UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AMERICAN TOWER CORPORATION

and **CASE 13-CA-326591**

COMMUNICATIONS WORKERS OF AMERICA

Christina Hill, Esq. and ***Ava Szoke, Esq.***, for the General Counsel
Nneka Maceo, Esq., of Washington, D.C., for the Charging Party
Gregory H. Andrews, Esq. (Jackson Lewis P.C.), of Chicago, Illinois, for the Respondent

DECISION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: The Respondent violated Section 8(a)(1) of the Act by impliedly threatening employees with discharge and by maintaining a rule which prohibited employees from disclosing their compensation, but did not violate the Act in any other manner alleged in the complaint.

Procedural History

This case began on September 27, 2023, when the Charging Party, Communications Workers of America (herein called the Union or the Charging Party), filed the original unfair labor practice charge. Board staff docketed the charge as Case 13–CA–326591. The Union amended the charge on October 13, 2023.

After an investigation, the Regional Director for Region 13 of the Board issued a complaint and notice of hearing on July 26, 2024. In doing so, the Regional Director acted on behalf of, and with authority delegated by, the Board's General Counsel (referred to below as the General Counsel or the government). The Respondent, American Tower Corporation, filed a timely answer. During a prehearing conference call, the parties agreed that the hearing could proceed

by videoconference.

On February 3, 2025, a hearing opened before me, using the Zoom for Government videoconferencing protocol. The hearing continued on February 4, 2025. On that date, the General Counsel moved to amend the complaint. Over the Respondent's objection, I granted that motion and adjourned the hearing until March 18, 2025, so that the Respondent would have time to prepare a defense to the newly-added allegation.

The hearing resumed on March 18, 2025. After the parties finished presenting evidence, I closed the hearing. Thereafter, the parties filed briefs, which have been considered carefully.

Admitted Allegations

In its answer to the complaint, the Respondent admitted the allegations raised in complaint subparagraphs I(a), I(b), II(a), II(b), II(c), IV, and VI(d). I find that the General Counsel has proven these allegations.

More specifically, I find that the government has proven that the charge and amended charge were filed and served as alleged.

Based on the admissions in the Respondent's answer, I also find that. at all material times, the Respondent has been and is a corporation engaged in the business of leasing antenna space on towers to wireless service providers, radio and television broadcast companies, wireless data providers, government agencies and municipalities, and that it has an office and place of business in Schaumburg, Illinois. Further, I conclude that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act and meets the Board's standards for assertion of jurisdiction.

Additionally, based on the Respondent's answer, I find that the following persons are supervisors of the Respondent within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act: Vice President of Operations Eric Dudek; Vice President of Human Resources Kerri Weidman; Human Resources Representative Stephanie Brein, and Territory Manager Gary "Todd" Smart.

The Respondent also admits that, about August 22, 2023, it discharged its employee Michael Hoffman. I so find.

The Respondent has partially admitted certain other allegations. Complaint subparagraph VI(a) alleges that about March 2023, Respondent's employee Michael Hoffman concertedly complained to Respondent regarding the wages, hours, and working conditions of Respondent's employees by demanding a wage increase. The Respondent's answer admits that Hoffman complained to Respondent *regarding his own wages* but denies the remaining allegations in paragraph No. VI (a). The Respondent thereby denies that Hoffman was engaged in concerted activity protected by the Act.

Complaint subparagraph VI(b) alleges that about March 2023, Michael Hoffman concertedly complained to Respondent regarding the wages, hours, and working conditions of Respondent's employees by demanding better wages, workloads, vacations, and other terms and conditions of employment. The Respondent's answer admits that Hoffman complained to Respondent *regarding his own wages* but denies the remaining allegations in subparagraph VI(b). Thus, the Respondent denies that Hoffman's complaint constituted protected concerted activity.

Complaint subparagraph VI(c) alleges that about July 31, 2023, Michael Hoffman concertedly complained to Respondent regarding the wages, hours, and working conditions of Respondent's employees by raising concerns about harassment in the workplace and other terms and conditions of employment. Although the Respondent's answer admits that Hoffman complained "regarding his own wages and his own harassment," it denies that Hoffman was engaging in protected concerted activities.

Facts

The Respondent owns towers at various locations and leases space on them to cellphone service providers. Employees called "Operational Site Leads," or "OSLs," perform various duties related to the towers. For example, they use drones to inspect the towers and they make sure equipment has been installed properly.

In 2023, the Respondent employed about 165 OSLs. (Tr. 332.) The present case is about one of them, Michael Hoffman, whom the Respondent discharged on August 22, 2023.

The General Counsel alleges that the Respondent fired Hoffman because he had engaged in concerted activity protected by the Act. Complaint subparagraphs VI(a), VI(b), and VI(C) describe this alleged protected activity.

The complaint also alleges that the Respondent violated the Act by making certain statements to employees which constituted implied threats. The employee who heard these statements and testified about them was Hoffman. It will serve clarity to describe the events chronologically, as they happened to Hoffman, rather than in the order the allegations appear in the complaint. However, subheadings will identify the relevant complaint subparagraphs.

Complaint Subparagraph VI(a)

In March 2023, Hoffman had a conversation, by telephone, with his supervisor, Territory Manager Todd Smart. Hoffman testified that the conversation took place after he had received his annual review and that only he and his supervisor, Todd Smart, were on the line.

According to Hoffman, he began the conversation by saying, "Todd, you know, American Tower should stand up immediately and raise anybody making less than $30 an hour to $30 an hour due to inflation." (Tr. 33.)

When he testified during the hearing, Hoffman explained that young people were struggling financially: "I mean, I watched my own kids struggle. So. . .I knew we needed to get the wages increased for the younger employees." (Tr. 33.)

According to Hoffman, Smart answered that he did not believe such a wage increase was going to happen, Hoffman replied, "I don't think American Tower wants to hear its employees' concerns. So I'm, you know, probably should look into organizing a union." (Tr. 33.)

Smart did not testify and I credit Hoffman's uncontradicted testimony. Based on that testimony, I find that, in March 2023, Hoffman advocated to Territory Manager Smart that other employees receive wage increases and also mentioned the possibility of seeking union representation. The Respondent has admitted that Smart was a supervisor, within the meaning of Section 2(11) of the Act and its agent within the meaning of Section 2(13) of the Act. Therefore, Smart's knowledge of Hoffman's union sympathies is imputable to the Respondent.

Concerted Nature of Activity

As noted above, the Respondent's answer admits that Hoffman complained about wages in about March 2023, but avers that Hoffman's complaint was only about his own wages and not about the wages of other employees. This distinction is important because the Act only protects concerted activities and not one employee's activity solely on his own behalf.[1]

However, although the term "concerted activity" generally refers to two or more employees acting together, the Board has recognized exceptions. One exception, which is relevant in the present case, involves an employee who voices to management the concerns of other employees. *Winston Salem Journal*, 341 NLRB 124, 125 (2004) ("an employee engages in protected activity by speaking up to management about the allegedly unfair treatment employees have received").

Hoffman proposed, to the supervisor who had just given him a performance review, that the Respondent increase certain employees' pay rate. That sequence of events might suggest that Hoffman was seeking a raise for himself. However, a closer examination of Hoffman's credited testimony reveals that he was talking about a wage increase for other employees, not one for himself.

Hoffman urged a wage increase for "anybody making less than $30 an hour. . ." Hoffman already was being compensated at a higher wage rate. Raising the pay of employees making less than $30 per hour would not affect Hoffman's pay at all.

Specifically, Hoffman testified that in August 2023, he was making $35 an hour. (Tr. 30.) He received a 2.5 percent wage increase in March 2023, but even before that increase, his wage rate had exceeded $30 per hour. Because Hoffman already received more than $30 per hour, he

1 Section 7 of the Act states in part, that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . ." 29 U.S.C. § 157.

was not advocating for himself when he said that the Respondent should increase the wages of anyone making less than that amount.

Therefore, I conclude that Hoffman was advocating on behalf of employees other than himself. Additionally, in this same conversation, he spoke of organizing a union. Such an activity necessarily entails group action. Moreover, Section 7 of the Act specifically protects forming a labor organization. 29 U.S.C. § 157. Accordingly, I conclude that, during this March 2023 conversation with his supervisor, Hoffman clearly engaged in activity protected by the Act.

Complaint Subparagraph VI(b)

Complaint subparagraph VI(b) alleges that Hoffman made another concerted complaint in March 2023. However, the record does not reflect that Hoffman complained to management a second time *in March 2023* and the General Counsel's brief does not suggest he did so.

Rather, the General Counsel's brief discusses a complaint Hoffman made, on about April 14, 2023, to Human Resources Representative Stephanie Brien. It would appear that subparagraph VI(b) of the complaint refers to what Hoffman said on this occasion.

Hoffman spoke with Brien by phone. Although his earlier complaint to Territory Manager Smart had concerned the wage rates of the *younger* OSLs, who were not making $30 per hour, he testified that he complained to Brien that "American Tower needs to start respecting its older employees." (Tr. 35–36.)

According to Hoffman, an employee "at five-week, five-year service gets the same vacation and personal day schedule as me at 17, 18 years." (Tr. 36.) He told Brien that he believed "the senior employees deserve, you know, an extra week of vacation or more personal days." (Tr. 37.) Hoffman also complained to Brien that, although the OSLs' workload had increased, they received no additional compensation.[2]

Brien's testimony concerning this conversation differs from Hoffman's in some respects. She testified that it took place "[a]round May of 2023." (Tr. 292.) However, based on an email which Brien sent to Operations Director Cyndi Smith on April 19, 2023, I conclude that this conversation with Hoffman likely took place on or about April 14, 2023. (GC Exh. 20.)

On direct examination, Brien described Hoffman seeking a pay increase for himself. She testified that Hoffman "felt that he was not being compensated enough." (Tr. 293.) On cross-examination, the General Counsel asked Brien whether Hoffman had mentioned other employees:

2 According to Hoffman, Brien gave "Company answers" because she stated that the "Company feels that you're paid adequately, you're compensated adequately." (Tr. 37.) To that, Hoffman said, "I don't agree." (Tr. 38.) How Brien allegedly responded to Hoffman's "I don't agree" remark forms the basis for the allegation in complaint subparagraph V(a), which will be discussed later in this decision,

Q. . . .Do you agree with me that Mr. Hoffman also raised concerns with regard to more senior employees or older employees in terms of how they are treated? Did he raise that as well?
A. I do not recall.

(Tr. 313.)

Brien's testimony, that she did not recall, does not contradict Hoffman's testimony, which I credit. Based on Hoffman's testimony, I find that he did advocate that other employees should receive wage increases.

Brien also testified that, at the end of their conversation, Hoffman mentioned starting a union. (Tr. 294.) This comment certainly indicates that Hoffman was contemplating concerted activity by other employees as well as himself.

In sum, the record leaves no doubt that Hoffman was advocating that the Respondent grant pay raises to other employees, not just to himself. Therefore, I conclude that he was engaged in protected concerted activity.[3]

Respondent's Knowledge of Hoffman's Protected Activity

The Respondent's answer admits that Brien is a supervisor and agent of the Respondent within the meaning, respectively, of Sections 2(11) and 2(13) of the Act. Therefore, Brien's ears are, in effect, the Respondent's ears and her knowledge of Hoffman's protected activity and union sympathies can be imputed to the Respondent.

Moreover, Hoffman's remarks to Brien were not the only way that Respondent's management became aware of Hoffman's interest in organizing a union. Hoffman's telephone conversation with Brien likely took place on Friday, April 14, 2023. On Wednesday, April 19, 2023, Brien received an email from Cyndi Smith, the operations director for the Respondent's central region, and this email referred to Hoffman's union activity.

Smith supervised Territory Manager Todd Smart, among others. Thus, she was the boss of Hoffman's boss. (Tr. 308.) Smith's email to Brien stated:

> Good morning Stephanie. I have learned this morning that Mike has been reaching out to HR and to other OSLs about forming a union. I am not at all familiar with anything I/we should be doing when this subject comes up. I would defer to HR on any guidance you could give to me. Clark alerted me this morning to him reaching out to multiple OSLs lobbying them to be part if it with him. *I have asked Clark for a list of*

3 In addition to protected, concerted activity, Hoffman also engaged in some specific union activity. Some time in April 2023, he visited the website of the Communications Workers of America and later became a "social member" of that organization. He solicited other employees to support this Union and helped set up a union organizing meeting on August 10, 2023. Hoffman's union activities will be discussed later in this decision.

> *any OSLs that he is aware of that Mike contacted and that can then be forwarded to you and Eric*. Just wanted to make sure we are all aligned of what has been transpiring and know if there are any next steps needed since a few people knew this was happening already.
>
> (GC Exh. 20; italics added.)[4]

Smith is a line manager, not a human resources specialist, and revealed her unfamiliarity with labor law in the sentence stating that she had "asked Clark for a list of any OSLs that he is aware that Mike contacted. . ." Labor Relations Representative Brien quickly corrected her. Seventeen minutes after Smith sent the email, Brien replied, informing her not to make such a list.

Specifically, Smith had sent her email to Brien on April 19, 2023, at 11:22 a.m.; at 11:39 a.m., Brien emailed the following to Smith:

> Thanks for reaching out. I did have a conversation with Mike [Hoffman] late last week, apologies I didn't loop you in. Mike informed me that he was unhappy with his compensation and intended on forming a union. I have made Legal aware of this as well. *We should not be collecting names of who he has contacted and we should not be interfering in this in any way. This is a protected employee activity. If employees come to us with questions, I would recommending focusing the conversation around how they like working at ATC and the benefits we offer. Managers can also say that they cannot speak to unionization but that it is within the employee's right to discuss with Mike/other employees.* I'm happy to set up a call with Legal for all the TMs [territory managers] to answer any questions there may be about how to approach this conversation if an OSL comes to you with questions.
>
> For the team's reference, in order for Mike to successfully organize a union, he would need to work with the National Labor Relations Board and have at least 30% of the OSL population support his election petition - and with the employees being spread across multiple states, there are some additional complications he would have to manager through, so I am not too concerned at this point that they will be able to unionize successfully.
>
> Let me know what you think about the all-TM call and if you need anything else from me in the meantime.
>
> Thanks.
>
> (GC Exh. 20, italics added.)

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4 The record indicates that "Clark" was Clark Lindstrom. In 2021, Lindstrom was one of the Respondent's regional directors, to whom territory managers report. (Tr. 344–345.) It is unclear what position he held in April 2023.

The complaint does not allege that the Respondent engaged in unlawful surveillance of any employee's union activity and the record would not support such a finding.

Complaint Subparagraph V(a)

As noted above, Hoffman and Brien had a telephone conversation on or about April 14, 2023. The discussion above concerned statements which Hoffman made to Brien and whether those statements constituted protected concerted activity. During this same conversation, Brien made a remark to Hoffman which, the General Counsel alleges, violated the Act.

More specifically, complaint subparagraph V(a) alleges that "about April 2023, the exact date being presently unknown to the General Counsel, Respondent, by Stephanie Br[i]en, during a telephone conversation, impliedly threatened its employees with discharge because they engaged in protected concerted activities." Complaint paragraph VII alleges that this statement violated Section 8(a)(1) of the Act.

Hoffman testified that, after he told Brien that he didn't agree with the claim he was being paid adequately, she "basically went on to, you know, 'If you don't like your job, why don't you move on?'" (Tr. 38.)

Brien testified: "I did say he sounded like he was unhappy. So if you feel like this was not the right fit, he—nobody is forcing him to stay here." (Tr. 304; see also Tr. 314.)

In deciding which testimony more accurately reflects what Brien actually said, I note Hoffman's use of the word "basically" to qualify the quote he attributed to Brien. As used by Hoffman, the word "basically" suggests that his quotation conveys the gist of what Brien said, the fundamental point, but does not claim to be a verbatim recollection.

In contrast, Brien's testimony does not include such a qualifier. Moreover, because she is quoting her own words, she may well recall them more exactly. Therefore, I conclude that Brien's recollection of her words is more accurate. Crediting her testimony, I find that she told Hoffman, "if you feel like this was not the right fit. . .nobody is forcing [you] to stay here."[5]

Whether this statement violated Section 8(a)(1) of the Act, as the General Counsel alleges, will be discussed below in the "Analysis" portion of this decision.

Changes in Respondent's Operations

Sometime in the Spring of 2023, the Respondent made major changes in its operations.[6] At

5 Brien further testified that, at the end of the conversation, Hoffman said he was looking into starting a union and she replied "okay." (Tr. 294.) Within a few days, Brien let her manager know what Hoffman had said. (Tr. 295.)

6 The exact date or dates of implementation are unclear. Training materials describing the changes are dated "May 2023." (R. Exh. 3.) Testimony does not pinpoint when employees received these materials. In a May 3, 2023 email, OSL Hoffman told Human Resources Representative Brien that he "found out the

least two of the changes affected the job duties of the OSLs.

One of these changes added to the OSLs' workload by assigning them new tasks previously performed by outside contractors. In the past, when a cellphone service provider leased space for its antennas, transmitters, and receivers, it would retain a contractor to make sure that this equipment had been installed properly. The Respondent decided to go into competition with these contractors. It began offering to provide the same service, for a fee.

When the Respondent entered into an agreement with a customer to provide this new service, it assigned the work to the OSLs. Doing so, of course, increased the OSLs' load.

The Respondent also made another change, one that significantly affected not only the OSLs' job duties but also their autonomy and status. Until mid-2023, the OSLs worked directly with the outside contractors that installed or repaired equipment. A separate department, construction and development, handled the building of new towers at new locations. Individuals called "construction managers" (or "CMs") work in that department. Their duties included visiting tower sites in connection with construction work being performed there.

The Respondent decided that it would increase efficiency and reduce redundancy to give the OSLs some of the on-site duties being performed by the construction managers and have the CMs, rather than the OSLs, deal with the contractors. This change isolated the OSLs, who no longer had contact with the contractors. It also affected with whom the OSLs dealt *within* the company.

The change did not *quite* make the construction managers the bosses of the OSLs. The OSLs would continue to report to territory managers. However, it did give a construction manager an amount of power or authority over the OSL. Training materials describing the change referred to the CM as the OSL's "customer." Those materials included "Rules of Engagement" for both OSLs and CMs. The rules for the OSLs stated:

- The CM is your customer.
- By providing field support, you enable the CM to increase capacity and take on additional revenue-generating projects.
- Your responsibility is to provide site information, collect site data, and facilitate construction related meetings.
- Be flexible and work with your CM to accommodate needs and effectively manage your calendar.

(R. Exh. 3.)

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other day the OSL's are now construction managers WITHOUT the title or pay. . ." (R. Exh. 7.) The training materials described, among other things, changes in the job duties of OSLs.

OSLs accustomed to dealing directly with contractors might well find this change humbling. They had lost some of their autonomy and were now, in a sense, helpers, contributing to the success of a construction manager.

The change also posed a particular challenge for OSL Michael Hoffman. Years earlier, Hoffman had had run-ins with a territory manager, George Greiner (Tr. 46), and had filed complaints accusing Greiner of being abusive. At some point thereafter, Greiner became a construction manager. In this new position, Greiner no longer supervised Hoffman and had little contact with him.

However, the Respondent's 2023 reorganization redefined the duties and roles of both construction managers and OSLs. Hoffman knew that he now would have to work with Greiner because Greiner was the construction manager in the same geographical area to which Hoffman was assigned. (Tr. 119.)

In his newly redefined role, Greiner would be taking over the task of dealing with the Respondent's clients, a duty previously performed by Hoffman, who now had to treat Greiner as his "customer." Considering how much he disliked Greiner, the prospect of having to work closely with him again—and to treat Greiner with the deference due a customer—clearly weighed on Hoffman's mind.

Hoffman's Dealings With Human Resources

At some point before May 2, 2023, Hoffman wanted to examine "harassment and discrimination" charges he had filed in the past. The record does not specifically establish that these were the same complaints Hoffman had filed against Greiner years earlier, but that seems likely.

Hoffman contacted the human resources department and asked for a copy of his employment records. However, when he made this request orally to a human resources representative, Hoffman may not have mentioned that he actually wanted to see the old charges he had filed and believed that those documents would be included in his employment records.

On May 2, 2023, Human Resources Representative Brien sent Hoffman the following email:

> Hi Mike,
>
> I hope you're well. I just wanted to follow-up with you regarding your request to view your employment records. I requested our Corporate Human Resources team for the information when you initially reached out to me on it, and should have the files ready to share with you later in the week. Sorry for the delay and thanks for your patience.

The next day, at 5:05 a.m., Hoffman replied. He first addressed the opening words in Brien's email, "I hope you're well." Hoffman's email stated:

> Well found out the other day the OSL's are now construction managers WITHOUT the title or pay.,,, so, guess I am doing wonderful....
>
> (R. Exh. 7, ellipses as in the original.)

It appears that Hoffman was referring to the changes, made by the reorganization plan, in the respective job duties of construction managers and OSLs. Hoffman's email continued:

> Is ATC management EVER going to address the issues in the field or is it just status quo....
>
> (R. Exh. 7, ellipses as in the original.)

Brien replied at 1:50 p.m. the same day. Her email stated:

> Hi Mike,
>
> I can reach out to Cyndi to have her connect with you to understand the concerns you may have around your role.
>
> Attached are the employee records that you requested. I will send you the password in a separate email.
>
> (R. Exh. 7.)

Presumably, "Cyndi" refers to Cyndi Smith, the manager to whom Hoffman's supervisor, Todd Smart, reported. (Tr. 308.) Thus, Smith was two steps above Hoffman in the chain of command.

Brien's email included, as an attachment, Hoffman's personnel records. Hoffman discovered that these records did not include the harassment charges which he had filed previously and now wanted to examine. Not finding those charges, he sent Brien the following email:

> Am I missing the harassment and discrimination charges I have made against ATC and ATC employees? Those are the files I need.
>
> (R. Exh. 7.)

The next day, May 4, 2023, Hoffman emailed Brien, asking, "Are you going to accommodate my request?" Brien replied: "That's not part of your personnel file and you're not entitled to the information." (R. Exh. 7.)

Hoffman replied the same afternoon. He addressed the email to Brien, with a "cc" to Gigi Bruno, the Respondent's senior vice president of human resources. (Tr. 375.) Notwithstanding Bruno's designation as a "cc," Hoffman addressed the second paragraph of the email directly to

her. The email states:

> What do you mean they are not part of my personnel files? Why are they not part of my personnel files? And who are you to tell me I'm not ENTITLED to this information.
> I filed the charges.
>
> Gigi,
>
> This is going to be a major issue if I can't see my related files to the charges I made against ATC employees as well as the company. Is this really how ATC wants to treat their employees?
>
> (R. Exh. 7, capitalization as in original.)

It is not clear whether Hoffman later received the requested copies of the charges or complaints that he had filed.

Hoffman's Correspondence With Manager Smart

In addition to this email discussion with Brien and Bruno, on this same date, May 4, 2023, Hoffman was also corresponding with his immediate supervisor, Territory Manager Todd Smart. This email exchange is relevant primarily because the emails include further instances of Hoffman's protected concerted activity, advocating for other employees.

At 12:13 p.m. on May 4, 2023, Hoffman's supervisor, Smart, sent the email quoted below. The term "Construction Services" refers to the reorganization which changed the OSLs' job duties:

> Mike, we had some scheduling conflicts today for our call however we would like to discuss at a later time you're [sic] concerns that you have about the rolling out of the Construction Services and how it affects the OSL.
>
> Thank you for understanding. We will be in touch at a later date.
>
> Thank you.
>
> (R. Exh. 7.)

At 12:31 p.m., Hoffman replied:

> Not sure a discussion is needed. Asking a simple question. Why are the OSL's not being compensated for new skills and responsibilities that keep coming our way?
>
> (R. Exh. 7.)

Later the same afternoon, Smart sent Hoffman this reply:

> We appreciate you raising your concerns. We do regularly review our employees' compensation to ensure we are being fair and competitive. We believe you're compensated fairly.
>
> As you learned in the training you participated in yesterday, as we roll out some changes across Network Operations and Construction Services, OSLs will continue to provide field support and will not be responsible for making any construction management decisions. Furthermore, only certain areas will be impacted by these construction services changes, and at this time your area is minimally impacted. I'm happy to discuss this in more detail when I return from my vacation if you require additional clarity.
>
> (R. Exh. 7.)

About an hour later, Hoffman replied:

> Typical company talking points... "WE BELIEVE" RIGHT THERE IS THE PROBLEM!!!!!!!!!
>
> (R. Exh. 7, capitalization as in original.)

Hoffman sent Smart this email at 4:05 p.m. on May 4, 2023. The record does not establish that Smart replied to it. Nonetheless, about 10 hours later at 2:05 a.m. on May 5, 2023—Hoffman again emailed Smart. That email stated:

> WOW, you all think this is about me, you couldn't be more incorrect We OSL's have been lied to years from management like just recently when management promised construction manger jobs.. Never happened. How about management asks the OSL's about wages and conditions, management assumes all is OK. Management seems to understand the OSL's are the cog that makes ATC what is today, and I and many others built this company. So much for transparency and do what we say were going to do, maybe hire good people and empower them.. Seems management abandons our core principals when it suits them.
>
> I have been told year end reviews "I'm sorry I can't get you what you deserve, because management wants the younger lower paid employees to catch up to us senior employees that in itself is DISCRIMINATION. OSL's never know from years to years what our increases will be till we receive them. WE HAVE NO SAY.
>
> ATC forced OSL's to become certified licensed pilots giving us way more tasks and responsibility, but no wage increase . . . that was/is a slap to every OSL's face. Changed our job description to benefit ATC, but not the OSL's.
>
> And management says our wages are comparable to others in our area? Who is management comparing us to? ATT tech, Verizon tech, SBA tech, Crown Castle

> Tech, generator tech, lighting tech, rooftop specialist, LL specialist, leasing consultant, construction managers, Seems all these folks make a way better living wage than I in my area.
>
> I am not the only OSL that feels this way, but I am willing to do whatever is needed to get OSL's better wages. I will continue to stand up and speak out for the OSL's until we are recognized for our work and dedication to ATC.
>
> Again, if you are so sure the OSL's are happy with their wages, then start asking them...
>
> (GC Exh. 19, spelling and punctuation as in original.)

It is unclear what prompted Hoffman to begin the email "WOW, you all think this is about me. . ." Perhaps Hoffman was responding to Smart's statement that "We believe you're compensated fairly."

In any event, Hoffman's email made clear that he was voicing the concerns of other employees as well as his own: "I am standing up and speaking out for ALL OSL's that are unfairly compensated and overworked." Thus, the email supports the conclusion that Hoffman was engaged in concerted activity.

Later in May 2023, Hoffman spoke with Respondent's vice president of operations, Eric Dudek, who then sent Hoffman an email thanking him and stating, in part: "As always, you are welcome and encouraged to voice your concerns." (GC Exh. 19.) In a May 18, 2023 email, Hoffman replied:

> Thank you for making the call to me this was appreciated. Although we have opposing views of the hourly compensation for the OSL, seems we both agree the OSL's handle quite a bit of tasks. My main question about the OSL compensation is when managements state they compare us to others in our area for wages, yet no one will tell us who we are being compared to. As I told you ATC has the OSL's wearing many different hats, during our days working. I am not sure what other avenues we OSL's have to increase our pay. But I will keep voicing my opinions to whoever will listen.
>
> (GC Exh. 19, punctuation as in original.)

In particular, the last two sentences indicate both that Hoffman was voicing the concerns of other employees and that he would continue to do so. Dudek did not reply to this email.

Complaint Subparagraph V(b)

Complaint subparagraph V(b) alleges that about July 31, 2023, the Respondent, by Eric Dudek, during a telephone conversation, impliedly threatened its employees with discharge

because they engaged in protected concerted activities. On that date, Hoffman met by telephone with Vice President of Operations Eric Dudek and Vice President of Human Resources Kerri Weidman.[7] (GC Exh. 16.)

Hoffman had requested the meeting. He testified that he "had several issues I wanted to bring up with Human Resources and Eric Dudek that were occurring, such as the new business arrangement where Construction and Operations were merging, workloads, salaries, wages, threats." (Tr. 44.) However, it is clear from Hoffman's testimony and from the notes taken by Kerri Weidman that the main focus of the meeting was Hoffman now having to work closely with construction manager George Greiner. Hoffman testified:

> [Dudek] asked why I was bringing up me and George, and I said, "Well, you, I have to meet this man on site now, and I feel uncomfortable with my safety since American Tower found Mr. Greiner to be inappropriate towards me years previous." And then, once we got past that point, I . . .I brought up wages, compensation, and so on, and it got to the point where Mr. Dudek just said, *"If you don't like your job, why don't you just quit?"*
>
> (Tr. 44, italics added.)

The General Counsel argues that the words attributed to Dudek and italicized above—"If you don't like your job, why don't you just quit?"—constitute the implied threat of discharge alleged in complaint subparagraph V(b).

Dudek's testimony makes no reference to such a statement. He was not asked about it.

Human Resources Vice President Weidman also testified concerning the July 31, 2023 conference call, Although her testimony does not address whether or not Dudek made the "just quit" comment, the notes she took during the meeting do describe Dudek making a somewhat similar statement. Weidman's notes state, in part:

- Michael then told Eric that his "workforce was disgruntled" – he cited people being unhappy that they have to do construction close-outs within five days.

- Eric said that this change was a good thing – and said that not everyone is going to be happy with every decision he makes, but that he believes everyone is in a good place based on what he's heard.

- Eric asked why Michael didn't look for another opportunity if he wasn't happy here, and Michael said, "I built this company, why should I give it up? I'm not miserable, I'm pissed. I love my job, just not the way you tell me to do it."

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7 The Respondent has admitted that both Dudek and Weidman are its supervisors and agents within the meaning of Secs. 2(11) and 2(13) of the Act, respectively.

(GC Exh. 16.)

Weidman testified that she took these notes in "real time." (Tr. 260.) Based upon my observations at the hearing, I conclude that she was a conscientious witness who took reliable notes. Because the notes were taken at the time of the conference call, I believe they likely reflect what was said more accurately than testimony given almost 2 years later. Therefore, to the extent that Weidman's notes differ from Hoffman's testimony, I credit the notes.

Accordingly, I do not find that Dudek told Hoffman, "If you don't like your job, why don't you just quit?" Rather, based on Weidman's notes, I find that Dudek asked Hoffman why he didn't look for another job "if he wasn't happy here."

Hoffman's Credibility

Hoffman's conflict with Greiner had taken place more than a decade earlier. Greiner did not testify and Hoffman is the sole source of information about the conflict. However, Hoffman had a tendency to use language in an extravagant way which makes it difficult to pin down exactly what, if anything, Greiner did.

As quoted above, Hoffman testified that he told Dudek and Weidman that, because of the changes in job duties caused by the reorganization, "I have to meet this man [Greiner] on site now, and I feel *uncomfortable with my safety* since American Tower found Mr. Greiner to be inappropriate towards me years previous." (Tr. 44, italics added.)

Hoffman did not explain what Greiner did, which he considered "inappropriate." According to the notes which Weidman took during the July 31, 2023 conversation, at one point Hoffman said that Greiner had been violent. However, when pressed to clarify, Hoffman said that by "violent," he meant that Greiner had used foul language. (GC Exh. 16.)

The notes which Weidman took during the July 31, 2023 conference call also indicate that, during that call, Hoffman had said that "many years ago" Greiner had harassed him. When pressed for details, Hoffman said Greiner had used foul language, had "watched him with the GPS and then questioned him." (GC Exh. 16.) On cross-examination during the hearing, Hoffman testified as follows:

> Q, Did you tell Eric and Kerri that George Greiner had harassed you?
> A. Most certainly.
>
> Q. And could you tell us what exactly that harassment consisted of?
> A. George used offensive foul language to me. He demanded me go above and beyond what other employees were made to do. He threatened me -- he threatened my wages and compensation.
>
> Q, So, when you say offensive foul language can you tell us what that consists of?

A. F-bombs. I mean foul language directed at me.

(Tr. 122.)

Thus, Hoffman did not claim that Greiner threatened to harm him physically. Rather, Hoffman testified that Greiner "threatened my wages and compensation."

However, at that time, Greiner was Hoffman's immediate supervisor. That fact sheds light on Hoffman's claim that Greiner "threatened" his wages. A supervisor chewing out a subordinate might well raise the possibility of a demotion, or worse, if the supervisor considered the employee's work deficient.

Greiner's status as Hoffman's immediate supervisor also explains a comment Hoffman made during his July 31, 2023 conference call with Dudek and Weidman. According to the latter's notes of that meeting, Hoffman said that Greiner had "watched him with the GPS and then questioned him." (GC Exh. 16.)

As an OSL, Hoffman did not report to an office or shop but rather worked out of his home. Through a "dashboard" on his computer he received assignments to perform work at specific cellphone towers, would drive to those locations and then would return home. (Tr. 28.) Hoffman's supervisor, Greiner, might not be at a particular tower site when Hoffman was working there. Rather, Greiner's evaluation of Hoffman's work necessarily would be based on information received from customers, from inspections of the tower sites and work performed there, and from GPS information concerning Hoffman's whereabouts at particular times. Greiner may have asked Hoffman uncomfortable questions about where he was and what he was doing.

No evidence suggests that Greiner ever threatened Hoffman physically. To the contrary, I conclude that Greiner simply was doing what first line supervisors ordinarily do.

Hoffman complained that Greiner used foul language, including "F-bombs." However, he has provided no specific information which would establish either the context or that the use of such language was unusual.

Hoffman testified that he reported Greiner to human resources, and to Greiner's immediate supervisor, "thirteen, fourteen years ago. . ." (Tr. 46.) Hoffman also claimed that the Respondent's management "found Mr. Greiner to be inappropriate towards me years previous." (Tr. 44.) However, Hoffman has not provided information about the particular facts. Even if the Respondent did deem Greiner's behavior "inappropriate," the significance of that term depends upon the particular context, which the record does not reveal.

Hoffman had ample opportunity, both during the July 31, 2023 conference call with Dudek and Weidman and when he testified at the hearing, to explain what Greiner had done that would make him fear for his safety if he had to work with Greiner again. Instead, Hoffman vaguely described Greiner's actions as "inappropriate." However, Hoffman disliked Greiner so much that, if Greiner had really done something threatening or improper, Hoffman would have remembered it and described it in detail. Therefore, I do not conclude that Greiner acted

improperly towards Hoffman.

Hoffman's vagueness and his tendency to blow things out of proportion raise doubts about the reliability of his testimony. Therefore, I do not credit that testimony when it conflicts with that of other witnesses or with Weidman's contemporaneous notes of the July 31, 2023 conference call.

Hoffman's Willingness To Work With Greiner

Because of the Respondent's reorganization, Hoffman and Greiner would be working together. During their July 31, 2023 conference call, Dudek and Weidman tried to ascertain Hoffman's willingness to work with Greiner. However, Hoffman made inconsistent statements. After stating that Greiner had harassed him in the past, Hoffman said that "they had put it in the past, and there was no tension." (GC Exh. 16.) But then, according to Weidman's notes, Hoffman said, "I have no problem working with George [Greiner] but ATC needs to do something."

Weidman's notes indicate that when Hoffman said "ATL needs to do something" she then "asked him what that meant to him, and he said we owe him compensation for what happened in the past." (GC Exh. 16.) Based on Weidman's notes, which I credit, I find that Hoffman thus conditioned his willingness to work with Greiner on receiving some kind of compensation, in addition to his regular wages, for doing so.[8]

However, it made little sense that Hoffman, after saying that he and Greiner had reconciled years earlier and that there was no present tension, would then demand extra compensation to work with him. It was at this point, after Hoffman had demanded some additional compensation, that Dudek sought Hoffman's assurance that he would be able to work with Greiner. Weidman's notes state:

> Eric [Dudek] then outlined that to move forward, Michael [Hoffman] needs to be able to work with George [Greiner], and asked if he'd be able to do that.
>
> Michael [Hoffman] asked Eric to put in writing that he had to work with George, or he was going to fire him. Eric said he would put together a summary email that outlined the expectations of his job. Michael asked several times for Eric to put in the e-mail that if he doesn't work with George he'd be fired. Eric reiterated several times that he needs to do what his job required, and if he doesn't do his job, then yes - there would be action taken.
>
> (GC Exh. 16.)

After some further conversation, Hoffman said, "I'll do my job, but I won't speak to him or meet with him." (GC Exh. 16.) From context, it is clear that, by "him," Hoffman meant Greiner.

8 Weidman's notes do not suggest that either she or Dudek agreed to pay Hoffman an additional amount to work with Greiner. Based on the entire record, I conclude that the Respondent did not.

When Dudek said that Hoffman had to speak with Greiner, Hoffman claimed that Greiner was "violent." Weidman's notes state:

> I asked him [Hoffman] to share what made him think he [Greiner] was violent - did anything happen, did he have any examples. Michael said he already told us, he harassed him. I said, "to be clear, when you refer to him as violent, you're referring to him using foul language," and he said "yes."

(GC Exh. 16.)

Events Leading to Hoffman's Discharge

Respondent's management, busy with implementing the reorganization plan, learned on July 31, 2023, of a new obstacle. Hoffman, who had requested a meeting with management, had signaled clearly that there was going to be a problem.

More than once during the July 31, 2023 conference call, Hoffman had indicated he was unwilling to work with Greiner. As noted above, at one point, Hoffman told Dudek and Weidman, "I'll do my job, but I won't speak to him or meet with him." (GC Exh. 16.) At another point, Hoffman said that he had no problem working with Greiner but that the Respondent needed to "do something," which meant paying him additional compensation for being "harassed" by Greiner when they worked together 13 or 14 years previously.

At times, Hoffman's opposition to working with Greiner seemed almost visceral. According to Weidman's notes, when Dudek told Hoffman, "that to do his job was to work in partnership" with the construction manager, Greiner, Hoffman "said this was appalling and he was going to speak to counsel." (GC Exh. 16.) Thus, Hoffman expressed disgust at the very premise of the Respondent's reorganization plan: Construction managers and OSLs would work together to increase productivity.

The record does not indicate that the Respondent required any other OSLs to state in writing that they would do what their jobs required. However, the record also does not indicate that any other OSL balked at working with a construction manager. Morever, Hoffman's opposition to working with Greiner was so adamant he asked Dudek to inform him, in writing, that he would have to work with Greiner and that if he did not he would be fired.

The very fact that Hoffman made this unusual request raised doubts about how Hoffman would react. Additionally, two complaints about Hoffman's behavior gave management further reason to fear that Hoffman's dealings with Greiner would be less than harmonious.

In November 2022, the Respondent received a complaint about Hoffman from the treasurer of a property owners association. To reach one of the Respondent's towers, maintenance employees had to use a dirt road which also served the property owners. The association official contacted Hoffman to complain that maintenance trucks would speed along the dirt road, raising excessive dust. The association official described Hoffman as being extremely arrogant:

> This did not go well and the conversation got heated. A week or so later, we had some association members get locked in behind the gate because someone locked the gate closed with a chain and lock that had American Towers' name on it. I am not saying that this was Michael, but it was certainly dome maliciously. This is certainly not what I was expecting from Michael and from here on out, I will not deal with someone that is that disrespectful.
>
> (R. Exh. 6.)

The association official's complaint is, of course, hearsay, and I make no findings concerning the truth of the matters it describes. However, management's receipt of this complaint almost certainly would have raised concerns about how Hoffman might react if he had a conflict with Greiner. Would he do something malicious? The complaint from the treasurer of the property owners association suggested that possibility.

The Respondent had also received another complaint raising concerns about Hoffman's reactivity. Hoffman's immediate supervisor, Territory Manager Todd Smart, discussed it in a December 5, 2022 email to Hoffman which stated, in part:

> I received feedback on November 11th that you may have spoken unprofessionally with some contractors at one of your sites. You were the one confronted by an employee of the general contractor who initiated a verbal confrontation. However, you also responded unprofessionally. Although I can understand your frustrations, it's important to remain professional and maintain your composure as your behavior reflects on American Tower.
>
> (R. Exh. 5.)

Thus, management had received two relatively recent complaints indicating that Hoffman would become mercurial in stressful situations. Moreover, Vice President of Operations Dudek and Vice President of Human Resources Weidman had witnessed firsthand Hoffman's hostile—and less than fully rational[9]—response to the prospect of working with Greiner.

The recent complaints about Hoffman and his own statements during the July 31, 2023 conference call provided ample reason to fear that he either would refuse to work with Greiner or that his hostility towards Greiner would erupt when the two men came together. On August 2, 2023, Vice President Dudek sent to Hoffman an email which, in effect, asked Hoffman to confirm that he would work with Greiner. Dudek's email stated:

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9 Hoffman's harboring virulent animosity towards Greiner for events which happened 13 to 14 years in the past certainly suggests a victory of emotion over equilibrium. Moreover, Hoffman repeatedly failed to see, or refused to see, the central point which Dudek and Weidman were trying to make during the July 31, 2023 conference call: Hoffman's job duties included working effectively with Greiner. Rather than acknowledging this requirement to work with Greiner, Hoffman ignored it, telling them, "I'll do my job, but I won't speak to him or meet with him." (GC Exh. 16.)

Hi Mike,

I'm following up on our conversation about my expectations regarding your support, as an OSL, of construction services. I've attached documentation that includes the training material to the construction service field support, the updated OSL prioritization guidelines, and a link to FAQs related to construction services.

A requirement of your role regarding the support of construction services is having a functioning working relationship with your Construction Manager counterparts. This includes all forms of communication—in person, verbal, email, etc. Active collaboration with the construction team is critical to us providing exceptional customer service. You've expressed reservations about your willingness to meet this requirement, having said that you'd neither meet with nor speak on the phone to George Greiner. I want to be clear that communicating respectfully, with George and others and in whatever medium is needed, is a requirement of your position.

Review the attached information and confirm to me via email that you can and will meet the requirements. The requirements described apply to all OSLs. Should you refuse to abide by them, discipline, up to and including termination of your employment, will result.

If you have concerns about how others communicate with you, raise those concerns to your manager or HR Business Partner so that they can be promptly reviewed and properly addressed.

Thanks,

Eric

(GC Exh. 4.)

Dudek sent this email to Hoffman's work email address. However, Hoffman testified that he believed he was on vacation when the email arrived and he did not respond to it. On August 14, 2023, Dudek sent Hoffman another email:

Hi Mike,

I wanted to follow up on my e-mail below, as I'd asked that you review and respond. Are you confident that you can meet the requirements that I outlined?

Please reply by end of day tomorrow.

Thanks,

Eric

(GC Exh. 4.)

Hoffman did not reply to this email. On August 17, 2023, Dudek sent Hoffman the following:

> Hi Mike, At this point I have to assume your lack of response indicates you will not be able to meet the requirements of the job. You have until noon EST tomorrow to let me know otherwise.
>
> Thanks.
>
> Eric

(GC Exh. 4.)

Fourteen minutes after Dudek sent that email, Hoffman replied as follows:

> I NEVER said I would not preform [sic] my duties. I said I was uncomfortable working with a person who directed inappropriate behavior towards me, and I feel threatened by. I have completed my job duties for 18 years even after the inappropriate behavior, as I am very dedicated to my job and very good at it.
>
> Michael Hoffman

(GC Exh. 4.)

Hoffman's Discharge

The next day, Human Resources Representative Brien sought approval from higher management to discharge Hoffman. The request stated that Hoffman had had "incidents of unprofessional communication to general contractors and landlords in November and December of 2022" and then described Hoffman's reaction to the shift "to a new work structure that required closer partnership with the Construction Services team." Brien noted that, after training concerning the reorganization, Hoffman had multiple conversations with managers:

> In late July, Eric Dudek and Kerri Weidman discussed Mike's concerns about the new work structure. On August 2, 2023, Eric sent a follow-up email to Mike to request acknowledgement of the role required and after Eric followed up on August 14 and August 17, Mike responded on August 17 in an aggressive tone and still failed to confirm that he would complete the job as Eric had outlined.

(GC Exh. 12.)

Brien sent Hoffman a letter, dated August 22, 2023, informing him of the discharge and stating that his last day of employment would be August 25, 2023. (GC Exh. 15.)

Based on the events leading up to Hoffman's discharge and on Brien's August 18, 2022 email seeking authorization to terminate his employment, I find that the Respondent took this action because of the two complaints which came from members of the public, because Hoffman had displayed a persistent hostility towards the prospect of having to work closely with Greiner, and because he would not state that he would meet the requirements of the job, which included having a functioning working relationship with Greiner.

The unusual nature of this requirement—that he must state that he would meet the requirements of his job—raises the possibility that management imposed it on Hoffman to create a pretextual reason for discharging him. However, for the following reasons, I do not find that the Respondent was so motivated.

First, it should be noted that Hoffman requested the meeting which took place by telephone on July 31, 2023. He wanted to speak with management because he was concerned about the possibility of having to work again with Greiner. The fact that Hoffman raised the issue of having to work with Greiner militates against any conclusion that management was trying to set a trap for him.

During this conference call with Dudek and Weidman, Hoffman made statements which did not appear wholly rational. For example, at one point, Hoffman had claimed that Greiner was violent but, when pressed, admitted that by "violent," he only meant that Greiner had used foul language.

The conflict between Hoffman and Greiner had taken place more than a decade before Hoffman's July 23, 2023 conference call with Dudek and Weidman. At one point during the call, Hoffman said that he had dealt with Greiner since that time and nothing happened. Weidman quoted Hoffman as saying, "There's been nothing since, which is sensible for him." (GC Exh. 16.)

Thus, by Hoffman's own admission, there appeared to be little reason for him to be worried about having to work with Greiner. Nonetheless, Hoffman told Dudek and Weidman that, although he would do his job, he would not speak to Greiner or meet with him.

That statement was illogical for two reasons. First, Hoffman had admitted that Greiner had apparently changed, or at least, that his more recent dealings with Greiner had been uneventful. Hoffman's concerns about further conflict therefore seemed unjustified.

Second, Hoffman's statement about doing his job but being unwilling to speak to or meet with Greiner ignores an essential aspect of Hoffman's duties, which included dealing with Greiner. The Respondent's reorganization required construction managers and OSLs to work together. Hoffman's stated position, that he would not speak to or meet with Greiner, constituted a refusal to do what his new job duties required.

In other words, Hoffman stated, in effect, that he would do his job as he had done it in the past, but would not perform the duties now required. However, the job had changed and the Respondent wanted assurance that Hoffman would do what the job now required. The record

does not indicate that any other OSL had indicated an unwillingness to perform the new duties, but Hoffman had. In view of Hoffman's objection to the new duties—an objection which Hoffman had raised on his own, without being asked—it was entirely reasonable for management to seek Hoffman's assurance that he would, indeed, meet the requirements of the job.

However, instead of stating that he would meet the requirements of the job, as it had changed because of the reorganization, Hoffman instead replied, "I have completed my job duties for 18 years" and had never said he would not do so. Hoffman failed to acknowledge what Dudek expressly had told him, that his duties now included speaking to and working with the construction manager, Greiner.

Considering Hoffman's unwillingness to acknowledge that his job duties had changed, it was perfectly reasonable for the Respondent to require that he specifically state that he would perform them. Accordingly, I do not find that the Respondent was trying to "set a trap" for Hoffman when it asked him to state that he would meet the requirements of his job.

Evidence of Respondent's Motivation

Hoffman, like other OSLs, worked out of his home and traveled by truck to cellphone towers in his geographical area. After his discharge, someone had to retrieve the equipment belonging to the Respondent. That task fell to another OSL, Phillip Royster.

Royster could not mail all of the equipment back to the Respondent so he arranged to meet with Territory Manager Todd Smart at a restaurant in Port Smith, Ohio. In addition to the equipment transfer, Royster and Smart ate at the restaurant.

Royster testified that he and Smart discussed Hoffman's discharge. He further testified:

> Q, What did Smart share as the reason for Hoffman's termination?
> A. Todd Smart informed me that Hoffman was reaching out directly to executives and upper-level management at American Tower, essentially cursing them out saying, you know, verbatim, that he was, you know, "effing" them over essentially, and in verbatim, what Todd Smart said was, "You can't talk to the Eric Dudek's and the Bud Knowles of the world like that."
>
> Q, Who are Eric Dudek and Bud Knowles?
> A. I'm not 100 percent sure what their titles are. They've since been promoted. I believe at the time Eric Dudek was the Senior Vice-President of Network Operations, and Bud Knowles, I believe, was the Vice-President of Network Operations.

(Tr. 164.)

Royster further testified that he told Smart, "I said, 'So essentially, what you're telling me is that Hoffman was fired for attempting to unionize,' to which Todd Smart shook his head yes in the affirmative." (Tr. 165.)

Hoffman's Union Activity

At this point in describing the facts, it is necessary to "flash back" about 4 months. After Hoffman's April 14, 2023 telephone conversation with Human Resources Representative Stephanie Brien, Hoffman had visited the website of the Communications Workers of America. (Tr. 36.) Union Representative Christina Ronk then contacted Hoffman and advised him about organizing.

Hoffman joined the Union as a "social member" and, in about May 2023, began contacting other employees. (Tr. 39–42.) These efforts resulted in one organizing meeting attended by employees. That was on August 10, 2023. (Tr. 41–42.) There were no follow-up meetings.

The record does not establish that the Respondent knew about Hoffman's contacting the Union and engaging in union activities. The Respondent certainly knew about Hoffman's union sympathies because of statements he made to supervisors. However, there is no evidence that the Respondent knew about the August 10, 2023 organizing meeting or about Hoffman's efforts to arrange for this meeting, and I conclude that it did not.

Complaint Subparagraph V(c)

Before the close of the hearing, the General Counsel moved to amend the complaint to add a new subparagraph V(c). In view of the General Counsel's considerable discretion in making amendments to the complaint, I granted the motion to amend over the Respondent's objection. Pursuant to the amendment, the following language is added to the complaint as subparagraph V(c):

> Respondent, since March 2020, has maintained an overbroad confidentiality agreement that lists confidential employment information to include employee records, salaries, and/or compensation, thus restricting employees from engaging in Section 7 rights in violation of 8(a)(1) of the Act.[10]

To afford the Respondent sufficient time to prepare a defense, I recessed the hearing from February 4, 2024, until March 18, 2024, when it resumed for the receipt of evidence concerning

10 In moving to amend the complaint, counsel for the General Counsel read this text aloud into the record (Tr. 419) and later introduced a written version of the proposed amendment as GC Exh. 22. However, the written text appearing in that exhibit differs somewhat from the text read aloud at the hearing. Because the text read aloud at the hearing is contemporaneous with my grant of the General Counsel's oral motion to amend the complaint, this text, and not the text in GC Exh. 22, will be added to the complaint. The text quoted here is identical to that shown on p. 419 of the trial transcript except for the correction of the following typographical error: Although the transcript uses the word "Respondents," the singular form appears in complaint subparagraph V(c) because there is only one respondent.

the new allegation.

The record establishes that from at least March 2020, if not earlier, the Respondent maintained in effect a "Confidentiality Agreement."[11] That agreement stated, in pertinent part:

> The term "***Confidential Business Information***" as used herein includes, without limitation, (a) customer information, (b) employee records, (c) salary and compensation information. . . .
>
> . . .I agree that I will hold in trust and confidence for the Company or its customer its Confidential Business Information. I will not make any independent use of, copy or retain, publish or disclose, or authorize anyone to publish or disclose, to any person or organization, any Confidential Business Information, except as required in the course of my employment with the Company. Additionally, I agree, to the full extent permissible by law, that under no circumstances will I disclose or utilize personally or for or with others, Confidential Employee Information, including, without limitation, disclosures to, or utilizations with respect to, other Company employees or agents.
>
> * * *
>
> I acknowledge that my obligations under this Confidentiality Agreement shall continue throughout my employment with the Company and indefinitely after the termination of my employment with the Company. I further acknowledge that for a violation of the terms of this Confidentiality Agreement, disciplinary action will be taken, up to and including immediate discharge. . .
>
> (U. Exh. 2, bold and italics as in original.)

Analysis

The complaint alleges that the Respondent's supervisors and agents made certain statements which interfered with, restrained, and coerced employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act. These allegations, raised in complaint subparagraphs V(a), V(b), V(c), and VII, will be addressed first.

The analysis will then focus on the allegations, raised in complaint subparagraphs VI(e), VI(f), VII, and VIII, that the Respondent discharged employee Michael Hoffman in violation of Sections 8(a)(1) and 8(a)(3) of the Act.

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11 The record suggests that this confidentiality agreement may not have been in effect at the time of the hearing in this case in 2025. However, credible evidence does not establish that the Respondent withdrew the agreement or otherwise rescinded the confidentiality requirement at any time in 2023, when the relevant events in this case took place. In the absence of such evidence, I conclude that the agreement remained in effect at all times during 2023.

Complaint Subparagraph V(a)

Complaint subparagraph V(a) alleges that about April 2023, the Respondent, by Brien, during a telephone conversation, impliedly threatened its employees with discharge because they engaged in protected concerted activities. Complaint paragraph VII alleges that this conduct violated Section (a)(1) of the Act. The Respondent denies these allegations.

On about April 14, 2023, Hoffman and Human Resources Representative Stephanie Brien spoke by telephone. Hoffman complained that older employees were not being paid enough. He specifically said that he believed he should be earning more. Brien credibly testified that she told Hoffman that he sounded unhappy, adding "if you feel like this was not the right fit, he - nobody is forcing him to stay here." (Tr. 304.)

For reasons discussed above, I have credited Brien's version—"nobody is forcing [you] to stay here"—rather than Hoffman's testimony that Brien said, "If you don't like your job, why don't you move on?'" (Tr. 38.) However, I agree with the General Counsel's argument that either version would be violative under longstanding Board precedents. The General Counsel's brief states, in part:

> The Board has held that inviting employees to quit in response to their expression of displeasure with their terms and conditions of employment, or other exercise of protected concerted activity, constitutes an implied threat of discharge in violation of Section 8(a)(1) of the Act. See *Starbucks Corp.*, 374 NLRB No. 9, slip op. at 1 (2024) (finding violation where employee who asked for better wages and working conditions was told that there were jobs at other companies with better pay); *Fresh & Easy Neighborhood Market*, 356 NLRB 588, 592 (2011) (violation found where employer invited employee to quit after employee discussed discipline with coworkers); *Novelis Corp.*, 364 NLRB 1452, 1454 fn. 11 (2016), enf. denied in part on other grounds, 885 F.3d 100 (2nd Cir. 2018) (violation found where employer told employees they did not have to work for the employer if they were dissatisfied with their terms and conditions of employment).

In addition to the cited cases, the Board reached a similar result in a number of other decisions, including *El Paso Electric Co.*, 350 NLRB 151 (2007), *Paper Mart*, 319 NLRB 9 (1995) (finding unlawful an employer's statement that if employee was not happy, the employee could seek employment elsewhere); *Tualatin Electric*, 312 NLRB 129, 134 (1993), enfd. 84 F.3d 1202 (9th Cir. 1996); *Rolligon Corp.*, 254 NLRB 22 (1981); *Stoody Co.*, 312 NLRB 1175, 1181 (1993); *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006); *Starbucks Corp.*, 373 NLRB No. 123, slip op. at 1 (2024); *Equipment Trucking Co.*, 336 NLRB 277 (2001) (implied threat of discharge when the respondent's president said she would run company any way she wanted and if the employee didn't like it, find another job); *Ozburn-Hessey Logistics*, LLC 359 NLRB 1025 (2013) (settled law that an employer's statement that pro-union employees should quit constitutes implicit threat); *Smithfield Foods*, 347 NLRB 1225 (2006).

This massive body of precedence compels a conclusion that Brien's statement to Hoffman—that nobody was forcing him to stay employed with Respondent if he felt it was not the right fit—constitutes an implied threat. I so find.

However, it concerns me that these precedents effectively create a per se rule that this particular statement always implies an unlawful threat of discharge. A per se rule would ignore the Board's guiding principle that, in deciding whether a statement is unlawful, it considers what message the words reasonably would communicate under the totality of circumstances. *Ebenezer Rail Car Services, Inc.*, 333 NLRB 167 fn. 2 (2001) ("in determining whether a statement by an employer violates 8(a)(1), or is protected by Sec. 8(c), the Board considers the totality of the relevant circumstances") citing *Mediplex of Danbury*, 314 NLRB 470 (1994).

A per se rule short circuits the Board's customary analytical process which entails finding the answer to three questions: (1) What words did the employer's agent actually say? (2) Under the totality of circumstances, what message would those words reasonably convey to a listener? (3) Does that message violate the Act. The first two questions concern matters of fact. The last is one of law.

At the outset, the trier of fact must determine what words the Respondent's agent actually said. To do so involves using the standard techniques for determining which testimony is most reliable. In the present case, for reasons discussed above, I have decided that Brien's testimony provides the more accurate version of what she actually said.

However, ascertaining what words the Respondent's agent spoke does not end the factual inquiry because the same words can communicate different messages in different contexts. Therefore, the judge must determine, applying an objective standard, what message the words spoken reasonably would communicate under the totality of circumstances.

Even though the judge is using a logical process to determine what message the words reasonably would convey under all the circumstances, this process remains within the realm of fact finding. It concerns a question of fact: What would an employee reasonably understand the words to mean? Only after determining what message reasonably would be conveyed can the analysis proceed to a question of law: Did the message violate the Act?

A per se rule that certain words always constitute an implied threat eliminates the second step, determining what message reasonably would be conveyed by the words under the circumstances. However, omitting this step, determining what message the words reasonably communicate, and instead always presuming that the message is a threat, raises a constitutional problem. If, in reality, the words do not communicate a threat, then they fall within the protection of the First Amendment. That protection depends on whether the words really communicate a threat, under the specific circumstances.

Stated another way, speech presumptively is protected by the First Amendment and a governmental body seeking to make certain speech unlawful must overcome this presumption by demonstrating that the particular words fall within an exception, such as the threat exception, The governmental body cannot rebut the presumption by saying “These words fall within the

threat exception because we deem them to be a threat." Rather, it must show that, in reality, the words communicate a threat. More precisely, it must show that, under all the circumstances, the words reasonably would be understood as a threat.

In the present case, the complaint alleges that the Respondent, through Brien, made an implied threat of discharge. In other words, the General Counsel is arguing that Brien was telling Hoffman that he might lose his job if he continued to engage in protected concerted activities or union activities. Supposedly, Brien conveyed such a portentous message by telling Hoffman, "if you feel like this was not the right fit, he - nobody is forcing him to stay here."

Considering the totality of circumstances, I cannot conclude that an employee reasonably would understand Brien's words to be a warning that the Respondent might discharge him because he had engaged in protected activities. It is true that Hoffman, during this conversation with Brien, expressed concerns that the Respondent was not adequately compensating other OSLs as well as himself. However, Brien's response does not suggest that she or the Respondent objected to Hoffman expressing his opinion that the OSLs should be paid more. Likewise, her words do not suggest that the Respondent would take any action against him if he persisted in advocating that the OSLs receive a wage increase.

In my view, an employee hearing Brien's words reasonably would understand them to mean that the Respondent believed it was paying Hoffman enough and that if he wanted more compensation he should go elsewhere. Brien's words reasonably would be understood to communicate that the Respondent was not going to raise Hoffman's pay, but it would not be reasonable to find in those words any reference to discharge. Indeed, considering the totality of circumstances, I do not discern in Brien's words any suggestion that the Respondent would take an adverse employment action against Hoffman.

The word "threat" is a legal term of art with a specific meaning. As a term of art, the word "threat" refers to a narrow category of statements which lie outside the free speech protections of the First Amendment and of Section 8(c) of the Act.[12] In general, though, speech enjoys constitutional protection. See *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 617 (1969) ("an employer's free speech right to communicate his views to his employees is firmly established, and cannot be infringed by a union or the Board").

A "threat" is an expressed intention to inflict harm on another. Words which do not communicate such an intention won't squeeze through the narrow threat exception to First Amendment protection. Stated another way, the term "threat" cannot be "defined down" to include nonthreatening words without disrespecting the Constitution.

Where, as here, a complaint alleges an *implied* threat, it is even more important to examine what message the words reasonably would communicate under the totality of circumstances.

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12 Section 8(c) states that the "expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

The word "implied" concedes that the words spoken do not, on their face, threaten the employee. Instead, the message conveyed depends on how an employee reasonably would interpret the words spoken, which depends on the totality of circumstances. A per se rule that certain words *always* communicate an *implied* threat, regardless of circumstances, abstracts the fact finding process from reality.

Here, a management official told an employee that if he felt like "this was not the right fit," no one was forcing him to stay there. Considering all the circumstances, I cannot conclude that any reasonable person would understand those words to express an intention to discharge the employee or to take other adverse action against him. The words, in my view, do not fall within the First Amendment's exception for threats and, therefore, constitute protected speech.

Nonetheless, in accordance with Board precedent, which is binding on me, I find that these words constitute a violation of Section 8(a)(1) of the Act. Very respectfully, I would suggest that the Board may wish to revisit this issue to address the constitutional concerns.

Complaint Subparagraph V(b)

Complaint subparagraph V(b) raises an allegation similar to that raised by complaint subparagraph V(a). The General Counsel's theory of violation is the same for both complaint subparagraphs.

Complaint subparagraph V(b) alleges that during a July 31, 2023 telephone conversation, Vice President of Operations Eric Dudek made an implied threat to discharge employees because they engaged in protected concerted activities. For reasons discussed above, I have found that, during a conference call on that date, Dudek asked Hoffman why he "didn't look for another opportunity if he wasn't happy here." (GC Exh. 16.)

Considering the totality of circumstances, I would conclude that Dudek's comment would not reasonably be understood to convey a threat of discharge or discipline if Hoffman continued to engage in union or other protected, concerted activities. The Respondent lawfully had changed the job duties of the OSLs, who now were to provide services for the construction managers. However, Hoffman persisted in refusing to acknowledge the change in job duties, which would require him to work with Greiner.

Hoffman made quite clear his unwillingness to recognize the change in duties. After Dudek asked why he didn't look for another opportunity if he wasn't happy there, Hoffman replied "I love my job, just not the way you tell me to do it." (GC Exh. 16.)

No union represents the Respondent's employees, and management lawfully may change employees' job duties unilaterally at any time. Having lawfully modified the OSLs job duties, the Respondent lawfully could discharge an employee for refusing to carry out the new duties.

Applying an objective standard and considering the totality of circumstances, I do not believe any listener reasonably would find a threat to discharge or discipline in Dudek's asking Hoffman why he didn't look for another job if he wasn't happy. Rather, a listener reasonably

would understand Dudek's words to mean that the OSLs' job duties had changed and would not be changed back.

However, if any kind of a threat reasonably may be inferred from Dudek's question it is a threat to discharge him *because he would not recognize and fulfil his new job duties*. No reasonable listener would consider it to be a threat to discharge Hoffman because of his union or other protected concerted activities. But a threat to discharge an employee for not performing his job duties does not violate the Act.

In sum, I do not believe that the General Counsel has proven that the Respondent made a threat which would remove Dudek's question from the protection of the First Amendment.

However, for the same reasons discussed above in connection with complaint subparagraph V(a), I believe that the Board's precedents, which are binding on me, compel a conclusion that the Respondent violated the Act.

Complaint Subparagraph V(c)

As discussed above, during the hearing the General Counsel amended the complaint to include a new subparagraph V(c). It alleged that, since March 2020, the Respondent had maintained an overbroad confidentiality agreement that lists confidential employment information to include employee records, salaries, and/or compensation, thus restricting employees from engaging in Section 7 rights in violation of 8(a)(1) of the Act. The Respondent denies this allegation.[13]

The record establishes that the Respondent implemented a confidentiality agreement in 2020. It specifically provided that an employee could be discharged for violating its provisions. Therefore, although called an "agreement," it operated as a work rule binding on all employees.

The confidentiality agreement defined the term "Confidential Business Information" to include employment records and "salary and compensation information." The confidentiality agreement prohibited employees from copying, retaining, publishing or disclosing such information. It also prohibited employees from disclosing to others or using confidential employee information.

Board precedent has long held that a rule prohibiting employees from discussing wages is unlawful even if not phrased in mandatory terms. *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992); *Heck's, Inc.*, 293 NLRB 1111, 1119 (1989); *Waco, Inc.*, 273 NLRB 746 (1984). The Respondent's confidentiality agreement explicitly prohibits employees from copying, retaining,

13 The Charging Party filed the initial charge in this case on September 27, 2023. Because of the 6–month "statute of limitations" in Sec. 10(b) of the Act, the relevant time period begins March 27, 2023. The record establishes that the Respondent maintained the confidentiality agreement in effect on and after this date. Accordingly, Sec. 10(b) of the Act does not preclude amendment. It appears that the confidentiality agreement no longer is in effect but the record does not reflect when the Respondent withdrew or modified it.

publishing or disclosing salary and compensation information. Accordingly, I conclude that Respondent's maintaining this rule violates Section 8(a)(1) of the Act.

However, the confidentiality agreement's chilling effects may go beyond the facially unlawful prohibition on discussing salary and compensation information. Thus, the confidentiality agreement defines "confidential business information" to include, "without limitation," (a) customer information, (b) employee records, and (c) salary and compensation information. The words "without limitation" suggest an expansive scope of the materials which must be kept confidential.

The confidentiality agreement also prohibits the disclosure of another category of information called "confidential employee information." That category includes "methods of operation, processes. . .billing rates and procedures, business methods, finances, management, and any other business information relating to the Company which has value to the Company and is treated by the Company as being confidential."

Information about "methods of operation" and "business methods" might well include terms and conditions of employment which employees had the Section 7 right to discuss among themselves and to disclose to others, including union representatives and the public. But employees, economically dependent on their employer, would not be likely to take chances about whether particular information fell within the prohibition. Rather than risking discharge, they would assume that it did.

An employer, of course, often has legitimate and indeed compelling business reasons for keeping certain information confidential. In *Stericycle, Inc.*, 372 NLRB No. 113 (2023), the Board promulgated an analytical framework which takes into account both an employer's legitimate business need for a rule and the rule's impact on the employees' exercise of Section 7 rights.

Under the *Stericycle* framework, the General Counsel bears the initial burden of showing that an employee reasonably could interpret a rule in a way which had a coercive effect discouraging the exercise of Section 7 rights. If the government carries this initial burden, it results in a presumption that the rule is unlawful. However, the employer may rebut that presumption by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule. *Stericycle*, 372 NLRB No. 133, slip op at 2.

It may bear repetition that an employer's rebuttal burden requires proof of two separate elements: The employer must show *both* that the rule advances a legitimate and substantial business interest *and* that the employer is unable to advance that interest with a more narrowly tailored rule.

As noted above, the confidentiality agreement defines "confidential business information" to include salary and compensation, and such a prohibition is facially unlawful. However, the scope of a second category, "confidential employee information," is not quite as clear.

"Confidential employee information" includes, among other things, "methods of operation" and "business methods." The confidentiality agreement states, in part:

> Additionally, I agree, to the full extent permissible by law, that under no circumstance will I disclose or utilize personally or for or with others, Confidential Employee Information. including, without limitation, disclosures to, or utilizations with respect to, other Company employees or agents.
>
> (U. Exh. 2.)

Section 7 of the Act clearly grants employees the right to communicate about problems with working conditions. The Act protects their right to discuss such problems among themselves, or with a union representative.

Suppose, for example, that Hoffman had not been discharged. Assume instead that he and Construction Manager Greiner had begun working together in the relationship contemplated by the Respondent's reorganization plan. In other words, Hoffman would have treated Greiner as his "customer," carrying out Greiner's instructions and trying to meet Greiner's expectations.

Considering the hostility that Hoffman still harbored, it is difficult to imagine Hoffman simply mumbling to himself "the customer is always right" while endeavoring to follow Greiner's instructions. At some point, a conflict almost inevitably would have arisen.

Such a conflict, between an employee and a manager concerning the performance of work, certainly would have concerned conditions of employment. Section 7 clearly would give Hoffman the right to discuss it with other employees and with others outside the company, such as with a union representative.

The confidentiality agreement prohibited an employee from disclosing information about "methods of operation." However, a conflict between Hoffman and Greiner concerning the performance of work almost certainly would require a discussion about methods of operation. It would be impossible to talk about how work should be done without disclosing information about methods of operation.

Clearly, the confidentiality agreement, by prohibiting disclosure of information about methods of operation, coercively limited employees' exercise of Section 7 rights. Therefore, I conclude that the General Counsel has carried the government's burden of proof.

Accordingly, under the *Stericycle* framework, the burden shifts to the Respondent to establish two things: (1) The rule advances a legitimate and substantial business interest and (2) the Respondent is unable to advance this interest through a more narrowly tailored rule. However, the Respondent has not carried this rebuttal burden.

The Respondent's brief does not address the two matters which must be established to rebut the presumption of unlawfulness.[14] The Respondent has not described any business interest furthered by the confidentiality agreement and also has not shown any reason why a more narrowly tailored confidentiality provision would not suffice to advance the same interest.

Accordingly, I conclude that the General Counsel has proven that, by maintaining the confidentiality agreement, the Respondent violated Section 8(a)(1) of the Act.

Complaint Subparagraphs VI(d), VI(e), and VI(f)

Complaint subparagraph VI(d) alleges that, on about August 23, 2023, the Respondent discharged employee Michael Hoffman. Based on the Respondent's admission, I find that the General Counsel has proven this allegation.

Complaint subparagraph VI(e) alleges that the Respondent did so because Hoffman had engaged in protected concerted activities, specifically, the protected concerted activities described in complaint subparagraphs VI(a) through VI(c), and to discourage employees from engaging in such activities. Complaint subparagraph VI(f) alleges that the Respondent discharged Hoffman because he joined and assisted the Union and engaged in concerted activities, and to discourage other employees from doing so. The Respondent denies these allegations.

The Respondent maintains that it discharged Hoffman because he would not commit to working with Construction Manager Greiner, as required under the reorganization plan which the Respondent had implemented. In a case such as this, where an employer's stated reason for discharging an employee may be true or pretextual, the Board examines the evidence using the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Under the *Wright Line* test, the General Counsel has the initial burden of establishing that employees' union or other protected, concerted activity was a motivating factor in the Respondent's taking action against them. The General Counsel meets that burden by proving protected activity on the part of employees, employer knowledge of that activity, and animus on the part of the employer. See *Willamette Industries*, 341 NLRB 560, 562 (2004) (citations omitted). However, to meet the General Counsel's initial burden, the evidence of animus also must support a finding that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019).

If the General Counsel makes this initial showing, the burden then shifts to the Respondent to prove as an affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. Id. at 563; *Manno Electric*, 321 NLRB 278, 280 fn. 12

14 The Respondent's brief argues that there was no evidence that Hoffman read the confidentiality agreement while he was employed by the Respondent. However, the Respondent does not dispute that it was in effect.

(1996). See *El Paso Electric Co.*, 350 NLRB 151 (2007).

For the following reasons, I conclude that the General Counsel has proven that Hoffman engaged in protected activity. This proof satisfies the first *Wright Line* element.

In March 2023, after Hoffman had received his annual performance review, he told his supervisor, Todd Smart, that "American Tower should stand up immediately and raise anybody making less than $30 an hour to $30 an hour due to inflation." (Tr. 33.) Hoffman already was earning more than $30 per hour, so he clearly was advocating for employees other than himself.

When the supervisor said he did not think such a wage increase was going to happen, Hoffman replied, "I don't think American Tower wants to hear its employees' concerns. So I'm, you know, probably should look into organizing a union." (Tr. 33.)

Hoffman sought to talk with a human resources representative and did so on about April 14, 2023, when he spoke by telephone with Human Resources Representative Stephanie Brien. He told her that the older OSLs received no more vacation time than did the younger ones and suggested that the Respondent give the more senior employees a bonus. (Tr. 34–38.)

Brien did not agree. Hoffman then said, "I think maybe we need—I need to look into organizing a union for the OSL's." (Tr. 38.)

Immediately after his conversation with Brien, Hoffman found the Union's website and left a message. (Tr. 39.) A union representative later contacted him. (Tr. 40.)

The record does not establish that other employees specifically authorized Hoffman to speak on their behalf, or even that he informed other employees he was going to do so. However, he consistently referred to employees in the plural and sought pay raises for those making less per hour than he did.

It is well settled that an employee engages in protected activity by speaking up to management about the allegedly unfair treatment employees have received. *Winston Salem Journal*, above, citing *Churchill's Restaurant*, 276 NLRB 775, 777 fn. 11 (1985).

Additionally, Hoffman contacted the Union. Doing so falls squarely within the Act's protection. Section 7 of the Act specifically protects the right to form, join or assist a labor organization. Moreover, Hoffman not only acted with the object of initiating group action but succeeded in doing so. On August 10, 2023, the Union held an organizing meeting attended by some of the Respondent's employees. Accordingly, I conclude that the General Counsel has satisfied the first *Wright Line* requirement.

Second, the General Counsel must prove that the Respondent knew about Hoffman's protected activity. The record clearly establishes that the Respondent was aware that Hoffman was speaking out about employees' terms and conditions of employment because he made these statements to admitted supervisors in March and April 2023. Likewise, the Respondent knew about Hoffman's interest in unionizing the employees because he mentioned unionization during

these conversations.

However, the record does not establish that the Respondent knew that Hoffman actually had contacted the Union.[15] Likewise, there is no evidence that the Respondent was aware that Hoffman had set up the August 10, 2023 organizing meeting. The record also does not establish that the Respondent knew about that meeting.

Nonetheless, the Respondent did know about Hoffman's union sympathies because of his statements to supervisors. It also knew that he had spoken with other employees about unionizing. (GC Exh. 20.) Such knowledge suffices to satisfy the second initial *Wright Line* requirement.

Third, the government must establish that the Respondent harbored antiunion animus. The General Counsel cites the statements by two admitted supervisors, Human Resources Representative Brien and Vice President of Operations Dudek, which form the basis for the allegations raised in complaint subparagraphs V(a) and V(b).

More specifically, I have found that, on about April 14, 2023, Brien told Hoffman that he sounded like he was unhappy, adding that if he felt like this was "not the right fit," nobody was forcing him to stay. Following Board precedent, I concluded that Brien's statement violated the Act. Additionally, I have found that, during the July 31, 2023 conference call, Vice President of Operations Dudek made a similar statement.

In general, establishing that an employer has violated Section 8(a)(1) of the Act does not require proof of intent. As the Board stated in *Waco, Inc.*, 273 NLRB 746, 748 (1984), "It is too well settled to brook dispute that the test of interference, restraint and coercion under Section 8(a)(1) of the Act does not depend on an employer's motive nor on the successful effect of the coercion." See also *Daniel Construction Co.*, 264 NLRB 569 (1982).

Because a violation of Section 8(a)(1) of the Act does not require any proof of intent, the legal conclusion that there is an 8(a)(1) violation does not itself establish the presence of animus. However, the violative statement or conduct itself may well shed light on the Respondent's intent. For that reason, statements or actions violating Section 8(a)(1) often provide the evidence of animus needed to satisfy the third *Wright Line* requirement. Indeed, a statement which violates Section 8(a)(1) almost always constitutes evidence of animus.

However, I do not find that Brien's statement to Hoffman—"if you feel like this was not the right fit. . .nobody is forcing [you] to stay here"—in any way suggests that the Respondent had a hostility to unions which would cause it to break the law. Similarly, I do not find that Brien's statement reflects any intention to discriminate against employees because of their union

15 As of mid-April 2023, the Respondent did know that Hoffman was speaking with other employees about forming a Union. An April 19, 2023 email from Cynthia Smith to Human Resources Representative Brien states that, "I have learned this morning that Mike has been reaching out to Human Resources and to other OSLs about forming a union." (GC Exh. 20.) However, there is no evidence that the Respondent knew that Hoffman actually had contacted the Union or spoken with a union representative.

sympathies or their protected concerted activities. To the contrary, I note Brien's April 19, 2023 email advising Operations Director Cyndi Smith that Hoffman's union efforts were protected activity and "we should not be interfering in this in any way." (GC Exh. 20.)

Likewise, Dudek's July 31, 2023 question to Hoffman, asking him why he did not look for other work if he wasn't happy, does not reveal any intent to discriminate. Both Dudek's question and Brien's earlier statement reflect only an unwillingness to change working conditions.

To prove animus, the General Counsel also relies on the testimony of former OSL Phillip Royster. He and Hoffman both reported to the same territory manager, Todd Smart. After Hoffman's discharge, Royster met with Smart to return some company equipment that Hoffman had used.

When asked by the General Counsel about the reason given by Smart for Hoffman's discharge, Royster testified: "Todd Smart informed me that Hoffman was reaching out directly to executives and upper-level management at American Tower, essentially cursing them out saying, you know, verbatim, that he was, you know, 'effing' them over essentially, and in verbatim, what Todd Smart said was, 'You can't talk to the Eric Dudek's and the Bud Knowles of the world like that.'" (Tr. 164.)

This explanation made no reference to the Union or unionization. However, Royster further testified that he asked Smart, "So essentially, what you're telling me is that Hoffman was fired for attempting to unionize." According to Royster, Smart "shook his head yes in the affirmative." (Tr. 165.)

Smart, who no longer works for the Respondent, did not testify.[16] Royster also is no longer employed by the Respondent. Nothing suggests that Royster would stand to gain by testifying in any particular way. Therefore, I credit his testimony, which is uncontradicted.

Although I find that Smart said the words and gave the nod which Royster attributed to him, I conclude that he was simply expressing his conjecture. There is no evidence that Smart took any part in the decision to discharge Hoffman. His name does not appear on any of the emails pertaining to the events leading up to the discharge. What Smart told Royster does not suggest that Smart participated in this discussion or even read the emails.

Significantly, Smart did not mention Hoffman's unwillingness to work with Greiner or Hoffman's previous conflict with Greiner. The record shows that Hoffman's hostility towards Greiner and unwillingness to work with him drove Hoffman to seek a meeting with higher management and played a major role in the Respondent's decision to discharge him.

16 The General Counsel argues that the Board should draw an adverse inference from Respondent's failure to call Smart as a witness. However, I believe doing so would be unwarranted. Although the complaint alleges Smart to be a supervisor, it does not allege that he committed any unfair labor practices. For that reason, as well as the fact that Smart no longer was under the Respondent's control, the Respondent's decision not to call him as a witness appears quite reasonable.

Moreover, Hoffman's conflict with Greiner was the kind of "juicy" detail which Smart likely would have mentioned if he had known about it. Smart also made no mention of the Respondent's reorganization, which resulted in Hoffman and Greiner having to work together.

Smart did know that Hoffman could be mercurial and abrasive. After Hoffman and the employee of a contractor had an altercation, Smart sent Hoffman a December 5, 2022 email stressing that "it's important to remain professional and maintain your composure as your behavior reflects on American Tower." (R. Exh. 5.)

Smart might well have assumed that Hoffman had acted with similar abrasiveness in communicating with the Respondent's top management. However, nothing in the record suggests that Smart had any knowledge concerning the reason higher management decided to discharge Hoffman. Based on his failure to describe Hoffman's objection to working with Greiner, I conclude that Smart had no actual knowledge concerning the decision to discharge Hoffman and merely was voicing his speculation without labeling it as such.

Nodding in response to Royster's question about whether Hoffman was fired for union activities provided an easy way for Smart to maintain the appearance that he was "in the know" without having to elaborate. If he had nodded negatively, signifying that Hoffman had not been discharged for union activities, Smart might have felt some pressure to explain his response. However, because discharging an employee for union activities is unlawful, Smart could nod affirmatively without being expected to say anything further.

To summarize, no evidence suggests either that Smart had participated in the decision to discharge Hoffman or that he had knowledge of what actually transpired. Because of his failure even to mention Hoffman's conflict with Greiner, I conclude that Smart did not have such knowledge. Therefore, I conclude that what Smart communicated to Royster has no probative value and does not establish that the Respondent harbored animus.

The government also argues that animus may be inferred from timing. The General Counsel's brief states:

> Further, the timing of Respondent's termination of Hoffman could hardly be more conspicuous, as Hoffman's August 2, 2023, termination came a mere 12 days after the August 10 organizing meeting between employees and union organizer Ronk, and roughly three weeks after the July 31 meeting where Hoffman (again raised issues of wages and workloads to management. See Tr. 41:14–15, 44:2–7. Though no record evidence demonstrates that Respondent knew of the August 10 meeting, Respondent had clear knowledge of the Fact that Hoffman intended to organize, as Hoffman had already boldly declared his intentions to management.

As the General Counsel's brief concedes, the government has not proven that the Respondent knew about the August 10, 2023 organizing meeting. Therefore, the fact that Respondent discharged Hoffman only 12 days later does not give rise to an inference of animus.

Additionally, when the Respondent learned that Hoffman was contacting other employees about unionizing, it did not react in a way which would demonstrate animus. On April 19, 2023, Operations Director Cyndi Smith emailed Human Resources Representative Stephanie Brien, informing her that Hoffman had contacted some other employees about forming a union. Smith said she had asked for a list of employees Hoffman had contacted. As noted above, within minutes, Brien replied to Smith's email, telling her not to keep such a list. Brien's email states:

> We should not be collecting names of who he has contacted and we should not be interfering in this in any way. This is a protected employee activity. If employees come to us with questions, I would recommending focusing the conversation around how they like working at ATC and the benefits we offer. Managers can also say that they cannot speak to unionization but that it is within the employee's right to discuss with Mike/other employees.
>
> (GC Exh. 20.)

The record does not indicate that any manager countermanded or disagreed with what Brien wrote. Brien's email certainly does not suggest that the Respondent bore hostility towards employees' union and/or protected concerted activities.

Accordingly, I conclude that the General Counsel has not satisfied the third *Wright Line* requirement and therefore has not carried the government's initial burden of proof. However, in case the Board should disagree with this conclusion, I will proceed to the next step of the *Wright Line* analysis.

In addition to proving the initial three *Wright Line* requirements discussed above, the General Counsel also must establish some nexus, or link, between Hoffman's protected activities and the decision to discharge him. *Tschiggfrie Properties, Ltd.*, above. However, I conclude that the record fails to establish such a link.

As discussed above, the record fails to establish that the Respondent knew that Hoffman had contacted the Union. However, as early as March 2023, the Respondent did know about Hoffman's union sympathies because he mentioned them to supervisors. Moreover, at least as early as April 19, 2023, the Respondent was aware that Hoffman had contacted other employees concerning unionizing.

Notwithstanding that the Respondent knew, in mid-April 2023, that Hoffman was talking with other employees about unionizing, it did not discharge him for more than 4 months. A link between the Respondent's knowledge of Hoffman's protected activities and his discharge cannot easily be inferred from timing.

Moreover, the record does not establish that the Respondent's management considered Hoffman's protected activities in August 2023, in connection with the decision to discharge Hoffman. To the contrary, the evidence establishes that management considered only his refusal to affirm a willingness to work with Greiner and the outside complaints which the Respondent had received concerning Hoffman's contentiousness.

Therefore, I would conclude that the General Counsel has not established the requisite nexus or link between Hoffman's protected activities and the decision to discharge him. *Tschiggfrie Properties, Ltd.*, above. Accordingly, I would recommend that the Board dismiss the allegations that the Respondent discharged Hoffman for union and/or other protected concerted activities.

Should the Board disagree and conclude that the General Counsel has, in fact, carried the government's initial burden of proof, I would find that the Respondent has established that, for legitimate business reasons, it would have discharged Hoffman in any case, even if he had not engaged in union or other protected activities. Several factors lead me to this conclusion.

First, Hoffman himself had requested a meeting with high management officials to discuss his unwillingness to work with Greiner. The notes Weidman took during this conference call show that it focused on Hoffman opposition to working with Greiner. However, because of the reorganization, working with Greiner was part of Hoffman's job duties. The Respondent had a legitimate concern that Hoffman would not do his job.

Second, during this discussion with Dudek and Weidman, Hoffman had taken erratic, illogical and contentious positions. Although Hoffman's job duties now included working with Greiner, who was the construction manager for Hoffman's area, Hoffman consistently refused to acknowledge this requirement. Thus, at one point, Hoffman said to Dudek and Weidman "I'll do my job but I won't speak to him or meet with him." (GC Exh. 16.)

Hoffman's statement demonstrated a stubborn refusal to acknowledge that his job duties had changed. During the conference call, Hoffman also said "I love my job, just not the way you tell me to do it." (GC Exh. 16.) However, the Respondent lawfully changed the job duties of the OSLs and management lawfully could require OSLs, including Hoffman, to fulfil those duties.

During the conference call, Hoffman never conceded that the job duties had changed and never clearly and unequivocally stated that he would perform the new duties. But although he was consistent in failing to acknowledge his new responsibilities and in failing to promise to discharge these duties, Hoffman's position otherwise shifted from time to time.

Thus, at one point, Hoffman indicated that he would work with Greiner if the Respondent compensated him for something that had happened between him and Greiner more than a decade earlier. However, Hoffman did not give a clear or consistent description concerning what had transpired between the two men. Hoffman claimed that Greiner had been violent but then admitted that by "violent" he meant that Greiner had used foul language.

At another point, when Dudek asked Hoffman if he would be able to work with Greiner, Hoffman asked Dudek to put in writing that he had to work with Greiner and that if he did not, Dudek would fire him. Weidman's notes state that Hoffman made such a request several times. Dudek said that he would send Hoffman an email summarizing the expectations of his job.

Two days after Hoffman had asked Dudek to put in writing that he had to work with Greiner or else be fired, Dudek sent Hoffman an email with the subject line "Follow up—Job Expectations CM Services." (GC Exh. 11.)

The term "CM services" referred to the services which OSLs, including Hoffman, were now to provide to the construction managers. As noted above, the Respondent had given employees instructional sheets stating that an OSL was to treat the construction manager as a "customer." Dudek's August 2, 2023 email to Hoffman included, as an attachment, the training materials concerning the OSL's new role.

That email, quoted at length above, included the following sentence: "I want to be clear that communicating respectfully with George [Greiner] and others and in whatever medium is needed, is a requirement of your position." It also stated that discharge could result from refusal to meet the position's requirements. (GC Exh. 11.)

Receiving no response to this email, Dudek sent a follow-up email on August 14, 2023 asking Hoffman if he was "confident that you can meet the requirements that I outlined?" (GC Exh. 4.) Again receiving no reply, Dudek sent Hoffman an August 17, 2023 email stating, "I have to assume your lack of response indicates you will not be able to meet the requirements of the job. You have until noon EST tomorrow to let me know otherwise." (GC Exh. 4.)

Hoffman could have replied simply that he would be able to meet the job's requirements. He did not, but instead alluded to his earlier conflict with Greiner. Hoffman's response did not state that he *felt* threatened (using the past tense) by Greiner's conduct when it supposedly occurred more than a decade earlier, but instead wrote "I feel threatened. . ." (GC Exh. 4).

In other words, Hoffman's reply clearly indicated an intention to keep the conflict with Greiner alive, in the present. That reply, considered together with Hoffman's statements during the July 31, 2023 conference call and the complaints about Hoffman from members of the public, signaled clearly that there would be problems when Hoffman and Greiner came together to work.

Those complaints about Hoffman's uncooperative and abrasive behavior, together with his almost hydrophobic antagonism towards Greiner, which he amply demonstrated during the July 31, 2023 meeting, gave management good reason to fear an unpleasant, if not hypergolic, interaction when the two men tried to work together. Because of Hoffman's steadfast objection to working with Greiner, the Respondent had good reason to ask him to affirm that he would meet the requirements of the job—notably, working productively with Greiner—even though the Respondent did not ask other OSLs to make such a statement.

It would have been easy for Hoffman to give such assurance. He simply could have replied, "I will meet the requirements of the job." He did not. Although he replied that he had never said he would not perform his job duties, Hoffman stubbornly failed to admit that his job duties had changed.

In these circumstances, I conclude that the Respondent had a legitimate business reason for discharging Hoffman and would have done so even if Hoffman had never engaged in protected activity. Accordingly, I further conclude that, even if the General Counsel had succeeded in proving the initial *Wright Line* elements, the Respondent would have met its rebuttal burden.

Conclusions of Law

1. The Respondent, American Tower Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Communications Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by (1) impliedly threatening its employees with discharge because they engaged in concerted activities protected by the Act, and (2) by maintaining a rule titled "Confidentiality Agreement" which prohibited employees from disclosing to others their compensation.

4. The Respondent did not violate the Act in any other manner alleged in the complaint.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as "Appendix."

If the Respondent has not rescinded the "Confidentiality Agreement" which prohibited employees from disclosing their compensation, it must do so. Moreover, it must inform employees that such a rule no longer is in effect.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[17]

ORDER

The Respondent, American Tower Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Impliedly threatening its employees with discharge because they engaged in concerted activities protected by the Act.

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

(b) Maintaining any rule, policy or "agreement" which prohibits employees from disclosing their compensation or other terms and conditions of employment.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

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

(a) Rescind any rule, policy or "agreement" which prohibits employees from disclosing their compensation or other terms and conditions of employment, modify the text of any "Confidentiality Agreement" by deleting any such prohibition, distribute copies of the modified "Confidentiality Agreement" to all employees bound by the agreement before it was modified, and notify employees that such prohibition is no longer in effect.

(b) Post at its place of business in Schaumburg, Illinois, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 13, 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 April 14, 2023.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C. January 28, 2026

Keltner W. Locke
Administrative Law Judge

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 abide by 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 interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT threaten employees with discharge or other adverse employment action because they engaged in union or other concerted activities protected by the National Labor Relations Act.

WE WILL NOT maintain any rule, policy or "agreement" which prohibits employees from disclosing their compensation or other terms and conditions of employment.

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

WE HAVE rescinded our previous rule prohibiting employees from disclosing their compensation and have deleted such prohibitions from our "Confidentiality Agreement" and have notified employees that such prohibitions are no longer in effect.

American Tower Corporation
(Respondent)

Dated: _____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal Agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor

practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to an agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

National Labor Relations Board
Region 13
Dirksen Federal Building
219 South Dearborn Street, Suite 808
Chicago, IL 60604-2027
(312) 353-9158, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb. gov/case/13-CA-326591 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.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (312) 353-7170.