July 1 and 3, both Pullin and Humphries discussed the Union's organizing campaign with their coworkers. After notifying dispatch he was going on break at the wash bay, Pullin went there and asked Cox and Simmons if they knew employees were trying to start a union. He also asked them how they felt about it. Pullin spoke to the two employees as they were each eating and not working. Humphries spoke to another employee, Pickett, while both were on break at the WestRock paper mill. Humphries asked Pickett what his opinion on the Union was. Pickett responded that he wanted to discuss it with a family member who was in a union. Humphries then told Pickett that, if he was interested in the Union, employees had authorization cards.

Thereafter, Cox, Pickett, and Simmons filed complaints with the Respondent that Pullin and Humphries solicited their signatures on authorization cards while the employees were "on duty." Strozier investigated the complaints by interviewing the complaining employees. According to Strozier's notes, both employees stated that they had been solicited to sign an authorization card while they were working. Cox also stated: "We said we didn't want any part of it and he [Pullin] continued on." Cox also provided Strozier with a contemporaneous text message Cox sent to a supervisor. In it, Cox stated that Pullin "started talking about the union and bullshitting about how that [PPP} grant thing gave all the managers raises and talking about the contract doesn't actually end till like 2023 . . ." After interviewing Cox and Pickett, Strozier issued the written warnings to Humphries and Pullin. He told Pullin that he was not allowed to talk about union stuff while he was working and that was why he was being written up. Strozier did not say anything to Humphries about why he was being disciplined.

Given these factual circumstances, I conclude the legality of the warnings must be evaluated using the analytical framework set forth in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 85 S.Ct. 171, 13 L. Ed. 2d 1 (1964). *Burnup & Sims* governs situations where an employer disciplines an employee for allegedly engaging in misconduct during the course of union activity, and the General Counsel contends that the employee did not, in fact, engage in misconduct. *KOIN-TV*, 370 NLRB No. 68, slip op. at 1 fn. 1 (2021), citing *La-Z-Boy Midwest*, 340 NLRB 80, 80 (2003), enfd. in pertinent part 390 F.3d 1054 (8th Cir. 2004). Under *Burnup & Sims*, an employer may lawfully discipline an employee for engaging in misconduct in the course of otherwise protected activity, but only if it had a good-faith and correct belief that such misconduct occurred. *Aston Waikiki Beach Hotel*, 365 NLRB 592, 596 (2017). The initial burden is on the General Counsel to establish that the employee was disciplined or discharged for conduct occurring during the course of protected activity. To do so, the General Counsel must show that the disciplined employee was engaged in protected activity, the employer knew it was such and the basis of the discipline was an alleged act of misconduct during that activity. The burden then shifts to the employer to show that it held an honest belief that the employee engaged in serious misconduct. Once the employer establishes that it held an honest belief in the employee's serious misconduct, the burden shifts to the General Counsel to affirmatively show that the misconduct did not in fact occur.[58]

The General Counsel has met the initial burden of establishing that Pullin and Humphries were disciplined for conduct occurring during the course of protected activity. Both Humphries and Pullin were discussing the Union with other employees, asking them what they thought about it. Such union-related discussions are protected by Section 7, even during working time, where, as here, an employer allows employees to discuss other non-work-related subjects. See generally, *BMW Mfg. Co.*, 370 NLRB No. 56, slip op. at 1–2 (2020); *Orchids Paper Products Co.*, 367 NLRB No. 33, slip op. at 2 fn. 8 (2018). The Respondent's employees discussed many non-work-related subjects while on working time, including Girl Scout cookie sales, tip boards, Super Bowl boards, and donations to coworkers and others in need. Based upon the evidence obtained by Strozier during his investigation of the solicitation complaints, the Respondent was aware of the protected union discussions Pullin and Humphries had with their coworkers. The Respondent disciplined the employees allegedly for engaging in misconduct during the protected discussions. The misconduct was soliciting authorization cards while the involved employees were on working time.

Thus, the burden shifts to the Respondent to show that it held an honest belief that Pullin and Humphries engaged in serious misconduct. Given the cursory and misdirected investigation

[57] Complaint pars. 6(b), (c), 11, 12, 13(a), (b), and (e). The complaint also alleges that the Respondent issued an identical disciplinary warning to Horne on July 9 for allegedly soliciting employees while on duty on July 6. (GC Exhs. 91, 92.) The warning was based upon the complaints from Cox and Simmons. (R. Exhs. 7, 9.) The General Counsel's complaint alleges that the warning violated Sec. 8(a)(3) and (1) because it was issued due to Horne's union activity. However, Horne's testimony at the hearing fails to establish that she was engaged in union activity on July 6. When called as a witness by the General Counsel, Horne was openly hostile on the stand and answered almost every question by saying she could not recall. She is a current employee of the Respondent and had absolutely no interest in testifying. As a result, she did not testify at all concerning her conduct with Cox or Simmons. (Tr. 745–748.) Instead, during cross-exam, she admitted to soliciting authorization cards while she was working and the other employees were working. (Tr. 753–754.) Given her lack of testimony, I recommend dismissal of the General Counsel's complaint allegation (a portion of complaint par. 13(a)) as to Horne's warning.

[58] In *General Motors LLC*, 369 NLRB No. 127 (2020), the Board held that it would no longer apply various setting-specific standards to decide whether misconduct in the course of protected activity lost the employee the Act's protection. Instead, in all such cases, the Board now applies *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, 102 S.Ct. 1612, 71 L. Ed. 2d 848 (1982), and approved in *NLRB v. Transportation Mgmt. Corp.,* 462 U.S. 393 (1983). However, applying *Wright Line* in such cases "presupposes that the employee actually engaged in the misconduct," and that nothing in the *General Motors* decision should be read as conflicting with *Burnup & Sims*. Id., 369 NLRB No. 127 fn. 27; see also *Nestlé USA, Inc.*, 370 NLRB No. 53, slip op. at 1 fn. 2 (2020).

conducted by Strozier, I conclude the Respondent has not met its burden. Strozier's investigation consisted solely of interviewing the complaining employees. He did not interview Pullin or Humphries to obtain their sides of the story. When Strozier met with Pullin and Humphries, he did not ask them any questions. After receiving his warning, Pullin denied trying to get employees to sign cards, instead admitting he was asking people if they were familiar with employees trying to start a union. He also told Strozier he was on break at the time. When Humphries discussed his alleged solicitation with Tommy Garten, Humphries stated he was not on company time but was on break.

Moreover, the questions Strozier asked of the complaining employees were misplaced, because he did not ask any of them if they were on worktime or performing their work duties when the conversations took place. Instead, he used the terms "on the clock" or "on duty." The former unquestionably refers to the start and end of an employee's shift or work hours, not worktime. The latter may be ambiguous, but Strozier clarified the meaning he ascribed to it by testifying that he determined Pullin and Humphries had committed the solicitation infraction by checking their timecards. Those cards showed nothing more than the start and end times of their workdays, not whether they were on break when allegedly soliciting signed authorization cards from other employees.

Even assuming for the sake of argument that the Respondent had an honest belief that Pullin and Humphries engaged in prohibited solicitation during working time, the finding of a violation remains. First, neither employee engaged in solicitation. In *Wynn Las Vegas, LLC*, 369 NLRB No. 91, slip op. at 5–6 (2020), the Board recently refined its definition of solicitation to include conversations where an employee makes statements to a coworker during working time that are intended and understood as an effort to persuade the employee to vote a particular way in a union election. If so, and the employer has a legal no-solicitation rule, the employee may be disciplined for such a conversation. Here, Pullin and Humphries asked their coworkers if they knew about the union campaign and how they felt about it. They were seeking to ascertain their coworkers' opinions about the Union, not to persuade them to support it. Humphries' additional comment to Pickett that "if he was interested in the Union, employees had authorization cards" was not a solicitation, again because the statement did not seek to persuade Pickett to support the Union. Rather, Humphries was providing Pickett with information on how to obtain a card if Pickett ultimately determined he would support the Union. Conversations about whether a union is good or bad do not constitute a solicitation for a union. See, e.g., *W.W. Grainger*, 229 NLRB 161, 166 (1977) ("'[S]olicitation' for a union is not the same thing as talking about a union or a union meeting or whether a union is good or bad."), enfd. 582 F.2d 1118 (7th Cir. 1978). Moreover, even if the statements of Pullin and Humphries constituted solicitation, the conversations occurred when all of the employees were on break, not working. Solicitations by employees in working areas during nonworking time are lawful. *Food Services of America, Inc*., 360 NLRB 1012, 1018 (2014).[59]

Accordingly, the Respondent's warnings to Pullin and Humphries violated Section 8(a)(3) and (1) under *Burnup & Sims*. See *Wal-Mart Stores*, 349 NLRB. 1095, 1095 fn. 6 (2007). In addition, Strozier's statement to Pullin that he was getting a warning for talking about "union stuff" while he was working and that was why he was being written up independently violates Section 8(a)(1). *Valley Medical Center*, 316 NLRB 704, 708 (1995).[60]

III. DID THE RESPONDENT'S SUSPENSION AND DISCHARGE OF BAKER VIOLATE SECTION 8(A)(3) AND (1)?

The General Counsel's complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and then discharging Jeffrey Baker for his union and protected concerted activity.[61]

(a) Legal framework

In determining whether an employee's discharge or discipline is unlawful, the Board applies the mixed motive analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved in *NLRB v. Transportation Mgmt. Corp.,* 462 U.S. 393 (1983). The framework established by the Board in *Wright Line* is inherently a causation test. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 7 (2019), quoting *Wright Line*,

[59] The Respondent also contended that Pullin and Humphries harassed employees while soliciting their signatures on authorization cards. The credited facts do not establish such harassment. Even if Pullin and Humphries had been soliciting card signatures, union solicitations do not lose their protection simply because a solicited employee is the subject of persistent solicitation and feels "bothered," "harassed" or "abused" by them. *Frazier Industries Co.,* 328 NLRB 717, 718–719 (1999).

[60] These legal conclusions apply to complaint pars. 11, 13(a), and (b). Having found a violation under *Burnup & Sims*, I decline to address the General Counsel's alternative legal theories to establish a violation. One additional theory was *Wright Line*. The other additional theory was disparate enforcement of the solicitation and distribution policy, alleged in complaint par. 12. Any additional finding that the warnings were unlawful under those theories would be cumulative and would not affect the remedy.

I also do not find, as the General Counsel contends, that Strozier independently violated Sec. 8(a)(1) by telling Humphries that his discipline was caused by his union activity. Humphries' testimony about what Strozier said to him in the meeting where he received the warning does not substantiate that allegation.

Finally, the General Counsel's complaint alleges that Strozier and Mace violated Sec. 8(a)(1) on July 6 and 8 by interrogating employees about their union activities. On those two dates, Strozier interviewed Cox, Pickett, and Simmons concerning their complaints that employees had solicited signed authorization cards from them while they were working. However, the General Counsel makes no argument as to why Strozier's and Mace's conduct on those dates was an unlawful interrogation in violation of Sec. 8(a)(1). Accordingly, I find that the General Counsel has not established those violations. (Complaint pars. 6(b) and (c).) In any event, Strozier's and Mace's conduct was not an unlawful interrogation. Strozier questioned the employees in response to their own complaints about prohibited solicitation by other employees. That questioning of the complaining employees objectively could not be threatening or coercive to them. As to Mace, she served as nothing more than an observer/note taker in those meetings and said nothing to the employees.

[61] Complaint pars. 13(c) and (d).

supra, 251 NLRB at 1089 ("[The Board's] task in resolving cases alleging violations which turn on motivation is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of their employer which detrimentally affect such employees' employment.").

To prove a discriminatory discharge or discipline under *Wright Line*, the General Counsel must demonstrate by a preponderance of the evidence that the employee's protected conduct was a motivating factor in the employer's decision. *SBM Site Services, LLC*, 367 NLRB No. 147, slip op. at 2 (2019). The General Counsel satisfies the initial burden by showing (1) the employee's protected activity; (2) the employer's knowledge of that activity; and (3) the employer's animus. *Alternative Energy Applications Inc.*, 361 NLRB 1203, 1205 (2014). Proof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). A discriminatory motive may be established by: (1) the timing of an employer's adverse action in relation to the employee's protected activity; (2) statements and actions showing an employer's general and specific animus; (3) the presence of other unfair labor practices; and (4) evidence that an employer's proffered explanation for the adverse action is a pretext. *National Dance Institute–New Mexico, Inc.,* 364 NLRB 342, 351 (2016)*; Lucky Cab Co.*, 360 NLRB 271, 274 (2014). Pretext may be demonstrated by: (1) an employer's false reasons for an adverse action; (2) disparate treatment; (3) departure from past practice; (4) shifting explanations by an employer for an adverse action; and (5) the failure to investigate whether the employee engaged in the alleged misconduct. *ManorCare Health Services–Easton,* 356 NLRB 202, 204 (2010); *Windsor Convalescent Center*, 351 NLRB 975, 984 (2007), enfd. in relevant part 570 F.3d 354 (D.C. Cir. 2009); *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007).

If the General Counsel makes the initial showing, the burden shifts to the employer to prove that it would have discharged the employee even in the absence of the employee's protected activity. *Donaldson Bros. Ready Mix, Inc.,* 341 NLRB 958, 961 (2004). The employer cannot meet its burden merely by showing that it had a legitimate reason for the discharge; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Roure Bertrand Dupont, Inc.,* 271 NLRB 443, 443 (1984). When the employer's stated reasons for its decision are found to be pretextual—that is, either false or not in fact relied upon—discriminatory motive may be inferred but such an inference is not compelled. *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (2019).

(b) The General Counsel met the initial Wright Line burden

The evidence establishes that Baker engaged in union activity of which the Respondent was aware. Baker was a lead organizer for the Union, holding the initial June 21 meeting in his garage with numerous employees present. He obtained signed authorization cards both at that meeting and thereafter. At the Respondent's June 24 meeting about the organizational campaign with other employees present, Baker spoke up and questioned assertions in a handout the Respondent gave to employees. He also stated that employees were not talking to the Steelworkers union shown on the authorization card on the handout. Baker then attempted to give Tommy Garten a handout stating 35 things an employer could not do once employees began organizing.

The General Counsel likewise has demonstrated, by the preponderance of the evidence, the Respondent's animus towards the employees' organizational campaign and Baker's union activity. At the time of the discharge, the Respondent had committed multiple unfair labor practices. They included the unlawful discipline of Pullin and Humphries and informing Pullin that his union activity caused the discipline. They also included interrogations, creating the impression of surveillance, threats of business closure and/or job loss, and informing employees that choosing the Union would be futile. The violations at the Respondent's June 24 and July 9 meetings took place with numerous employees in attendance. The June 24 violations occurred prior to Baker's suspension.

On timing, Baker was suspended on June 29, just 5 days after he spoke up at the Respondent's meeting. That normally would show strong support for an animus finding. However, here the finding is somewhat muted because the suspension came as a result of Ledford's unsolicited sexual harassment complaint to the Respondent. His discharge came 18 days following the June 24 meeting.

Finally, as to statements of general or specific animus, Tommy Garten told Baker at the June 24 meeting that he "did not give a damn" which union the employees were organizing with, after Baker told him it was not the Steelworkers. He also refused Baker's attempt to hand him the flyer detailing things an employer could not do when employees were organizing and told employees to call his lawyer if they wanted.

Taken as a whole, I find all these factors sufficient to sustain the General Counsel's burden to show the Respondent's animus.

Having established Baker's union activity, the Respondent's knowledge of the activity, and the Respondent's animus, the General Counsel has met the initial *Wright Line* burden.

(c)The Respondent's investigation of Baker does not establish pretext

To buttress the animus showing, the General Counsel relies heavily on criticisms of the Respondent's investigation into Baker's alleged misconduct to argue that pretext is established. Upon an examination of all the circumstances of the investigation, I do not agree.

To begin, the Respondent's investigation of Baker did not start because of his union activity. It started as a result of Ledford's complaint to Matt Garten about sexual harassment in the workplace, wherein she specifically identified Baker. She asked to be switched off her crew and that her identity as the complaining employee be kept confidential from Baker. Ledford did not complain about Baker's union activity, which she knew about at the time. In fact, Ledford signed an authorization card shortly before complaining to Matt Garten about Baker.

Nonetheless, the General Counsel claims that the Respondent seized on Ledford's sexual harassment complaint to investigate and ultimately discharge Baker. The General Counsel points to testimony from Ledford that she previously complained to Rose and Mace about sexual harassment and the Respondent did

nothing.[62] Ledford's testimony about her prior complaints was abbreviated and provided no further details, including what she specifically reported to supervisors Rose and Mace, what their responses were, or if any owner or Strozier was aware of the complaints. In any event, the Respondent could not stand by and refuse to investigate Ledford's complaint that Baker was sexually harassing her simply because it had not investigated her prior complaints and Baker was a known union supporter. The Respondent was obligated to immediately investigate Ledford's sexual harassment complaint, made to owner Matt Garten, and it did so.

Regarding the investigation itself, Matt Garten assigned Strozier to investigate Ledford's complaint. Strozier played no role in the Company's response to the union organizing campaign, either before or after the initiation of the investigation. Strozier initially interviewed Ledford as the complaining employee. She detailed multiple, extremely lewd comments that Baker made to her or other females. Unsolicited, she also told Strozier about copies of the "*Brown Book*" she made at Baker's direction on the ASR copier, totaling about 1000 pages. Strozier had no idea at that time that the "*Brown Book*" was a document on union organizing. Strozier asked Ledford for additional information on the date the copies were made. She later informed him that she copied the big packet on June 18. Strozier also asked Ledford for witnesses to the alleged sexual harassment. Ledford identified two employees, Gunter and Pullin. Strozier also interviewed Hubbard and Jackson, who worked with Baker in the dispatch trailer and who Ledford likewise had accused of making inappropriate sexual comments.

Only then did Strozier interview Baker. He asked Baker specific questions regarding Ledford's sexual harassment allegation, all of which Baker denied. He also asked Baker if he ever used a copy machine for personal use and Baker admitted to doing so. When Strozier then asked Baker specifically if he ever instructed a subordinate employee to make personal copies for him, Baker did not deny doing so. Instead, he asked what Strozier meant by subordinate employee. When Strozier provided the definition, Baker responded that he had no subordinate employees under him. Baker's response suggested that he had, in fact, asked a coworker to make personal copies for him. Strozier then told Baker he was suspended pending investigation.

After interviewing Baker as part of the investigation, Strozier interviewed three additional employees (Pullin, Laura Lawhorn, and Suzanne Byer) concerning Ledford's sexual harassment allegations. Ultimately, Strozier concluded that Ledford's allegations could not be substantiated. He did not rely on those allegations when recommending to the Gartens that Baker be discharged. The Garten accepted Strozier's recommendation that Baker be discharged for misuse of WestRock property, not sexual harassment.

Because the Respondent did not discharge Baker due to sexual harassment, the General Counsel's argument that Strozier's investigation of Ledford's complaint was shoddy is misplaced. His investigation into the sexual harassment allegations is irrelevant. The relevant question is whether the Respondent's investigation into Ledford's allegation that Baker directed her to copy 1000 pages of personal documents was proper.

Even if it was relevant, I find that Strozier conducted a meaningful, not perfunctory, investigation into Ledford's allegations. Strozier interviewed a total of seven employees, including five alleged witnesses to Baker's misconduct. He asked the employees if they had ever been sexually harassed or seen anyone else sexually harassing an employee. All of the witnesses said no to these questions. Strozier was consistent when he questioned all of the employees identified by Ledford as potential witnesses, essentially utilizing a script. He unsuccessfully attempted to locate the driver who Ledford alleged told Baker to "show some respect" after Baker commented on a woman. As a result, Strozier concluded he could not substantiate Ledford's claims.

The General Counsel argues that Strozier made a number of errors in his investigation. The errors include not asking Baker more specific questions about the sexual harassment allegations and failing to interview every witness Ledford identified as potentially having information on the allegations. It is true that, if Strozier had taken these additional actions, the investigation would have been more thorough. Certainly, asking Baker if any other employee, not just a subordinate, made personal copies for him would have been a logical step. Interviewing all the identified witnesses would have been ideal. But the Board only requires that the investigation be meaningful. It does not require the investigation to be perfect. See *Park'n Fly, Inc.*, 349 NLRB 132, 136–137 (2007); *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1220–1221 (2004).

It also must be kept in mind that Strozier's regular positions with the Respondent were general manager and financial controller. Although he performed HR functions in June and July 2021, that was not his regular job. In those circumstances, that he would not perform such functions perfectly is to be expected. Strozier appears not to have been sophisticated when it came to his HR functions, including those involved in this case. But the lack of sophistication does not reflect an intentionally inadequate investigation designed to end in Baker's discharge.

Turning now to the relevant inquiry, the Respondent's investigation into Ledford's allegation of Baker misusing the WestRock copier likewise was sufficient. Again, Ledford made this allegation to Strozier unsolicited. She identified June 18 as the date she made over 1000 copies at Baker's direction, because she believed him to be her supervisor at that time. Strozier then questioned Baker about the allegation. Reading between the lines of his answers to the copying questions, Baker carefully denied only having directed a subordinate to make him personal copies. He did not deny obtaining other copies for personal use from a coworker. With that information in hand from his interview of Baker, Strozier had the ability to conduct further investigation into the copying allegation and he did so. First, Strozier examined whether any large copying jobs had been completed on the copier in the dispatch trailer which the Respondent owned. Then, because Strozier did not have access to the WestRock copier, he asked the Gartens to look into its use on June 18. Matt Garten called a WestRock representative and ultimately talked to a WestRock IT employee. That employee confirmed to him that a large, atypical number of copies had been made on that

[62] Tr. 939, 954.

copier on June 18. Matt Garten reported that to Strozier, who recommended to the Gartens that Baker be discharged.

The General Counsel argues that Matt Garten's conversation with the WestRock IT employee did not prove Ledford's allegation concerning "*The Little Brown Book of Organizing"* copies. I disagree. Ledford already had provided specifics in her allegation, that Baker directed her to make over 1000 pages of copies on June 18. Matt Garten asked the representative about that critical date. The representative verified that the number of copies made on that date was atypical. That was sufficient corroboration of Ledford's allegation. Although the General Counsel harps on Matt Garten's failure to ask the representative what documents were copied, nothing in the record indicates that such information was available from the copier. Moreover, Matt Garten did not ask the representative if any union documents had been copied on that date. In any event, it was the number, not the content, of the copies that constituted the misconduct.

Finally, it is worth noting that, during the copier investigation, Baker did not share with the Respondent, as he did at the hearing, his contention that Ledford had made the copies of "*The Little Brown Book of Organizing"* without any instruction from him. Had he volunteered that information, Strozier would have been faced with a conflict in testimony, much like the conflict on the sexual harassment allegation which Strozier concluded he could not substantiate. Baker likely did not volunteer that information because, even by his own account, he asked Ledford to make copies of union materials on a company copier. Thus, Baker appears to have been aware that such a request was improper.

For all these reasons, I conclude that the Respondent's investigation into Baker's copier misuse was sufficient to give it a reasonable belief that Baker had instructed Ledford to make a large number of personal copies for him on the ASR copier owned by Westrock. The Respondent discharged Baker for that misconduct. The investigation does not warrant an inference that the Respondent's stated reason for discharging Baker is a pretext.

(d) The Respondent established it would have discharged Baker absent his union activity

With the General Counsel having established that Baker's union activity was a motivating factor in his discharge, the burden shifts to the Respondent to prove that it would have discharged Baker even in the absence of his union activity. Given the Respondent's track record of terminating employees for similar offenses, I conclude that the Company met its burden. The Respondent's sole business was to provide shuttle service for the WestRock paper mill. Lose that contract and the business ceases to exist. Unsurprisingly then, in the 7 years preceding Baker's discharge, the Respondent terminated four other similarly situated employees. The justifications for their discharges were the destruction, damage, loss, or theft of WestRock property. By directing Ledford to make copies totaling 1000+ sheets of paper on the ASR copier for his personal use, Baker likewise committed theft of WestRock property. WestRock owned the copier and furnished all of the supplies needed for its use. Strozier credibly testified about why he recommended termination to the Gartens:

> We had an employee that put my job at risk as well as the jobs of 200 other individuals at risk to save $40 from going to Kinko's. So it was my recommendation that I—you know, you're not going to put my job at risk. My—my recommendation was termination. We've terminated other people for similar things, so.

The Respondent demonstrated that, over a significant period of time, it took its employees' misuse of WestRock property seriously. Baker simply was the latest in a line of employees to be discharged for engaging in that misconduct.

The General Counsel first argues that the Respondent failed to meet its burden because it did not maintain a rule prohibiting employees from using the ASR copier for nonwork purposes. The lack of such a rule, the argument goes, means Baker did not engage in misconduct, even if he did use the copier for his own purposes. Accepting the argument would defy common sense. It is true that some of the Respondent's supervisors, including Mace, gave some employees, including Baker, the de minimus benefit of limited personal use of the ASR copier. But no employee was ever permitted to make 1000+ pages of copies for personal use. And Baker could not have thought that doing so was permissible, rule or no rule. In that same vein, none of the employees whom the Respondent previously discharged for destroying WestRock timeclocks, damaging their vehicles, stealing their mud flaps, or losing their remote controls could have thought that the lack of rules prohibiting such conduct meant they could not be discharged for it.

The General Counsel also contends that the other five discharged employees are not similarly situated comparators. The General Counsel points to the lack of any damage caused by Baker or any prior acts of misconduct by Baker. However, the argument is premised upon accepting Baker's version that he asked Ledford to make one copy of "*The Little Brown Book*," an account I have discredited. Beyond that, the common thread in all of the discharges is the misuse of WestRock property, which put the Respondent's contract with WestRock at risk of cancellation. That is a sufficient comparator as any misuse, irrespective of its severity, could result in a contract cancellation. Finally, although two of the five employees who previously were discharged engaged in prior misconduct, the other three did not.

Finally, the General Counsel argues that the only true comparator is Ledford herself, because she made the copies for Baker even though, by her own account, she knew making such personal copies was wrong. Based upon my credibility determination discussed above, I found that Ledford viewed Baker as her supervisor, whether he actually was or not. She made the copies at Baker's direction, believing that she was required to do so. Engaging in an act of misconduct at a superior's direction is not comparable to directing another employee to engage in the misconduct.

Accordingly, I conclude that the Respondent has satisfied its shifting *Wright Line* burden. The Respondent's discharge of Jeff Baker did not violate the Act.[63]

IV. THE EMPLOYEE HANDBOOK ALLEGATIONS: FINDINGS OF FACT

[63] I also reject the General Counsel's alternative argument that Baker's discharge was unlawful under *Burnup & Sims*. Because Baker engaged in the misconduct for which he was discharged, no *Burnup & Sims* violation occurred.

AND CONCLUSIONS OF LAW

The General Counsel's complaint also alleges that the Respondent maintains work rules in its employee handbook which violate Section 8(a)(1) of the Act.

(a) The solicitation and distribution policy[64]

The Board has long recognized the principle that "[w]orking time is for work," and thus has permitted employers to adopt and enforce rules prohibiting solicitation during "working time," absent evidence that the rule was adopted for a discriminatory purpose. *Conagra Foods, Inc.*, 361 NLRB 944 (2014). In contrast, rules which prohibit solicitation during "working hours" or while employees are "on the clock" are presumptively invalid. *Burger King*, 331 NLRB 1011, 1012–1013 (2000); *Our Way, Inc.*, 268 NLRB 394 (1983). In addition, solicitations cannot be banned during nonworking times in nonworking areas, nor can bans be extended to working areas during nonworking time. *Food Services of America, Inc*., 360 NLRB 1012, 1016 (2014).

The Respondent's solicitation and distribution policy[65] states in relevant part that "[e]mployees may not solicit…to other employees during their own work time, to other employees who are working, or [in] areas where customers are present." The rule defines solicitation as "approaching another employee for the purpose of influencing him/her to take a specific course of action concerning any outside cause, but not about regular work duties or conditions." The rule defines work time as "any time during an employee's shift except for authorized breaks and lunches." That language "any time during an employee's shift" renders the rule unlawful. An employee's shift equates to the scheduled period of work, i.e., the start and end times of a workday. However, an employee could be on the clock, but not working, during a shift. An employee can solicit during such nonworking times in working and nonworking areas, absent special circumstances not present here. *Food Services of America, Inc*., supra (citing *UPS Supply Chain Solutions*, 357 NLRB 1295, 1296 (2011)). Accordingly, I conclude that the Respondent's no-solicitation rule violates Section 8(a)(1).

(b) The "Boeing" legal framework applicable to the remaining rule allegations

The General Counsel's remaining rule allegations must be evaluated utilizing the legal framework adopted by the Board in *Boeing Co.*, 365 NLRB 1494 (2017), as subsequently clarified in *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019).

In *Boeing Co.*, the Board set out its current legal standard for determining whether a facially neutral work rule or policy, reasonably interpreted, would unlawfully interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. The outcome of this inquiry "should be determined by reference to the perspective of an objectively reasonable employee who is 'aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the NLRA.'" Id., slip op. at 3 fn. 14 (quoting *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 271 (5th Cir. 2017)). "When evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule." *Boeing Co.,* supra, slip op. at 3. The Board's effort to "strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy" resulted in the creation of three categories of employment policies, rules, and handbook provisions. Id., slip op. at 3–4. These categories "represent a classification of *results* from the Board's application of the new test" and "are not part of the test itself." Id., slip op. at 4 (emphasis in original).

In *LA Specialty Produce Co.*, the Board clarified the burdens under this classification scheme. The General Counsel has the initial burden to prove that a facially neutral rule or policy would, when read in context, be interpreted by a reasonable employee as potentially interfering with the exercise of Section 7 rights. Id., slip op. at 2. If the General Counsel fails to meet this initial burden; the Board does not need to address the employer's legitimate justifications for the rule. Instead, the rule is lawful and fits within category 1(a). Conversely, if the General Counsel does meet the initial burden of proving that a reasonable employee would interpret a rule as potentially interfering with the exercise of Section 7 rights, the Board will then balance that potential interference against the employer's legitimate justifications for the rule. Id., slip op. at 3. When the balance favors general employer interests, the rule at issue will be lawful and will fit within category 1(b). When the potential interference with Section 7 rights generally outweighs any possible employer justification, the rule at issue will be unlawful and will fit within category 3. Finally, "in some instances, it will not be possible to draw any broad conclusions about the legality of a particular rule because the context of the rule and the competing rights and interests involved are specific to that rule and that employer. These rules will fit in *Boeing* category 2. Id.[66]

(c) The handbook's introductory statement[67]

In its employee handbook, the Respondent maintains the following "Introductory Statement":

> Finally, this handbook is the property of GT. You should take all efforts to maintain it in good, usable condition. Because this handbook is company property, it should not be given to outsiders without the permission of one of the Owners.

The General Counsel argues that this rule falls into category 3 and is unlawful because it precludes employees from discussing handbook policies on wages, benefits, and other working conditions with third parties.

A reasonable employee would interpret the rule's language to prohibit disclosure to third parties of the handbook's provisions, including those concerning overtime pay, health insurance,

[64] Complaint par. 5(e).

[65] The full text of the rule appears on p. 13 of this decision.

[66] The Board's *Boeing* decision did not disturb longstanding precedent governing employer restrictions on solicitation and distribution, including the Respondent's rule discussed above, which already struck a balance between employee rights and employer interests. *UPMC Presbyterian Hospital*, 366 NLRB No. 142, slip op. at 1 fn. 5 (2018).

[67] Complaint par. 5(b).

retirement benefits, vacation and other leave, and overtime pay. Employees long have had a protected right to discuss their working conditions with others, including other employees, the public, and unions. See, e.g., *Fresh & Easy Neighborhood Market*, 361 NLRB 72, 73 (2014); *The Exchange Bank*, 264 NLRB 822, 831 (1982); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978). Thus, the rule interferes with employees' exercise of Section 7 rights and the General Counsel met the initial *Boeing/LA Specialty* burden.

As for its business justification, the Respondent argues that the handbook contains policies which, if disclosed to the public or its competitors, would put it at a competitive disadvantage. In that regard, Strozier testified that the handbook information which the Respondent did not want disclosed to third parties, including competitors, was "things dealing with vacation…even pay and…what some drivers get paid."[68] Strozier thereby admitted the violation. The rule violates Section 8(a)(1).[69]

(d) Protection of confidential information rule (part 1)[70]

In the "Security" portion of its employee handbook, the Respondent maintains the following "Protection of Confidential Information" rule:

> Generally, any information about GT gained by any employee, as a result of his/her employment with GT and which is not legally known by the general public, is considered confidential and should be treated as confidential. This includes financial information, billing, operational and marketing information, as well as information concerning the identity of GT's vendors, customers and suppliers. In addition, our customers often entrust us with important information relating to their own businesses. This information should also be considered confidential.
>
> During employment with GT, and after the termination of that employment, irrespective of whether the termination was voluntary or involuntary, employees should use, access, disclose or copy/duplicate confidential information only as needed to perform their duties and in no manner which is detrimental to the best interests of GT. This forbids, among other things, the discussion or disclosure of confidential information with outsiders, including members of your family and close friends. Employees are also prohibited from discussing confidential information with other employees unless the employees in question are specifically required to do so in the performance of their duties.

The General Counsel argues that this is an unlawful category 2 rule, because the definition of confidential information is overly broad and the reference to information "not legally known by the general public" is ambiguous.

A reasonable employee would interpret this rule as interfering with the protected right to discuss wages, benefits, and other working conditions with other employees, the public, and unions. The definition of confidential information is so broad—any information gained by an employee as a result of employment with the Respondent—that it reasonably includes those subjects. The last sentence of the rule prohibits employees from discussing those topics with other employees. As a result, the General Counsel has met its initial *Boeing/LA Specialty* burden.

Regarding the business justification, the Respondent's asserts that this rule is to protect its and its customers' proprietary information. Strozier also testified that this interest was important because "if I terminate a payroll clerk and they happen to post all the salaries online, I wouldn't want that to happen." He further stated that confidential information must remain confidential and not given to the "general public," in part because the Respondent's relationship with customers could be affected by disclosure of customer information.[71]

If they were standing alone, the rule's prohibitions on disclosing financial information, billing, operational and marketing information, as well as information concerning the identity of the Respondent's vendors, customers and suppliers would be a lawful category 1 rule under *Boeing*. See *LA Specialty*, supra, slip op. at 4 (finding that a company's confidentiality rule was lawful under *Boeing* because, when objectively and reasonably interpreted, it sought to protect business information and did not prevent employees from speaking with clients and vendors about the business). Because of that provision, I find this rule to fall into *Boeing* category 2. However, as with the introductory statement rule above, the language prohibits employees from disclosing or discussing their wages and benefits with each other and outside parties. Strozier again admitted such, stating the Respondent's justification for this rule included preventing employees from posting "all of the salaries online." As a result, the impact on employees Section 7 rights outweighs the Respondent's business interest in protecting its and its customers proprietary information. Accordingly, this rule violates Section 8(a)(1).

(e) Protection of confidential information rule (part 2)[72]

In the same "Security" portion of its employee handbook, the Respondent maintains the following, additional "Protection of Confidential Information" rule:

> In order to protect confidential information, employees are prohibited from bringing any device to work which has the ability to photograph, record (audio or visual), transcribe, photocopy, or otherwise duplicate images, documents or things unless it is specifically necessary for the employee to have such a device for job related functions. Items prohibited include, but are not limited to: cameras, camcorders, phone cameras, tape recorders, and PDAs. Except as specifically required by the

[68] Tr. 1042–1043.

[69] I further note that the Respondent did not justify this rule on the need to protect confidential or proprietary information. See *Newmark Grubb Knight Frank*, 369 NLRB No. 121 (2020), slip op. at 3 (finding that a reasonable employee would understand the company property policy to be a general declaration of the Company's property rights).

In addition, the rule's requirement that employees obtain the permission of a supervisor before engaging in protected activity likewise is unlawful. *Schwan's Home Service*, 364 NLRB 170, 173 (2017) (citations omitted); *Saginaw Control & Engineering, Inc.*, 339 NLRB 541, 553 (2003) ("[t]he Board law is clear, employees do not need [their employer's] permission, written or otherwise, to engage in protected activities") (citing *Brunswick Corp.*, 282 NLRB 794, 798 (1987)).

[70] Complaint par. 5(d).

[71] Tr. 1045–1046.

[72] Complaint par. 5(d).

> employee's job, employees are also prohibited from copying, photographing, recording (audio or visual), downloading or otherwise duplicating confidential information or images unless the employee is specifically required to do so in the performance of his/her duties with GT.

The text amounts to a no-camera rule. The Board has found that no-camera rules, as a type, fall into *Boeing* Category 1(b) and are lawful. *AT&T Mobility, LLC*, 370 NLRB No. 121, slip op. 2–4 (2021); *Boeing Co.*, supra, slip op. at 17–18. Thus, this rule does not violate the Act.[73]

(f) The personal and work area appearance rule[74]

In its handbook, the Respondent maintains the following "Miscellaneous Work Rules" policy concerning "Personal and Work Area Appearance":

> While every employee is entitled to his or her own political affiliation, philosophy, or opinion, it is the policy of GT that the workplace is not an appropriate place for the display of political affiliation, philosophy, or opinion. The workplace and each employee's attire should remain politically neutral and free from political discussion or display. . .
>
> Employees must avoid clothes or hats that display gang, club, or political affiliation either in markings or writing . . .

As to the first paragraph, the General Counsel asserts that this rule infringes on employees' protected right to engage in political activity that attempts to improve employees' lot. In addition, the General Counsel argues that it is not clear whether the work "political" applies only to "affiliation" or also to "philosophy" or "opinion." Thus, the General Counsel argues this rule falls into *Boeing* category 2. As to the second, the General Counsel argues that the rule bans employees from wearing union insignia. I do not agree on either count.

In *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), the U.S. Supreme Court held that employees had a right to distribute material of a political nature on company property, where the subject matter of the material "bears such a relation to employees' interests as to come within the guarantee" of Section 7 and "fairly is characterized as concerted activity for the 'mutual aid or protection'" of the employees. A link between the political material and employees' terms and conditions of employment must exist. The first sentence of this rule does not address distribution of such political material, but rather the display of it to which no protected right attaches.

As to the second and third sentences in the rule, employees long have had a Section 7 right to wear union buttons and insignia at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803, 65 S.Ct. 982, 89 L. Ed. 1372 (1945). When an employer interferes in any way with employees' Section 7 right to display union insignia (whether through buttons, pins, stickers, shirts, hats, or any other accessories or attire), that interference is presumptively unlawful, and the employer has the burden to establish special circumstances that justify its interference. *Tesla, Inc.*, 371 NLRB No. 131, slip op. at 16–17 (2022). However, a reasonable employee who read the rule's language would interpret it as a ban on the wearing of attire containing political, not union, messages.

Accordingly, I conclude that the General Counsel has not shown that a reasonable employee would interpret this rule to interfere with Section 7 rights. The General Counsel has not sustained the initial *Boeing*/*LA Specialty* burden and this rule is lawful.

(g) The social networking rule[75]

In its employee handbook, the Respondent maintains the following "Personal Conduct Policy (inclusive of Social Media use)", which states in relevant part:

> Information published on any blog(s) or sites should comply with the company's confidentiality and other established policies as well as federal and state law. This means you should never disclose any confidential information regarding GT or any information about a customer.

As previously noted, the Respondent includes employee discussions about wages, benefits, and other terms and conditions of employment in its definition of "confidential information", i.e., "any information about GT gained by any employee, as a result of his/her employment with GT and which is not legally known by the general public." For the same reasons stated above in the protection of confidential information (part 1) above, this rule is unlawful.

(h) The termination of employment relationship rule

In its employee handbook, the Respondent maintains a "Termination of the Employment Relationship" policy with the following "Return of Property" rule:

> All GT property must be returned at the time of separation from employment, whether the separation was voluntary or involuntary. Employees will be responsible for the return of all uniforms issued to them. Employees will be responsible for the cost of any uniforms not returned and applicable court costs. Failure to return GT property may result in appropriate legal action.

The General Counsel contends that this rule is unlawful because the Respondent classifies its employee handbook as GT Property and, as previously discussed, employees have a right to disseminate the handbook to outside parties. To begin, while this policy applies to former employees, for the purposes of the Act, Section 7 rights "do not depend on the existence of an employment relationship between the employee and the employer. . . and the Board has . . . affirmed that such rights extend to former employees." *IGT*, 370 NLRB No. 50, slip op. at 5 (2020). Thus, the Respondent's former employees are free to continue to discuss the content of the handbook as it relates to their terms and conditions of employment with their former co-workers, the public, and unions. But a reasonable employee reading this rule

[73] I note that, if the rule fell into *Boeing* category 2, the Board acknowledged in *AT&T Mobility* and *Boeing* that no-camera rules interfere with employees' Sec. 7 rights. In addition, the Respondent provided no justification for this rule.

[74] Complaint par. 5(f).

[75] Complaint par. 5(g).

would not interpret it as prohibiting such discussions. Rather, the reasonable reading is that the employees could retain the handbook while they were employed with the Respondent. However, once they left that employment, the physical handbook had to be returned to the Respondent. That does not infringe on their Section 7 rights.

Accordingly, I conclude that the General Counsel has not met the initial *Boeing/LA Specialty* burden and this rule is lawful. See *Newmark Grubb Knight Frank*, 369 NLRB No. 121 (2020), slip op. at 3 (finding that a reasonable employee would understand the company property policy to be a general declaration of the Company's property rights).

(i) The conduct after separation rule[76]

In its employee handbook, the Respondent maintains a "Termination of Employment Relationship" policy with the following "Conduct After Separation" rule:

> Even after the separation of employment, whether the separation was voluntary or involuntary, employees have certain legal obligations or "fiduciary" duties to GT. These include the duty not to disparage the company, not to disclose confidential information, and to not unfairly compete with GT. For more information on what duties and obligations you may have, please see your Manager or an Owner."

Again, as previously noted, the Respondent includes employee discussions about wages, benefits, and other terms and conditions of employment in its definition of "confidential information", i.e., "any information about GT gained by any employee, as a result of his/her employment with GT and which is not legally known by the general public." For the same reasons stated above in the protection of confidential information (part 1) above, this rule is unlawful.[77]

As to the four remaining handbook rule allegations in the complaint, the General Counsel concedes that the rules are lawful under *Boeing Co.* and *LA Specialty Co.* (Complaint pars. 5(a), (c), (f), (g) to the extent that the rules in 5(f) and (g) are not already addressed above, as well as the rule in paragraph 5 of the complaint in Case 10–CA–296060). However, the General Counsel argues that the Board should overturn those two decisions and adopt a new framework for unlawful maintenance of handbook rules. Under the new framework, those rules would be unlawful. Because I am bound to apply current Board precedent, those allegations are dismissed.

V. THE UNION'S OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION

As previously noted, the Union lost the representation election conducted on August 4 through 6, 2021, by a count of 30 to 65. On August 13, 2021, the Union filed timely objections to conduct affecting the results of the election. On July 6, 2022, the Regional Director for Region 10 issued a report on objections, order consolidating cases, and notice of hearing. The Regional Director ordered the consolidation of the representation and unfair labor practice cases for the purpose of hearing, ruling, and decision by an administrative law judge and, if necessary, the Board.

In this decision, I have found that the Respondent violated Section 8(a)(1) by interrogating employees about their union activity (two violations: Rose interrogating Morgan and Baker on June 23); creating the impression that employees' union activity were being surveilled (Rose to Morgan on June 23); threatening employees with business closure and job loss for unionizing (two violations: June 24 in a meeting with 20 employees and July 9 in a meeting with 30 employees); making statements to employees that choosing the Union would be futile (June 24 meeting with 20 employees); telling an employee that his union activity caused him to be disciplined (Pullin, July 9); and maintaining a number of unlawful handbook rules. I also found that the Respondent violated Section 8(a)(3) and (1) on July 9 and 12 by issuing warnings to Pullin and Humphries for their union activity. These violations, and other findings of fact, conform to Objections 1, 2, 3, 4, 6, 8, 10, 11, 13, and 15. I sustain those Union objections. Based on my conclusions that the remaining unfair labor practices were not established, I recommend dismissing Objections 5 and 9.[78]

"[I]t is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period since '[c]onduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election.'" *Clark Equipment Co*., 278 NLRB 498, 505 (1986), quoting *Dal-Tex Optical Co*., 137 NLRB 1782, 1786 (1962). The critical period in this case ran from June 30, 2021, the date the Union filed the petition, to August 4, 2021, the first day of the election. Within that period, the Respondent violated Section 8(a)(1) by threatening employees with business closure and job loss for unionizing at the July 9 meeting. That conduct alone is sufficient to warrant a new election.

The only exception to the Board's policy is where the Board

[76] Complaint par. 5(h).

[77] The portion of the rule prohibiting ex-employees from making disparaging comments about the Respondent, standing alone, would be lawful. The Board has held that maintaining a facially neutral rule prohibiting employees from disparaging their employers is lawful under *Boeing*. *Motor City Pawn Brokers*, 369 NLRB No. 132 (2020), slip op. at 20 (finding that while such a policy may interfere with an employee's Section 7 right to seek support regarding their employment conditions, the balance tipped in favor of the employer's legitimate interest of protecting business and relationships with clients.)

[78] Objection 14 was the only objection not also alleged as an unfair labor practice in the General Counsel's complaint. In that objection, the Union alleged that "the Employer unlawfully engaged in surveillance of the polling place and was in the polling area in violation of the *Milchem* rule." When alleged objectional conduct is not also an unfair labor practice, the proper standard to apply is whether the alleged misconduct, taken as a whole, warrants a new election because it has "the tendency to interfere with employees' freedom of choice" and "could well have affected the outcome of the election." *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995); *Metaldyne Corp.*, 339 NLRB 352 (2003). In *Milchem, Inc.,* 170 NLRB 362 (1968), the Board held that an election will be set aside if a party to the election engages in prolonged conversation with prospective voters waiting in line to cast their ballots, regardless of the content of that conversation. Objection 14 relates to Rose and Austin being onsite at the Respondent's facility on August 4 and 5. They did not interact, or converse, with any employees nor were they seen by any employees except for Baker. In these circumstances, I recommend dismissal of Objection 14.

finds that it is "virtually impossible" to conclude that the misconduct could have affected the election results. Id. Here, the July 9 meeting was attended by approximately 30 employees. The election outcome could change if only 13 employees altered their votes as a result of the violation. Thus, it is not "virtually impossible" that the misconduct could have affected the election results.

Accordingly, I order that the election be set aside and direct that a new election be held. *Onsite News*, 359 NLRB 797, 797 fn. 1 (2013); *La-Z-Boy Midwest*, 241 NLRB 334, 335 (1979).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a Section 2(5) labor organization.
3. The Respondent violated Section 8(a)(1) by maintaining the following work rules: introductory statement; protection of confidential information; solicitation and distribution; social networking; and return of property.
4. The Respondent violated Section 8(a)(1) on June 23, 2021, by interrogating employees about their union activity.
5. The Respondent violated Section 8(a)(1) on June 23, 2021, by creating an impression among its employees that their union activities were under surveillance by the Respondent.
6. The Respondent violated Section 8(a)(1) on June 24, 2021, by threatening to close its business and threatening employees with job loss if they chose the Union as their bargaining representative, as well as informing employees it would be futile for them to select the Union as their bargaining representative.
7. The Respondent violated Section 8(a)(1) on July 9, 2021, by threatening to close its business if employees chose the Union as their bargaining representative.
8. The Respondent violated Section 8(a)(1) on July 9, 2021, by telling employees that it disciplined them for their union activity.
9. The Respondent violated Section 8(a)(3) and (1) on July 9 and 12, 2021, by issuing written warnings to Ray Humphries and Allen Pullin due to their union activity.
10. The Respondent has not violated the Act or engaged in objectionable conduct in the other manners alleged.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, having found that the Respondent violated Section 8(a)(3) and (1) by issuing warnings to Ray Humphries and Allen Pulling due to their union activity, I order the Respondent to rescind the warnings and notify the employees that this has been done.[79]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[80]

ORDER

The Respondent, Garten Trucking, LLC, Covington, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a solicitation policy which prohibits employees from soliciting on nonwork time in work areas.

(b) Maintaining a rule in its handbook's introductory statement prohibiting employees from disclosing the handbook, including its terms and conditions of employment, to outsiders without the permission of an owner.

(c) Maintaining a protection of confidential information rule prohibiting employees from discussing their terms and conditions of employment with other employees, the public, and unions.

(d) Maintaining a social networking rule prohibiting employees from discussing their terms and conditions of employment with other employees, the public, and unions.

(e) Maintaining a conduct after separation rule prohibiting employees from discussing their terms and conditions of employment with other employees, the public, and unions.

(f) Interrogating employees about their union activity.

(g) Creating the impression among its employees that their union activities were under surveillance.

(h) Threatening to close the business and threatening employees with job loss if they chose the Union as their bargaining representative.

(i) Informing employees that it would be futile for them to select the Union as their bargaining representative.

(j) Issuing written warnings to employees for engaging in union activity.

(k) Telling employees that they were disciplined due to their union activity.

(l) 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, rescind the July 9 and 12, 2021, warnings issued to Ray Humphries and Allen Pullin and remove from its files any references to them, and within 3 days thereafter, notify Ray Humphries and Allen Pullin in writing that this has been done and that these unlawful acts will not be used against them in any way.

(b) Post at its facility in Covington, Virginia, copies of the attached notice marked "Appendix."[81] Copies of the notice, on

[79] Given the violations that I have found, I decline the General Counsel's and the Union's request for special remedies. The Board's standard remedies are sufficient to address those violations.

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

[81] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees has 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

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, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 23, 2021.

(c) 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. February 17, 2023

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 maintain a solicitation policy which prohibits employees from soliciting on nonwork time in work areas.

WE WILL NOT maintain a rule in our handbook's introductory statement prohibiting employees from disclosing the handbook, including its terms and conditions of employment, to outsiders without the permission of an owner.

WE WILL NOT maintain a protection of confidential information rule prohibiting employees from discussing their terms and conditions of employment with other employees, the public, and unions.

WE WILL NOT maintain a social networking rule prohibiting employees from discussing their terms and conditions of employment with other employees, the public, and unions.

WE WILL NOT maintain a conduct after separation rule prohibiting employees from discussing their terms and conditions of employment with other employees, the public, and unions.

WE WILL NOT interrogate employees about their union activity.

WE WILL NOT create the impression among our employees that their union activities were under surveillance.

WE WILL NOT threaten to close our business and threaten you with job loss if you chose the Union as your bargaining representative.

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

WE WILL NOT issue written warnings to employees for engaging in union activity.

WE WILL NOT tell employees that they were disciplined due to their union activity.

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

WE WILL, within 14 days from the date of this order, rescind the July 9 and 12, 2021, warnings we issued to Ray Humphries and Allen Pullin due to their union activity and remove from our files any references to them, and within 3 days thereafter, notify Ray Humphries and Allen Pullin in writing that this has been done and that these unlawful acts will not be used against them in any way.

GARTEN TRUCKING, LLC

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/10-CA-279843 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.

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.