S & S Enterprises, LLC d/b/a Appalachian Heating *and* Sheet Metal, Air, Rail and Transportation Workers, Local Union No. 33. Cases 09–CA–235304, 09–CA–235307, 09–CA–235314, 09–CA–236905, 09–CA–237847, 09–CA–237851, 09–CA–237858, 09–CA–238621, 09–CA–238930, 09–CA–239148, 09–CA–239170, 09–CA–241292, 09–CA–242230, 09–CA–242235, and 09–CA–242238

December 17, 2020

DECISION AND ORDER

BY MEMBERS KAPLAN, EMANUEL, AND MCFERRAN

On January 15, 2020, Administrative Law Judge David I. Goldman issued the attached decision.[1] The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

[1] On February 14, 2020, the judge issued an errata correcting inadvertent omissions and amending his conclusions of law, remedy, recommended Order, and notice.

[2] No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) by: (1) interrogating employee Eric Faubel about whether he had been solicited by a union organizer; (2) soliciting employee grievances and promising to remedy them; (3) interrogating Faubel about his union membership; (4) maintaining an overbroad confidentiality rule; (5) maintaining an unlawful solicitation and/or distribution rule; (6) telling employees that it needed to isolate union supporters away from other employees and threatening discharge to employees who spoke to the lead union organizer; (7) surveilling employees engaged in union activity by photographing them on the picket line; (8) threatening to call the police on employees for engaging in a strike, asking its employees to videotape and disclose the union activities of other employees, and creating an impression of surveillance of employees' union activities; and (9) threatening Faubel with criminal and civil prosecution for engaging in union activities. Further, no exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(3) and (1) by: (1) excluding Faubel from an employee safety meeting; (2) isolating employees and assigning them to work together and away from other employees because of their support for the Union; (3) permanently laying off employee Brandon Armstrong; (4) disciplining employee Stephen Marolf on March 27, 2019; and (5) discharging Faubel. No exceptions were filed to the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(1) by distributing employee handbooks and requiring that employees sign the acknowledgement of receipt, and violated Sec. 8(a)(3) and (1) by disciplining Marolf on March 15, 2019.

[3] In affirming the judge's dismissal of the allegation that the Respondent promulgated an unlawful rule by distributing the March 8 leaflet, we agree that, because the consolidated complaint alleged that the March 8 leaflet "constituted the promulgation and maintenance" of a new rule and, because the leaflet "is not reasonably understood as a . . . promulgation of a new rule," the General Counsel failed to establish the violation. We disagree with our dissenting colleague's conclusion that the consolidated complaint supports finding that the leaflet violated the Act as an unlawful threat, and we further disagree that this new theory was fully and fairly litigated by the parties. To begin, the General Counsel's brief in support of his exceptions did not contend that the leaflet would be unlawful even if it did not constitute the promulgation of a rule. Rather, the General Counsel's brief was limited to arguments based on the complaint's "unlawful promulgation" theory of the allegation. Furthermore, the portion of the consolidated complaint relied on by our dissenting colleague does not support her position, as it states that the "Respondent, *by promulgating* the rule[] . . . threatened employees with . . . criminal prosecution . . . ." (emphasis added). Finally, we note, as did the judge, that the complaint allegation misquotes the Respondent's leaflet. The leaflet provided, among other things, that employees should contact the Board's regional office if they believed their rights "to support or not support a labor union" were being violated, and that the Respondent "w[ould] not permit anyone to violate the legal rights of our employees who wish to fight *for or against* a labor union." (emphasis added).

Member McFerran would find, contrary to the judge and her colleagues, that the Respondent's March 8 leaflet constituted an unlawful threat in violation of Sec. 8(a)(1). First, she disagrees with the judge that the complaint failed to allege such a threat. Complaint para. 8(e) of the third consolidated complaint alleges that, by the leaflet, the Respondent "threatened employees with discipline, discharge, or criminal prosecution if they engaged in union or other concerted activities." Under the Board's "notice pleading" standard, this allegation was sufficient to advise the Respondent of the threat allegation related to the leaflet and give the Respondent an opportunity to present its position. See Sec. 102.15 of the Board's Rules and Regulations; see also *Artesia Ready Mix Concrete, Inc*., 339 NLRB 1224, 1226 (2003). Even absent this complaint allegation, Member McFerran would find that the threat issue was closely connected to the other complaint allegations related to the leaflet and was litigated by the parties. See *Pergament United Sales, Inc.*, 296 NLRB 333 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). At the hearing, both parties presented evidence regarding the facts underlying this threat allegation. In addition, in his post-hearing brief and again in his brief in support of the exceptions, the General Counsel asserted that the leaflet "threaten[ed] employees for engaging in union activity" and cited precedent involving unlawful threats. See *Moffitt Building Materials*, 214 NLRB 655, 656 (1974).

Second, she would find a violation on the merits, for the following reasons. Without providing any evidence to demonstrate that unprotected activity had occurred, the Respondent, in the leaflet, equated union activity with unlawful harassment under its anti-harassment policy and did so in the context of the Respondent's ongoing and, as the judge found, "wide-ranging" antiunion campaign. The Respondent then warned employees that they would be subjected to criminal prosecution "to the fullest extent of the law" for violating the anti-harassment policy. In these circumstances, employees would reasonably understand the March 8 leaflet to threaten them with criminal prosecution if they engaged in protected union activity, and that the coercive effect of this threat was heightened by the fact that the Respondent conveyed it to employees alongside their paychecks. See *Care One at Madison Ave.*, 361 NLRB 1462, 1465 (2014), enfd. 832 F.3d 351 (D.C. Cir. 2016); *Palmas Del Mar Co*., 277 NLRB 71, 81–82 (1985).

Member McFerran would further find it unnecessary to pass on the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by interrogating employees during the January 10 safety meet-

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, S & S Enterprises, LLC, d/b/a Appalachian Heating, Bradley, West Virginia and Charleston, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Replace paragraph 2(i) with the following:

(i) Post at its Bradley and Charleston, West Virginia facilities copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 9, 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 January 9, 2019.

Dated, Washington, D.C. December 17, 2020

Marvin E. Kaplan, Member

William J. Emanuel, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Jamie Ireland, Esq. and *Jonathan Duffey, Esq.* of Cincinnati, Ohio, for the General Counsel.

Kera L. Paoff, Esq. (Widman & Franklin, LLC) of Toledo, Ohio, for the Charging Party.

James Allen, and *Nathan Sweet, Esq. (National Labor Relations Advocates)* of Cincinnati, Ohio for the Respondent.

DECISION

INTRODUCTION

DAVID I. GOLDMAN, Administrative Law Judge. These cases involve an employer that sells, installs, and services HVAC systems. In late November 2018, the Employer became the focus of a union organizing effort. The General Counsel of the National Labor Relations Board (Board) alleges that in opposing the Union campaign the Employer engaged in numerous unfair labor practices including the discriminatory discharge and layoff of the two main employee organizers.

As discussed herein, I find merit to many, but not all of the allegations made against the Employer. Clearly, the Employer engaged in wide-ranging illegal misconduct under the National Labor Relations Act (Act). In particular, it is clear that the two main employee union organizers were unlawfully terminated by the Employer. And for the most part, allegations of unlawful interrogation, photographing, and isolation of union supporters are found to have merit. On the other hand, certain of the allegations were unproven, and I will recommend dismissal, as discussed below. Finally, as discussed herein, given the persistent and wide-ranging unfair labor practices committed by the Employer, and given the cavalier attitude it expressed towards its obligations under the Act and the Board's traditional remedial scheme, I find that a broad cease-and-desist order is warranted in place of a more traditional cease-and-desist order.

STATEMENT OF THE CASES

On February 5, 2019, the Sheet Metal, Air, Rail and Transportation Workers, Local Union No. 33 (Union) filed three unfair labor practice charges alleging violations of the Act by S & S Enterprises, LLC, d/b/a/ Appalachian Heating (Employer or Respondent or Appalachian Heating or AH) docketed by Region 9 of the Board as Cases 09–CA–235304, 09–CA–235307, and 09–CA–235314. The Union filed another unfair labor practice charge against Appalachian Heating on March 1, 2019, docketed by the Region as Case 09–CA–236905. On

ing because this additional finding of a violation would be cumulative and would not affect the remedy.

[4] We shall modify the judge's recommended Order (as modified by his errata of February 14, 2020) to correct the location of the Respondent's facilities and in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020).

[5] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

March 15, 2019, three additional charges were filed by the Union alleging violations of the Act by Appalachian Heating, docketed as Cases 09–CA–237847, 09–CA–237851, and 09–CA–237858. On March 27, 2019, the Union filed a further charge against Appalachian Heating, docketed by the Region as Case 09–CA–238621. A further charge was filed on April 3, 2019, docketed by the Region as Case 09–CA–238930. Two additional charges were filed on April 5, 2019, docketed by the Region as Case 09–CA–239148 and Case 09–CA–239170.

Based on an investigation into these charges, on May 13, 2019, the Board's General Counsel (General Counsel), by the Region 9 Acting Regional Director, issued an order consolidating Cases 09–CA–235304, 09–CA–235307, 09–CA–235314, and 09–CA–236905, and issued a consolidated complaint alleging violations in these cases. Appalachian Heating filed a timely answer to the consolidated complaint on May 26, 2019, denying all alleged violations.

On May 10, 2019, the Union filed an unfair labor practice charge against Appalachian Heating, docketed by the Region as Case 09–CA–241292. On May 28, 2019, the Union filed three additional unfair labor practice charge against Appalachian Heating, docketed by the Region as Cases 09–CA–242230, 09–CA–242235, and 09–CA–242238.

On June 21, 2019, the Board's General Counsel, by the Region 9 Acting Regional Director, issued an order consolidating Cases 09–CA–237847, 09–CA–237851, 09–CA–237858 09–CA–238621, 09–CA–238930, 09–CA–239148, and 09–CA–239170, with Cases 09–CA–235304, 09–CA–235307, 09–CA–235314, and 09–CA–236905, and a second consolidated complaint alleging violations in these cases. Appalachian Heating filed an answer to the second consolidated complaint on July 3, 2019, in which it denied all alleged violations of the Act.

On July 5, 2019, the Board's General Counsel, by the Region 9 Acting Regional Director, issued an order consolidating Case 09–CA–241292, 09–CA–242230, 09–CA–242235, and 09–CA–242238, with the previously consolidated Cases 09–CA–237847, 09–CA–237851, 09–CA–237858 09–CA–238621, 09–CA–238930, 09–CA–239148, 09–CA–239170, 09–CA–235304, 09–CA–235307, 09–CA–235314, and 09–CA–236905, and a third consolidated complaint alleging violations in these cases. Appalachian Heating filed an answer to the third consolidated complaint on July 17, 2019, in which it denied all alleged violations of the Act.

A trial in this matter was conducted August 12–14, 2019, in Charleston, West Virginia. At the hearing, counsel for the General Counsel orally moved, over the opposition of the Respondent, to make further amendments to the third consolidated complaint. This motion was granted, and the Respondent orally denied the new allegations. The third consolidated complaint, including amendments to the complaint granted at the hearing, was received into evidence as General Counsel's Exhibit 1(vv).[1]

On August 14, 2019, the hearing was closed conditionally—more accurately recessed—while the parties prepared proposed transcripts for various recordings introduced as exhibits at the hearing. The parties' joint motion to receive the proposed transcripts into evidence was granted on September 19, 2019, and the record in these cases was then closed. Counsel for the General Counsel, the Charging Party, and the Respondent filed post-trial briefs in support of their positions by October 24, 2019.

On the entire record, I make the following findings, conclusions of law, and recommendations.[2]

JURISDICTION

At all material times, the Respondent has been a limited liability corporation with an office and place of business in Charleston, West Virginia, and has been engaged in the commercial sale, service, and installation of HVAC systems. During the 12-month period ending July 1, 2019, Respondent, in conducting its operations, purchased and received at its facility goods valued in excess of $50,000 directly from points outside the State of West Virginia. It is alleged and admitted that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2) and (6) of the Act. It is further alleged and stipulated to by the Respondent (Tr. at 21) that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce within the meaning of Section 2(7) of the Act, and that the Board has jurisdiction of this case pursuant to Section 10(a) of the Act.

I. FINDINGS OF FACT

A. Background

Appalachian Heating is in the business of commercial and residential sales, installation, and servicing of heating, air conditioning, and ventilation systems, and plumbing work. Its main office is in Bradley, West Virginia (near Beckley), and in recent years it began renting a warehouse in Charleston, West Virginia, that serves as a second office and second reporting location for employees. AH's president and owner is Dan Akers.[3] His son, Daniel Akers is the general and operations manager. Tim McGuffin is the service and installation manager, the top manager other than the Akers. At the time of the hearing, AH employed approximately 48 employees.

In November 2018, and through the time period relevant to this case, through May 2019, AH's largest job was as a subcontractor for the construction of the Crossings, an approximately 200–300 room nursing and assisted living facility being built near Charleston, West Virginia. AH employed approximately 7

[1] Hereinafter, references to the "complaint" are to General Counsel's Exhibit 1(vv).

[2] On my own motion, the following corrections to the transcript in these cases are made: all references to "Steven" Marolf are changed to "Stephen"; all references to Howard or Robert (Bob) "Baccus" are changed to "Backus" (references to Eli Baccus remain Baccus); Tr. 73, line 24, change "DUFFEY" to "SWEET"; Tr. 225, line 20, change "don't" to "do"; Tr. 308, line 18, change "IRELAND" to "PAOFF"; Tr. 386, line 24, change "help" to "health."

[3] The business began about 70 years ago as a family business and involved, at least, Akers' father and brother. An outside company became majority owner at some point but in 2014, Akers bought back the remaining shares and became 100 percent owner of Appalachian Heating.

to 15 employees assigned to the job at the Crossings from late November 2018, and into May 2019. AH employees reporting from the Charleston warehouse and from the Bradley office were assigned to work at the Crossings. (Generally, employees from the Charleston office did not travel down to the Beckley market, but the converse was not true: Bradley office employees were assigned in the Charleston market).

B. The Union Becomes Interested in AH and Sends Applicants to be Hired in November 2018

Unbeknownst to Dan and Daniel Akers—at least, unbeknownst until sometime in early January 2019—the Union had begun an organizing effort at AH in 2018. Starting in 2018—the record does not speak more precisely as to when—Union Organizer Steven Hancock met and discussed the Union with a couple of AH employees, including the AH foreman at the Crossings project, Mike Doughton. Later, between November and January, Hancock established relationships with other AH employees, including Stephen Marolf, an HVAC installer who had worked for AH since December 2017, and before that in 2016.

Most significantly, in November 2018, the Union sent a union organizer employed by the Union, Eric Faubel, and a rank-and-file union member, Brandon Armstrong, to apply and obtain employment at AH as HVAC installers. Armstrong interviewed and was hired around mid-November. Faubel applied a few days later and started work November 26. Neither disclosed their union affiliation or interest in organizing to anyone in management—or, for some months, to any of the other employees, until events described below. Faubel and Armstrong were assigned to the Crossings from the beginning of their employment.

In November, AH began assigning more employees to work at the Crossings and it soon became AH's biggest project. AH was a subcontractor supplying and installing HVAC components, ventilation, and ductwork for the construction project. The general contractor for the project was Jarrett Construction. As the AH foreman on the Crossings job, Doughton's responsibilities included representing AH in meetings onsite where Jarrett representatives coordinated with all the various subcontractors and kept them abreast of developments and upcoming schedules as the work project progressed.

C. January 9—Faubel is Up for Promotion; Daniel Akers Asks Faubel if he has Been Solicited

Foreman Doughton was interested in leaving AH. Hancock assisted him in obtaining a job with a union contractor elsewhere. Consequently, Doughton resigned from AH in early January 2019. The resignation was sudden as far as AH management was concerned. Doughton gave 2-week's notice, but was unresponsive to the Akers' texts after giving notice and ended up leaving early.

In early January—sometime before January 9—Union Organizer Hancock dropped off employment applications for himself and other laid-off union members at AH's Bradley office, personally entering the office and putting the resumes on the secretary's desk.

With Doughton gone on short notice, AH management, specifically Installation and Service Manager Tim McGuffin, asked Faubel to attend the Jarrett general contractor meetings held with subcontractors at the Crossings on January 8. After this 4-hour meeting concluded and Faubel reported to McGuffin, McGuffin and Daniel Akers thanked Faubel for "stepping up" and attending the meeting.

The next day, January 9, Faubel attended a second such general contractor meeting at which upcoming work was scheduled. In the next couple of weeks, and in the absence of an official AH job foreman, Faubel continued to attend these general contractor meetings as they arose. As a result, as Faubel explained, "the guys kind of looked to me as to where to go, what to do next and, you know, kind of filled them in on the meeting." Based on his attendance at these meetings, Faubel could tell AH employees at the Crossings which work needed to be focused on, and which needed to be finished first. There was some testimony that employees considered or perceived Faubel to be the new foreman, or that he "fell into that position" through attending these meetings and subsequent reporting to employees of what needed to be done.

With Faubel filling in for Doughton, the Akers embarked on the process of formally replacing Doughton. According to Dan Akers, he considered Faubel and another installer working on the Crossings job, Jonathan Tierson, but initially he only talked to Faubel about the promotion to the foreman position vacated by Doughton.

After Faubel's January 9 meeting with the general contractor, that afternoon Daniel Akers spoke with Faubel on the phone about the foreman position. Faubel recorded the conversation. Akers told Faubel that Doughton's departure "obviously left a void that we need to fill" and he asked Faubel if he was interested in the foreman position. Akers was highly complimentary of Faubel in this conversation ("literally there's not been one person that you've worked with that's had one negative thing to say about you" . . . and you need to be rewarded for that") and they discussed the possibilities of him becoming foreman.

In explaining to Faubel that he was a "straight shooter," who doesn't like "he said, she said," Akers told Faubel,

> But I'm fully aware of all this crap going on with the union guys coming into our shop and one of our ex-employees disgruntled got—has called or given our call list to the main union guy. And that union guy solicited every single employee of ours both in Charleston and in Beckley.
>
> Faubel responded with an expression of surprise, saying only "Oh, wow."
>
> In a reference to Hancock, Akers continued,
>
> And so the funny thing I think about that is that same union guy came into my shop trying to get me to hire 15 guys. So if the union's so great and has all of this work, then why is he trying to get me to hire 15 of his guys that he has just standing around with their hands in their pocket?
>
> Akers went on to directly ask Faubel "have you been solicited by the union guy?"

Faubel denied it, offering the excuse that "I'm not even from

the area, so how they would even get ahold of me is—would be beyond me." Faubel added that, "I mean, I hear the guys talk, but I have nothing to do with any of that." Faubel went on to ask Akers "is there anything particular you would want me to say or do if I am contacted"? Akers failed to take the bait, responding, "Well, you know, I mean, we're not a jail. We want everyone to succeed professionally and personally," and described his view that "we're all just a big team together."

Akers went on to express disappointment that Doughton had left suddenly and without notice. Akers finished the conversation by telling Faubel that he would talk with his father, Dan Akers, and at the employee safety meeting planned for the next day they could talk further with Faubel about the foreman job.

D. The January 10 Safety Meeting

The next morning, Thursday, January 10, 2019, AH conducted a safety meeting for employees working in the Charleston area (i.e., generally speaking, employees working at the Crossings). The meeting began at 7 a.m. at the Charleston warehouse location.

Daniel Akers conducted the meeting, which was recorded by Faubel. After extensive discussion of safety, production, licensing, and other matters, Akers turned the meeting to what he called the "scuttlebutt going around." He told the employees that he had heard that Doughton had left to work for the Union and that there were "union guys coming here and leaving their business cards and stuff." Similar to what Akers had told Faubel the day before, Akers explained to the group:

> we've kind of traced it back to is an employee that left us, took our phone list and gave it to the union guys. So the union guys, is what I've heard, is calling everybody. Is that true? Has everybody got a call from the union guy? Because there's some in Beckley, that they've gotten a call and maybe he is just targeting specific people. And, you know, we're an at will employer, I don't want anybody to think ah… Obviously, you can do whatever you want to, um, but I wanted to let you guys know that we, we enjoy working with every one of you.

Akers continued:

> And, if there is ever a problem with anything, I want you guys to know that you can call me at any time. Any time. No matter how big or small or minor, or whatever the issue is, please call me. Um, because, like with Mike, it got to the point where you know, the barn had already burnt to the ground and then Tim and Dan expected me to be able to fix it. And if somebody let me know a haystack was on fire in the corner, maybe then I could have done something but, you know, Mike had already accepted another offer, made his decision up, put in his 2-weeks' notice and was gone. You know, I can't fix that. But if anybody is unhappy with anything, if anybody's unhappy with, um, you know, a coworker, or whatever, you know I am here to help. So, you know, I just wanted to come down and say that so if anybody needs anything, or you know, wants, wants me to try to remedy any issues that's going on or if I can help fix anything at all, you know, please let me know. That's what I'm here for. I mean, I do, in the Bradley office I just do whatever it takes, you know, every day. I . . . I dabble with the service department, I dabble with all the warranty claims, I dabble with HR, the payroll, I order every piece of equipment that's ever came into our shop, I do that. I sign every check that comes into the office. Um, so, you know, I do have a lot on my plate, but I'm willing to take more. I mean, I'll work as much as I have to, you know, keep everybody happy and, um, keep the big machine rolling. So, does anybody have anything that they want to talk about or . . .?

This provoked discussion about equipment. Employees called out telling Akers various items they wanted: ladders, trash bags, a corded grinder, additional saws, and other items that they said they needed. Akers responded positively to the requests, following up, for example by asking,

> Two of each? Or do you need more? . . . Three? . . . . So, three 6 and three 8s? Um . . . do you have room to pick them up today? . . . . I'll order them before . . . before you leave.

This went on for some time, with Akers promising to supply nearly everything that employees asked for. Finally, after the requests were exhausted, Akers moved to end the meeting, "As long as nobody's got anything else guys, I want to try to keep this meeting as close to 30 minutes as possible . . . ."

As the meeting concluded, Daniel Akers called Faubel over to continue discussion of the foreman position. However, before much could be said, an employee brought Daniel Akers a copy of a flyer that had been placed under the windshields of the cars parked outside the meeting. The flyer announced that "Sheet Metal Workers, Local #33 is here to help you" and alleged that Dan and Daniel Akers had "g[iven] themselves" substantial bonuses at employees' expense. It asked, "How many times did Daniel cheat you out of money last year? How often did Daniel try to nickel-and-dime you last year? Well now you know where all the money went." The leaflet concluded with the union organizer stating, "Call me, Steve Hancock," and provided a telephone number.

The leaflet and its accusations upset Daniel Akers, who called it "bullshit" and derided the union officials as "unethical." Akers declared that he needed to go talk to the union official as the leaflet "literally makes my blood boil" because "every[ ] single thing is so wrong here."

However, in a few minutes Akers redirected his attention and the conversation to Faubel, telling Faubel that that he and his father were in agreement that Faubel would be a good candidate for foreman, that they were prepared to discuss it further, including a pay raise—beginning with a raise from $18 an hour to $22 an hour, with an "ultimate goal" of $25 an hour, with other "perks" such as a company vehicle to drive. Faubel expressed interest, and Akers said that he would be meeting the following Monday, January 14, with McGuffin and Dan Akers, and they would get a "formal job description" and "compensation package and all that" together for Faubel at that time.

Later that day, January 10, or within a day or so, Akers called Hancock in response to the leaflet and accused him of spreading "lies and deceitful information." The next day or so, another Union organizer contacted Akers seeking a meeting with Akers, which Akers refused.

Faubel went back to work and for the remainder of the week

continued informally to direct employees at the Crossings based on what he knew was needed from his attendance at the general contractor meetings.

E. January 14—Dan Akers Looks into Faubel's References and Quizzes Faubel About the Union

On Monday January 14, Dan Akers stopped by the Crossings and he and Faubel had a long (44 minute) conversation that amounted to an interview of Faubel for the foreman position.[4] Akers asked Faubel to fill out another employment application, as AH could not find Faubel's November application and wanted to contact Faubel's references before formally offering him the foreman position.[5]

Akers and Faubel talked about Faubel's work experience and background. Akers asked about Faubel's experience as a foreman in previous jobs and they discussed that. Akers relayed how Daniel Akers had "said you were a rock star when . . . when he interviewed you." (Ellipses in original).

They then discussed how the work should be accomplished if Faubel became the foreman for the Crossings project. Akers suggested that if Faubel was in charge at the Crossings it would relieve Tim McGuffin of oversight responsibility for the Crossings. Akers told Faubel that with his qualifications, McGuffin did not need to be at the Crossings to supervise.

During the conversation Akers indicated that he wanted Faubel's references so Daniel Akers could contact them as part of the final decision on Faubel's promotion. However, Akers also indicated that he would talk immediately to McGuffin and tell him that Faubel was going to be "in charge" and "running this job."

Indeed, McGuffin arrived during the conversation and Akers told him "so I want Eric to run this job and I want for at least this first week or 10 days til I get a handle on it, I want him to talk directly to me." Akers also told McGuffin and Faubel, "Ok. Alright. So let's start the transition today. Let's start the transition. Eric's in charge. Eric's gonna run some things through me but mainly because I wanna get up to speed and to know your progress . . . ." Akers told Faubel and McGuffin to "let the men start talking to [Faubel] about" absences and coming in late "and then you pass it on [to Akers or McGuffin] if somebody's not showing up because, see, they'll just lay off 2 or 3 days and we don't know about it." Faubel said he understood and that if someone is off "just a day or they're gonna be late, I am not going to bother you with that."

Akers still was requesting Faubel's reference information and Faubel gave him the information orally, and Akers told him to fill out the blank application he had given Faubel earlier in the conversation. Faubel had been earning $18 an hour since he began at AH. Akers told Faubel,

> officially, um . . . you're $22 an hour but I'm gonna call this guy [Faubel's reference] and if he tells me, yes, well, we were gonna review it, but then in 30 to 60 days and take you to $25, if he gives me a good report, and then . . . then . . . then we'll go to $25 and I'll call you and tell you. You're not going to have to guess. I'm gonna say right now you got $22 and I'm gonna call you if I get to talk with [the reference] by the day and I'll let you know and it might change quickly.

Akers' attempts to contact the reference, a man named McDougal in Ohio, were unsuccessful at first. Because he had trouble reaching McDougal, Akers initiated a background check on Faubel. However, before the background check information came back, Akers reached McDougal. After he had repeatedly called McDougal and no one answered the phone, Akers mentioned it to Faubel. Faubel told Akers to call at a particular time and someone would answer. Akers followed this and got through to McDougal.

McDougal told Akers that Faubel was "a great guy and that he wished he was still working there." McDougal told Akers that Faubel had supervised 20–25 employees for his company.

Akers asked McDougal if the company was "a union operation." McDougal told him "we have a union shop and a split shop." Akers asked if Faubel worked on the union or nonunion side of the business. McDougal told Akers that Faubel worked on the nonunion side.

Dan Akers called Faubel later that day, January 14, after work. Faubel recorded the conversation. Akers said that he had spoken with McDougal, and that he had received a good recommendation. However, Akers added that McDougal had "mentioned one thing that concerned me a little bit." Akers told Faubel that when he googled the referenced employer, he saw that it was listed as a "union shop." Akers assured Faubel that "[i]t doesn't make a difference to me whether it's union or not, but when I asked him about that, he said that they ran what's called a split shop. You know, some of them were union and some of them were not union, and you were working on the nonunion side."

Faubel said that this was correct. Akers continued,

> Now, so I guess my question to you is—and, again, you know, it's a free enterprise. You can do whatever you want. But I'm just curious now because of these letters and things that's been posted on some of our vehicles, are you a member of the union here?

Faubel answered, "No sir."

Akers responded:

> Okay. Well, then I don't know where all this union stuff's coming from. We've never had any problem with the union and I was—but that just bothered—well, I'm just curious about that. I was, well, I'm just going to ask Eric, because I trust you. It's just like—and you'll find out with me, Eric, I'll tell you exactly what I think and I want you to tell me exactly what you think. I think we're going to be a good team, and

[4] Faubel, who recorded this conversation, testified that the conversation was between he and Dan Akers (i.e., the father), and I so find. I note that the transcript of the recording of this conversation (GC Exh. 10) entered into evidence lists "Daniel Akers," i.e., the son, as the Akers participating in this conversation. I find that the transcript is in error in this regard, and that it was Dan—not Daniel—Akers who spoke with Faubel in this conversation. General Counsel's Exhibit 10 is hereby corrected in this regard.

[5] Daniel Akers had inadvertently misfiled Faubel's parts of the original application and thus the Akers could not find the references Faubel previously had provided. Daniel Akers later found the original completed application.

> so—so I want you to carry on as our crew leader down there. And—but I want to you wait until the end of the week just to see if you—you know, if you really accept the job. I'm going to go ahead and I don't pay on—I don't know when the pay periods are, but you're my $22-an-hour man. But at the end of the week I want you to—the fact that you went to another one of these sessions, if you want to accept this job, then we'll pay you $25 an hour. And that may not be the end of it. That's just where we're—that's where we think the job's worth. And then as we get to know you, and you can—you bring different things to the table that will help us and save us money, then, you know, again, what you make today doesn't mean that's what you're going to make in six months. But I'm willing to up it to the $25 on Friday if you want to continue doing what you're doing. So that'll give you a week to kind of feel this out, think about it. And then—because I don't want you to rush into it because this is a big position for us. And we don't have many people making $25 an hour. So—and I don't want to push more on you than what you can handle, but John [McDougal] said that, just as you said, that you've had as many as 25 people working for you and as little as 10. But all of them might be on different jobs or all on the same job. So that's what we need. We need superintendents, leaders, men that can make decisions. And you're my man.

Faubel thanked Akers and they concluded the conversation with Akers saying, "So let's move forward and hopefully both of us can make some money. . . . Okay. Partner, we're in business together. And—I'll talk to you throughout the week then and see how things are going."

Faubel continued working the rest of the week. On Tuesday January 15, he attended the general contractor meeting as he had the previous week. There were no other AH management officials on site that week.

A few days later, on or about January 14, Union Organizer Hancock showed up on an AH job sight in Raleigh County, West Virginia, and passed out his business card to employees. Later that evening Hancock called Daniel Akers, who did not answer his call. On January 15, Daniel Akers saw videos on YouTube posted by the Union that Akers believed "defamed" AH. Akers filed a complaint with YouTube and the video was removed, but additional videos—these showing the Union's General Counsel Eli Baccus speaking about AH and accusing it of underpaying employees—were posted to YouTube in the next few days.

F. January 18—Faubel Loses the Promotion

On Friday morning, January 18, at about 8:30 or 9 a.m., Dan Akers and Tim McGuffin summoned Faubel to meet with them in the job trailer at the Crossings. Faubel recorded most (but not all) of the meeting.

When Faubel joined them in the trailer, Akers and McGuffin were looking at blueprints and asked some questions of Faubel relating to the blueprints.

However, the main impetus for the meeting was a disciplinary write-up Akers presented to Faubel, asserting that he had not been clocking in and out properly—a procedure employees did from their cell phones using a phone app that recorded their hours. The meeting got a little testy—Faubel was "annoyed" or "angry" depending on one's perspective and defended himself insisting that "you can ask every guy here. I'm the first guy here every single day since my first day I started I've been the first guy here." Akers told Faubel, "I already don't like your attitude. You're to be my man and I can't have my man arguing with me over things like this."

The three got Daniel Akers on the phone—he was more conversant and knowledgeable about the app—and after some discussion and use of the app, they seemed to reach the conclusion, as Faubel had contended, that the app had not been accurately recording his hours. The app was deleted and reinstalled on Faubel's phone and that seemed to correct the problem. Faubel said, "Good deal. Problem solved, right?" Dan Akers responded, "Problem solved." Dan Akers told Faubel that the write-up was being withdrawn ("so, no, this is not going to be effective because I guess you were not told how to do it").

Before getting off the phone with Daniel Akers, Dan Akers told him, regarding Faubel, "and then the other thing—he does not have our company, um, handbook, so, um, so go ahead and email that—how are you doing that? Are you emailing that or just copies that we can bring down Monday or what?" Daniel Akers told Dan, "I'll print a copy and have somebody bring it to him." Dan Akers told Faubel that he would be getting a handbook with the AH policies that he should have gotten when he was hired—but did not. Akers blamed McGuffin for that, as Daniel Akers was away when Faubel was hired in November. Dan Akers noted that "Tim hired you. Daniel doesn't let stuff like that slip through. . . . So now we're going to see that you get that. . . . but, if indeed you were told how to do [the sign-in app] you would be written up." Akers mentioned that the handbook would explain to Faubel that "you'll have three warnings and then you don't have a job." Akers added that "we are starting the interview process. I mean Daniel, again, has a process. He goes through—he's got u, uh, applications on—on the internet and Indeed and all that. So, now that process will . . . go forward and, um, we'll—we'll see where we go with that."

At that the meeting ended. Akers suggested that the three "walk up on the floors [of the Crossings] and see what's going on." Faubel, McGuffin, and Dan Akers did an informal job walkthrough and then Faubel returned to his work.[6]

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[6] McGuffin's account of the meeting in the trailer described a version of events in which Faubel was cursing, "totally out of control," with flailing arms and yelling "five times louder than normal." McGuffin testified that "I never had anybody blow up like that on me." He indicated that the meeting ended when Akers ordered Faubel "to leave out of the trailer" and Faubel then "stormed out" still "saying words and flailing and things like that." At that point McGuffin claimed that he turned to Akers and told him, "You're a hell of a man . . . "there would be no way in the world that I would let an employee talk to me like that."

I discredit McGuffin's account. The audio recording of this meeting refutes McGuffin's testimony. The meeting neither ended nor was conducted as described by McGuffin. And although the recording of the event did not purport to capture every part of the encounter—two to three minutes at the beginning of the meeting were not recorded, and the phone was turned off for perhaps a minute during the meeting when Faubel handed his phone to Akers to show him the app's GPS function was working—over 11 minutes was recorded and it is inconsistent with

Dan Akers told Faubel that he wanted to talk to another employee—Johnathan Tierson—and asked Faubel if he knew where he was working. Faubel directed Akers to Tierson, who was down the hallway.

Akers and McGuffin then approached Tierson and asked him whether he would like to take the foreman position. Tierson testified that he then discussed it with his wife over lunch and accepted the position that evening. However, according to Faubel, Tierson told Faubel that day that he was the new foreman. Faubel tried calling McGuffin and Akers, left a text and a voicemail, but neither answered.

Faubel left around lunchtime to assist with a family emergency, a situation which he had raised with Akers and McGuffin when they were in the trailer that morning. Faubel testified that they told him it was "okay. They said they weren't happy that I was leaving without notice, but, you now, they understood. Stuff happens."

G. January 21—Faubel is Reassigned to the Vet Clinic

Over the weekend, probably Sunday, January 20, Faubel received a text from Dan Akers telling him that instead of reporting for work to the Crossings that week, he was to report to a different job headed up by McGuffin at an area vet clinic. Faubel asked Akers:

> Did I do something wrong?

Akers responded Sunday morning:

> When we met Monday of last week I told you we would make a decision on Friday concerning the foreman position for the Crossing. I was concerned with your attitude about simple questions that I asked involving correct procedures in recording working hours from your smart phone as well as telling me you were only working a half day Friday. I have decided these are not leadership qualities I want for the Crossing. I also need your help on the Vet Clinic.

The next morning, Monday, January 21, at 8:13 a.m., Akers sent a further text to Faubel indicating that McGuffin was on his way to the job site but was running late because he had to stop by the office. Faubel thanked Akers and then added:

> Hey Dan, after our interactions on Friday, I would like to apologize for overreacting. I know better and should have handled things differently. I hope in the near future we can try again.

That day, January 21, Faubel began working at the vet clinic. As he had at the Crossings, he spent most of his time there "hanging ductwork." The work was essentially the same as at the Crossings, but it was a smaller job than at the Crossings, involving only three total employees—Faubel, Shane (probably Shane Bair, the only Shane on the employee list attached to GC Exh. 26), and Tim McClung. Shane stopped working there after Thursday, January 24, leaving only McClung and Faubel assigned there, although at least two others worked there the following week. Meanwhile, approximately 8–12 employees were working for AH at the Crossings.

H. January 25—Akers Brings Faubel an Employee Handbook and Asks for a Signed Acknowledgement of Receipt; Tierson Does the Same for Other Employees; the Handbooks Contain the Same Rules, Including Confidentiality and Solicitation and/or Distribution Rules that Have Been Maintained for Several Years

On Thursday, January 25, Dan Akers came out to the vet clinic and brought Faubel a copy of the employee handbook.[7] At the conclusion of the January 18 meeting with Faubel at the Crossings trailer, Akers had told Faubel that he would be receiving the handbook, and that he should have gotten one when he started as a new employee, a lapse Dan Akers blamed on McGuffin having conducted Faubel's hiring instead of Daniel Akers who normally did the hiring.

Akers asked Faubel to sign and return the acknowledgement of receipt contained in the handbook, which Faubel did on January 28. While providing the handbook to Faubel, Akers explained to McGuffin that Faubel should have received one of these when he was first hired, and McGuffin said he did not know why he had not. The other two employees present—McClung and Bair—were not given a handbook at this time, but both had been working for AH for a much longer time.

At the end of January, and at various later dates, a few employees received a handbook and were required to sign the acknowledgement of receipt. Robin Reece, listed in company records as an office administrator, signed the acknowledgement on January 28, 2019. Cynthia Allen, also listed as an office administrator, and who was hired January 28, 2019, also signed the acknowledgement on January 28, 2019. Paul Castle and Brandon Armstrong signed the acknowledgements on January 25, 2019, when Tierson called them to a room in the Crossings and gave them the handbook and asked them to sign the acknowledgment. Jesse Lee Flint signed the acknowledgement his first day of hire, April 1, 2019. Chris Kilgore, hired September 17, 2018, signed the acknowledgement on January 30, 2019. Dustin Dooley, hired April 1, 2019, signed an acknowledgment that day.

Daniel Akers testified that the handbooks he provided employees were the same as they had been for many years. Employees were supposed to receive them when hired but Akers explained that, for unclear reasons, that had not necessarily happened, and so he made an effort to make sure all paperwork, including the distribution and acknowledgement of handbooks occurred.

The AH employee handbook is a comprehensive employee handbook, 42 pages in length and establishing a wide range of rules and policies grouped in sections headed Diversity, Employment, Workplace Safety, Workplace Expectations, Compensation, Time off/leaves of absence, and Benefits.

The handbook contains the following provision which is part

McGuffin's account of the "out-of-control" behavior attributed to Faubel, which if true, could not have been instantaneously stopped and started so as to be absent from the recording of the meeting. I also note that in his testimony, Akers did not endorse an account of the meeting that can be squared with McGuffin's testimony.

[7] The handbook (Jt. Exh. 1) is titled "Employee Manual," but throughout refers to itself as the employee handbook. Throughout this decision I refer to the document as the employee handbook.

of the Confidentiality rule (Jt. Exh. 1 at 23):

> . . . . Idle gossip or dissemination of confidential information within the company, such as personal information, financial information, etc. will subject the responsible employee to disciplinary action or possible termination.

In addition, the handbook's solicitation and/or distribution rule (Jt. Exh. 1 at 27) states in part:

> Solicitation and/or distributions, as well as gambling are prohibited on company property.

The acknowledgment form that employees were asked to sign provides, in bold,

> **Accordingly, either I or Appalachian Heating can terminate the relationship at will, with or without cause, at any time, so long as there is not violation of applicable federal or state law.**

The second to last paragraph of the document, also in bold, provides,

> **I understand and agree that nothing in the Employee Handbook creates, or is intended to create, a promise or representation of continued employment and that employment at Appalachian Heating is employment at will, which may be terminated at the will of either Appalachian Heating or myself. Furthermore, I acknowledge that this handbook is neither a contract of employment nor a legal document.**

I. January 30—Faubel Posts and Distributes a Video Declaring that he is a Union Organizer; The Background Check on Faubel Comes in

On January 30, Faubel and the Union posted and distributed a video on YouTube announcing to employees and management of AH that Faubel was a union organizer. In this video, which he sent to AH employees and management on January 30 (specifically to Dan and Daniel Akers, and Tim McGuffin), Faubel is sitting behind a desk draped with the Union's logo and declares that he is a union organizer:

> Many of you know me as Eric of Appalachian Heating and Cooling, I work with a lot of you. But what you also don't know, is that I'm also Eric, a union organizer with Local 33.

Faubel's video explained that the employees should join the Union and become union represented. With this video, Faubel directly disclosed for the first time to coworkers and management that he was a union salt. While Faubel testified that he suspected that some of his coworkers knew or suspected before this, there is no direct evidence of this.

The response from employees was mixed. Some responded saying they knew all along. One or two asked that he not send anything else. There was no response from management.

As referenced above, in mid-January, when Dan Akers was having trouble reaching Faubel's reference, he ran a background check on Faubel. When the background check came back, it showed that Faubel had worked for a company, Groggs Heating and Air Conditioning in Parkersburg, West Virginia. Akers called the owner, Tim Hannon, and asked about Faubel. Groggs told Akers that when Faubel worked there, he had tried to organize a union.

Akers testified that he learned this from the Parkersburg employer *after* he gave the foreman job to Tierson (i.e., after January 18), and "almost to the day"—which was January 30—that he saw the YouTube video Faubel released and distributed to employees and managers revealing that he was a union organizer. Akers testified that he did not know Faubel was a union organizer until the time Faubel released the video.

J. Faubel is Not Invited to the February 4 Safety Meeting, Which Includes an Antiunion Presentation by AH and Its Attorneys; Armstrong is Identified as a Union Supporter

On February 4, AH held another safety meeting for employees, one at the Bradley office (at 7:30 a.m.) and one at the Charleston office (around 11 a.m. or a little before noon, the evidence varies). At the conclusion of the Charleston meeting, lunch was provided by AH to all present. At the morning Bradley meeting donuts were provided.

These meetings began as routine safety meetings, with Daniel Akers speaking for about 15–20 minutes about safety and operations issues. Then Dan Akers spoke, changing the presentation over to a "Union Information Meeting" slide show that began with a history of the company and segueing into a discussion of the Union. This included a slide depicting Faubel's and other Union employees' wages taken from 2017 union financial reports. There was discussion of AH's opposition to union representation, with AH's attorneys present and participating in the presentation. As testified to by Armstrong, at the Charleston meeting, Dan Akers told the employees that

> they didn't hire people to just do a job and didn't lay them off, they hired people to retire from the company. And that, you know, they didn't plan on ever laying anybody off, that they never have laid anybody off. And that back in the old days if they did lay somebody off, you know, they'd take them back to the family farm and work them there so they wouldn't have to lay them off. Then he started to talk about the union, and how they were a huge threat to the company and their employees, and that they were attacking him. And then the attorney said that, you know, he wouldn't go union over his cold dead body.

Marolf attended the Bradley meeting. He testified that he considered the meeting mandatory, based on what another employee had told him that a warehouse manager, Bob Backus, had said, but there appears to have been no explicit rule—the meetings were simply announced in advance by the time clock at Bradley, and employees were expected to attend.

Faubel was not notified of the meetings and did not attend. Faubel learned of the meeting when the three other employees assigned to the vet clinic project that day—Tim McClung, Tim Rhodes, and Stephen Marolf—arrived late to the job site, around 10:30 a.m. that day, and told Faubel where they had been.

On February 8, Faubel asked Dan Akers, who was visiting the vet clinic jobsite, why he had not been invited to the meeting. He did not get a response. At the hearing, Dan Akers admitted that he "would think" one of the reasons that Faubel was not invited to the February 4 meeting was because he had put out the video announcing that he was a union organizer.

However, Akers suggested that he had not been involved in the decision—meaning that Daniel Akers had handled invitations to the February 4 meeting. Daniel Akers admitted he did not notify Faubel of the meeting but did not address his motives for that.

Daniel Akers had noticed Brandon Armstrong recording the February 4 Charleston meeting. He told Roger Hight about it in a text exchange later that day (or perhaps the next day). He wrote to Hight that he "watched the guy do it the whole time," and had seen videos put out (presumably by the Union) about the meeting. After the meeting, still in early February, Akers looked online and found posts by Armstrong on Facebook that led him to believe that Armstrong worked with the Union.

On or about February 20, Daniel Akers forwarded to employee Hight years old photos from Facebook posted by Armstrong complaining about working conditions at a past job. Akers texted Hight that this showed that "our very own salts post on Facebook they hate their job." Although Akers blacked out or redacted the name of the author of the Facebook posts he shared, Armstrong saw the texts when Hight forwarded them to him, and Armstrong could identify the Facebook posts as his own, and thus, knew that Akers had identified him as a union salt. Given this, the next day Armstrong wore a union organizer sweatshirt to work.

K. February 25—Faubel is Reassigned Back to the Crossings; Alleged Isolation of the Union Supporters

On February 25, Faubel was reassigned back to the Crossings from the vet clinic and was now working under the direction of Jonathan Tierson. Faubel was assigned to work alone that day. Tierson told Faubel that he didn't care if Faubel did any work, "I was just to be away from everybody." Stephen Marolf testified that that morning, between 7 and 8 a.m., he and Tim Rhodes went to find Faubel on the third floor to ask him something about the job. Tierson "came in and said anybody talking to Eric is—will get fired." Faubel corroborated that Marolf told him "when we got here, we were told to stay away from you. Not to talk to you."

Soon thereafter, Armstrong was assigned by Tierson to work with Faubel. The two worked together on their own floor. Previously, all the crews had tended to be assigned to the same floor working together. Armstrong testified that Tierson told him that "they instructed him to put us together, separated from everyone else."

Paul Castle testified that at some time, probably in early March, standing beside Tim McGuffin's truck, he heard Tierson say to McGuffin "that we needed to isolate the union guys away from the rest of us so they couldn't be spreading their union propaganda." Castle testified that McGuffin "made a remark like he was agreeing with him, but didn't come straight out and say it that way." Castle testified that Tierson then repeated the comment directly to him as they walked away.

In his testimony, Tierson denied telling anyone that they would be fired if they talked to Faubel, or that he ever isolated employees because of their union affiliation. However, I credit, Marolf's, Armstrong, and Castle's testimony on these matters. Marolf, in particular, appeared credible in his demeanor and presented as a disinterested witness. Indeed, although he supported the Union during his time at AH, he was not a salt and no longer an AH employee at the time of the hearing in this matter. His testimony on this point was corroborated by Faubel. Castle, remains an employee, testified under subpoena, and appeared to me to be honestly recalling, without exaggeration, what he heard Tierson say to McGuffin and then to himself. I note that McGuffin testified and did not deny (or address) the claims about what Tierson allegedly told him. I further note that no explanation for the change in assignments, or the pairings of employees, or denial that it happened, was offered by the Respondent. Accordingly, for all these reasons, I discredit Tierson's denials on this issue.[8]

L. The February 27 Strike; Tierson Photographs the Picketers as he Goes to and from Work; Akers Texts Employees and Tells them to Videotape and Report Strikers Engaged in "Illegal Activity"

On Wednesday, February 27, Faubel went out on a strike that he and the Union characterized as an unfair labor practice strike undertaken "in regard to me not being promoted and kind of being disciplined for my union affiliation."

The strike lasted approximately two weeks, until mid-March. He was joined in this strike by two other AH employees, Stephen Marolf and Jarod Smith. The three of them, plus other union officials, picketed outside the Crossings job site, the Charleston warehouse, and outside the Bradley, West Virginia office.

Faubel and Marolf testified and denied ever seeing anyone (or engaging in any) blocking of the roads, or threats against anyone while manning the picket lines. Castle, who did not strike, but drove into the Crossings during the strike, also testified that he did not see any threatening or blocking. Armstrong also denied seeing any blocking or other unusual behavior by the picketers.

Faubel testified that on the third day of the strike, March 1, he observed Jonathan Tierson holding his phone up in the direction of picketers as if to record the picketers when he came through the picket line as a passenger in a company vehicle coming into work at the Crossings that morning. A few days later, Faubel observed Tierson doing the same thing as he exited work at about 4 p.m. Hancock essentially corroborated this testimony, and described seeing Tierson engaged in this activity, although he thought it occurred one day going in and the immediately following day when Tierson was exiting the Crossings. Marolf offered similar testimony, although he dated the first incident as February 28, and suggested that Tierson was driving the company vehicle at the time.

Tierson admitted taking the photos. He testified that he did so because he was told by Hight and McClung that picketers were stepping in front of the vehicle they were driving. Hight testified and did not confirm or address any of this. McClung testified that, at an unidentified time during one of the strikes,

[8] I note that, on brief, the Respondent contends that Faubel was only isolated for one day, and then, only because he showed up for work at lunchtime. However, the Respondent (R. Br. at 32) is actually referring to Faubel's testimony about his return to work on March 13, after the first strike, not his reassignment to the Crossings on February 25.

when he was leaving the Crossings and driving through the picket line with Steve Parrish, a couple of picketers "ran in front of my van" and stayed close to the van so that he was afraid he would hit them. As a result of this incident, McClung suggested to Daniel Akers that "we need to get cameras or something for these vans." Tierson further testified that picketers were "running at my truck with a sign and screaming at me." Tierson testified that, picketers surrounded his truck with a sign.[9] After this happened, on what I believe to be the second day of the strike, February 28, there is no evidence that it was repeated. Tierson said that these incidents prompted him to record to make sure he had it on camera if they did it again. But he also testified that "it actually seemed as though whenever I did have the camera on them they acted civil." He then sent the pictures to either McGuffin or Daniel Akers."

There is no evidence that any of the picketing employees were ever disciplined for picket line misconduct. There is no evidence of police or other efforts by any authorities to control any kind of striker misconduct.[10]

During this same period, probably on February 28, some of the employees called Akers and told him that in one instance the union picketers "seemed to be a lot more aggressive" and there was an increase in the number of picketers. Daniel Akers told employee Tim McClung to call 911 if he felt threatened by the actions of picketers. McClung told Akers that his daughter suggested that he get a "dash cam" and record the picketing. The morning of March 1, 2019, Daniel Akers sent a phone text message to certain employees (who were not striking) stating:

> All,
>
> Picketers are not allowed to block the road, gates or any access to any jobsite. They are not allowed to prevent you from going to work.
>
> If the actions you encountered yesterday continue please drive slowly, proceed with the upmost caution and avoid them. Have your passenger use a smart phone and video record their illegal activity. I'll get you all a dash cam as one of you suggested.
>
> Report any and all events to me and I will call the police and also the national labor board to report any and all wrong doing by the union.
>
> National Labor Board
> 1-513-684-3686
>
> Police just dial 911 I don't know if they would dispatch the Sherriff or South Charleston Police.
>
> And job site is:
>
> Peyton Way, South
>
> Charleston WV 25309
>
> (Landmarks are the Bible center church and the Kanawha county metro 911 center.)

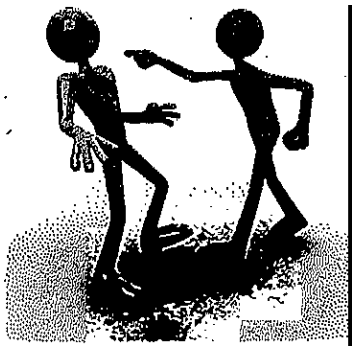
Akers testified that he sent this message only to those employees who had expressed concern to him about the striker's activities. Pressed on why he did not send the message to Armstrong, who was not striking, Akers evinced noticeable difficulty directly answering the question, but then suggested that he did not send it to Armstrong because he only sent the message to employees who drove company vehicles, and Armstrong always drove his personal vehicle. However, after being directed to review portions of his sworn pretrial affidavit, Akers agreed that he did not send the March 1 text to Armstrong because he assumed that Armstrong was a union supporter from the information Akers had found on Armstrong's Facebook page.

Based on the record as a whole, I find that Tierson's photographing first occurred on the third day of the strike, March 1. The record reveals that on the second day of the strike, February 28, the Union invited sympathizers from other unions, legislators from the West Virginia House of Delegates, and some representatives from the AFL–CIO, to come to the Crossings picket line. The media came too. The larger crowd apparently had increased activity and interaction with employees going to work and accounted for the increased activity described by employees. I find that Tierson first photographed the next day, March 1. This date is also consistent with Akers' March 1 text which alluded to unruly picketer conduct the day before. I also find that the second incident of photographing occurred a few days later, probably around March 4, which is consistent with most witnesses' testimony.

M. March 8—Most Employees Receive a Letter with their Paystubs

On March 8, Akers included a leaflet to employees with their mailed paycheck stub. I reproduce the leaflet here:

Tired of Union Threats?



- **We are being told that some Sheet Metal union supporters are threatening some of our workers.**
- **It is a violation of Federal Law for a labor union to threaten employees.**

[9] Tierson testified that if he was driving "any bit slower, I probably would have hit them," a detail that leads me to believe that he was not, in fact, "surrounded" by picketers, but that picketers were approaching his car.

[10] Tierson also testified that Hight said that picketers "were throwing rocks," but there is no nonhearsay testimony on this. Hight testified but did not address it. I find it unproven.

- **It is also a violation of Appalachian Heating's anti-harassment policy, which says in part, ". . . Appalachian Heating is committed to a work environment in which all individuals are treated with respect and dignity. Each individual has the right to work in a professional atmosphere that promotes equal employment opportunities and prohibits unlawful discriminatory practices, including harassment. . . "**
- **Let me remind each of you that, although we respect the rights of our workers to support or not support a labor union, we will not permit anyone to violate the legal rights of our employees who wish to fight for or against a labor union.**
- **Anyone caught threatening our employees or otherwise violating their rights will be subject to criminal prosecution to the fullest extent of the law.**
- **Appalachian Heating will protect all of our workers and will not tolerate threats or harassment!**

If you feel your rights to support or not support a labor union are being violated you are free to contact the NLRB:

National Labor Relations Board John Weld Peck Federal Building 550 Main Street, Room 3003 Cincinnati, OH 45202-3271
513-684-3686
Information.Officer@nlrb.gov

This leaflet was sent to most employees. However, Faubel, Marolf, and Armstrong did not receive the leaflet with their pay stub.

N. March 13—the Strike Ends; the Strikers and Armstrong Assigned to Work Together

On March 12, the Union informed AH that starting the next day, March 13, the three strikers (Faubel, Marolf, and Smith) were unconditionally offering to return to work. They returned to work Wednesday March 13.

Marolf and Jarod Smith were assigned to work with each other. Faubel worked nearby, paired with Brandon Armstrong. Armstrong testified that the four of them were on one floor, and all the employees were working on a different floor, which, Armstrong contended was different than things had been in the past. Marolf had always worked with Tim Rhodes at the Crossings, never before with Smith. Indeed, prior to this, Marolf had never seen Smith assigned to the Crossings. Rather, Smith had worked in the office and warehouse with Warehouse Manager Backus, and occasionally delivered materials to the Crossings.

O. March 14—Faubel Receives His 90-Day Employee Evaluation

On March 14, Dan Akers, with Daniel Akers present, met with Faubel and gave him his 90-day employee review at the Crossings job site in the Jarrett trailer. These reviews are routinely done for new employees, and after that employees routinely receive annual reviews. In this case, Faubel asked for the review, because he had heard others talking about them and knew that employees got raises based on the reviews.

Faubel's 90-day review was a positive review; "more good than bad" according to Daniel Akers. There was little to nothing mentioned about dampers, other than a reference to how Faubel had tried to help back in December when he discovered and reported to Doughton that the wrong dampers had been ordered for the Crossings—vertical instead of horizontal damper—and new ones had to be ordered and those already installed replaced with the correct dampers. Neither Dan nor Daniel Akers registered any complaint regarding Faubel's installation of fire dampers.

The "bad" part of the review was the Akers' concern about Faubel's attendance. Faubel testified that he asked Akers if they were referring to the strike, because, testified Faubel, he had never missed a day other than when on strike. Faubel testified that Akers said, "Well, yeah, we take that into account." Daniel Akers testified that Faubel "did miss a lot of work" and he appeared to agree with counsel's suggestion that this included time when Faubel was on strike as well as what he referred to as Faubel and "some other boys in Charleston" having a "kind of habitual habits of calling in sick or just saying they wouldn't be there for one reason or another."

P. The March 15 Incident Between Marolf and Hight; Marolf's First Write-Up

Upon his return from the strike on Wednesday, March 13, on a couple of occasions that day Marolf walked past employee Roger Hight and felt that Hight would not respond to his greetings. Hight testified that in his view, Marolf gave him dirty looks and one time he suspected that Marolf threw some sheet metal screws near him—though he did not know for sure if it was Marolf and he did not necessarily believe the screws were intended to hit him rather than just to make a noise. He also suspected that Marolf called him a "rat," although he was unsure whether it was Marolf or even whether it was directed at him. Marolf denied calling Hight a rat when Hight confronted him about it. Hight started yelling at Marolf and accused Marolf of "throwing screws at him and stuff like that." Marolf denied doing this and the two walked away. In any event, there was tension building between the two.

On Friday, March 15, Marolf was directed by Tierson to go through the building organizing and cleaning up materials in various areas of the Crossings, a new assignment for Marolf. Hight testified that he had asked Tierson not assign him to work near Marolf and for this reason Tierson had assigned Hight to work on the first floor. Hight thought that Marolf would not be on the first floor but Marolf believed he was to scout the entire building for trash and clean it up. When he was on the first floor, Marolf went to the bathroom and then entered a room where McClung and Smith were working, intending to pick up some trash. He began "cutting up" with McClung, and jokingly asked him if "he wanted a union sticker, because I had one on my hard hat." McClung declined. Hight happened to walk into the room and McClung said, "See if Roger wants any of them," encouraging Marolf to give Hight a sticker.

When Marolf proposed this to Hight—repeatedly, according to Hight—the two ended up in a confrontation. Each testified that the other came at him. Marolf claimed that Hight responded angrily, threw his stuff down and angrily confronted Marolf, threatening him. Hight said that Marolf kept walking toward

him until Hight said "You're not going to stop, are you?" They ended up in each other's faces cursing and angry and loud. McClung stepped in between them and then Tierson suddenly appeared and grabbed Hight by the shoulder and took him out of the room where arguing was overheard.

McClung told Tierson that they needed to notify McGuffin and Daniel Akers about the incident. Tierson sent Hight out to give McGuffin a statement.

Marolf testified that he was "really worked up." Marolf told McGuffin what happened. Then he called Daniel Akers and told him what happened. Marolf felt that Akers was not sympathetic: "all he was concerned about was what did I do?" After he calmed down, and had talked to Faubel and Hancock, Marolf called Akers back to tell him in more detail what had happened. Akers told him, "Well, I think it's awfully funny that you remember what you said now." Shortly thereafter, Marolf got a call from Tierson, who told Marolf that McGuffin wanted to see him. When Marolf found McGuffin, McGuffin told him that Akers wanted to see Marolf in his office. Marolf went to Akers' office in Bradley. Akers had a write-up for him, and asked Marolf for his own written statement of what had happened.

The March 15, 2019 write-up, or "corrective action notice" for "Stephen Marlof" [sic] stated that

> Stephen was allegedly harassing Roger about the union and was trying to get Roger to put a union sticker on his hard hat. Roger states that Stephen has been rude and badgering him since his return. Stephen also left his assignment on 3rd floor to come down to 1st floor . . . at that time Stephen allegedly said something to Roger which caused Roger to move toward Stephen. Promptly Jonathan Tierson and Tim McClung got in between them before anything escala[t]ed further.

The corrective action was signed at the bottom by Marolf and by Daniel Akers. Akers then sent Marolf home for the day—1 p.m. instead of his normal 4:30 p.m.—and told him that he would be contact with him to tell him where and when to be at work on Monday, March 18.

Hight testified that he too was sent home on Friday, March 15, by McGuffin and Daniel Akers, and written up the following Monday. He had to sign the write-up. Hight's write-up is in evidence as General Counsel's Exhibit 26 at pages 78–79. It is an attachment to a position statement submitted by the Respondent on or about April 29, 2019, to the NLRB agent investigating the unfair labor practice charges in this case. Hight's corrective action is signed and dated Tuesday March 19 (not Monday March 18, as Hight testified). Like Marolf's, Hight's name is misspelled on the write-up. But more than that coincidence, the text of Hight's warning is a verbatim copy of the text, set forth above, that was in Marolf's March 15 write-up.

As discussed below, Marolf was subsequently assigned to work out of town for two days and then at the warehouse. Hight remained at the Crossings.

Q. The March 18 Strike

After returning from the first strike on March 13, Faubel worked just two days—mostly on the third and fourth floor in areas C and/or D. He says he installed 6–8 dampers. On Friday, March 15, the Union informed AH's attorney that starting Monday, March 18, Faubel and employee Paul Castle would be "on an unfair labor practice strike in response to the conduct of your client towards its employees."

R. March 27—Marolf's Second Write-Up

After being disciplined and sent home on Friday, March 18, on Sunday, March 20, Marolf got a call from the warehouse manager, Bob Backus. Backus told Marolf that on Monday the two of them were going to a job site in Martinsburg, Virginia and to plan to stay overnight for a 2-day job. Marolf had not spent an overnight out of town for work since July 2018. He called Hancock and told him about the Martinsburg assignment. On Monday morning Backus and Marolf drove to Martinsburg. On Tuesday, when they were returning to the Martinsburg job site from a trip to Lowes, Hancock was at the job site. Hancock talked to Backus. Hancock testified that Backus told him he was "too old to go union, but . . . we had a nice conversation about the HVAC industry." That afternoon, Backus and Marolf returned home and Marolf spent the rest of the week working in the Bradley warehouse with Backus, mostly cleaning. Marolf had never before been assigned to clean at the warehouse.

The following week, in the morning on Wednesday, March 27, Marolf was in the warehouse "making some duct for a job," when Daniel Akers approached and told him that he wanted to see him in his office when he was done. Marolf said his work would take all day, and should he come now. Akers said, yes. When he got to Akers' office, Akers said something to the effect of, "I think you know why you're here." Marolf did not know, but then Akers gave Marolf another write-up.

This corrective action stated that, "Stephen is sharing confidential company information with an outside organization. Sharing job site locations, clients, scopes of work, employee locations is a violation of company policy. Attached is page 23." The action declared that Marolf needed to "Follow all company policies," and stated that, "This is your 2nd major violation of company policy within a one week period. Future failure will result in termination of employment."

Akers told Marolf that very few people knew that he and Backus were at the Martinsburg job. Marolf testified that he "was kind of irritated because I hadn't received a handbook, so I didn't really know that it was against the rules, so I was pretty irritated." Marolf testified that he has seen other employees' friends or wife's show up on jobs and he did not know there was a rule against revealing a job. Akers told Marolf that, "we're going to play baseball and three strikes you're out."

A couple of weeks later Marolf was reassigned to the Crossings. He remained there until he quit his employment with AH around May 20. During this time, he and Hight worked together on several occasions without incident. As Hight said, "We worked, we weren't real sociable, but we worked together and everything was done. It was done."

S. March 27—Armstrong is Permanently Laid Off

On March 27, Armstrong was at work and was approached by McGuffin and Tierson. They ushered him to a room alone where they gave him a written notice that he was being laid off. The note, which was signed by Armstrong and by Dan Akers, had Brandon Armstrong's name handwritten in and continued,

> you are being laid off due to lack of work. The company has no expectation that it will recall you. Your final day of work will be 3-27-19. Thank you for your time and service.

McGuffin told Armstrong that "they had plenty of people for the job, and that they had to lay me off. I was the last one hired and the first one to go, and there was no possibility of rehire."

McGuffin testified that that he told Armstrong, "nothing against him," but "[w]e didn't need his services because we had more guys on the job site than we had initially needed." McGuffin told Armstrong that he didn't know anything about the layoff until that morning. Tierson testified that McGuffin told him that Armstrong's layoff was "nothing about him, but because he was the last one hired, he would be the first one to go." McGuffin told Tierson that he told Armstrong that he was willing to be a reference for him if he went to look for other work. Tierson testified that he did not know why Armstrong was laid off. Castle testified that he heard Tierson say that he didn't "know why they laid him off, he needed more people as it was." Previously, in late February, Tierson had said they planned on hiring three or four more people.

Based on company records provided pursuant to subpoena, Armstrong was the only employee to the company issued a layoff notice since 2017. The Respondent's employee list (Jt. Exh. 14) shows two employees laid off for lack of work in February 2019. However, they are listed as reporting to "Virginia jobs" and they are the only two employees so designated. Every other employee reported from Bradley or Charleston, and none, except Armstrong was laid off. Company records also show that Armstrong was not the last hired. Armstrong was hired November 19, 2018. An employee listed as an HVAC Helper (the same position as Armstrong), Keven Keith, was hired December 17, 2018. Faubel was hired November 28, 2018, as an HVAC Helper. Armstrong worked for a period with Keith in a two-man crew at the Crossings. Keith was "new to the field" and Armstrong was "teaching him a lot of things as we went along." Keith remained employed by AH when Armstrong was laid off "with no possibility of rehire." Since Armstrong's layoff, AH has hired five HVAC Helper's (Armstrong's classification). Each of the new hires reported out of the Bradley office, while Armstrong had reported from Charleston. However, Dan and Daniel Akers testified that Bradley-assigned employees worked in the Charleston market, including the Crossings (Tr. 76, 623) where Armstrong primarily worked.

At the February 4 safety meeting, Dan Akers told employees that "they had never laid anyone off," and assured employees that "they didn't plan on ever laying anybody off." Moreover, Dan Akers testified at the hearing that it was AH's policy to bring back an employee laid off for lack of work if future work became available.

At the hearing, McGuffin testified that in the spring of 2019 several more experienced HVAC employees were reassigned to the Crossings from jobs that the Respondent was finishing up "in the Virginia market" and "a couple of other commercial projects." Employee Lehman and Tierson confirmed that some workers who had been assigned to work offsite came back and begin working at the Crossings in this time period.

There was also testimony from multiple witnesses that work was plentiful at the Crossings that spring. Marolf testified that the general contractor, Jarrett Construction, was "pushing us a lot harder to get work done" in April and May. Marolf rode into work with Tierson on a regular basis during this period and he testified that Tierson talked to him constantly—"every morning"—"about not having enough guys on site." Marolf testified that Tierson told him that "he kept asking for more and more people and they never give them to him, or they'd give him a guy for a day or two and then pull them right back out." Indeed, in May, a couple of weeks before Marolf left employment with AH, he received a group text from McGuffin announcing that employees should plan on staying at work until 5:30 from thereon, instead of leaving at the regular 4:30 quitting time. Castle testified that this extra hour a day continued for three or four weeks and employees were paid at overtime rates for it. Tierson testified that the overtime was "strictly voluntary," which McGuffin also stated in his testimony. In late May employees began working Saturdays in addition to their regular 5-days a week. At the hearing, Akers and McGuffin attributed this to the fact that equipment rented by Jarrett Construction for the Crossings site was idle and available to use on Saturdays. Castle testified that at the time Armstrong was laid off, "[o]ur workload never decreased. If anything, it increased on us because they was starting to put deadlines on us." Castle testified that on a couple of different occasions he heard Tierson say that "we had a lot work to be done and we needed more people." According to Castle, Armstrong's layoff occurred at a time "we was being pushed to get it done, and we was just being overwhelmed by the work at that time."

T. March 28—Castle Returns to Work

The Union offered for Castle to return to work on March 28, and he was brought back to work at the Crossings. Castle testified that when he came back from the strike he was limited to working with Steve Parrish and Steve Marolf. Previously, he had worked with everybody. For almost a month Tierson had him "stuck just wrapping duct."

U. May 28—Faubel Returns to Work and is Immediately Terminated and Threatened with a Prosecution for Misinstallation of Fire Dampers, Although that Problem had been Identified and Corrected 4 Months Earlier

Faubel remained out on strike until, the Union, on May 24, wrote AH's counsel indicating that Faubel was willing to unconditionally return to work. Faubel returned to work at the Crossings on Tuesday, May 28, the day after Memorial Day. He was instructed to meet outside the job trailer. When he arrived, Dan Akers was there with Tim McGuffin. After some small talk about weather, Akers handed Faubel a letter and said, "We will no longer need your services, and we'll see you in court." Faubel left with the letter. The letter, dated May 28, from Akers on AH letterhead stated:

> Mr. Faubel:
>
> This letter shall serve as formal notice that your employment with Appalachian Heating is terminated immediately. Appalachian recently discovered, and has verified through multiple witnesses and sources, that you are responsible for improper installation of numerous fire dampers at the Crossings. Im-

> proper installation of fire dampers presents a serious safety concern for our clients. You are not eligible for rehire or further employment with Appalachian. Please note that it is unclear whether your conduct may have violated West Virginia Law.
>
> Appalachian will cooperate fully with any criminal investigation or prosecution by the West Virginia State Fire Marshall, the State Police, or other law enforcement agency. The company is seeking legal advice and may pursue civil action to recover damages if it is determined by a law enforcement agency that your conduct was a willful act of industrial sabotage. Numerous witnesses have already provided statements indicating that SMART Local 33 officials have repeatedly asked them to engage in unlawful industrial sabotage which would result in serious public safety risks.

In his testimony Faubel denied any kind of sabotage or incorrect installation of fire dampers or other equipment. Castle also denied ever being told to sabotage work.

The evidence at the hearing about fire damper installation covered a couple of different situations. When Faubel first began working at the Crossroads in late November and through January 18, he was the only employee there with a state fire protection damper technician license, qualifying him to install the fire dampers in West Virginia. For this reason he did much, or most of the damper installation, though the evidence, while varying and contradictory, suggests that numerous others also installed fire dampers, at least until a fire marshal's visit in late December or early January, which—may or may not have put a stop to it.

During December, Faubel discovered that the wrong kind of fire dampers—vertical instead of horizontal—had been ordered and were in the process of being installed. Faubel brought it to Doughton's attention, and then damper installation stopped while AH ordered the correct horizontal dampers.

The new, correctly aligned dampers were received and in late December, right after Christmas, Faubel began installing the correct dampers on the fourth floor. The testimony indicates that other crews did too, undisputedly including Howard Backus and Brandon Armstrong who worked together on the second floor. According to Faubel, Hight and Paul Castle worked together at this time and installed dampers, as did Tierson working with an employee named Jimmy. (Hight claimed that he only installed dampers once he got a permit to do so, which was on February 4; Tierson claimed that he did not install dampers until he received his license on February 28.) In any event, the record shows that during this period AH began arranging for additional employees to obtain their fire licenses, a matter that, based on this record, appears to have been easy to arrange, more a matter of payment to the state than training.

Sometime in January, and no later than January 21, AH learned that some of the fire dampers had been installed upside down on the second and fourth floors. As discussed below, McGuffin suggested that AH learned this in early-to-mid January, Tierson suggested it was just after he took over as foreman on January 18. Tierson testified that 13 of 16 dampers on the fourth floor, where Faubel was working, were installed upside down and had to be switched or "flipped" before fire marshal would approve that floor. Tierson testified that the fourth-floor dampers were switched about a week or so after they were discovered, that is, in late January. Howard Backus assisted by Armstrong was installing on the second floor, and Tierson testified that approximately five of those dampers had to be "flipped" as well. All of the misinstalled dampers were exposed—no drywall had been put up around them—which made the reinstallation process simpler.

Although much was made of these incorrectly installed dampers at the hearing, there was little contemporaneous attention paid to the matter. No discipline was issued to anyone regarding the misinstallation (until Faubel's May 28 discharge). The entire subject and incident went unmentioned in Faubel's March 14 mostly positive employee evaluation, although the testimony from McGuffin and Tierson makes clear that AH knew about and corrected the misinstalled dampers long before the evaluation. Neither Backus nor Armstrong were ever disciplined for misinstalled dampers. In addition, there is evidence that fire dampers remained an ongoing problem. As noted, before the misinstalled dampers, the wrong kind of dampers were originally ordered in December. In addition, Faubel testified that in March when he returned to the Crossings from the vet clinic, he noticed a number of fire dampers installed incorrectly, using screws instead of brackets to hold them in place, which prevented the dampers from being removed with a breakaway connection. At the vet clinic, Faubel observed that the wrong size dampers for the duct being run had been installed, but the word from McGuffin was to "make them work."

II. ANALYSIS

The complaint cites a variety of incidents of threats, promises, interrogations, surveillance, maintenance of unlawful rules, and other matters, alleged to be independently in violation of Section 8(a)(1) of the Act. Further, the complaint alleges that the Employer unlawfully failed to promote Faubel, isolated and excluded employees in work settings, issued written warnings to Marolf, laid off Armstrong, and discharged Faubel, in violation of Section 8(a)(3) of the Act. I consider each alleged violation below, roughly, in chronological order.

A. The January 9 Interrogation of Faubel (Complaint ¶5(d))

This incident occurred on January 9, when Daniel Akers first spoke over the phone to Faubel about the possibility of Faubel replacing Doughton as foreman. After highly complimentary remarks to Faubel, Akers raised with Faubel that he was aware "of all this crap going on with the union guys coming into our shop" and that "that union guy solicited every single employee of ours both in Charleston and in Beckley."

After some criticism of the Union's ability to find work for employees, Akers directly asked Faubel, "have you been solicited by the union guy?" Faubel denied it, which was probably true, but not in the way that Akers would have taken it.

The General Counsel alleges that this constituted an unlawful interrogation. I agree.

In reaching this conclusion, I note that I agree with the Respondent that Akers' general negative musings about the Union in this call were not unlawful. And whether or not Akers' expressions of purported knowledge of the Union's solicitation of employees gave the impression of surveillance, that is neither

alleged nor argued by the General Counsel. Finally, I agree with the Respondent that Akers successfully resisted any temptation to advise unlawful action when Faubel asked Akers what Akers wanted him to do if he was contacted by the Union.

But still, the malignant core of the conversation remains. As the Respondent explains (R. Br. at 14), "[t]he gist of the conversation was to gauge Faubel's interest in assuming the foreman role." As part of that assessment, Akers wanted to know, and pointedly and nonrhetorically asked if Faubel had been solicited by the union organizer.

Of course, not every interrogation is unlawful. Whether the questioning constitutes an unlawful coercive interrogation must be considered under all the circumstances and there are no particular factors "to be mechanically applied in each case." *Rossmore House*, 269 NLRB 1176, 1178 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). The test is an objective one that does not rely on the subjective aspect of whether the employee was, in fact, intimidated. *Multi-Ad Services, Inc.*, 331 NLRB 1226, 1227–1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001).

In this instance, the reasonable tendency of the questioning to be coercive is clear. This was not casual conversation. It was not a general question, but one posed specifically to Faubel about his contacts with the Union. The question of whether Faubel had been in touch with the union organizer was not asked rhetorically, or unseriously—by all appearances, Akers—one of two highest ranking officials at AH—wanted to know. Faubel's union activity is not a legitimate subject for Akers' inquiries to employee.[11] This questioning was part of a process to consider Faubel for the promotion to foreman. Thus "his chance of being hired [for the new position] was implicated." *Facchina Construction Co.*, 343 NLRB 886, 886 (2004), enfd. 180 Fed.Appx. 178 (D.C. Cir. 2006); *Gilberton Coal Co.*, 291 NLRB 344, 348 (1988), enfd. mem. 888 F.2d 1381 (3d Cir. 1989) ("questions concerning union preference, in the context of job application interviews, are inherently coercive and unlawful"). Faubel was not an open union supporter—to the contrary he was a covert union supporter—and under Supreme Court precedent, indisputably an employee under the Act. *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 87 (1995). He felt compelled to answer untruthfully, another indicium of the reasonable tendency of the questioning to coerce. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1182 (2011) ("As to [this] factor, employee attempts to conceal union support weigh in favor of finding an interrogation unlawful"); *Evergreen America Corp.*, 348 NLRB 178, 208 (2006), enfd. 531 F.3d 321 (4th Cir. 2008). *Grass Valley Grocery Outlet,* 338 NLRB 877, 877 fn. 1 (2003), enfd. 121 Fed.Appx. 720 (9th Cir. 2005).[12]

I find that in all the circumstances, Akers' questioning to Faubel of whether he had been solicited by the union organizer is violative of the Act.[13]

B. The January 10 Interrogation of Employees at the Safety Meeting and Soliciting of Employee Grievances (Complaint ¶¶5(e) & (f))

As described above, during the January 10 safety meeting, Daniel Akers stood in front of his employees, and explained that there were "union guys coming here and leaving their business cards and stuff." He told the group:

> we've kind of traced it back to is an employee that left us, took our phone list and gave it to the union guys. So the union guys, is what I've heard, is calling everybody. Is that true? Has everybody got a call from the union guy? Because there's some in Beckley, that they've gotten a call and maybe he is just targeting specific people. And, you know, we're an at will employer, I don't want anybody to think ah . . . Obviously, you can do whatever you want to, um, but I wanted to let you guys know that we, we enjoy working with every one of you. And, if there is ever a problem with anything, I want you guys to know that you can call me at any time. Any time. No matter how big or small or minor, or whatever the issue is, please call me. Um, because, like with Mike, it got to the point where you know, the barn had already burnt to the ground and then Tim and Dan expected me to be able to fix it. And if somebody let me know a haystack was on fire in the

[11] *All Kind Quilting Inc.*, 266 NLRB 1186, 1195 (1983) (questioning employee about whether she had spoken to the union is coercive). See, *Chino Valley Medical Center*, 362 NLRB 283, 283 fn. 1 (2015) (employer violated 8(a)(1) by issuing subpoenas duces tecum to employees seeking communications between employees and the union and documents relating to the distribution and/or solicitation of union authorization cards), enfd. in relevant part 871 F.3d 767 (9th Cir. 2017); *Guess?*, Inc., 339 NLRB 432 (2003) (employer violated 8(a)(1) by asking an employee during a deposition in a workers' compensation case to reveal the identities of other employees who attended union meetings), enfd. 107 Fed.Appx. 576 (6th Cir. 2004).

[12] I note that the fact that Faubel was being considered for a supervisory position in no way lessens the unlawfulness of the questioning. It has been long settled that asking an internal applicant for a supervisory position to express his feelings about unions in the job interview is coercive. *NLRB v. Bell Aircraft Corp.*, 206 F.2d 235, 236–237 (2d Cir. 1953) ("At the time the discrimination took place he was clearly a protected employee, and his prospects for promotion were among the conditions of his employment. The Act protected him so long as he held a nonsupervisory position, and it is immaterial that the protection thereby afforded was calculated to enable him to obtain a position in which he would no longer be protected"), enfg. 101 NLRB 132 (1952); *United Exposition Service*, 300 NLRB 211, 215 (1990), enfd. 945 F.2d 1057 (8th Cir. 1991); *Premier Rubber Co.*, 272 NLRB 466, 471–472 (1984); *Bendix-Westinghouse Automotive Air Brake Co.*, 161 NLRB 789, 791–792 (1966).

[13] The Respondent contends that this allegation should be dismissed because, as alleged in the complaint (¶5(d)) the perpetrator is alleged to be Dan Akers, and not, as the evidence showed, his son Daniel Akers. The Board has described such an error as "inconsequential." *Print Fulfillment Services LLC*, 361 NLRB 1243, 1244 fn. 6 & 1252 (2014) ("We agree with the judge that the complaint's erroneous attribution of this statement to Morrison rather than Pearcy was inconsequential"). That is the case here. The date and nature of the pled allegation is consistent with the proven allegation. The Respondent had a full and fair opportunity to defend the allegation. Indeed, as the Employer's FRE 615 representative at the hearing, Daniel Akers was present for the evidence concerning this conversation, which consisted of testimony but also an audio recording of the interrogation. Daniel Akers testified at the hearing—twice. The issue was fully litigated and fully briefed by both parties. Albeit imprecisely pled, the issue was squarely within the subject matter of the complaint and fully litigated. *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

> corner, maybe then I could have done something but, you know, Mike had already accepted another offer, made his decision up, put in his 2-weeks' notice and was gone. You know, I can't fix that. But if anybody is unhappy with anything, if anybody's unhappy with, um, you know, a coworker, or whatever, you know I am here to help. So, you know, I just wanted to come down and say that so if anybody needs anything, or you know, wants, wants me to try to remedy any issues that's going on or if I can help fix anything at all, you know, please let me know. That's what I'm here for. I mean, I do, in the Bradley office I just do whatever it takes, you know, every day. I. . I dabble with the service department, I dabble with all the warranty claims, I dabble with HR, the payroll, I order every piece of equipment that's ever came into our shop, I do that. I sign every check that comes into the office. Um, so, you know, I do have a lot on my plate, but I'm willing to take more. I mean, I'll work as much as I have to, you know, keep everybody happy and, um, keep the big machine rolling. So, does anybody have anything that they want to talk about or . . .?

This provoked a long list of requests from employees for equipment and Akers made clear he was willing to satisfy the requests.

Complaint ¶5(f) contends that Akers unlawfully solicitated employee complaints and promised to remedy them impliedly if they refrained from organizational activity. This allegation is meritorious.

"Absent a previous practice of doing so . . . the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act" (internal quotations omitted). *Maple Grove Health Care Center*, 330 NLRB 775, 775 (2000) (citing, *Capitol EMI Music*, 311 NLRB 997 (1993), enfd. mem. 23 F.3d 399 (4th Cir. 1994)). "[I]t is not the solicitation of grievances itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances . . . that is unlawful." *Uarco, Inc.*, 216 NLRB 1, 2 (1974); *Maple Grove Health Care Center*, supra ("it is the promise, expressed or implied, to remedy the grievances that constitutes the essence of the violation"). "The solicitation of grievances alone is not unlawful, but it raises an inference that the employer is promising to remedy the grievances." *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004), enfd. 165 Fed. Appx. 435 (6th Cir. 2006); *Blue Grass Industries*, 287 NLRB 274, 274 fn. 4 (1987); *Uarco*, 216 at 2 (1974).

Here (and the text quoted above is sufficient but not the entirety of it, see GC Exhs. 9 & 9(b) generally, and see text, supra at sec. D of Findings of Fact), Akers' solicitation was made in conjunction with his statements that he knew the Union was contacting employees, and, specifically with regard to the Union, Akers told the employees "you can do whatever you want to" but added,

> if there is ever a problem with anything, I want you guys to know that you can call me at any time. Any time. No matter how big or small or minor, or whatever the issue is, please call me.

This is a solicitation of grievances. And Akers expressly let the employee know that he would fix their problems:

> you know I am here to help. So, you know, I just wanted to come down and say that so if anybody needs anything, or you know, wants, wants me to try to remedy any issues that's going on or if I can help fix anything at all, you know, please let me know. That's what I'm here for. . . . I do have a lot on my plate, but I'm willing to take more. I mean, I'll work as much as I have to, you know, keep everybody happy and, um, keep the big machine rolling.

This is a promise to remedy grievances brought to him, and as the full record of the meeting shows, he proceeded to do just that. Akers moved from a direct solicitation of grievances straight to a lengthy discussion on how these requests would be satisfied. Employees requested ladders—Akers said "What do you need John? Six or 8 footers?" John said, he needed both. Akers said "Two of each? Or do you need more?" John said he needed three. Akers said, "So, three 6 and three 8s?" Akers asked if the employee could pick them up today, telling the employee "I'll order them before . . . you leave." Another employee requested trash cans. Akers asked if they had room in their trucks to carry them. Employees asked for saws and grinders. Akers said, "Ok, well, I'll get on that order right now," and complained that neither Doughton nor McGuffin had ever told him employees needed these items. He said, "just let me know and I'll get it ordered." Screws. Oil changes for vehicles. And more. Akers let employees know that their requests would be granted.

This is all an express solicitation of grievances, express promises to remedy them, in the context of the employer's express desire to ward off the employees' selection of union representation. It is violative of the Act, as alleged.[14]

In addition, the General Counsel contends (complaint¶5(e)) that the following portion of Akers' statement is an unlawful interrogation:

> So the union guys, is what I've heard, is calling everybody. Is that true? Has everybody got a call from the union guy?

I find that under the circumstances this questioning does not constitute an unlawful interrogation. As noted above, not every interrogation is unlawful. The matter must be considered under all the circumstances. *Rossmore House*, supra. In this case, the "questioning"—and I am particularly guided here by my impression of the audio recording (GC Exh. 9) more than the mere transcript (GC Exh. 9(b))—was rhetorical. As the Respondent contends (R. Br. at 17) "[i]t is presented as a rhetorical question, or perhaps a foregone conclusion." Akers did not wait for, appear to expect, or get an answer. The comments were not addressed to any specific employee. The record does not speak to whether there were nods yes or no in answer to his questions but there were no audible responses. And Akers does not break his monologue to receive responses. To the contrary he moves along segueing into his solicitation of grievances, as discussed above. I do not find that Akers' was seeking information when

[14] The Respondent argues, as it did with regard to complaint ¶5(d), discussed supra, that this allegation should be dismissed because the complaint alleges that it was Dan and not, as found, Daniel Akers that committed the violation attributable to the Respondent. I reject that defense for the same reasons it was rejected as to ¶5(d). See supra.

he asked these "questions." Given this, I find that in this instance Akers' "questioning" is more of an announcement to employees that he knows the Union is on the scene and reaching out to employees. To the extent this might constitute an unlawful impression of surveillance, it is not argued, and I do not reach that issue. But—putting aside any implications related to surveillance—I do not find that as an interrogation of employees' union activity this is unlawful conduct. I dismiss complaint paragraph 5(e).

C. The January 14 Interrogation of Faubel About His Union Membership (Complaint ¶5(a))

As described above, Dan Akers called Faubel on January 14, after he had spoken to Faubel's reference, McDougal, a former employer in Ohio. The reference was positive, but Akers was concerned about and raised the fact that McDougal—or part of his business—was unionized. Akers told Faubel that "It doesn't make a difference to me whether it's union or not, but" that he asked McDougal about it. McDougal said it was "a split shop," one side union and one side nonunion. Akers continued:

> Now, so I guess my question to you is—and, again, you know, it's a free enterprise. You can do whatever you want. But I'm just curious now because of these letters and things that's been posted on some of our vehicles, are you a member of the union here?
>
> Faubel denied it. Akers responded:
>
> Okay. Well, then I don't know where all this union stuff's coming from. We've never had any problem with the union and I was—but that just bothered—well, I'm just curious about that. I was, Well, I'm just going to ask Eric, because I trust you. It's just like—and you'll find out with me, Eric, I'll tell you exactly what I think and I want you to tell me exactly what you think. I think we're going to be a good team, and so—so I want you to carry on as our crew leader down there.

Akers went on to make clear that Faubel would be receiving a pay raise and should take the week to consider whether he wanted the promotion. He told Faubel, "We need superintendents, leaders, men that can make decisions. And you're my man."

The General Counsel contends that this inquiry into Faubel's union membership was an unlawful interrogation. I agree. It is unlawful for the same reasons Daniel Akers' January 10, very similar, inquiry was unlawful. The questioning would have a reasonable tendency to be coercive. It was specifically directed to Faubel, by the owner of the company and a top ranking official. The matter was raised in an effort to uncover who was involved in and part of the union campaign that the Akers were facing. The questioning came as part of the discussion of the reference and promotion process, and the interrogation was directed at someone who was not an open union supporter, and who felt compelled to conceal his union membership and not answer the question honestly. As with Daniel Akers' January 10 interrogation, this interrogation of union membership by Dan Akers was violative of Section 8(a)(1).[15]

[15]I note that the fact that Faubel was a union salt, and likely not intimidated by the questioning is irrelevant. The test is an objective one that does not rely on the subjective aspect of whether the employee was, in fact, intimidated. *Multi-Ad Services, Inc.*, 331 NLRB 1226, 1227–1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). The questioning would have a reasonable tendency to coerce an employee.

D. Failing to Promote and then Isolating Faubel (Complaint ¶¶9(a) & (b))

The General Counsel contends that AH's failure to carry through with the anticipated promotion of Faubel to foreman was motivated by AH's antiunion animus, and therefore, unlawful. Instead of promoting Faubel to foreman at the Crossings, on January 21, AH sent Faubel to work at the vet clinic, a smaller job with only two other employees at the time. The General Counsel also alleges that the reassignment to the vet clinic was discriminatorily motivated.

The Board's Supreme Court-approved standard for cases turning on employer motivation is found in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (approving Wright Line analysis).

In *Wright Line*, the Board determined that the General Counsel carries his burden by persuading by a preponderance of the evidence that employee protected conduct was a substantial or motivating factor (in whole or in part) for the employer's adverse employment action. Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Brink's, Inc.*, 360 NLRB 1206, 1206 fn. 3 (2014); *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. 184 Fed. Appx. 476 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). Indeed, "[m]ore often than not, the focus in litigation under this test is whether circumstantial evidence of employer animus is 'sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision.'" *Tschiggfrie Properties*, 368 NLRB No. 120, slip op. at 1 (2019) (quoting *Wright Line*, supra at 1089); see also *Tschiggfrie Properties*, supra at slip op. at 8 ("we emphasize that we do not hold today that the General Counsel must produce *direct* evidence of animus against an alleged discriminatee's union or other protected activity to satisfy his initial burden under *Wright Line*" (Board's emphasis).

When the General Counsel satisfies his initial *Wright Line* burden, such showing proves a violation of the Act subject to the following affirmative defense: the employer, even if it fails to meet or neutralize the General Counsel's showing of unlawful motivation, can avoid the finding that it violated the Act by "demonstrat[ing] that the same action would have taken place in the absence of the protected conduct." *Wright Line*, supra at 1089. In order for the employer to meet this standard, it is not sufficient to produce a legitimate basis for the adverse employment action or merely to show that legitimate reasons factored into its decision. *T. Steele Construction, Inc.*, 348 NLRB No. 79, slip op. at 17 (2006) (not reported in Board volume). Rather, it "must persuade that the action would have taken place absent protected conduct by a preponderance of the evidence." *Weldun Int'l*, 321 NLRB 733 (1996) (internal quotations omitted), enfd. in relevant part 165 F.3d 28 (6th Cir.

1998). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (approving *Wright Line* and rejecting claim that employer rebuts General Counsel's case by demonstration of a legitimate basis for the adverse employment action). In such cases, the Board will not weigh the relative quantity or force of the unlawful motive compared to the lawful motive: the violation is established if the employer fails to prove it would have taken the action in the absence of protected activity. *Wright Line*, supra at 1089 fn. 14.

The framework established by the Board in *Wright Line* is inherently a causation test. See *Wright Line*, supra, 251 NLRB at 1089. Common elements most often used to prove the General Counsel's causation burden are (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) antiunion animus, or animus against protected activity, on the part of the employer.

In terms of the alleged discriminatory failure to promote Faubel, as of January 14, Faubel was clearly on his way to being named foreman. Indeed, during his conversation with Faubel on January 14, Dan Akers told Faubel and McGuffin, "[l]et's start the transition. Eric's in charge." Akers promised to raise Faubel's pay immediately to $22 an hour with a raise within 30–60 days if his references were positive. Something happened, however. And by Friday at about noon, Faubel was out as foreman. Applying *Wright Line*, the issue is whether antiunion animus was a motivating factor in Faubel losing the promotion.[16]

In terms *Wright Line*, as the Respondent recognizes, it is obvious that Faubel, who was a union salt, was engaging in union activity, and this, obviously satisfies the first prong of the General Counsel's initial *Wright Line* burden.

Moreover, were the second prong satisfied, there would be ample animus to support the third prong of *Wright Line* in this case. Although not required under *Wright Line,* the animus demonstrated here includes animus directed towards Faubel or occurring in his presence. As set forth above, he was unlawfully interrogated about his union activities by Daniel Akers on January 9. He was part of the group of employees at the January 10 safety meeting from whom employee complaints were unlawfully solicited and promises made to remedy them if they refrained from organizational activity. Faubel was unlawfully interrogated once more, on January 14, by Dan Akers, who showed real interest in the fact that Faubel's reference had a union shop and followed up by quizzing Faubel on whether he had anything to do with the union activity that AH was experiencing and whether he was a union member "here." Moreover, these interrogations were set in a context where Daniel Akers was very aware of repeated videos being posted from the Union focusing on AH, the presence of a union organizer, and the belief that the Union had an employee list and was actively contacting employees. Clearly, the Akers' multiple incidents of unlawful conduct—particularly when set in the context of their concern with the union activity at their facility—would satisfy the third prong of *Wright Line* and demonstrate that protected activity was a substantial or motivating factor in its conduct toward Faubel.

I hedge and say "would" satisfy, because there is still the matter of the second prong of *Wright Line*. This prong, involving evidence of the employer's knowledge that Faubel was engaged in protected activity, requires more discussion.

In terms of direct evidence, it is undisputed that the Respondent became aware of Faubel's union activity on January 30, when Faubel posted and distributed the video declaring to employees and management that he was "a union organizer with Local 33." This, however, was nearly two weeks after the Akers' had denied Faubel the foreman promotion. In addition, Dan Akers learned that Faubel had attempted to start a union at a past employer in Parkersburg, Groggs Heating and Air Conditioning owned by Tim Hannon. Akers asserted that he learned of this after he had "decided not to give Eric the job and gave it to Mr. Tierson," and that he spoke with Hannon "almost to the day then [that Faubel] came out with the video announcing that he was a union organizer." Akers estimated that this happened "maybe the last part of January" and asserted that "I did not know Mr. Faubel was a union organizer until he did the video. And when he did the video, then that's the time we got the background check, and then we found—then that's when I found Mr. Groggs to confirm that." While it is true, as the Union contends, that Akers' testimony on this point was offered with an air of uncertainty about the dates—his testimony does not establish that AH had knowledge of Faubel's union activity at the time he was denied the foreman position.[17]

Faubel, for his part, testified that there was "talk" of his union activity "amongst the men" but he also testified that until the January 30 video distribution, he kept his involvement with the Union "secret" and he "didn't speak with any of the employees" about it until the video came out. Faubel agreed that, as of January 18, he has no evidence that the Akers or McGuffin knew that he was in the Union.

On brief, the General Counsel breezes by this point about employer knowledge, asserting that AH discovered Faubel's union activity on or about January 14 (GC Br. at 42), but fails to identify evidence for this claim.

Of course, under *Wright Line*, it is well established that an employer's knowledge of employees' union activities—like the

[16] Both at the hearing, and on brief, there is some difference of opinion between the parties over whether Faubel was denied the foreman promotion or had been given the foreman job and had it taken away. I do not see the distinction as decisive. Faubel was not named foreman on January 14, but was essentially promised it, and promised a raise for it (which never came through) and put in charge of work at the Crossings. The important (and undisputed) thing is that AH had a change of heart about Faubel being foreman. The motive for that change of heart is at issue, not whether he was briefly made foreman and removed or was simply denied the position. Formally, however, I find that Faubel never officially assumed the foreman position, and I consider the allegation properly framed as whether Faubel was unlawfully denied the foreman position.

[17] This not an instance where "the demeanor of a witness" satisfies me "not only that the witness' testimony is not true, but that the truth is the opposite of his story." *NLRB v. Walton Mfg.*, 369 NLRB 404, 408 (1962). In other words, Akers' testimony that he learned of Faubel's prior union organizing in Parkersburg *after* he rejected Faubel as a foreman does not lead me to believe that he is hiding that he learned of Faubel's union organizing *before* he rejected him for the foreman position.

proof of unlawful motivation—may be inferred from circumstantial evidence based on the record as a whole. *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 983 fn. 36 (2007). ("The General Counsel need not prove knowledge by direct evidence; knowledge may be reasonably inferred or imputed"), enfd. in relevant part 570 F.3d 354 (D.C. Cir. 2009); *BMD Sportswear Corp.*, 283 NLRB 142 (1987), enfd. 847 F.2d 835 (2d Cir. 1988); *Montgomery Ward & Co.*, 316 NLRB 1248, 1255 (1995) (knowledge of union activity inferred in part based on "incredible reasons" given for discharge), enfd. mem. 97 F.3d 1448 (4th Cir. 1996); *Metro Networks, Inc.*, 336 NLRB 63 (2001) (Board can infer knowledge from the timing of the discharge); *Medtech Security, Inc.*, 329 NLRB 926, 929–930 (1999).

Moreover, to satisfy the "knowledge" element of the *Wright Line* burden, it is enough to show that the Respondent suspected or believed that the employee engaged in protected conduct—it is not necessary to prove that the Respondent knew of the protected conduct. See, e.g., *Kajima Engineering & Construction*, 331 NLRB 1604, 1604 (2000) (proof that employer suspected that employee engaged in union activity satisfies *Wright Line's* knowledge requirement).

In its brief, the Union argues (CP Br. at 3–5) that there is sufficient evidence to infer AH's knowledge of Faubel's union affiliation. To my mind, this a close call. The argument that there is sufficient circumstantial evidence for inferring employer knowledge—or at least, adequate employer suspicion—is not without force. For one, Faubel's promotion was being considered at a time that AH indisputably knew that some employees were engaged in union activity and both Daniel and Dan Akers exhibited significant interest in learning who they were—including interrogating Faubel about it, twice. However, both interrogations (described and found unlawful, above) were asked as part of the discussions regarding whether he wanted to be promoted. While unlawful, I detect no active suspicion of Faubel in the questioning. Indeed, I think it is safe to say that, given their animus, if either of the Akers suspected Faubel of being with the Union they would not have been considering him for foreman. Faubel denied to Akers that he had any union ties.[18]

Perhaps most significantly, inferring employer knowledge or suspicion of Faubel's union activity provides explanatory power for the abrupt about-face that the Respondent engaged in with regard to the promotion of Faubel. AH went from practically assuring him the position as of January 14, giving him foreman responsibilities, and effusively complimenting his talents, to suddenly dropping him from contention on January 18.

Not much of an explanation that would account for this change of heart was forthcoming from the Respondent. McGuffin's claim that Faubel was "totally out of control" at the January 18 trailer meeting has been discredited. Akers offered no testimonial explanation at all. His explanation to Faubel for the change—through text communications that weekend—was not particularly compelling, although it was barely plausible: in phone texts to Faubel the weekend after the January 18 trailer meeting he said he did not like Faubel's attitude about the problems with the sign-in app on his phone and did not like that Faubel told him that he was going to take Friday afternoon off. Akers wrote Faubel that "I have decided these are not leadership qualities I want for the Crossing. I also need your help on the Vet Clinic." Further, as the Respondent stresses, Faubel's response to this announcement from Akers was to "apologize for overreacting," and an admission that "I know better and should have handled things differently." Faubel wrote that "I hope in the near future we can try again." Obviously, Faubel's response provides some corroboration that there was a basis for Akers' dissatisfaction with Faubel's behavior.

While Respondent's explanation for not promoting Faubel is not elaborate or well explained on the record, it is not the Respondent's job—at least when considering the General Counsel's initial *Wright Line* burden—to prove why it did not promote Faubel, or prove that it did not know of his union activity. These are the General Counsel's burdens. Even the claim that that the Respondent's explanation was a pretext, still remains the General Counsel's, not the Respondent's burden. See, e.g., *New York Telephone*, 300 NLRB 894, 896 (1990), enfd. mem. 940 F.2d 648 (2d Cir. 1991). Thus, while, Akers' explanation for the change of course was not particularly compelling, I do not find it incredible, obviously unbelievable, or demonstrably pretextual. Had the General Counsel met his initial *Wright Line* burden, I think it unlikely that Akers' explanation would rebut the General Counsel's showing. But that is not the test. The question is whether the General Counsel's initial burden, specifically its burden to show employer knowledge of Faubel's union activity, can be met based on the explanation offered by Akers. I do not believe it can.

In many ways, it is tempting to suspect that the most likely explanation for Dan Akers' about-face on Faubel's promotion is—contrary to his testimony, which as the Union points out, was provided with a measure of uncertain demeanor—that he learned between January 14 and 18, and not "the last part of January," that Faubel had attempted to organize a union when he worked at Groggs Heating and Air Conditioning. Alternatively, as the Akers had twice asked Faubel if he had contact with the Union, his denials notwithstanding they may have become suspicious, or been informed by someone unknown of Faubel's union connection, and this would account for the sudden change in Faubel's prospects. However, I think the evidence falls short of supporting such a conclusion, even circumstantially.

An instructive comparison is found in the Board's decision in *Montgomery Ward & Co.*, 316 NLRB 1248 (1995), a case where the Board found, based on circumstance and inference, that the employer had knowledge of the discharged employees' union activity. In *Montgomery Ward*, the judge dismissed allegations of discriminatory discharge, despite finding that two discharged employees engaged in union activity shortly before being discharged, and despite finding that the employer other-

[18] I note that the Union contends (CP Br. at 4), that when Akers did a Google search on Faubel's reference, McDougal—through which Akers saw that McDougal's company was listed as a union contractor—it is likely that Akers did a Google search of Faubel. However, there is no evidence that a search of Faubel in Google yields evidence of his union affiliations.

wise demonstrated strong antiunion animus. The judge dismissed the allegations on the grounds that there was no proof of employer knowledge. The Board reversed, finding that the "confluence of circumstances" supported an inference of employer knowledge of the fired employees' union activity. These circumstances included the "incredible" rationale offered by the employer for firing the employees; the fact that the firing came promptly after both employees engaged in union activities at work, in areas the employer "can and does, monitor" with a closed-circuit television system, and which involved talking with other employees about the union and distributing authorization cards and urging employees to sign the cards, all within these camera-monitored areas. The discharged employees ceased their union activity at work only after they told the union that "they felt that they were being watched" by supervisors.

The circumstances relied upon by the Board to infer employer knowledge in *Montgomery Ward* are significantly different than those here. Here, there is no such circumstantial evidence making it likely that AH observed Faubel engaged in union activity. Indeed, Faubel was not engaging in any union activity at work that could be observed or reported at the time he was denied the promotion. He kept his union affiliation secret at work until later in the month.

Moreover, the timing of the failure to promote is not significant. Faubel had been working at AH—as a salt—for a week shy of two months at the time he was denied the promotion on January 18.

While he was interrogated about his union activity just a few days before being denied the promotion, this was part of the Respondent's interview with him for the position. I do not want this to be misconstrued: the interrogation was unlawful and I have so found. But neither its timing nor the fact that it occurred suggests that the Respondent knew or suspected that Faubel was a union salt—to the contrary, it seems clear that as of January 14, AH did not know, otherwise he surely would not have been the Akers' fulsomely praised candidate for foreman. Finally, while the Respondent's explanation for deciding not to promote Faubel is not very compelling, it is not "incredible." The position was an important one for the Akers. The foreman position at the Crossings—AH's biggest project—was one of great responsibility and trust, and the record demonstrates that the Akers moved slowly and deliberately to fill it, repeatedly engaging in multiple discussions with Faubel, unrelated to union issues, as to what it would entail and to assess his interest in it. While the Akers did not provide a particularly compelling reason for deciding not to promote Faubel, as adverse actions go this is less suspicious than a discharge. The promotion to a trusted position may be influenced by a variety of subtle factors.

Although it is a close case, and granting that the Respondent's about-face with regard to Faubel is suspicious—particularly given that we know he was a salt and given the Respondent's animus—I find that the employer's knowledge of Faubel's union status and activity was unproven as of January 18, and into the next week, January 21 when he was reassigned to the vet clinic. I am aware that this is an instance where there is more than a little possibility that a fuller airing of facts might have led to a different result. But in my view, any intuition or suspicion of employer knowledge of Faubel's union sympathies at this time is just that, and no more. I find that there is not a legitimately-demonstrated inference, and I dismiss the allegation of unlawful failure to promote on grounds that it is unproven that the Respondent was aware of Faubel's union sympathies or activities when it denied him the promotion to foreman.[19]

That weekend, after informing Faubel that he would not be the foreman, Akers told Faubel to report to a different project—the vet clinic. Previously Faubel had worked at the Crossings. The vet clinic involved similar work, but was a smaller job and involved far fewer employees.

The General Counsel and the Union allege that Faubel was assigned to the vet clinic instead of the Crossings as a method of isolating him because of his union activities. This allegation faces the same problem as the allegation that he was unlawfully denied the promotion. That is, the Employer's knowledge of Faubel's union status at this time is speculative and unproven. For the reasons stated above, I will recommend dismissal of this allegation.

E. Giving Employees Documents Stating they are "At Will" Employees as a Threat of Discharge (Complaint ¶¶5(b) & (6)(a))

The General Counsel contends that the Respondent violated the Act by distributing its employee handbooks to certain employees, beginning in late January 2019, and requiring employees to sign the acknowledgement of receipt that emphasized that the employees were "at will" employees.[20]

The General Counsel's brief suggests that this was done in retaliation for the union campaign, or, at least, as part of the Respondent's anti-union campaign. The General Counsel also suggests, wrongly, that the handbooks were provided only to employees working with Faubel. In sum, the General Counsel alleges that the timing of the distribution, the "at-will" language of the handbook, and the more general hostility to union activity otherwise shown, renders the distribution of the handbooks an unlawful threat of discharge.

I recommend dismissal of this allegation. In the first place, I read the record differently than the General Counsel. The evi-

[19] I note that this is not a case where proof of the employer's knowledge (or suspicion) of Faubel's union activity is unnecessary to the General Counsel's case. For instance, this is not a case where the General Counsel alleges, or the evidence suggests, that adverse action was taken against Faubel as a way of retaliating against an employee for the union activity of others. See, e.g., *Napleton Cadillac of Libertyville,* 367 NLRB No. 6, slip op. at 14 (2018) ("it is well-settled that the General Counsel need not prove that . . . the Respondent was aware of each discriminatee's union support, where an employer takes adverse action against employees, regardless of their individual sentiments toward union representation in order to punish the employees as a group to discourage union activity") (internal quotations omitted).

[20] I note that the General Counsel's "heading" in its brief (GC Br. at 44) suggests that the Respondent violated by the Act by "maintaining its at-will policy." This is not pled. Nor is it argued, as the General Counsel's argument on brief is premised on the timing of the distribution of the handbooks with the "at-will" language. Given that it is not pled or argued, I do not reach any contention that the mere maintenance of the "at-will" handbook provision violates the Act.

dence is that the employee handbooks, which were the same handbooks that had been in effect since 2014, were intended to be provided to employees when they began working for AH. This had not happened with some recent employees, a matter the Respondent attributed to the fact that the more methodical Daniel Akers was not present when some of the newer employees were hired in the recently opened Charleston office.

I will assume without deciding that the realization that the Union had its sights on AH prompted Akers to review his "checklist" of documents to be provided to new employees (such as handbooks, I-9 forms, etc.) and to follow-through in instances where those details had been ignored. But I see no violation of the Act in this.[21]

Akers made sure that handbooks were provided to those who did not receive them. The fact that there is evidence that Akers missed a couple and failed to provide handbooks to two employees (Marolf and Keith) who never received them shows nothing other than that Akers missed a couple. The employees who received handbooks that spring included union activists Faubel and Armstrong—who had not received handbooks when hired—but also included office assistants (Allen and Reece), employees Kilgore, Dooley, and Flint, some of whom were newly hired (Allen, Dooley, and Flint) some of whom were not (Reece, Kilgore) but none of whom—by any evidence—had anything to do with the Union. In addition, Paul Castle signed for a handbook on January 25. He had been hired in January of 2018. But there is no evidence that the Respondent had notice of Castle's union activity on January 25. Indeed, the General Counsel affirmatively contends (GC Br. at 28) that the Respondent did not have notice of Castle's union activity until March 18. The handbooks were signed for by employees reporting to Bradley (Allen, Dooley, Flint, Reece) and Charleston (Armstrong, Castle, Faubel, Kilgore).

In short, there is no pattern of retaliation or discrimination to be found in the fact that the Respondent returned to its practice of providing handbooks to new employees and provided them to recent hires to whom it had failed to provide handbooks upon their hiring. There is no claim by the General Counsel that the mere maintenance of "at will" language, by itself violates the Act or misstates the situation. Finally, I note that the General Counsel does not cite a single case in support of its claim that AH violated the Act by distributing the handbooks and having employees sign for them. It is not self-evidently a violation. I dismiss.[22]

[21] It might be different if the union campaign had led Akers' to seek the acknowledgements and employees' failure to provide them led to discipline—but that is not this case.

[22] I agree with the Respondent that the facts here are distinguishable from those in a case like *Belle of Sioux City*, 333 NLRB 98, 106 (2001), where the Board found that a supervisor violated the Act when, after he unlawfully demanded to know the names of coworkers with whom an employee had discussed a holiday scheduling dispute, approached one of the named coworkers and screamed at her asking if she knew what an at will employee was, and told her that an at will employee meant that he had the right to fire someone and didn't have to have any reason" and that "I want you to know that I have the right—an at will employee means that I have the right to fire you any time I want and I don't have to have a reason. Do you understand that?" Id. The Board found this to be a threat of discharge. See also, *General Fabrications Corp.*, 328 NLRB 1114, 1119 (1999) (unlawful threat of discharge where supervisor gave speech that he "will not succumb to threats from anybody," that was found to be reference to threat of unionization and in that speech told employees that "[t]his is what you call an at will employment. That at will employment is that you can leave at any time, and we can dismiss you at any time . . . . Any future orders will not be built [in this plant]"), enfd. 222 F.3d 218 (6th Cir. 2000). However, in addition to the obvious distinction between the screaming about the right to fire and, as here, the prosaic act of having employees acknowledge receipt of an employee handbook that includes "at-will" language, in *Belle of Sioux City* the Board found that there was no apparent legitimate reason for the employer's exposition on the meaning of "at will" employment. By contrast, AH"s provision of an employee handbook to employees and the request that they acknowledge receipt would not reasonably tend to appear to employees as a threat or coercion but rather as a matter of personnel administration, given that the employees had yet to receive the handbook that, per the employer's practice, they should have received upon commencement of employment.

F. Maintenance of Overbroad Confidentiality and Solicitation and/or Distribution Rules (Complaint ¶¶8(a), (b), & (d))

The employee handbooks distributed in January were the same handbooks in effect at AH since 2014. They included a confidentiality rule that states, in relevant part:

> Idle gossip or dissemination of confidential information within the company, such as personal information, financial information, etc. will subject the responsible employee to disciplinary action or possible termination.

The employee handbooks also contain a solicitation and/or distribution rule that states in relevant part:

> Solicitation and/or distributions, as well as gambling are prohibited on company property.

The General Counsel alleges that the maintenance of each of these rules violates the Act based on the foregoing language.

The confidentiality rule subjects employees to disciplinary action, up to and including "possible termination" for "dissemination of confidential information within the company." Examples of "confidential information" include "personal information, and "financial information," and other such matters ("etc.").

This rule is unlawful as stated. While facially neutral, reasonably interpreted, the rule would prohibit Section 7 activity. *Boeing Co.*, 365 NLRB No. 154, slip op. at 3 (2017). A reasonable employee aware of and trying to abide by this rule would be likely—indeed, unlikely not to—believe this rule prohibited the dissemination of information critical to Section 7 activity, such as his or her own or other employees' wages and benefits. Indeed, an individual employee's wages and benefits is the most likely information an employee would reasonably consider to be both "personal" and "financial" and therefore, squarely prohibited from dissemination by this rule.

Contrary to the contention of the Respondent (R. Br. at 28), the fact that the rule only prohibits dissemination of such information "within the company" does not save the rule. Indeed, the focus on prohibiting dissemination "within the company" underscores that it is the sharing of information *between employees* that targeted by the rule, and that, of course is al-

ways a central concern of the Act. That the rule does not prohibit dissemination of information to third parties is no saving grace where, as here, the rule prohibits exchange of information between employees and where that prohibited exchange would reasonably be interpreted as prohibiting the sharing wage and other employee information.

Note, nothing in the rule hints or suggests that the rule is directed toward proprietary company information, financial information that is limited to company investment, pricing information, or other "business"-type information marginal to Section 7 activity. This was the case in *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 4 (2019), where the Board found that,

> [t]he other categories of information prohibited from disclosure [and listed in the confidentiality rule as examples of confidential and proprietary information], such as 'accounting records, work product, production processes, business operations, computer software, computer technology, marketing and development operations, to name a few'—further confirm that the portion of the Confidentiality rule at issue only applies to the Respondent's own nonpublic, proprietary records.

Here, by contrast, the rule's examples of confidential information subject to the prohibition on dissemination are only "personal information, financial information, etc." This rule implicitly, but reasonably interpreted would be understood to prohibit employees from disseminating wage and benefit information among themselves. No employer interest justifies such a rule. None is offered, and none is apparent or deducible. As the Board has recently explained in *LA Specialty Produce*, supra, slip op at 3 fn. 4:

> a facially neutral rule that an objectively reasonable employee would interpret as prohibiting discussion of wages with coworkers would be unlawful and fit within Boeing Category 3 because the potential impact on the exercise of a core Sec. 7 right outweighs any possible employer interest, whether general for all employers or specific to the employer involved, in maintaining such a rule.[23]

I note that this rule is broader than a rule merely prohibiting discussion of wages with co-workers. This rule would reasonably be interpreted as prohibiting "dissemination" of such information—an act that includes but is not limited to the transmission and sharing of the information in oral discussions. I find that the Respondent violated the Act through the maintenance of this rule.[24]

The General Counsel also alleges that the Respondent's rule prohibiting "[s]olicitation and/or distributions as well as gambling on company property" is unlawful. No justification for this rule is offered. To the contrary, the Respondent states that it "proffers no defense to this allegation" and essentially concedes that this flat prohibition on all solicitation and distribution at all times on its property is unlawful. (R. Br. at 29.) And it is. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803–804 fn. 10 (1945) (quoting *Peyton Packing Co.*, 49 NLRB 828, 843–844 (1943)); *Our Way, Inc.*, 268 NLRB 394 (1983); *Stoddard-Quirk Mfg.*, 138 NLRB 615 (1962); *MTD Products, Inc.*, 310 NLRB 733 (1993). I find a violation.[25]

Although these rules appear to have been maintained at all times within the 10(b) period, the violation is alleged, since about January 28, 2019. Accordingly, I will limit my finding of a violation to that date.

G. Excluding Faubel from the February 4 Meeting (Complaint ¶9(c))

The General Counsel contends that AH's exclusion of Faubel from the February 4 safety meeting violated Section 8(a)(3) of the Act and, derivatively, Section 8(a)(1) of the Act.[26]

The February 4 safety meetings (one was conducted at Bradley and in Charleston), were devoted to routine safety and business matters, but also included presentations about the company and its history, and discussion of AH's opposition to union representation. The Respondent's attorneys were present and participated and made clear AH's opposition to unionization, in

[23] I note that in *LA Specialty Produce Co.*, 368 NLRB No. 93 at slip op. at 3, fn. 4, the Board made clear that *Boeing* is not to be understood—some "misleading" statements not withstanding—as intending that rules designated unlawful under Category 3 are those that *expressly* prohibit protected activity such as the discussion of wages. As the Board explained, a rule expressly prohibiting activity recognized to be protected under the Act "is not facially neutral and would be found unlawful under longstanding precedent predating *Boeing* and *Lutheran Heritage*." Id. *Boeing*, and its categories are concerned with rules, such as that in this case, that are facially neutral, and in such cases the issue is whether an objectively reasonable employee would interpret the rule as prohibiting Sec. 7 activity, and if so, whether the adverse impact on NLRA rights is outweighed by the rule's justifications.

[24] However, I do not find that the prohibition of "idle gossip" to be unlawful or add to the unlawful character of the rule. Previously, in finding lawful a rule that proscribed "harmful gossip," the Board cited the dictionary definition of gossip found in Merriam-Webster's Collegiate Dictionary (10th ed. 1999): a "rumor or report of an intimate nature" or "chatty talk." *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 861 (2011), review granted on other grounds, 805 F.3d 309 (D.C. Cir. 2015). In *Hyundai*, the Board found, applying *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), that the rule against "harmful gossip" would not reasonably be construed by an employee as prohibiting Sec. 7 activity. The outcome is no different under the Board's current rule for analyzing the lawfulness of rules announced in *Boeing Co.*, 365 NLRB No. 154 (2017). Reasonably interpreted, a rule against "gossip" does not prohibit or interfere with the exercise of NLRA rights. I note that the yoking of "idle" to "gossip"—the rule prohibits "idle gossip"—does not seriously impact the analysis. Idle in this context means "lacking worth or basis" (*Merriam-Webster.com.* https://www.merriam-webster.com (January 9, 2020)). While I am sensitive to the concern that employer rules must not have a tendency to inhibit activity and speech protected by the Act—whether that speech is idle or vital, true or untrue—the prohibition on "gossip" (and only idle gossip at that) is too far removed from the important concerns of Sec. 7 to render the rule unlawful.

[25] However, I do not find that the prohibition on gambling violates the Act.

[26] As any conduct found to be a violation of Sec. 8(a)(3) would discourage employees' Sec. 7 rights, a violation of Sec. 8(a)(3) is also a derivative violation of Sec. 8(a)(1). *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 fn. 4 (1983); *Chinese Daily News*, 346 NLRB 906, 933 (2006), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

no uncertain terms.

Faubel, alone among employees, as far as the record reflects, was not told of or invited to the meetings. This was after he had notified employees and management through the video he posted and distributed that he was a union organizer. Dan Akers admitted that he "would think" one of the reasons that Faubel was not invited to the February 4 meeting was that he had put out the video announcing himself as a union organizer. However, Akers suggested that he had not been involved in the decision—meaning that Daniel Akers had handled invitations to the February 4 meeting. Daniel Akers admitted he did not notify Faubel of the meeting but did not address his motives for that.

I believe that given the AH's demonstrated animus to union organizing, its knowledge as of this date that Faubel was integral to the union campaign, and Dan Akers near admission that Faubel was not invited to the meeting because of his announcement that he was a union organizer, the General Counsel has easily met its burden to show that Faubel's union activity was a motivating factor in the failure to invite Faubel to the meeting. Indeed, no other explanation was advanced or offered by the Respondent.

Notably, this meeting was not purely a captive audience meeting concerning the union campaign. The meeting was billed as, and was, a monthly safety meeting that the Respondent tried to do near the first of every month. It was, for a significant period at the beginning of the meeting, a safety meeting concerned with the normal issues of safety that are of relevance and concern to all employees, be they for, against, or indifferent to unionization. See, GC Exh. 24 at slides 2–4. This included important rules and practices with which the Respondent expects and demands that employees comply. The meeting was indoors. Presumably it was heated; it was light duty compared to the normal duct installation work performed by employees. There were even donuts provided for the morning Bradley meeting and lunch after the Charleston meeting. Thus, Faubel's discriminatory exclusion from this meeting was because of his union activities and affected his terms and conditions of employment by denying him important information related to his work and denied him a respite from his regular duties that other employees received. Respondent's conduct was violative of Section 8(a)(3).[27]

H. Isolating Pro-Union Employees by Assigning them Work Away from Other Employees and Threatening Employees who Spoke to Union Employees or who Engaged in Union Activities (Complaint ¶¶6(e)-(g) & 9(d))

As discussed above, the day Faubel was reassigned to the Crossings on February 25, he worked alone. Tierson told Faubel that he didn't care if Faubel did any work, "I was just to be away from everybody." As also found above, in early March, Tierson told McGuffin, in front of employee Castle, that they "needed to isolate the union guys away from the rest of us so they couldn't be spreading their union propaganda." Tierson announced to Marolf and Rhodes that "anybody talking to Eric is—will get fired." In addition, Tierson told Armstrong "they instructed him to put us together, separated from everyone else."

These comments obviously violate Section 8(a)(1). At this point in time Faubel was known by all to be a union organizer. The threat of discharge for talking to Faubel would obviously tend to coerce employees in the exercise of protected activity. Tierson's comments to Faubel about isolating him, and his comments in front of Castle that the "union guys" needed to be "away from the rest of" the employees are also unlawful under the circumstances. In re *Alamo Rent-a-Car*, 336 NLRB 1155, 1176–1177 (2001); *Corliss Resources, Inc.*, 362 NLRB 195, 203 (2015); *Montgomery Ward & Co.*, 93 NLRB 640, 640–641 (1951), enfd. in relevant part, 192 F.2d 160 (2d Cir. 1951).

As to the reassignment of Faubel to work alone on February 25, and then, the assignment of Armstrong to work with Faubel on their own floor, not with other crews as had previously been the practice, the March 13 post-first-strike pairing of Marolf and Jarod Smith working near Faubel and Armstrong, but not near others, and Castle's assignment upon his return on March 28, to working with Parrish and Marolf, these incidents have been proven by the General Counsel. Indeed the only evidence offered against them by the Respondent is Tierson's discredited denial that he ever isolated employees because of union affiliation.

This isolation easily satisfies the *Wright Line* standard for a violation. The union activity of Faubel, Armstrong and Marolf was known to the Employer. The record of animus is clear and, in particular, the credited comments about the isolation of these employees and the threat to fire employees for talking to Faubel are not only unlawful in themselves, but also provide powerful evidence supporting the finding that antiunion considerations were a motivating cause of the Respondent's discriminatory isolation of these employees. The Respondent has not proven that it would have taken the same action in the absence of protected activity. Thus, a Section 8(a)(3) and, derivatively, a Section 8(a)(1) violation is proven.

I. Tierson's Surveillance of Striking Employees (Complaint ¶¶6(b)-(d))

The General Counsel contends that Tierson's admitted photographing of picketers one day as he entered work, crossing the picket line, and another day as he left, violates the Act. The General Counsel alleges that this conduct constitutes unlawful surveillance and the unlawful creation of the impression of surveillance.

Absent actual violence or mass picketing, the Board has generally condemned employer photographing outright. *Flambeau Plastics Corp.*, 167 NLRB 735, 743 (1967), enfd. 401 F.2d 128 (7th Cir. 1968), cert. denied 393 U.S. 1019 (1969) (rejecting "anticipatory" photographing of picketing "in the event something 'might' happen"). "The Board has long held that absent proper justification, the photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate." *F. W. Woolworth Co.*, 310 NLRB 1197 (1993); *Waco, Inc.*, 273 NLRB 746, 747 (1984). As the

[27] I do not reach the issue of whether it would have been lawful for the Respondent to exclude Faubel if the meeting was limited to communicating the Respondent's views on unionization and not also to communicate and discuss work-related safety and operations information.

Board explained in *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998), "the Board requires an employer engaging in such photographing or videotaping to demonstrate that it had a reasonable basis to have anticipated misconduct by the employees. '[T]he Board may properly require a company to provide a solid justification for its resort to anticipatory photographing.'" (citing, *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 701 (7th Cir. 1976)).

In this case, Tierson admits he photographed picketers on two occasions, which I have found to be March 1, and a few days later, probably on or about March 4. In each instance Tierson held up his cell phone and photographed the picketers from his vehicle, in one instance as he entered and in another as he exited the premises. The photographs show a small group (not even a dozen) individuals standing by the side of the road, most holding picket signs.

By the photographic evidence, and his own admission, Tierson's photographing was not conducted while any employees were engaging in misconduct. Rather, Tierson testified that he photographed the strikers because he heard from others that strikers stepped in front of vehicles and in one case picketers were close to and around his car with signs while screaming.[28]

On this record, the Respondent has failed to demonstrate any misconduct justifying anticipatory photographing of the picketers or that would outweigh the tendency of such

photographing to coerce. There was no evidence that individuals were blocked or stopped from entering or exiting the worksite. There is no proof of violence or threats. Yelling and boisterous behavior may be unsettling, but it is not unlawful nor necessarily even "misconduct." Getting too close to entering or exiting cars may be unnerving, but mere "impropriety" such as "employees seeking to enter and leave the plant [being] momentarily obstructed or diverted" does not justify subsequent anticipatory photographing. *United States Steel Corp.*, 255 NLRB 1338, 1338 fn. 1 (1981), enf. denied on other grounds, 682 F.2d 98 (3d Cir. 1982). Such impropriety—proven to have happened once—is the most that has been proven. The proven actions of the strikers does not justify subsequent random photographing of peaceful and protected picketing. *Chester County Hospital*, 320 NLRB 604, 620 (1995) (no justification for photographic surveillance of protected handbilling based on "isolated and inconclusive" evidence of "temporary blocking of entrances"); *Russell Sportwear Corp.*, 197 NLRB 1116, 1117–1118 (1972) (photographing of pickets taken in response to picketers slowing but not "completely obstruct[ing] auto traffic in and out of the plant property" found unlawful); enf. denied on other grounds, 1973 WL 3142 (6th Cir. 1973). I note that the Respondent makes no claim that Tierson's photographing was done to establish unlawful picketing under the Act or to secure evidence for an injunction proceeding, two recognized justifications for photographing of pickets. *Lechmere, Inc.*, 295 NLRB 92, 99 (1989), enfd. 914 F.2d 313 (1st Cir. 1990), revd. on other grounds, 502 U.S. 527 (1992).

Finally, I reject any suggestion that Tierson's photographing of strikers, which occurred only twice, was too isolated or infrequent to have a reasonable tendency to coerce employees. Each incident involved open and visible photographing of picketers from close range as the vehicle Tierson was in moved past the pickets. It was reasonably calculated to be seen by the picketers, as Tierson admits. He testified that he intended for the photographing to restrain any untoward conduct directed at him by picketers. His subjective intent aside, the reasonable and objective tendency of such photography would be to interfere with the employee pickets' rights to engage in protected activity. See by contrast, *Summit Nursing & Convalescent Home*, 204 NLRB 70, 70 fn. 1 (1973) (one-time effort at photography by supervisor undertaken at lawyer's direction, and from 100 feet, in an effort to film alleging trespassing union organizers, and which was observed by one employee, and which involved putting camera to her face for a moment before immediately realizing there was no film in camera, found too isolated to support violation).

I find that Tierson's photographing of picketers was not justified and would have a reasonable tendency to coerce employees in their protected activity. Accordingly, the incidents in which Tierson took pictures of striking employees constitutes unlawful surveillance.[29]

J. Daniel Akers' March 1 Text Message to Employees Regarding Picketers (Complaint ¶¶7(a)-(d))

The complaint alleges that Daniel Akers' March 1 text sent to (some of the) employees violated the Act in numerous ways: by threatening to call the police on employees for striking (¶7(a)); by asking employees to disclose to it the union activities of other employees (¶7(b)); by asking employees to videotape and disclose to it the union activities of other employees (¶7(c)); and by creating an impression of employees that their union activities were under surveillance by asking employees to disclose and to videotape the union activity of other employees (¶7(d)).

It is obviously unlawful to threaten to call the police on employees for reports received about their engagement in union activity. Nor is it lawful to encourage employees to report on and videotape employees for engaging in union activities.

The Respondent contends that the text does not threaten or encourage action against employees for union activity, but rather, for "wrongdoing" or "illegal activity," illustrated by the example that picketing employees are not allowed to block

[28] I note that I have rejected the truth—unproven as it is—of the claim that picketers threw rocks. Accordingly, the mere fact that Tierson says—I assume, arguendo that his testimony is accurate—that he was told by Hight that picketers threw rocks, does not justify or add to a justification for Tierson's photographing of peaceful picketing. An honest but mistaken belief that unprotected conduct occurred does not constitute "solid justification for recordation of protected activity. Rather, . . . the employer must show that it had a reasonable, objective basis for anticipating misconduct." *National Steel and Shipbuilding Co.*, 324 NLRB at 499 fn. 4.

[29] Given this finding, it is unnecessary to reach and I do not reach the allegations of the complaint (¶¶6(d) and (e)) alleging that these same actions of Tierson created an impression among employees that their union activities were under surveillance. There was no evidence of additional efforts by Tierson to appear to be photographing employees other than the two instances found to constitute unlawful surveillance.

access to any jobsite and "are not allowed to prevent you from going to work."

Recognizing that employee activity that is protected by the Act can be perceived as noisome and offensive to other employees, longstanding Board precedent finds that employers violate the Act "when they invite their employees to report instances of fellow employees' bothering, pressuring, abusing, or harassing them" through union solicitations or activities. *Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 238 (1998). An employer's encouragement of its employees to report the union activities of other employees is unlawful if it is "broad enough to cover mere attempts by union proponents to persuade employees," or "so vague as to invite employees generally to inform on fellow workers who were engaged in union activity." *Liberty House Nursing Homes*, 245 NLRB 1194, 1197 (1979).

> In light of this, it is worth reviewing Akers' message. He writes, in relevant part:
>
> Picketers are not allowed to block the road, gates or any access to any jobsite. They are not allowed to prevent you from going to work.
>
> If the actions you encountered yesterday continue please drive slowly, proceed with the upmost caution and avoid them. Have your passenger use a smart phone and video record their illegal activity. I'll get you all a dash cam as one of you suggested.
>
> Report any and all events to me and I will call the police and also the national labor board to report any and all wrong doing by the union.
>
> National Labor Board
> 1-513-684-3686
>
> Police just dial 911 I don't know if they would dispatch the Sherriff or South Charleston Police.

On the one hand Akers' text tells the employees that he will call the police to report any "wrong doing" by the Union reported to him. It encourages employees to "video record" picketers' "illegal activity." However, Akers' entreaty must be considered in its full context. Its full context is that it references and encourages reporting and videotaping of any repeat of the "actions you encountered yesterday"—i.e., the February 28 picketing by the Union that brought the news media, state legislators, and various representatives of other unions to the Crossings picket line. As stated above, the Respondent has failed to demonstrate that the February 28 picketing, while apparently more provocative than on other days, amounted to illegal or unprotected misconduct. There is no evidence that anyone was blocked from entering or exiting the worksite.

Accordingly, Akers' text message suggests that union and employee conduct, such as that occurring on the picket line on February 28, should be reported to the police and to Akers, and further, should be videotaped so that Akers can contact the police with the information he receives. This is an invitation for employees to broadly report to police and to management boisterous union and employee conduct, regardless of whether it is protected by the Act. Akers testified that he sent this message only to those employees who had expressed concern to him about the striker's activities. But these employees' subjective concern does not demonstrate that the conduct at issue was unprotected. The Board has long recognized that picket lines are tense settings and not all hostility from pickets toward crossing employees can be deemed to be unlawful restraint or coercion. See *Longview Furniture Co.*, 100 NLRB 301, 304 (1952), enfd. as modified 206 F.2d 274 (4th Cir. 1953). In the context of a picket line, a certain amount of impulsive behavior is to be expected and must be tolerated so as not to discourage the exercise of Section 7 rights. See, e.g., *CKS Tool & Engineering, Inc. of Bad Axe*, 332 NLRB 1578, 1585–1586 (2000); *Shalom Nursing Home*, 276 NLRB 1123, 1137 (1985).

On this record, while there may have been reports of subjectively offensive or hostile actions by the picketers on February 28, there is no evidence at all that they engaged in unprotected or illegal conduct. For this reason, Akers' invitation for employees to report and videotape the picketers if they repeated their February 28 conduct is unlawful. See, e.g., *CMI-Dearborn, Inc.*, 327 NLRB 771, 776 (1999) (employer violated Act with letter to employees from plant manager stating that it would protect employees from union "threats, coercion or scare tactics" and "if anyone tries these tactics on you, we urge you to report it to me or any other member of Management"). Akers' text unlawfully encourages employees to report union activity to police, asks employees to videotape striking employees, and announces management's intent to take action to contact the police over subjectively offensive actions of strikers that are reported to it "without regard to whether not the reported activity was protected by the Act." *Hawkins-Hawkins Co.*, 289 NLRB 1423, 1424 (1988). Accordingly, Akers' text unlawfully encourages employees to report, videotape, and promises to report to the police, union activity that by all evidence is within the ambit of protected activity. Such threats to call the police on employees for striking are unlawful. *Roadway Package System*, 302 NLRB 961, 961 (1991) (unlawful for employer to respond to protected and concerted activity by threatening to call the police); *All American Gourmet*, 292 NLRB 1111, 1111 fn. 2 (1989). It is similarly unlawful to ask employees to report on union activity, and unlawful to ask them to videotape employees, which does create—not the least of all for employees receiving the text message who may consider joining the strikers—the impression that union activities will be under surveillance initiated by the employer.[30]

K. Promulgation and Maintenance of New "Anti-Harassment" Policy (Complaint ¶8(c))

The General Counsel alleges that the leaflet inserted into the pay stub envelopes of employees on March 8, violated the Act. The General Counsel's theory (GC Br. at 51–52 & see complaint ¶8(c)) is that that the insert constituted the promulgation and maintenance of a new anti-harassment policy, one that amended the longstanding antiharassment policy in the employee handbook to include enhanced punishment for violation of the policy in the form of criminal prosecution.

[30] I note that I dismiss complaint allegation 7(b) as redundant of complaint allegation 7(c).

This theory does not align with the facts. More specifically, the March 8 insert is not reasonably understood as a statement of or promulgation of a new rule, and even more specifically, neither the complaint allegation (¶8(c)) nor the General Counsel's brief accurately quotes the March 8 insert. The quote that the complaint and General Counsel's brief assert as the core of the alleged violation—and it is represented to be a quote from the March 8 insert—is wording that does not appear in the March 8 insert.[31]

I don't know how this happened. I attribute it to error and not design. The General Counsel's brief and conduct show no tendency to mislead. But in any event, the allegation as pled must be and is dismissed.[32]

L. Marolf's Disciplinary Warnings (Complaint ¶¶9(e) and (f))

The General Counsel contends that Marolf's March 15 discipline after his altercation with Hight, and Marolf's March 27 discipline for disclosing the Respondent's job site, each violate Section 8(a)(3), and derivatively, Section 8(a)(1) of the Act.

With regard to the March 15 incident, the discipline came after a confrontation between Marolf and Hight. Each told a similar story of how the confrontation occurred, and what led up to it, but each blamed the other for the hostilities from which, at the end, they had to be separated and then were each sent home for the day. Each claimed that the other came at him and would not stop, leading to the face-to-face confrontation that was broken up by coworkers and Tierson.

The General Counsel offers two theories of violation. First, advancing a *Wright Line* analysis, the General Counsel contends (GC Br. at 52–53) that the Respondent's discipline of Marolf was discriminatory, and motivated by antiunion animus. According to the General Counsel, the incident with Hight was "simply used as a pretext" for the discriminatory discipline. GC Br. at 53. Second, citing the Supreme Court's decision in *NLRB v. Burnup & Sims Inc.*, 379 U.S. 21 (1964), the General Counsel contends (GC Br. at 53) that Marolf was engaged in protected activity when he offered Hight a sticker and engaged in no misconduct in the course of doing so. Under *Burnup & Sims,* "§ 8 (a)(1) is violated if it is shown that the [disciplined] employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct." 379 U.S. at 23.

I do not find a violation of the Act in the Respondent's discipline of Marolf for the March 15 incident under either theory advanced by the General Counsel. Before analyzing the issue under *Wright Line* and *Burnup & Sims*, I want to convey my more general sense of the incident. That is, and contrary to the claim of the General Counsel and the Union, my reading of the evidence is that this was an employee versus employee incident in which both Marolf and Hight share blame and responsibility. My impression is that Marolf purposely provoked Hight, more as a joke than a serious attempt at solicitation, as he knew that Hight did not want a union sticker. Tension had been building between them, and this final incident sparked the confrontation. Hight is at fault, and so is Marolf. My best reading of the incident is that neither backed off and that is how the incident led to a face-to-face blow-up that might well have ended in a physical altercation if McClung and then Tierson had not stepped in. Confronted with this outburst, management reasonably and appropriately disciplined and sent home both employees involved. That's my view. But more important is to put this in terms of legal analysis.

First, as to *Wright Line*, I find that the General Counsel has met his initial causation burden: Marolf had just returned, 2 days earlier on March 13, from the 2-week strike. He was one of three employees to strike, and the Respondent was aware that he had struck (Jt. Exhs. 4 & 6). Moreover, when he was disciplined for the March 15 incident with Hight, the write-up makes clear that the Respondent understood he was engaged in union activity when the dispute broke out. Thus, Marolf had engaged in union activity and the Respondent was aware of it. In addition, as to the third prong of *Wright Line*, by March 15, the Respondent's animus to union activity had already been made clear through a number of unlawful actions, set forth above, some of which involved Marolf directly. Thus, I find that the General Counsel's initial *Wright Line* burden has been met, and that Marolf's union activity was a motivating cause of the discipline.

However, I also find that the record demonstrates that the Respondent would have disciplined Marolf for his confrontation with Hight even in the absence of his union activity. In the first place, Hight too was sent home and disciplined for the incident with Marolf. Thus, Hight is an instructive comparator. As to Hight—whom the General Counsel states (GC Br. at 53) was "clearly anti-union"—there was an absence of union activity, and yet he was disciplined for the incident, which, in this case I find is strong evidence that the Respondent would have disciplined Marolf even in the absence of his protected activity. This suggests that—apart from any antiunion animus—the Respondent had a dual motive for disciplining Marolf and Hight that involved the desire to maintain order in its workforce and not to countenance angry employees threatening one another in face-to-face confrontations that could easily have ended in physical assault. The General Counsel sees disparate and discriminatory treatment in the fact Marolf but not Hight was returned to the Crossings worksite, while Marolf was reassigned to an out-of-town assignment and then to work in the warehouse with Backus. But it seems to me that this evidences a reasonable and responsible desire of an employer to separate temporarily two employees who had come close to blows in the

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[31] The complaint (¶8(c)) and brief (GC Br. at 51) assert that since March 8, 2019, the Respondent has promulgated and maintained the following rule, quoted in the complaint and the brief as:

> That anyone who violates the anti-harassment policy or is caught threatening employees or otherwise violating their rights will be subject to criminal prosecution to the fullest extent of the law.

This quoted language does not appear anywhere on the March 8 insert. See, Joint Exhibit 5.

[32] The General Counsel also argues (GC Br. at 52) that the March 8 insert, read as a whole, threatens employees for engaging in union activity. Whatever the merits of this contention, it is not plead in the complaint, and, particularly given the very different and inexplicably erroneously pled complaint allegation, I will not consider this very different theory of violation.

workplace. Nothing in the record suggests that if the fight had been over sports stickers, or some other matter unrelated to union activity, that it would have been Hight and not Marolf who was temporarily reassigned or that both would have returned to the Crossings on Monday.

The Union contends (CP Br. at 9) that only Marolf and not Hight received discipline for this incident. To the contrary, I credit Hight's unrebutted testimony that he was sent home Friday March 15, and later disciplined for this incident. I do recognize that Hight's write-up is odd—and one might wonder, as the Union hints, if it was an after-the-fact contrivance. The write-up and its description of the events is, verbatim, the same as that on Marolf's write-up. That description, which is set forth in the text above largely blames Marolf for the incident, but does suggest that Hight came at Marolf, not the other way around as maintained by Hight ("Stephen allegedly said something to Roger which caused Roger to move toward Stephen"). In any event, whatever the Union's suspicions, I do not believe that the evidence proves that Hight's discipline was a pretext—that is, that Hight was disciplined after-the-fact of Marolf's discipline, four days later, in order to provide cover for the antiunion-motivated action against Marolf. That is a logical possibility but I do not believe it has been proven.

The General Counsel's argument that the Respondent failed to meet its *Wright Line* "rebuttal" burden proceeds from a premise that I do not accept as a factual matter—that is, the claim that Hight provoked the encounter, that Hight threatened Marolf, that Hight acted unreasonably and pursued the confrontation, and that Marolf did none of this. I am far from convinced that Hight was blameless, but I am not persuaded that Marolf was either.[33] More specifically, in terms of *Wright Line*, the truth of what happened between Marolf and Hight is not really the issue. Rather, the issue is the Respondent's motivation. As the Board explained in *McKesson Drug Co.*,

> In order to meet its burden under *Wright Line* (i.e., to show that it would have discharged the employee even in the absence of protected activity), an employer need not prove that the employee committed the alleged offense. However, the employer must show that it had a reasonable belief that the employee committed the offense, and that it acted on that belief when it discharged him.

McKesson Drug Co., 337 NLRB 935, 936 fn. 7 (2002).[34]

Almost undeniable on these facts, and I find, either Marolf or Hight could have, but neither did, back away and withdraw from this confrontation, regardless of which one of them might be found to have the majority of the blame for "starting it." Neither of them withdrew, and the failure to do so put them very close to a physical encounter. That's enough for a reasonable employer to say—"you're both in trouble."[35]

The General Counsel also points out that the disciplinary notice characterizes the incident as beginning when Marolf badgered employees with union propaganda and allegedly harassing Hight about the Union. The General Counsel views this as evidence of animus. I suppose it is, although animus is not what is lacking in support of the General Counsel's case. I agree that the General Counsel has met his initial *Wright Line* burden and proven that Marolf's union activity was a motivating cause of the discipline. But the fact that protected activity began this heated confrontation from which the two employees had to be separated—and the fact that this was noted on Marolf's disciplinary form in wording that suggests the animus I have already found to exist on the part of the Respondent, does not undermine my conclusion that the Respondent would have responded to a similar Marolf-Hight conflict over sports stickers the same way that it did to this one. Even given the Respondent's unlawful motive, it would have taken the same action in the absence of protected activity. I find there is no violation under a *Wright Line* theory.

Alternatively, the General Counsel contends (GC Br. at 53), citing *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), that the Respondent's discipline of Marolf for an incident that occurred while he was engaged in protected activity establishes a violation.

In *Burnup & Sims*, the Supreme Court confronted a situation where it was falsely reported to the employer that two employees seeking to solicit members for the union at the employer's facility had said that "the union would use dynamite to get in if the union did not acquire the [employee] authorizations." 379 U.S. at 21. The employer discharged the two employees for the threat. The Board found that the employees had not threatened to use dynamite, and "concluded that respondent's honest belief in the truth of the statement was not a defense." Id. at 22. The Court upheld the Board's finding of a Section 8(a)(1) violation where an employer takes action against an employee, whom it knew to be engaged in protected activity, based on a good faith but mistaken belief that the employee had engaged in misconduct while conducting the protected activity. The Court recognized that "protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith. Id. at 23. As the Court explained (Id. at 24), in reaching this ruling,

> it is the tendency of the [discipline] to weaken or destroy the § 8(a)(1) right that is controlling. We are not in the realm of managerial prerogatives. Rather we are concerned with the manner of soliciting union membership over which the Board has been entrusted with powers of surveillance.

Thus, the Court concluded that "we are of the view that in the

[33] I do not credit Marolf's testimony to the extent it can be read to hold him blameless for the incident, including that it was Hight and Hight alone who rushed Marolf and threatened him.

[34] See also *Yuker Construction*, 335 NLRB 1072 (2001) (discharge of employee based on mistaken belief does not constitute unfair labor practice, as employer may discharge an employee for any reason, whether or not it is just, so long as it is not for protected activity); *Affiliated Foods, Inc.*, 328 NLRB 1107, 1107 fn.1 (1999) (it was not necessary for employer to prove that misconduct actually occurred to meet burden and show that it would have discharged employees regardless of their protected activities; demonstrating reasonable, good-faith belief that employees had engaged in misconduct was sufficient).

[35] I recognize that the General Counsel argues that the Respondent did not do an adequate investigation, which the General Counsel claims is more evidence of bias and undermining to the Respondent's defense. But I do not agree. As stated in the text, the Respondent reasonably, and accurately, knew what it needed to know to discipline these employees for their misconduct.

context of this record s 8(a)(1) was plainly violated, whatever the employer's motive." Id. at 22.

In the instant case, the General Counsel contends that Marolf was engaged in protected activity and was disciplined based on the Respondent's erroneous belief that he and not Hight was responsible for the confrontation that was the basis of their mutual discipline. The General Counsel essentially contends that even if the Respondent was acting in good faith in disciplining Marolf, the facts show that Marolf did not engage in misconduct and under *Burnup and Sims* his discipline for the protected activity violates the Act.

I do not agree that this *Burnup & Sims* analysis establishes a violation. For one thing, the Court limited its *Burnup & Sims* analysis to finding a Section 8(a)(1) violation. It expressly did not reach the question of whether a Section 8(a)(3) violation could be found in similar circumstances, where the employer had acted with a good faith motive but mistakenly believed that the employee had engaged in misconduct. The General Counsel's complaint pleads only that Marolf's discipline is an independent Section 8(a)(3) violation and does not assert that it is also an independent Section 8(a)(1) violation. This distinction appears purposeful and is not without meaning. *Burnup & Sims* does not provide a basis for finding an 8(a)(3) violation.

Second, even on its own terms, I find that the General Counsel has not proven a *Burnup & Sims* violation. It is the General Counsel's burden to prove that Marolf did not engage in misconduct. *E.W. Grobbel Sons, Inc.*, 322 NLRB 304 (1996), enf. denied 149 F.3d 1183 (6th Cir. 1998) (finding that General Counsel failed to prove the misconduct did not occur). See *Rubin Bros. Footwear Inc.*, 99 NLRB 610, 611 (1952). It has failed to do so. As I have found Marolf was not innocent in the encounter with Hight. He shares responsibility. Accordingly, the General Counsel's *Burnup & Sims* theory of violation fails.[36]

The General Counsel also contends that Marolf's second, March 27 discipline violated Section 8(a)(3) of the Act. This allegation stands on firm ground, and the Respondent offers no defense on brief to it (in an otherwise comprehensive defense of the allegations against it).

Marolf was disciplined after union organizer Hancock showed up at the Martinsburg, Virginia job site to which Marolf and warehouse manager Backus traveled on March 21. Akers' (correctly) assumed that Marolf must have told Hancock about the location of his new assignment.

Akers' disciplined Marolf allegedly for

> sharing confidential company information with an outside organization. Sharing job site locations, clients, scopes of work, employee locations is a violation of company policy.

The discipline referenced page 23 of the employee handbook, which contains the "confidentiality" provision of the employee handbook. However, that confidentiality provision says nothing about restriction on sharing job site locations, clients, scopes of work, or employee locations.

This is a violation. The General Counsel's initial *Wright Line* burden is easily met. Marolf's union activity was known to the Respondent and, as discussed above, there is significant animus on the record that supports a finding of antiunion motivation. Moreover, as the General Counsel contends, the explanation for the discipline here is pretextual. The policy does not, on its face, lend itself to an interpretation that would lead one to conclude that it precludes telling an outsider the location of a job site. There is no evidence that the rule had ever been enforced in this manner in the past. Indeed, Marolf testified credibly, and seemed shocked at the idea that he had violated a company rule by telling Hancock about where he was working. Marolf explained,

> I've been on jobs and I've heard people talk about jobs to, you know, friends, previous employees. I've been on jobs and their friends show up or previous employees, their wi[ves], girlfriends, whatever. And nothing's ever happened to them.

The Respondent offered nothing to counter this credibly-offered testimony. I find that Akers "invented" this interpretation of the confidentiality policy out of pique that Marolf had revealed the job location to Hancock, thus enabling Hancock to show up and add the location to his organizing efforts at AH. Thus, I find that this is not only further evidence that Marolf's union activity motivated the discipline, but also that the Respondent's claims that it was motivated by an employee handbook violation are not just unproven, but pretextual. Accordingly, the Respondent has failed to prove that it would have taken the same action against Marolf in the absence of his protected activity and, indeed, the inquiry is pretermitted by the pretextual nature of the Respondent's only proffered explanation. *David Saxe Productions*, 364 NLRB No. 100, slip op. at 4 (2016); *Rood Trucking Co.*, 342 NLRB 895, 898 (2004), quoting *Golden State Foods*, 340 NLRB 382, 385 (2003); *Frank Black Mechanical Services*, 271 NLRB 1302, 1302 fn. 2 (1984) (noting that "a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel").

I find that the Respondent's March 27 discipline of Marolf violated Section 8(a)(3) of the Act, and derivatively, Section 8(a)(1).

M. Armstrong's Layoff (Complaint ¶9(g))

The General Counsel alleges that the Respondent permanently laid off Brandon Armstrong on March 27, in violation of Section 8(a)(3) of the Act, and derivatively, Section 8(a)(1).

The evidence easily satisfies the General Counsel's initial *Wright Line* burden. Armstrong was a union member and supporter, and no later than February 2019, the Respondent learned

[36] I note that the General Counsel argues only that Marolf engaged in *no misconduct* and was mistakenly disciplined by the Respondent. He does not concede that Marolf engaged in misconduct, but contend that, nevertheless, Marolf's misconduct was not so egregious or opprobrious as to lose the protection of the Act. Accordingly, I do not reach the issue. I note, however, that this dispute occurred during the time that the employees were supposed to be working, on the work site, in front of other employees, disrupted the work being performed, involved not just profanity but threatening one-on-one direct confrontation which by all evidence could have ended in physical assault, and did not because of the intervention of others. Finally, the confrontation was not provoked by an unfair labor practice or other action of the Respondent.

of his union activity. Akers observed Armstrong surreptitiously recording the February 4 Charleston meeting, and by early February had viewed Facebook posts by Armstrong that led him to believe that Armstrong worked with the Union. By February 20, Akers was referring to Armstrong as "our very own salt[ ]," and when Armstrong learned of it the next day, he wore a union organizer shirt to work. The Respondent was aware of Armstrong's union activity.

The Respondent's antiunion animus is firmly established on the record. There are the previously-discussed violations, of course, including the isolation of Faubel and Armstrong, both known union organizers. Moreover, and significantly, the Respondent's explanation and handling of Armstrong's layoff both add to the General Counsel's case and fail to satisfy the Respondent's obligation to demonstrate that it would have laid off Armstrong in the absence of his union activity.

The Respondent claims that the Armstrong layoff was for lack of work. It also declared at the time it laid him off that the layoff was permanent ("The company has no expectation that it will recall you"). Both these claims are implausible and highly suspicious on this record.

The claim of lack of work represents a sudden and unexplained about-face. Only a few weeks before Armstrong's layoff, in the February 4 safety meeting, Dan Akers had assured employees that "they didn't plan on ever laying anybody off, that they never had laid anybody off." In late February, Tierson had told employees that the Respondent planned to hire an additional three to four people. Tierson, the foreman at the Crossings job, told employees that he didn't know why Armstrong was laid off as the "he needed more people as it was." When Armstrong was laid off, Tierson and McGuffin made clear they knew nothing about it in advance. The Akers never explained how (or when) they made the decision. Contrary to the claim that lack of work motivated the layoff, the need for more employees at the Crossings continued after Armstrong's layoff. Tierson talked constantly "about not having enough guys on site." Although "he kept asking for more and more people and they never give them to him, or they'd give him a guy for a day or two and then pull them right back out." In fact, five additional employees were hired into Armstrong's classification within a few months of his layoff. By all evidence, after Armstrong's layoff, employees were working harder than ever at the Crossings, with work continuing to be plentiful, including overtime and, for a time, a longer workday. Castle described the employees as "overwhelmed by work at that time." This evidence calls into question, to say the least, the Respondent's claim that it was motivated to lay off Armstrong because of a lack of work.

There are more inconsistencies that render the Respondent's asserted motivation for the layoff suspicious. Layoff notices were rarities. Armstrong was singled out to get one. Based on company records provided pursuant to subpoena, Armstrong was the only employee to the company issued a layoff notice since 2017.[37] Although Tierson testified that he was told by McGuffin that Armstrong's layoff was "nothing about him, but because he was the last one hired," in fact, Armstrong was not the last one hired—Faubel was hired at the Crossings *after* Armstrong, as was an employee named Kevin Keith.

Finally, not only the claim of lack of work, but the assertion of the permanence of the layoff is highly suspicious. Akers testified at the hearing that it was AH's policy to bring back an employee laid off for lack of work if future work became available. In addition to the fact that there appears to have been plenty of work available at the Crossings, there is no explanation offered for AH needing or wanting to tell Armstrong, contrary to AH policy, that he would have no prospects of future work with AH. Thus, not only the Respondent's claim that it lacked work for Armstrong, but also its asserted certainty at the time it laid off Armstrong that he had no prospects of returning to work is completely inexplicable on this record and highly suspicious.

At a bare minimum, the Respondent's false, illogical explanation for Armstrong's permanent lay off, undertaken for reasons that the Crossings manager Tierson was not consulted about and did not know about, fails to satisfy the Respondent's burden to show that, in the face of the General Counsel's case demonstrating that animus was a motivating factor in the layoff, the Respondent would have taken the same action in the absence of protected activity.

At the hearing, and on brief, the Respondent stressed its contention that in the spring of 2019, several more experienced HVAC employees—unnamed, their return undated, their exact numbers unstated—were reassigned to the Crossings from jobs that the Respondent was finishing up "in the Virginia market" and "a couple of other commercial projects." From that, the Respondent, presumably, wants to imply that these returning employees left no work for Armstrong. That is entirely unproven. Indeed, the suggestion that additional employees were streaming into the Crossings more likely demonstrates that the Respondent needed *more* employees at the Crossings, not less. That conclusion is consistent with Tierson's expectations, the evidence of overtime work performed in the Spring, the additional hiring, and testimony that work at all times remained heavy at the Crossings for incumbent employees. There is simply no basis on which to conclude that this vague testimony about returning senior employees was the reason that Armstrong—and only Armstrong—was left with no work and no prospects of having any work. The Respondent has failed to meet its *Wright Line* burden and I find the violation as alleged.[38]

[37] The Respondent's employee list (Jt. Exh. 14) shows two employees laid off for lack of work in February 2019. However, they are listed as reporting to "Virginia jobs" and they are the only two employees so designated. Every other employee reported from Bradley or Charleston, and none, except Armstrong were laid off.

[38] At the hearing the Respondent adduced testimony impugning the quality of Armstrong's work while employed with the Respondent. Without reaching any conclusions as to the accuracy of this evidence, it is undisputed that concern with Armstrong's work *was not* the stated basis for his layoff. In that sense, the testimony raised more questions than it answered. I note, however, that the Respondent did not pursue this matter in its brief and reaffirmed (R. Br. at 32) its position that "Armstrong was laid off for lack of work." In light of its brief, I consider any suggestion—and it was, at most, an implicit suggestion—that

N. Faubel's Discharge and Threat to Prosecute Him (Complaint ¶¶9(h) & (5(c))

The General Counsel alleges that the Respondent's discharge of Faubel upon his return to work from the strike on May 28, violated Section 8(a)(3) and (1) of the Act. The General Counsel further alleges that the termination letter, which suggested that he might be subject to criminal prosecution for "willful acts of industrial sabotage," independently violated Section 8(a)(1) of the Act.

As to the discharge, the General Counsel's initial *Wright Line* burden is easily met. Faubel, was the lead union salt, working "undercover," so to speak, at AH from the time of his hire in November 2018. On January 30, 2019, he dramatically revealed his salt status and intentions to employees and management in his video, and thereafter continued working and openly leading two strikes at AH. The first two prongs of *Wright Line* are met. In terms of animus, the third prong of *Wright Line* is easily satisfied on this record, for all the reasons it was satisfied, as set forth above, when considering the failure to promote Faubel to supervisor in mid-January 2019. To this can be added the unlawful exclusion of Faubel from the February 4 safety/captive audience meeting, the unlawful isolation of union supporters, including Faubel for work assignments, Tierson's unlawful photographing of strikers, and Akers' text message seeking to have employees report and videotape strikers.

Finally, the timing of the discharge, which occurred immediately upon Faubel's return to work from a strike, but was based on alleged misconduct that occurred, and that the Respondent knew of months previously, adds to the inference of animus. As discussed below, this timing is unexplained by a legitimate rationale. It is further evidence of unlawful animus. See, e.g., *Napleton 1050, Inc. d/b/a Napleton Cadillac of Libertyville*, 367 NLRB No. 6, slip op. at 15 (2018) ("[U]nexplained timing can be indicative of animus.") (citing cases); All of this together easily establishes that Faubel's union activity was a motivating cause in the decision to terminate Faubel.[39]

The Respondent, in its termination letter and its brief, claims that it fired Faubel for alleged misinstallation of fire dampers. The termination letter states:

> Appalachian recently discovered, and has verified through multiple witnesses and sources, that you are responsible for improper installation of numerous fire dampers at the Crossings. Improper installation of fire dampers presents a serious safety concern for our clients. You are not eligible for rehire or further employment with Appalachian.

I have carefully considered the evidence. I do not believe the Respondent has met its burden. That burden is not simply to prove that it believed that Faubel had engaged in the misconduct alleged, and that it provided a legitimate justification for termination, but also to prove "that the action would have taken place absent protected conduct by a preponderance of the evidence." *Weldun Int'l*, 321 NLRB 733 (1996) (internal quotations omitted), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998). In other words, the Respondent must prove not that it "could've" fired Faubel on May 28, in the absence of union activity, but, rather, that it "would've." *Carpenter Technology Corp.*, 346 NLRB 766, 773 (2006) ("The issue is, thus, not simply whether the employer 'could have' disciplined the employee, but whether it 'would have' done so, regardless of his union activities"). See also *NLRB v. Transportation Management*, supra at 395 (rejecting employer's claim that its burden is met by demonstration of a legitimate basis for the discharge).

I have significant doubts about Faubel's sole responsibility for the misinstalled dampers, the seriousness of the problem, and the Respondent's good faith believe in either. However, I need not spend time analyzing the somewhat murky and contradictory record on those points.

A threshold and decisive problem that stands out on the record is that the misinstalled dampers that the Respondent attributes to Faubel, and which it says motivated the decision to fire him on May 28, occurred and by all evidence were known to AH months before in January 2019. Nevertheless, no action was taken against Faubel until the day he returned from his second strike, on May 28. Indeed, Faubel's March 14 employee evaluation reflected *none* of the charges leveled against Faubel on May 28. To the contrary, his evaluation was "more good than bad," and the bad concerned attendance, and not damper misinstallation or industrial sabotage.

As set forth above, in its May 28 termination letter, the Respondent asserted that it "recently discovered" and "verified" that Faubel had improperly installed numerous fire dampers at the Crossings. However, there is zero evidence supporting this claim of recent discovery or verification. There is substantial evidence that it is not true, and I so find.

With no elaboration or detail, Akers testified that he made the decision to terminate Faubel after he heard from McGuffin and Tierson about the damper misinstallation. Neither Tierson nor McGuffin testified about these conversations. None of them testified as to when they occurred.

McGuffin testified that AH learned of the misinstalled dampers at the Crossings in mid-January 2019 ("within seven to ten-day work time" from approximately "the end of December to the first of January," when a fire marshal inspection uncovered the upside-down installed dampers. He says he discussed the matter with Faubel at the time (I do not believe that, but it is an admission that the Respondent knew about the problem and Faubel's alleged role in it in January.) Tierson agreed that he learned of the upside-down dampers when the fire marshal found the problem, which the Respondent dates to January 21. (R. Br. at 42.) Tierson testified that Faubel had misin-

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the Respondent is contending that Armstrong was laid off for cause, to be abandoned.

[39] The Respondent is simply wrong when it contends (R. Br. at 38) that the General Counsel's case fails on grounds that neither "the General Counsel nor the union proffered any evidence establishing a nexus between protected activity and Faubel's termination." To the contrary, the evidence is rich, albeit indirect. As the Board has recently reaffirmed in *Tschiggfrie Properties*, 368 NLRB No. 120, slip op. at 1, the reliance on indirect circumstantial evidence is "[m]ore often than not" the focus for proving motivation in a *Wright Line* case. See also, *Tschiggfrie Properties*, supra, slip op. at 8 ("we emphasize that we do not hold today that the General Counsel must produce direct evidence of animus against an alleged discriminatee's union or other protected activity to satisfy his initial burden under *Wright Line*") (Board's emphasis)).

stalled 13 of 16 fourth floor dampers at the Crossings before January 18, i.e., before Tierson was supervisor. He stated that the "flipped" dampers on the fourth floor were fixed—turned right side up—about "[a] week or so . . . after the fire marshal inspected them," which would be late January, while Tierson was foreman (i.e., after January 18) but before he received his own fire damper license, which he received on February 28. In his testimony, McGuffin blamed the errors on Faubel because, at the time, Faubel was the only employee with a license to install fire dampers, although the evidence suggests that others were also installing dampers.[40]

Thus, by all evidence, including the admissions of the Respondent's witnesses, the Respondent knew about and corrected the misinstalled fire dampers attributed to Faubel (and others) by mid to late January 2019. The Respondent knew who was working at the Crossings when the dampers were put in upside down. It knew who had a damper installation license and who did not. McGuffin even claims he talked with Faubel about the misinstallations. There is no evidence that AH learned anything additional about the damper installation between March 14 and May 28. Yet, as of March 14, there is no suggestion—in an employee evaluation that, reasonably, would cover just such matters—that the Respondent blamed Faubel for the errors, believed them to be significant, or felt that it reflected sanctionable conduct by any employee. The matter went unmentioned.

This failure to act against Faubel before May 28—and the failure to even note the incident in its March 14 evaluation of Faubel—is inexplicable, unexplained, and renders the asserted motivation for the May 28 discharge highly suspect. It is powerful evidence that the misinstalled dampers were not really a cause of the discharge, but rather, a pretext for Faubel's discharge. *El Paso Electric Co.*, 350 NLRB 151, 153–154, 166 (2007) (no explanation for delay in expressing disapproval of employee's conduct is evidence of pretext), enfd. 272 Fed. Appx. 381 (5th Cir. 2008); *Doctors' Hospital of Staten Island, Inc.*, 325 NLRB 730, 738 (1998) (delay in acting on alleged misconduct evidence of pretext); *Superior Coal Co.*, 295 NLRB 439, 452–453 (1989) (discharge for absenteeism previously ignored indicates that "absenteeism was not more than a convenient pretext"). In the absence of a truthful explanation for its decision to terminate Faubel based on information it possessed for nearly 4 months, the most likely explanation is that the damper issue was a pretext for the unlawfully motivated discharge proven by the General Counsel. Indeed, not only the late date of the discharge, but the fact that it coincided with Faubel's return from the strike is highly suspicious, and unlikely to be coincidental. I find that the damper installation issue was a pretext seized upon by the Respondent to mask its decision to fire Faubel for his union activity.

In any event, even assuming arguendo that the dampers were not a pretext but merely a dual motive alongside the motive of antiunion animus for the discharge, the unexplained delay—and false assertion that the Respondent only learned of Faubel's alleged misinstallation of dampers in April or May—clearly undermines the Respondent's effort to prove that it would have terminated Faubel on May 28, in the absence of protected activity. The Respondent bears the burden of persuasion at this point. To meet its burden, the Respondent is tasked with explaining—and persuading—why, only after Faubel returned from the strike, four months after the incident for which he was allegedly being discharged, the employer suddenly decided to fire him for alleged misconduct known to it but not previously remarkable or remarked upon. In the absence of a credible explanation for the Respondent's decision to ignore Faubel's misconduct for four months, and then utilize it as a basis for discharge when he returned from a strike, the Respondent has failed to prove that it would have taken the same action against Faubel in the absence of his union activity. At most, the Respondent has proven that it "could have" fired Faubel in the absence of protected activity—not, as required, that it "would have." Its *Wright Line* defense thus fails.

I note that on brief, the Respondent also accuses Faubel of encouraging other employees to engage in a slowdown. However, the text message from Faubel that the Respondent characterizes as an instruction to engage in an illegal slowdown was not a basis for the discharge, as the Respondent makes clear in its brief. R. Br. at 39 ("Appalachian had the absolute right to terminate Faubel on the basis of the text when it became aware of it but did not"). Moreover, and consistent with the Respondent's position at hearing, the May 28 termination letter does not cite the "slowdown" text as grounds for the discharge.[41]

The complaint also alleges (¶10(b)-(d)) that the Respondent unlawfully failed to reinstate Faubel upon his unconditional offer to return to work from the strike. The Respondent did fail to do so, because it unlawfully discharged him, as found above. I do not believe it would effectuate the purposes of the Act to find this discharge unlawful *and* find that the employer unlaw-

[40] Tierson testified that additional dampers were installed incorrectly on the second floor by Howard Backus and Brandon Armstrong, but neither was disciplined in any way for it. On brief, the Respondent suggests that this is because there were only five dampers misinstalled (not 13 as on Faubel's floor), and the Respondent could not decide whether it was Backus or Armstrong who was responsible. Given the basis on which I reject the Respondent's *Wright Line* defense, I need not reach this "comparator" issue. However, I note that if 13 misinstalled dampers warrants discharge, then five might warrant some sort of note in the file, or some sort of investigation into who was responsible. There is no evidence of any such concern exhibited on the part of AH.

[41] The text message accused AH of underpaying employees while taking huge Christmas bonuses, and stated that

> Since they won't pay us more, I think we show [sic] we should work slower. Union scale is 54/hr. We should be working 2–3 times slower, since we get paid 1/2–1/3 of this. We need to stand together.

The Respondent characterizes this as an instruction to engage in a slowdown. It is certainly a suggestion that one would be fair, but there is a rhetorical quality to a single text suggesting that low pay merits working at 1/3 speed. It takes more than that to organize a slowdown and, in fact, the evidence is there was none, nor any evidence of a repeat of such a message from Faubel. In any event, even assuming that this text could have been a basis for discharge, it was not. I note further that, like the damper installation, this was not even mentioned in Faubel's March 14 employee evaluation, even though the message was sent in early February, including to Tierson, the foreman at the Crossings as well as to other employees who provided a copy to Akers.

fully failed to reinstate Faubel. Accordingly, I do not reach the latter allegation.

Finally, the General Counsel alleges that the threat in Respondent's termination letter to Faubel that he could be the subject of criminal and civil prosecution was unlawful pursuant to Section 8(a)(1) of the Act.

Clearly, the letter was calculated to inform Faubel and anyone else reading it that in addition to termination, Faubel would be subject to criminal and civil investigation and, perhaps, prosecution and conviction for the allegedly improperly installed dampers. However, as I have found, the misinstallation of dampers was a pretext.

There is no evidence that any lawsuit was filed. There is no evidence that there was any criminal or other investigation by authorities.[42] The threats were not "incidental" to a lawsuit. Accordingly, the threats of legal action against Faubel violated the Act. *Three D, LLC*, 361 NLRB 308, 308 fn. 3 (2014); *DHL Express, Inc.*, 355 NLRB 680, 680 fn. 3 (2010); *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1427 (2007).

CONCLUSIONS OF LAW

1. The Respondent S & S Enterprises, LLC, d/b/a/ Appalachian Heating is an employer engaged in commerce within the meaning of Section 2(2) and (6) of the Act.

2. The Charging Party Sheet Metal, Air, Rail and Transportation Workers, Local Union No. 33 (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. On or about January 9, 2019, the Respondent violated Section 8(a)(1) of the Act by coercively interrogating an employee about whether he had been solicited by a union organizer.

4. On or about January 10, 2019, the Respondent violated Section 8(a)(1) of the Act by soliciting employee grievances and promising to remedy them in order to discourage employees from selecting union representation.

5. On or about January 14, 2019, the Respondent violated Section 8(a)(1) of the Act by coercively interrogating an employee about whether he was a union member.

6. Since on or about January 28, 2019, the Respondent violated Section 8(a)(1) of the Act by maintaining a provision in the confidentiality rule in its employee handbook that states in relevant part:

> . . . dissemination of confidential information within the company, such as personal information, financial information, etc. will subject the responsible employee to disciplinary action or possible termination.

7. Since on or about January 28, 2019, the Respondent violated Section 8(a)(1) of the Act by maintaining a provision in its solicitation and/or distribution rule in its employee handbook that states in relevant part:

> Solicitation and/or distributions . . . are prohibited on company property.

8. On or about February 4, 2019, the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily excluding its employee Eric Faubel from an employee safety meeting because of his support for the Union and to discourage employees from supporting the Union.

9. On or about February 25, 2019, and dates thereafter, the Respondent violated Section 8(a)(1) of the Act by telling employees that it needed to isolate union supporters away from other employees and by threatening employees that anyone speaking to the lead employee union organizer would be discharged.

10. On or about February 25, 2019, and thereafter, the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily isolating employees and assigning them to work together and away from other employees because of their support for the Union and to discourage employees from supporting the Union.

11. On or about March 1, 2019, and on a date thereafter on or about March 4, 2019, the Respondent violated Section 8(a)(1) of the Act by engaging in surveillance of employees engaged in union activity protected by the Act, by photographing them on the picket line.

12. On or about March 1, 2019, the Respondent violated Section 8(a)(1) of the Act by threatening to call the police on employees for engaging in a strike, asking its employees to videotape and disclose to it the union activities of other employees, and by creating an impression among its employees that their union activities were under surveillance.

13. On or about March 1, 2019, the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily permanently laying off employee Brandon Armstrong because of his support for the Union and to discourage employees from supporting the Union.

14. On or about March 27, 2019, the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily disciplining employee Stephen Marolf because of his support for the Union and to discourage employees from supporting the Union.

15. On or about May 28, 2019, the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging employee Eric Faubel because of his support for the Union and to discourage employees from supporting the Union.

16. On or about May 28, 2019, the Respondent violated Section 8(a)(1) of the Act by threatening an employee with criminal and civil prosecution for engaging in union activities.

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

REMEDY

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

The Respondent shall rescind or revise the employee confidentiality and solicitation and/or distribution rules in its employee handbook and advise its employees in writing that it has done so in accordance with *Guardsmark, LLC*, 344 NLRB 809, 812 & fn. 8 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007).

[42] Moreover, there is no evidence that, as claimed in the termination letter, "[n]umerous witnesses have already provided statements indicating that [Union] officials have repeated asked them to engage in unlawful industrial sabotage which would result in serious public safety risks."

The Respondent, having unlawfully discharged Eric Faubel and having unlawfully laid off Brandon Armstrong, shall reinstate Faubel and Armstrong to their former jobs or, if their positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privilege previously enjoyed. The Respondent shall make Faubel and Armstrong whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful discrimination against them. The make whole remedy shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall compensate Faubel and Armstrong for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. The duration of the backpay period shall be determined in accordance with *Oil Capital Sheet Metal*, 349 NLRB 1348 (2007). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate Faubel and Armstrong for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 9 a report allocating backpay to the appropriate calendar year for Faubel and Armstrong. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

The Respondent shall also be required to remove from its files any references to the unlawful discharge of Faubel, layoff of Armstrong, and March 27, 2019 disciplinary warning issued to Stephen Marolf, and to notify them in writing that this has been done and that the discharge, layoff, and disciplinary warning will not be used against them in any way.

The Union contends that the Respondent's conduct is warrants the imposition of a broad cease and desist order. I agree. A broad order is appropriate when a respondent has been shown either to "have a proclivity to violate the Act" or to have "engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357, 1357 (1979). *Federated Logistics & Operations*, 340 NLRB 255, 258 fn. 9 (2003) (broad order can be appropriate when the conduct engaged in is egregious or widespread even when a respondent has not been shown to have committed prior violations of the Act); *Stern Produce Co.*, 368 NLRB No. 31 (2019). That is the case here. The record shows that the Respondent engaged in persistent attempts, by varying methods, to interfere with its employees' protected rights. The Respondent's aggressive, broad, and unlawful effort to undermine the union only grew more egregious over time and demonstrated a general disregard for employee rights. For instance, its termination of the two lead union organizers was undertaken with only a thinly veiled pretense of nondiscrimination. And most of the misconduct was carried out by the owners and top managers of the Respondent. *Sysco Grand Rapids, LLC*, 367 NLRB No. 111, slip op. at 1–2 (2019) (broad cease-and-desist order warranted in part based on fact that much of the misconduct was perpetrated by high-level management officials, including the respondent's president). Moreover, I agree with the Union that the Respondent's cavalier disregard for its obligations under the Act is further evidenced by its representative's dismissive reference to the numerous Section 8(a)(1) complaint allegations—most of which were found to have merit—as "spaghetti allegations," that could be painlessly remedied by "just putting a notice on the wall for 60 days." (Tr. 31.) This is an employer unconcerned by the prospect of traditional Section 8(a)(1) remedies and candid enough to put the Board on notice as to that. For all of these reasons, a broad cease-and-desist remedy is warranted and will best effectuate the remedial purposes of the Act.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Respondent's facilities in Bradley and Charleston, West Virginia, wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 9, 2019. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 9 of the Board what action it will take with respect to this decision

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[43]

ORDER

S & S Enterprises, LLC, d/b/a/ Appalachian Heating, Charleston West Virginia, Richmond, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union support or union activities, including whether they have been solicited by a union organizer or whether they are union members.

(b) Soliciting employee grievances and promising to remedy them in order to discourage employee from selecting union

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

representation.

(c) Maintaining a provision in the confidentiality rule in its employee handbook that contains the following language:

> dissemination of confidential information within the company, such as personal information, financial information, etc. will subject the responsible employee to disciplinary action or possible termination.

(d) Maintaining a provision in the solicitation and/or distribution rule in its employee handbook that contains the following language:

> Solicitation and/or distributions . . . are prohibited on company property.

(e) Excluding employees from employee safety meetings in retaliation for their union activities.

(f) Telling employees that it needs to isolate union supporters away from other employees.

(g) Threatening employees that anyone speaking to the lead union organizer will be discharged.

(h) Isolating employees and assigning them to work together in retaliation for their union activities.

(i) Engaging in surveillance by photographing employees engaged in union activities.

(j) Threatening to call the police on employees for engaging in union and protected activities.

(k) Asking employees to videotape and disclose the union activities of other employees.

(l) Creating an impression that employees' union activities are under surveillance.

(m) Discharging, laying off, issuing a disciplinary warning, or otherwise discriminating against any employee for supporting the Sheet Metal, Air, Rail and Transportation Workers, Local Union No. 33 (Union) or any other labor organization.

(n) Threatening any employee with criminal and civil prosecution for engaging in union activities.

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

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

(a) Rescind the following unlawful provision of the confidentiality rule in the employee handbook that states:

> dissemination of confidential information within the company, such as personal information, financial information, etc. will subject the responsible employee to disciplinary action or possible termination.

(b) Rescind the following unlawful provision of the solicitation and/or distribution rule in the employee handbook that states:

> Solicitations and /or distributions . . . are prohibited on company property.

(c) Furnish employees with an insert for the current employee handbook that (1) advises that the unlawful provisions have been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provisions; or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

(d) Within 14 days from the date of this Order, offer Eric Faubel and Brandon Armstrong full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make Eric Faubel and Brandon Armstrong whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(f) Compensate Eric Faubel and Brandon Armstrong for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 9 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Eric Faubel, the unlawful layoff of Brandon Armstrong, and the unlawful disciplinary warning issued to Stephen Marolf, and within 3 days thereafter, notify each of them in writing that this has been done and that the discharge, layoff, and disciplinary warning will not be used against them in any way.

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

(i) Within 14 days after service by the Region, post at its Charleston and Bradley, West Virginia facilities copies of the attached notice marked "Appendix."[44] Copies of the notice, on forms provided by the Regional Director for Region 9, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 9, 2019.

(j) Within 21 days after service by the Region, file with the

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

Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

Dated, Washington, D.C. January 15, 2020

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your union support or union activities, including whether you have been solicited by a union organizer or whether you are a union member.

WE WILL NOT solicit grievances from you and promise to remedy them in order to discourage you from selecting union representation.

WE WILL NOT maintain an overly broad confidentiality rule or solicitation and/or distribution rule that prohibits you from engaging in activities protected by the National Labor Relations Act.

WE WILL NOT exclude you from employee safety meetings in response to your union activities.

WE WILL NOT tell you that we need to isolate union supporters away from other employees.

WE WILL NOT threaten that any employee speaking to a union organizer will be discharged.

WE WILL NOT isolate you and assign you to work together in retaliation for your union activities.

WE WILL NOT engage in surveillance of you by photographing you while you are engaged in union activities.

WE WILL NOT threaten to call the police on you for engaging in union activities.

WE WILL NOT ask you to videotape coworkers and disclose your coworkers union activities to us.

WE WILL NOT create an impression that your union activities are under surveillance.

WE WILL NOT discharge you, lay you off, or issue a disciplinary warning to you, because of your support for the Sheet Metal, Air, Rail and Transportation Workers, Local Union No. 33 (Union) or any other labor organization.

WE WILL NOT threaten you with criminal and civil prosecution for engaging in union activities.

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

WE WILL rescind the following unlawful provision of the confidentiality rule in our employee handbook, that states:

> dissemination of confidential information within the company, such as personal information, financial information, etc. will subject the responsible employee to disciplinary action or possible termination.

WE WILL, rescind the following unlawful provision of the solicitation and/or distribution rule in the employee handbook that states:

> Solicitations and /or distributions . . . are prohibited on company property

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

WE WILL within 14 days from the date of this Order, offer Eric Faubel and Brandon Armstrong full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Eric Faubel and Brandon Armstrong whole for any loss of earnings and other benefits resulting from their discharge and layoff, less any net interim earnings, plus interest, and WE WILL make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Eric Faubel and Brandon Armstrong for the adverse tax consequences, if any, of receiving lump-sum backpay awards and we will file with the Regional Director for Region 9 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Eric Faubel, the unlawful layoff of Brandon Armstrong, and the unlawful disciplinary warning issued to Stephen Marolf, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharge, layoff, and disciplinary warning will not be used against them in any way.

S & S ENTERPRISES, LLC, D/B/A/ APPALACHIAN HEATING

Administrative Law Judge's decision can be found at www.nlrb.gov/case/09-CA-235304 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.