W. E. Carlson Corporation *and* Millwrights and Machinery Erectors Local Union No. 1693, an affiliate of United Brotherhood of Carpenters and Joiners of America and Richard Lightfoot. Cases 13–CA–40817–1 and 13–CA–40936–1

January 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 31, 2003, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel also filed limited exceptions, 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,[1] and conclusions only to the extent consistent with this Decision and Order.

This case involves allegations of violations of Section 8(a)(1), (3), and (4) of the Act, arising in the context of an unsuccessful union organizing campaign. The judge found that the Respondent violated Section 8(a)(1) by threatening suspension of wage increases, loss of benefits, plant closure and layoffs, and that collective bargaining would be futile, all if the Union won the election. For the reasons stated by the judge, we adopt these unfair labor practice findings.[2] The judge also found that the Respondent violated Section 8(a)(3) and (4) by denying employee Richard Lightfoot a wage increase, placing him on probation, and discharging him because he engaged in union activity and provided information to the Board in its investigation of unfair labor practice charges against the Respondent. For the reasons explained below, we affirm the judge's finding that the denial of Lightfoot's wage increase violated Section 8(a)(3), but we reverse his findings that the Respondent violated Section 8(a)(4) by denying the wage increase and Section 8(a)(3) and (4) by placing Lightfoot on probation and discharging him.

A. The Denial of Lightfoot's Wage Increase

Facts

The Respondent installs and maintains dock levelers. Its installers have been represented by Millwrights and Machinery Erectors Local Union No. 1693, an affiliate of United Brotherhood of Carpenters and Joiners of America (the Union) since the mid-1970s. In October 2002, the Union began an organizing drive among the Respondent's service technicians. After receiving authorization cards from 8 of the Respondent's 11 service technicians, the Union sent a letter to the Respondent dated November 5, 2002, requesting an addendum to the installers' collective-bargaining agreement so as to cover the service employees. The Respondent declined, and the Union filed a representation petition with the Board on January 2, 2003.[3] The election was held on February 11, and the Union lost.

The Respondent's established practice was to give employees a wage increase annually in the paycheck following the employee's anniversary date. Lightfoot's anniversary date was January 10, and he was eligible to receive his annual wage increase in his January 31 paycheck. He did not receive a wage increase. Other than in this instance, no employee had been denied an annual wage increase since 2001. From 1997 to 2001, one employee was denied annual wage increases because of subpar production.

On January 30, William Carlson, the Respondent's president and owner, and Rick Leadley, its service and installation manager, met with the service technicians. Leadley told them that the Union was "useless" and a "waste of time." Carlson told them that he considered them to be "family" and urged them to compare their present benefits with those to be obtained through union representation.[4] When Carlson asked for questions, Lightfoot asked how Carlson could justify treating one family member differently from another. Lightfoot's point was clear: the Respondent's installers were under a collective-bargaining agreement, while its service technicians were not. Lightfoot testified that Carlson looked irritated and said he would answer personal questions at a one-to-one meeting.

On February 3, Carlson and Leadley held individual meetings with the service technicians. At their meeting

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

[2] Regarding the judge's finding that the Respondent threatened the futility of collective bargaining, we observe that the judge based this finding on a threat to delay negotiations made by the Respondent's president and owner, William Carlson, but not on the January 30, 2003 statements by Manager Rick Leadley that unions were "useless" and a "waste of time."

[3] All subsequent dates are in 2003, unless specified otherwise.

[4] In a January 27 memorandum, the Respondent told the service technicians that they would lose $3912 in benefits if they unionized.

with Lightfoot, Lightfoot told Carlson of Lightfoot's strong desire to be a union member and asked Carlson why he was opposed to the Union. Carlson replied that he could not afford the Union and that, if the Union won, he would "stall negotiations for as long as possible" and lay off employees. Carlson also said that the company "would not last" if the Union won the election.

In late January or early February, Lightfoot asked Leadley about his wage increase. Leadley told Lightfoot that wages were frozen until after the union election. Lightfoot was the only employee whose anniversary date fell during the period between the filing of the representation petition and the holding of the election. Lightfoot did not receive a wage increase after the election.

Leadley testified that he decided not to give Lightfoot a wage increase because of poor performance. The record shows that Lightfoot's performance had been a concern for some time. Beginning in 2001, a manager reviewed Lightfoot's work tickets on an almost daily basis because of concerns about the quality of his work. Also in 2001, several managers spoke with Lightfoot about excessive travel times to customer worksites. In April 2002, Leadley spoke with Lightfoot about excessive tardiness and absences. On November 7, 2002, Leadley and Guy Horbus, the Respondent's service technician supervisor, met with Lightfoot to discuss a number of issues, including absenteeism, tardiness, customer complaints about his work, sleeping in his truck, excessive travel times, and making personal calls on a company cellular phone.

In early March, Lightfoot provided information to the Board in support of an unfair labor practice charge filed by the Union.

The Judge's Decision

The judge determined that the General Counsel met his initial burden, under *Wright Line*,[5] of showing that Lightfoot's protected activity was a motivating factor in the Respondent's decision to deny Lightfoot a wage increase. The judge found that Lightfoot engaged in protected activity by advocating for the Union during the group meeting on January 30 and in his individual meeting with Carlson and Leadley on February 3, and by providing information to the Board in early March. The judge also found that the Respondent was aware of the foregoing activity, and that it harbored antiunion animus as demonstrated by its several violations of Section 8(a)(1). The judge reasoned that the timing of the denial of Lightfoot's wage increase in close proximity to his protected activity supported an inference that the Respondent's union animus was a motivating factor in that denial.

In addition, the judge found that the Respondent failed to show that it would have denied Lightfoot a wage increase even absent his protected activity. The judge rejected the Respondent's claim that it denied the wage increase due to unsatisfactory performance because Leadley did not mention performance when Lightfoot asked him about the wage increase. Accordingly, the judge concluded that the only reasonable inference to be drawn was that the Respondent withheld the wage increase to punish Lightfoot for his support of the Union in violation of Section 8(a)(3). The judge further concluded that the Respondent violated Section 8(a)(4) by continuing to deny the wage increase after Lightfoot provided information to the Board in support of the Union's pending unfair labor practice charge.

The Respondent's Exceptions

The Respondent excepts to the judge's findings that it violated Section 8(a)(3) and (4) by denying Lightfoot a wage increase. The Respondent contends that the General Counsel failed to satisfy his initial burden under *Wright Line* of demonstrating discriminatory motivation because the decision to deny Lightfoot a wage increase was made before the Respondent knew anything about Lightfoot's union views. The Respondent acknowledges that it first became aware of those views on January 30 and that, had it been granted, Lightfoot's wage increase would have appeared in his January 31 paycheck. The Respondent contends, however, that it made the decision to withhold a wage increase well before January 30 because of the leadtime required for calculating payroll and issuing checks. Even assuming, however, that the General Counsel met his *Wright Line* burden, the Respondent contends that it denied Lightfoot a wage increase because of his poor performance, and that it proved it would have done so even in the absence of Lightfoot's protected activity.

Analysis

Under *Wright Line*, supra, the General Counsel must first prove, by a preponderance of the evidence, that animus against protected conduct was a motivating factor in the adverse employment action. If the General Counsel makes a showing of discriminatory motivation by proving union activity, the employer's knowledge of that activity, and animus against protected conduct, the burden of persuasion then shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004).

[5] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

The Respondent contends it was unaware of Lightfoot's union sympathies when it decided against giving Lightfoot a wage increase in his January 31 paycheck. The Respondent was aware, however, that its service technicians had engaged in union activity. It first became aware of that activity on or about November 5, 2002, when it received the Union's request for an addendum to the installers' collective-bargaining agreement covering the service technicians. The Respondent was confirmed in this knowledge on January 2, when the Union filed an election petition with the Board. The Respondent's strong antiunion animus is demonstrated by its multiple and serious threats in violation of Section 8(a)(1), which the Respondent made close in time to its decision to withhold Lightfoot's increase. Moreover, Lightfoot was the only service technician who was eligible for a wage increase during the pendency of the Union's petition; and when Lightfoot asked about his wage increase, Leadley told him that wages were frozen until after the union election. As the judge recognized in the section of his decision discussing the Respondent's 8(a)(1) violations, Leadley's explanation for withholding the wage increase was not a lawful one. Thus, "Board law is quite clear that, in the midst of an on-going union organizing or election campaign, an employer must proceed with an expected wage or benefit adjustment as if the organizing or election campaign had not been in progress. . . [A]n employer acts in violation of Section 8(a)(1) by attributing its failure to implement the expected wage or benefit adjustment to the presence of the union. . . ." *Earthgrains Baking Cos*., 339 NLRB 24, 28 (2003), enfd. 116 Fed. Appx. 161 (9th Cir. 2004). Accordingly, we find that the General Counsel established a compelling case that animus against its employees' union activities was a motivating factor in the denial of Lightfoot's wage increase.

Turning to the Respondent's *Wright Line* rebuttal case, we acknowledge that Lightfoot's performance was deficient, and that this deficiency would be a legitimate reason to deny a wage increase. The burden resting on the Respondent, however, required it not merely to present a legitimate reason for its action, but to persuade by a preponderance of the evidence that it would have withheld the wage increase even in the absence of the protected conduct. See *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). The Respondent has not done this. When Lightfoot asked about his wage increase, Leadley said nothing about performance. Instead, he said that wages were frozen until after the union election, thus unlawfully linking the denial of the increase to employees' protected activity. Moreover, the Respondent's past practice with respect to wage increases undermines its *Wright Line* defense. Prior to denying Lightfoot's wage increase, the Respondent had not withheld an annual wage increase since 2001, and the record evidence is that only one employee was ever denied a wage increase because of poor performance. Moreover, Lightfoot received wage increases in 2001 and 2002, notwithstanding a less than stellar work record at those times. This further undermines the Respondent's belated justification for denying Lightfoot a wage increase.

In sum, the Respondent has not shown by a preponderance of the evidence that it would have withheld Lightfoot's wage increase for legitimate reasons even in the absence of the employees' union activities. Accordingly, for the foregoing reasons, we affirm the judge's finding that the Respondent violated Section 8(a)(3) by denying Lightfoot a wage increase.

The dissent would dismiss this 8(a)(3) allegation. It contends that the General Counsel did not show that the Respondent knew, at the time the wage increase was denied, that Lightfoot had engaged in union activity. The dissent speculates that we must be inferring that the Respondent knew of union activity by Lightfoot from its knowledge that the service technicians were engaged in an organizing drive.

The dissent misunderstands our rationale. We do not find that the Respondent knew of union activity specifically by Lightfoot. Rather, we find that the Respondent knew that its service technicians were seeking to organize and, because of its animus against that activity, decided to freeze wages pending the union election, resulting in the denial of Lightfoot's wage increase. Thus, it is immaterial that the Respondent lacked knowledge of union activity specifically by Lightfoot. It knew about the organizing effort, harbored animus against that effort, and retaliated by freezing wages; and the effect of that retaliation fell on Lightfoot.

All of the elements of an 8(a)(3) violation have been established. As the Sixth Circuit has explained, "[T]he courts have held that although the General Counsel must usually show that the employer knew about individual employees' union activities before the Board may conclude that the employer violated Section 8(a)(3), the General Counsel may also prevail by showing that the employer [acted] . . . in retaliation against its employees because of the union activities of some." *Birch Run Welding & Fabricating v. NLRB*, 761 F.2d 1175, 1180 (6th Cir. 1985). "The focus of [this] theory is upon the employer's motive . . . rather than upon the anti-union or pro-union status of particular employees." Id. In other words, under this theory, "the Board need not show that the employer knew of any particular employee's union involvement to show that the employer acted out of un-

ion animus." *WXGI, Inc. v. NLRB*, 243 F.3d 833, 843 (4th Cir. 2001). In short, "[a]dverse employment action in retaliation for concerted activity 'violates the NLRA, even if the employer wields an undiscerning axe. . . .'" *RGC (USA) Mineral Sands, Inc. v. NLRB*, 281 F.3d 442, 448 (4th Cir. 2002) (quoting *NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 510 (4th Cir. 1991)). That is precisely the situation here.

The dissent says that it is inappropriate for us to rely on the foregoing rationale because it differs from that argued by the General Counsel. We disagree. Our analysis does not, under the circumstances presented, deprive the Respondent of due process. First, the complaint specifically alleged that the denial of Lightfoot's wage increase violated Section 8(a)(3). Second, the wording of the complaint was not limited to any particular 8(a)(3) theory.[6] In fact, the wording of the complaint encompasses the reasoning described above, as well as the judge's description of the Respondent's antiunion animus.[7] Third, the facts and circumstances of the wage increase denial were fully litigated at the hearing. The judge concluded that the denial of the wage increase violated Section 8(a)(3). We agree, but based on a slightly different rationale. It is well settled that even where the General Counsel has not excepted to an administrative law judge's analysis, the Board "is not compelled to act as a mere rubber stamp" but rather is "free to use its own reasoning." *NLRB v. WTVJ, Inc.*, 268 F.2d 346, 348 (5th Cir. 1959). We use our own reasoning here, just as the Board has done in prior cases. See, e.g., *Pepsi America, Inc.*, 339 NLRB 986 (2003); *Jefferson Electric Co.*, 274 NLRB 750 (1985), enfd. 783 F.2d 679 (6th Cir. 1986).

Although the Respondent's decision to withhold Lightfoot's wage increase was unlawful, there is no evidence that Lightfoot's participation in the Board's unfair labor practice investigation played a role in that decision. The decision to withhold the wage increase was made long before Lightfoot, in March, provided information to the Board, and there is no evidence that the Respondent reaffirmed that decision after learning that Lightfoot had done so. Accordingly, we reverse the judge's finding that the Respondent violated Section 8(a)(4) by denying the wage increase.

B. Lightfoot's Probation and Discharge

Facts

As already noted, Lightfoot had numerous work-related problems during his employment with the Respondent. In 2001, Lightfoot's work tickets were reviewed almost daily because of concerns about the quality of his work, and the Respondent's managers spoke with Lightfoot about excessive travel times to customer worksites. In April 2002, Leadley spoke with Lightfoot about excessive tardiness and absences. On November 7, 2002, Leadley and Horbus met with Lightfoot to discuss a number of issues, including absenteeism, tardiness, customer complaints about his work, sleeping in his truck, excessive travel times, and making personal calls on a company cellular phone. Leadley and Horbus testified that Lightfoot was placed on a 90-day probation at the end of the meeting. Lightfoot denied being told he was on probation. The judge credited Lightfoot.

In 2003, Lightfoot reported to work late on 10 days and missed 8 scheduled workdays through March 6. On March 11, Leadley and Horbus met with Lightfoot again, placed him on a 60-day probation, and told him that this was his last chance to avoid being discharged. Lightfoot signed a "written warning acknowledgment" form that cited "continued attendance problems," warned Lightfoot not to miss any more days of work, and required him to work 40 hours per week. On March 17, Lightfoot failed to report for work on time. Horbus called him at home, and Lightfoot said he had overslept. Lightfoot arrived at work 2 hours late. On March 21, Horbus spoke with Lightfoot about damage to Lightfoot's company truck,

[6] Because we are not finding an unfair labor practice unalleged in the complaint, *Pergament United Sales*, 296 NLRB 333 (1989), enfd. 920 F.2d 130 (2d Cir. 1990), cited by the dissent, is inapposite. *Pergament* sets forth the Board's test for finding an unalleged violation of the Act, not for finding an alleged violation on grounds that differ somewhat from the judge's reasoning. Similarly, *Lamar Advertising of Hartford*, 343 NLRB 261 (2004), also relied upon by the dissent, is distinguishable. In *Lamar*, the complaint alleged that the respondent violated Sec. 8(a)(4) by discharging employee Gary Crump because he planned to *testify* against the respondent in an unfair labor practice proceeding. The issue presented was whether the Board could find, consistent with due process, that the respondent violated Sec. 8(a)(4) by discharging Crump for a different and unalleged reason, namely that Crump *threatened to retain counsel*, which the General Counsel argued amounted to a threat to file charges with the Board. 343 NLRB at 266–267. The Board held that finding the violation would offend due process because the complaint did not allege that Crump's threat to retain counsel constituted protected activity or was a motivating factor in the discharge, no evidence was presented on those issues at the hearing, and, consequently, the respondent had no meaningful notice of the charge and no opportunity to fully and fairly litigate it at the hearing. Id. Here, by contrast, the complaint alleged the violation we have found: that the Respondent violated Sec. 8(a)(3) by denying Lightfoot's wage increase. The facts surrounding the denial of the wage increase—including the Respondent's knowledge of organizing activities, antiunion animus, the direct tie of Lightfoot's wage increase denial to the presence of the union, and Respondent's pretextual defense (that Lightfoot did not receive an increase due to poor performance)—were fully explored and litigated. Consequently, *Pergament* does not apply, and *Lamar Advertising* is distinguishable.

[7] Par. VI(e) of the complaint states: "Respondent engaged in the conduct described above in pars. VI(a)–(d) [failing to issue an annual pay increase to Lightfoot, inter alia] because [Lightfoot] assisted the Union and engaged in concerted activities, *and to discourage employees from engaging in these activities*." (Emphasis added.)

which Horbus had noticed a few days earlier. Lightfoot said he did not think he had to report minor damage to his truck. On March 24, the Respondent received a copy of the charge the Union filed with the Board alleging unfair labor practices by the Respondent in violation of Section 8(a)(1), (3), and (4). The Respondent understood that Lightfoot was a specified alleged discriminatee. On March 25, Leadley informed Lightfoot that he was being discharged for reporting to work late on March 17, and for failing to report the damage to his truck.

The Judge's Decision

The judge found that the General Counsel sustained his initial burden under *Wright Line*, supra, of showing that Lightfoot's protected activity was a motivating factor in the Respondent's decisions to place him on probation and to discharge him. The Respondent was aware of Lightfoot's union sympathies and was aware that he had given information to the Board in support of the Union's unfair labor practice charges against the Respondent. In addition, the judge found that the Respondent's 8(a)(1) threats and its denial of Lightfoot's wage increase demonstrated its antiunion animus. The judge also observed that Lightfoot was placed on probation on March 11, within 2 weeks of providing information to the Board, and discharged on March 25, 1 day after the Respondent received notice of the unfair labor practice charges that included allegations concerning Lightfoot.

The judge further found that the Respondent failed to prove that it would have placed Lightfoot on probation and discharged him even in the absence of union activity. Rejecting the Respondent's claim that Lightfoot was put on probation due to tardiness and absences in January through early March, the judge noted that Lightfoot worked at least 40 hours a week during that period of time, and that the Respondent did not speak with him about his continuing time and attendance problems until 44 days after the end of the claimed 90-day probation beginning in November 2002. Lightfoot was discharged purportedly for reporting late to work on March 17 and damaging a company vehicle; but the judge observed that the March 11 probation form did not warn Lightfoot about tardiness, that Lightfoot did not miss any scheduled work days after March 11, and that he worked more than the requisite 40 hours a week. The judge also found that the Respondent treated Lightfoot more harshly than the rest of its employees. He noted evidence of unpunished time and attendance abuses by numerous employees, as well as evidence that another employee also failed to report minor damage to his company truck and was not punished. Having found that the Respondent failed to sustain its rebuttal burden under *Wright Line*, supra, the judge concluded that the Respondent violated Section 8(a)(1), (3), and (4) by placing Lightfoot on probation on March 11 and discharging him on March 25.

The Respondent's Exceptions

Although the Respondent disagrees with the judge's finding that the General Counsel met his initial burden under *Wright Line*, supra, it argues only that it proved it would have disciplined and discharged Lightfoot for legitimate reasons regardless of his protected activity. The Respondent asserts that the judge ignored the testimony of Russ Knopf, a discharged former employee called to the stand by the General Counsel, who testified that Lightfoot was not "the most mechanically-inclined person" and that other employees had to fix his mistakes. The Respondent contends that it placed Lightfoot on probation on November 7, 2002, and that the judge erred in crediting Lightfoot to the contrary. According to the Respondent, the judge also erred in relying on the fact that the March 11 probation form did not mention tardiness. In this connection, the Respondent points out that Lightfoot admitted that Leadley "mentioned other things that happened the years previous and told me just make sure I don't repeat those," and that Leadley previously had spoken to Lightfoot about tardiness. The Respondent also faults the judge's reliance on Lightfoot's having worked 40-hour weeks because that did not lessen the inconvenience to the Respondent's operation caused by Lightfoot's tardiness and absences. The Respondent contends that employees who were not punished for being tardy or missing work had far fewer work-related problems than Lightfoot, and that the only two employees with performance and attendance problems comparable to Lightfoot's—Jim Jessen and Dan Follett—also were discharged.

Analysis

Assuming that the General Counsel met his initial burden under *Wright Line*, supra, we find that the Respondent demonstrated that it would have placed Lightfoot on probation and discharged him even in the absence of his protected activity.

Lightfoot's work-related problems up to November 2002 were manifold. Customers repeatedly complained about Lightfoot's work, and even a discharged former employee called by the General Counsel testified that Lightfoot was, in essence, incompetent. In addition to performance issues, there were Lightfoot's conduct problems: tardiness, unscheduled absences, sleeping in his truck, excessive travel times, and making personal calls on a company cellular phone.

The Respondent met with Lightfoot in April 2002 to discuss some of these issues. Because the problems con-

tinued, Leadley and Horbus met with him on November 7, 2002. Although the judge found, based on credibility determinations, that Lightfoot was not placed on probation at that time, it is clear that Leadley and Horbus had a serious discussion with Lightfoot concerning a number of performance and conduct problems. Despite this discussion, Lightfoot repeatedly missed scheduled work days and even more frequently was late for work during January, February, and early March. In other words, Lightfoot's unacceptable conduct was continuing. March 11 was the third time in less than a year that the Respondent talked to Lightfoot about his unscheduled absences. Only 6 days into his March 11 probation, Lightfoot was almost 2 hours late to work. The next day, Horbus noticed unreported damage to Lightfoot's company truck.

The judge found it significant that Lightfoot was working 40-hour weeks. We do not. Regardless of total hours worked, Lightfoot failed to report on scheduled days, causing the Respondent to scramble to replace him. The judge also found it significant that the Respondent waited 44 days after the end of the asserted 90-day probation beginning in November 2002 to place Lightfoot on 60-days probation the following March. The only significance of that delay, however, is that it tends to support the judge's crediting of Lightfoot that he was not placed on probation at the end of the meeting on November 7, 2002. As stated above, however, we place little weight on this circumstance. The Respondent voiced serious concerns about Lightfoot's performance and conduct at that meeting. Even if the meeting did not result in probation, it does not follow that the Respondent's concerns were spurious. The judge also relied in part on the fact that the probation form did not mention tardiness. Lightfoot admitted, however, that he was warned not to repeat previous mistakes, which included tardiness. Although the judge correctly found that the Respondent was flexible about time and attendance and that a number of employees benefited from that flexibility, we agree with the Respondent that only Jessen and Follett had comparable records,[8] and they were both discharged.

In sum, we recognize that the timing of Lightfoot's probation and discharge (shortly after the Respondent learned of his protected activities) raises doubts. However, given Lightfoot's history of work-related problems dating back many months, we find that the Respondent has shown that it would have placed him on probation and discharged him even in the absence of any union activity and regardless of his having furnished information to the Board. Accordingly, the Respondent did not violate Section 8(a)(3) or (4) by placing him on probation and discharging him, and those allegations will be dismissed.

ORDER

The National Labor Relations Board orders that the Respondent, W. E. Carlson Corporation, Elk Grove Village, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening suspension of annual wage increases, plant closure, layoffs, loss of benefits, or the futility of collective bargaining if the service technicians selected the Union as their collective-bargaining representative.

(b) Denying customary wage increases to employees because a union organizing campaign is in progress.

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

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

(a) Make Richard Lightfoot whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful denial of Richard Lightfoot's 2003 wage increase, and within 3 days thereafter notify him in writing that this has been done and that the denial of the wage increase will not be used against him in any way.

[8] Leadley met with Jessen in November 1999 to address several issues, including excessive travel times, work safety, and driving more carefully. Horbus met with Jessen in October 2000 to communicate the importance of being more thorough on service calls and to discuss two particular jobs where Jessen's lack of thoroughness "caused real problems." Jessen's performance did not improve, and he was discharged in March 2001.

Leadley and Carlson met with Follett in April 2002 to discuss a number of issues, including customer relations, attitude, timeliness, safety, taking proper care of equipment, following company procedures, and not arguing or fighting. They met with Follett again in October 2002 to discuss attitude, following directions without conflict or disagreement, acting acceptably at customer jobsites, and responding promptly to calls from the office. Follett was placed on probation until May 2003. He was discharged in June 2003 due to customer complaints and insubordination.

Thus, as with Lightfoot, it was an accumulation of various issues that led to Jessen's and Follett's discharges, and the evidence concerning other employees who were permitted leeway on time and attendance does not show that they similarly presented multiple performance and/or conduct problems.

(c) 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.

(d) Within 14 days after service by the Region, post at its Elk Grove Village, Illinois, facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 17, 2003.

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

CHAIRMAN BATTISTA, dissenting in part.

I agree in all respects with the decision of my colleagues, except for their finding that the Respondent violated Section 8(a)(3) by denying Richard Lightfoot a wage increase in January 2003. I would dismiss this complaint allegation because the General Counsel failed to meet its burden, under *Wright Line*,[1] of proving that the Respondent knew of Lightfoot's union activity at the time it decided not to grant him an annual wage increase.

The Respondent has a practice of granting its service technicians annual wage increases on the anniversary date of their hire. The increases are not automatic, however. Rather, they are based on satisfactory job performance. Although only one employee was previously denied an increase, the relevant point is that a decision is made on the anniversary date.

The Respondent's practice is to make a decision on an employee's anniversary hire date on whether to grant that employee a wage increase. If an increase is decided upon, it is then reported to the payroll office, and the actual increase appears in the paycheck that follows the employee's anniversary date of hire. There is no evidence that the Respondent has ever manipulated the payroll system by preventing a wage increase from taking effect after an affirmative decision has been reported to the payroll office to grant an employee a wage increase.

Lightfoot was a service technician whose anniversary date of hire was January 10. In accord with the Respondent's practice described above, it was also the date on which the Respondent made the decision not to grant Lightfoot a wage increase. Thus, if, as the judge and my colleagues find, the denial of a wage increase to Lightfoot was unlawful, the violation had to have occurred on January 10, because that is when the decision to withhold the increase was made. Under the Board's *Wright Line* analysis, this cannot be shown.

To establish a violation of Section 8(a)(3) under *Wright Line*, "credible proof of 'knowledge' [of an employee's protected activity] is a necessary part of the General Counsel's threshold burden, and without it, [a] complaint cannot survive." *Tomatek, Inc.*, 333 NLRB 1350, 1355 (2001). The rationale for this threshold showing is that, under *Wright Line*, the General Counsel's *ultimate* burden is to show that "an employee's protected activity was a motivating factor in the employer's adverse action against that employee." *Southside Hospital*, 344 NLRB 634 (2005). If, however, the employer never knew about such activity, "it is axiomatic that the employer could not have been 'motivated' by the employee's protected activity" in taking adverse action against him. *Tomatek*, 333 NLRB at 1355. That is the case here.

As the judge and my colleagues acknowledge, Lightfoot did not engage in any protected activity until January 30 when he advocated for the Union during an employee group meeting with the Respondent's management officials. It is clear, therefore, that because this union activity and Lightfoot's similar expression of support for the Union in his February 3 meeting with Respondent's officials occurred 3 weeks after the decision was made to withhold a wage increase from Lightfoot,

[9] 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."

[1] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

his union activity could not have been a motivating factor behind the Respondent's decision not to grant him an increase.

My colleagues apparently concede that there is no direct evidence that the Respondent was, or could have been, aware of Lightfoot's protected activity at the time the decision was made to deny him a wage increase. They suggest, instead, that such knowledge may be inferred from circumstantial evidence that Respondent was aware since November 2002 of the organizing drive among its service technicians. I disagree. Although "[i]t is true that, in an appropriate case, knowledge of an employee's union activities may be proven by circumstantial evidence from which a reasonable inference may be drawn," here, as in *Register Guard*, such an inference is not supported. 344 NLRB 1142, 1145 (2005).

In *Register Guard*, the employee (Kama Cox) actually engaged in protected activity prior to being discharged, but there was no specific knowledge of this by the respondent, and the Board declined to infer such knowledge based on respondent's general knowledge of its employees' organizing campaign. The instant case is an even stronger one for dismissal. The employee here did not even engage in any protected activity prior to the adverse action taken against him. Since Lightfoot did not engage in union activity prior to January 10, it is obvious that the Respondent could have no knowledge of any such activity on that date. At most, based on general knowledge of union activity, the Respondent could have suspected that Lightfoot was engaged in union activity. However, there is no evidence to support even such a suspicion, and thus the General Counsel does not press that theory. See generally *Amber Foods*, 338 NLRB 712, 714 (2002) ("[T]here is not a scintilla of record evidence that the Respondent believed or, at the very least, even *suspected* that Alvarez was engaged in union activity at the time she was warned and discharged, although the Respondent knew generally . . . that its employees had contacted the Union.").

Perhaps it is theoretically possible that the Respondent made a favorable decision on January 10, revoked it after the January 30 meeting, and immediately reported the revocation to the payroll office (so as to have the increase revoked by that office by the January 31 payroll date). However, all of this is sheer speculation and cannot support the finding of a violation.

In sum, absent evidence that Lightfoot had engaged in protected activity prior to the Respondent's decision to deny him a wage increase, the General Counsel necessarily failed to meet his threshold burden under *Wright Line* of proving the critical element of employer knowledge of protected activity. Accordingly, because a prima facie case has not been established that the wage increase denial violated Section 8(a)(3) and (1), I would dismiss this complaint allegation.

My colleagues have set forth a theory of violation that is not alleged by the General Counsel.[2] The General Counsel's sole theory of violation was that the Respondent unlawfully denied *Lightfoot* a pay increase because of *Lightfoot's* union activities. The General Counsel did not assert, as my colleagues find, that the Respondent's denial of Lightfoot's increase was part of a broad wage freeze scheme designed to unlawfully retaliate against all the service technicians. Nor does the General Counsel argue, as does the majority, that based on such a broad wage freeze scheme, and because the "effect of that retaliation fell on Lightfoot," it is "immaterial" that the Respondent was unaware of any union activity by Lightfoot. Since the argument is not raised by the General Counsel, it is not an appropriate basis on which to find a violation.[3]

My colleagues disagree. They say that in deciding whether a violation has been committed, "[i]t is well settled" that the Board may rely on reasoning different from that of the judge or different from a complaint theory argued by the General Counsel. That may be true where the variance accords with the test set out in *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). In *Pergament*, the Board held that it "may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." In *Lamar Advertising of Hartford*, 343 NLRB 261, 266–267 (2004), the Board found that the *Pergament* test was not met because the new complaint theory presented to the Board was neither included in an amended complaint nor litigated by the parties at the hearing. To find a violation based on a new complaint theory "would violate fundamental principles of procedural due process, which require meaningful notice of a charge and a full and fair opportunity to liti-

[2] The majority refers to its argument as "our reasoning," i.e., not that of the General Counsel.

[3] Contrary to my colleagues' assertion, par. VI of the complaint, which is set forth in fn. 7, supra, does not encompass their theory of the violation. Rather, it is restricted solely to the theory that the General Counsel argued, i.e., that Lightfoot was denied a wage increase. As I have stated, this alleged theory must fail because the Respondent had no knowledge that Lightfoot engaged in union activity at the time he was denied the increase on January 10. Complaint par. VI, including the language that my colleagues emphasize in italics, does not allege *their* theory. That is, the complaint alleges the Respondent's motive for denying the pay increase *to Lightfoot*. The Respondent's alleged motive for this denial may have been to discourage Lightfoot and others from engaging in protected concerted activity, but this does not contradict the fact that the allegation is conduct *toward Lightfoot*.

gate it." I would therefore reject my colleagues' new theory of the wage denial violation.

My colleagues acknowledge that there can be no violation where the complaint alleges certain conduct as unlawful, and the evidence establishes different conduct. See *Lamar Advertising,* supra. However, they say a violation can be found where the same conduct is alleged and found unlawful, even if the theory of violation differs from that alleged. The Board, in *Lamar*, rejected this contention. The Board said that the General Counsel could not "expand[ ] the *theory* of the violation beyond what was alleged in the complaint and litigated at the hearing." Supra at 266 (emphasis added). Further, the distinction drawn by my colleagues ignores the vice that troubles the Board. Irrespective of whether the variation is in the facts or in the theory of violation, a respondent is denied due process by not being apprised of what it must defend against. Indeed, the instant case is an even greater denial of due process than that in *Lamar*. In that case, the General Counsel sought to expand the theory of the complaint. In the instant case, my colleagues do it themselves.

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 threaten suspension of annual wage increases, plant closure, layoffs, loss of benefits, or the futility of collective bargaining if our service technicians select the Millwrights and Machinery Erectors Local Union No. 1693, an affiliate of United Brotherhood of Carpenters and Joiners of America, or any other union as their collective-bargaining representative.

WE WILL NOT deny customary wage increases to employees because a union organizing campaign is in progress.

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

WE WILL make Richard Lightfoot whole, with interest, for our unlawful failure to grant him a wage increase in 2003.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful denial of Richard Lightfoot's 2003 wage increase, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the denial of the wage increase will not be used against him in any way.

W. E. CARLSON CORPORATION

Jeanette Schrand, Esq., for the General Counsel.
David L. Miller, Esq., of Chicago, Illinois, for the Respondent.
Edward A. Kersten, Esq., of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Chicago, Illinois, on September 8, 9, and 22, 2003. The Millwrights and Machinery Erectors Local Union No. 1693, an affiliate of United Brotherhood of Carpenters and Joiners of America (the Union) filed a charge in Case 13–CA–40817–1 on February 5, 2003, and amended it on March 18, 2003. Richard Lightfoot (Lightfoot) filed a charge in Case 13–CA–40936–1 on March 27, 2003. The order consolidating cases, consolidated complaint and notice of hearing was issued on April 30, 2003. The consolidated complaint was amended at the hearing.

The Respondent is alleged to have made statements or taken action, in the course of an organizing drive, in violation of Section 8(a)(1) of the National Labor Relations Act (the Act), and to have placed service department employee Lightfoot on probation on March 11, 2003, and discharged him on March 25, 2003, due to his activities on behalf of the Union in violation of Section 8(a)(3) and (4) of the Act. The Respondent denied that it committed any violations of the Act and contends that Lightfoot was discharged for cause.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the posthearing briefs filed by counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, installs, maintains, and services loading dock systems in the Chicago, Illinois area. It maintains its main office and storage facility in Elk Grove Village, Illinois, where it annually receives goods valued over $50,000 directly from outside the State. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent specializes in installing and maintaining dock levelers and related equipment. Other than office employees, the Respondent employs installers and service technicians. The Respondent's installation employees are typically involved in the construction of new loading docks, while the service technicians perform repair and maintenance on existing docks. Since the mid-1970s, the installers have been covered by a collective-bargaining agreement between the Respondent and the Union. However, the service technicians have never been covered by a collective-bargaining agreement.

William E. Carlson (Carlson) is the president and sole owner of the Respondent. Rick Leadley (Leadley) has been the Respondent's manager of the service and installation department for the past 20 years. He reports to Carlson. As manager, Leadley has overall responsibility for the service and installation department employees. Guy Horbus (Horbus) is the Respondent's service technician supervisor and directly supervises the service employees. Horbus reports to Leadley. Lightfoot was an employee in the Respondent's service department from January 10, 2000, to March 25, 2003. As a service employee, he was required to service and repair loading docks.

B. The Union Campaign

In late October 2002, the Union began an organizing campaign among the Respondent's service employees. On November 5, 2002, after receiving completed authorization cards from eight service employees, union organizer James Atton sent a letter to the Respondent requesting a meeting to discuss the inclusion of an addendum to the Union's current collective-bargaining agreement adding the service employees. In a letter, dated November 13, 2002, Carlson declined the request to meet due to pending litigation involving the Union's pension fund for the installers. However, he left open the possibility of agreeing to an addendum as part of a resolution of the litigation.

The Union responded to the rejection of its request for voluntary recognition by filing a petition with the Board to represent the Respondent's 11 service employees on January 2, 2003.[1] An election, which was scheduled by the Board for February 11, was preceded by several weeks of written and oral communications between Carlson and the service employees. The election resulted in a majority vote by the service employees against certification of the Union as their collective-bargaining representative.

1. The distribution of memoranda to employees

Three memoranda distributed by the Respondent to the employees during the election campaign are at issue. In the first memorandum, dated January 17, Carlson informed all service employees about the process involved in the February 11 election, urged them to vote and assured them that their vote would be confidential. However, he went on to explain, in pertinent part, that "[i]f the majority votes against the union, we can continue our business and you can talk to us anytime about your wages, employment and working conditions." He also added that "[i]f both sides have drastically different positions, bargaining could last for months or years. During negotiations, your wages are frozen."

On January 27, the Respondent distributed another memorandum to the service employees explaining the impact unionization would have on their vacation, holiday, sick, and personal leave benefits. The memorandum purported to disseminate additional information relevant to the union certification election and provided an outline setting forth the amount of leave days currently enjoyed by the employees and the corresponding monetary value of those benefits. However, the memorandum asserted that, "[b]ased on the Agreement the Union has with Journeyman, none of these benefits will be available to you should the service technicians unionize." It further concluded, by stating, in bold letters, **"you will lose $3,912."**

In an individual memorandum sent to each of the service employees, dated January 30, Carlson reminded them about the benefits they currently received. In Lightfoot's case, his customary 4-percent annual pay increase would be effectively reduced to 1.9 percent if the Union were involved in negotiations, based on a projected 4.9-percent raise, less a 3-percent deduction for union membership dues. Carlson also indicated that Lightfoot would lose the opportunity to perform overtime work and receive monetary bonuses. Based on overtime performed and a bonus received in 2002, Lightfoot stood to lose a total of $5,203.90. Carlson revised his earlier projection of lost benefits in the January 27 memorandum and concluded that Lightfoot's "new loss would total," again in bold letters, **"$9,115.90."**

2. Meetings with employees

The General Counsel also contends that Carlson and Leadley made oral threats at several group and individual employee meetings prior to the election. The Respondent held its first group meeting with the service employees on January 30. The meeting, which was attended by all but two of the service employees, was held in the Respondent's storage facility and lasted approximately 30–45 minutes. At the meeting, Carlson told the service employees that he considered them to be a part of his "family" and repeated the suggestion contained in the memoranda distributed to employees that they compare their present benefits with those to be obtained through union representation.[2] Carlson also told the employees that he was "not a big fan of Unions" and "in our world today their, their service isn't really as necessary as it was back in the 1930's and that type of scenario." His remarks were followed by Leadley, who referred to the Union as "useless" and a "waste of time."

Upon concluding his remarks at the January 30 meeting, Carlson asked whether the employees had any questions with respect to the memoranda.[3] Lightfoot responded to Carlson's

[1] All dates and months, unless otherwise indicated, hereinafter refer to 2003.

[2] According to Russel Knopf, a credible former employee, most of the meeting related to Carlson and Leadley explaining why they were opposed to the Union. Tr. 178. Neither Carlson nor Leadley refuted Knopf's characterization of the meeting.

[3] Carlson initially testified that he scheduled meetings with individual employees for the following week because "we learned in the meet-

"family" comment by asking how he could justify treating one family member different from another. Carlson "looked a little confused" and Lightfoot then provided an example about a parent who purchases an expensive pair of shoes for one child, but gets an inexpensive pair for another child. Carlson responded to the example by looking "a little irritated" and told Lightfoot he would "answer any personal questions on a one to one meeting."[4] The only other service employee who spoke at the meeting was Frank Baron. He was strongly opposed to union representation.

Carlson and Leadley held the individual meetings with the employees on February 3. Their meeting with Lightfoot lasted about 45 minutes. Leadley began the meeting with an introductory statement about the informational purpose of the meeting. Carlson then asked Lightfoot whether he had any questions. Lightfoot told Carlson of his strong desire to be a member of a union and then asked Carlson why he was opposed to the Union. Carlson replied that he could not afford the costs associated with a union relationship and opined that the company "would not last" if the Union prevailed in the election.[5] He also avowed that, if the Union won the election, he would intentionally delay negotiations and lay off employees in order to pay the higher salary costs associated with overtime work.[6]

In addition to the meetings arranged by the Respondent, Lightfoot approached Leadley around the end of January or the beginning of February and asked whether he would be receiving his annual pay increase and be paid for his scheduled February vacation. It was the Respondent's standard practice to provide for annual pay increases and paid vacations.[7] However, Leadley told Lightfoot that all wages were "frozen" until after the election and could not guarantee that he would be paid for his vacation.[8]

C. The Alleged Discriminatory Treatment of Richard Lightfoot

On November 7, 2002, Leadley and Horbus held individual meetings with several of the service employees. In their meeting with Lightfoot, Leadley, and Horbus discussed customer complaints, time and attendance issues,[9] excessive travel times to work assignments, unauthorized rides by his children in his company truck, personal calls on his company cellular telephone, and napping during the workday. The meeting ended with Leadley telling Lightfoot that he needed to improve and noting that management was "cracking down" on all of the employees.[10] However, the meeting was not disciplinary in nature and at no time during the meeting did Leadley tell Lightfoot that he was being placed on probation or that termination might result if there were any problems in any of the areas discussed.[11] In fact, there was a substantial flexibility in the Respondent's time and attendance policies, as tardiness was not an uncommon occurrence,[12] and other employees had been permitted to call off on days they were scheduled to work or manipulate the classification of their leave days after the fact.[13]

ing" that a "couple of the employees did not feel comfortable talking with the other employees present." However, in response to a follow-up question, he contradicted himself by stating that these employees did not speak to him at the meeting, but rather, spoke to Leadley. Tr. 379. It is clear, therefore, that Carlson had already determined, prior to the group meeting, to hold individual meetings with the employees.

[4] Lightfoot's contention that he spoke at the meeting was not contradicted by other testimony. Carlson could not recall the comments, but conceded that it was possible that Lightfoot spoke at the meeting. Tr. 394–395. Furthermore, although apparently confusing the date of the January 30 meeting with another group meeting on February 10, Russell Knopf confirmed that Lightfoot asked Carlson the question using the shoe example and Carlson responded. Tr. 177–181.

[5] Lightfoot testified that the meeting lasted 45 minutes, while Carlson testified that none of the meetings lasted more than 15 minutes. Tr. 50, 382. I adopt Lightfoot's estimate since, unlike Carlson, he had a specific recollection of the meeting.

[6] Carlson denied making the comments attributed to him by Lightfoot at the February 3 meeting or at any other time during the union organizing campaign. Tr. 387, 396–398, 403–405. Leadley confirmed Carlson's version of the meeting and explained that there were only general discussions about negotiations during that meeting. Tr. 553. However, Carlson announced at the January 30 meeting, after Lightfoot pressed him about his opposition to union representation, that he would deal with any "personal questions" in individual meetings. I have no doubt that Lightfoot, who was the only service employee with the temerity to challenge Carlson at the group meeting, raised the issue of Carlson's opposition during the February 3 meeting. Therefore, the denials of Carlson and Leadley that they made statements indicating their intent to take retaliatory action should the Union prevail in the election, were not credible.

[7] The Respondent's contention that these raises were discretionary and merit based, rather than automatic, was negated by its attorney's concession that it was the Respondent's customary practice "to award earned raises on the paycheck that followed the [employees] anniversary date." GC Exh. 11, p.5.

[8] Lightfoot's version of the conversation was credible and not refuted by Leadley. Tr. 57–58.

[9] The Respondent's employees were required to punch a timeclock by 6:30 a.m. at the beginning of each workday and then review their daily work assignments to ensure they had the appropriate parts on their trucks before leaving the shop. Employees were also required to call in prior to scheduled workdays if they wanted to take the day off.

[10] Lightfoot's credibility as to his version of the meeting was enhanced by his candid concession of the deficiencies noted on GC Exh. 30(a); Tr. 71–74.

[11] Horbus and Leadley each testified that the latter told Leadley he was on probation. Tr. 212, 425, 509, 511. However, neither Leadley's assertion, nor Horbus' support for his supervisor's version of the events, were credible. Leadley prepared a list of items to discuss at the meeting and referred to them at trial as "pre-probation meeting notes." The list was written in pencil, but some items were added in blue ink shortly before the meeting. Allegedly, after the meeting ended, Leadley then wrote, in black pen, the words, "90 DAY PROBATION." GC Exh. 30(a); Tr. 154–155, 324–329. Leadley also allegedly generated, in black ink, two pages of handwritten notes summarizing the meeting and noting at the end of the second page that Lightfoot had been placed on probation for 90 days. R. Exh. 15; Tr. 422. Leadley's dubious explanation as to why he used blue ink to mark up the notes before the meeting, but black ink to mark up the notes after the meeting, support a reasonable inference that the black handwriting on GC Exh. 30(a) and R. Exh. 15 were not generated at or around the time of the meeting. It appears likely that they were written much later and solely for the purpose of bolstering the Respondent's contention that Lightfoot was placed on probation on November 7, 2002.

[12] GC Exhs. 17, 34, 37, 39, 43, 50, 58, 60–63, 68, 75, 79.

[13] GC Exhs. 20, 22, 24, 35, 38, 40, 41, 44–46, 48, 49, 61, 62, 69–71, 73, 76, 77, 80, 81, 83.

The Respondent's time and attendance records indicated that many of its employees benefited from this flexibility: Ken Milarski, Ron Follet, Steve Goldsmith, Mark Litrento, Scott Miller, Bob Balzano, Tom Gorman, Phil Torgeson, and Larry Iwanski. Even problem employees Dan Follett and Jim Jessen benefited from this flexibility in time and attendance policies before the severity of their performance-related problems required disciplinary action.

The record reveals little interaction between the Respondent and Lightfoot until after the Union's campaign for certification. At the group meeting of January 30, Lightfoot asked Carlson why he opposed unionization of the service employees and Carlson replied that all "personal questions" would be answered in individual meetings. At Lightfoot's individual meeting with Carlson and Leadley on February 3, he restated his strong support for the Union.

Around the same time, Lightfoot asked Leadley about his annual wage increase, as it has been the Respondent's customary practice to award an annual wage increase in the paycheck immediately following an employee's anniversary date. Based on this practice, Lightfoot would have been eligible to receive an increase in his January 31, 2003 paycheck.[14] However, Leadley told Lightfoot that wage increases were suspended pending the outcome of the union election on February 11. During that conversation, Leadley did not mention anything about Lightfoot's performance. Subsequent to the union election on February 11, the Respondent still failed to award Lightfoot his 2003 wage increase.

In addition to declaring his support for the Union at the meetings of January 30 and February 3, Lightfoot provided information to the Board in support of the Union's unfair labor practice charge in early March. The Respondent was clearly aware of Lightfoot's involvement with the Board since its March 6 position statement responding to the Union's unfair labor charge explained the Respondent's reasons for failing to grant Lightfoot his annual pay increase even after the union election on February 11. Lightfoot was the only employee for whom such an explanation was given, as he was the only one "whose anniversary date fell within the campaign and election period" mentioned in the General Counsel's February 26 letter outlining the unfair labor charge.[15]

On March 11, Leadley and Horbus met with Lightfoot and told him that he was being placed on a 60-day probation and that this was his last chance before being discharged. Leadley then had Lightfoot sign, for the first time during his employment with the Respondent, a "written warning acknowledgement" form. The form cited "continued attendance problems," indicated that Lightfoot was on probation and was not to miss any more days of work, except for scheduled days off, and required that he work 40-hour weeks.[16] The attendance problems were attributed to instances during January, February, and early March when Lightfoot reported late to work or called to take leave on the same day that he was scheduled for work. In recent years, only one other employee was formally placed on probation.[17]

On March 17, Lightfoot failed to report to work on time, was called at home by Horbus and simply explained that he overslept. He arrived to work nearly 2 hours late.[18] On March 21, Horbus spoke to Lightfoot about damage to Lightfoot's company truck that Horbus noticed 3 days earlier.[19] Lightfoot's explanation was that he did not realize he was required to report minor damage to the truck.[20]

Subsequently, on March 18, the Union filed charges with the Board alleging unfair labor practices by the Respondent in violation of Section 8(a)(1), (3), and (4). The charges, which were mailed to the Respondent on March 20 and received by it on March 24, included allegations pertaining to a specific employee. The Respondent was aware that the employee referred to in the letter was Lightfoot.[21] Upon returning from vacation on March 25, 2003, Leadley informed Lightfoot that he was being discharged because he reported late to work on March 17, 2003, and failed to report minor damage to his company truck.[22]

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[14] Although the Respondent occasionally withheld pay increases due to unsatisfactory work performance, there were instances in which the Respondent awarded pay increases to service employees prior to the completion of a performance evaluation or a meeting to discuss performance issues. For example, the Respondent awarded a 4 percent pay raise to Knopf before meeting with him in November 2002 to discuss his performance. Tr. 181–184. There were also instances in which others received wage increases after being involved in serious incidents or being required to repay the Respondent for excessive personal use of a company cellular telephone. GC Exhs. 23, 28; Tr. 278–279, 308–309.

[15] GC Exh. 11, p. 5.

[16] While the Respondent claims that there were performance-related issues, there was no credible proof that the Respondent spoke to Lightfoot about them at any time between November 7, 2002, and March 11, 2003. Tr. 512; GC Exh. 8.

[17] Jim Jessen had been placed on probation on October 18, 2000, because of performance-related problems.

[18] Lightfoot's testimony at trial, as well as in an affidavit submitted to the Board on April 9, 2003, that he overslept because of a power outage at his home, was not credible. Tr. 67–68. One would reasonably expect that a person in the process of being fired because he overslept would reveal the mitigating circumstances of a power outage. However, this was the only portion of Lightfoot's testimony that I found to be not credible.

[19] R. Exh. 17.

[20] A similar incident occurred during the fall of 2002 when Russel Knopf, another service department employee, was also admonished for failing to report minor damage to his company truck. However, Knopf was not punished.

[21] The amended charge stated, in pertinent part, that "[t]he Employer further withheld the evaluation and raise of an employee after the filing of the representation election petition by [the Union]. The Employer also changed the terms and conditions of employment unilaterally, during the term of the union representation election campaign when it changed the policy for paid vacation time. All this was punitive and aimed at known union supporters. The Employer retaliated against an employee by placing him on 'probation' for alleged poor attendance. By placing the employee on 'probation,' the Employer also denied him his review and raise. All of this occurred after the Employer became aware of that particular employee giving testimony to the NLRB during the investigation of a charge of violating 8(a)(1) of the Act." GC Exh. 1(c).

[22] In recent years, only two employees have been discharged by the Respondent, but the infractions leading to their termination were more serious than the alleged infractions of Lightfoot and did not involve

DISCUSSION

I. THE SECTION 8(A)(1) VIOLATIONS

The General Counsel asserts that the Respondent violated Section 8(a)(1) of the Act by attempting to discourage employees from selecting the Union as their collective-bargaining representative by: (1) on or about January 17, distributing memoranda to employees and threatening them with suspension of annual wage increases for an indefinite period; (2) on or about January 27, distributing memoranda to employees and threatening them with the loss of benefits pertaining to vacation, sick, personal, and holiday leave; (3) on or about January 30, distributing memoranda to employees and threatening them with the loss of bonus and overtime pay, and annual wage increases; (4) in late January or early February, threatening employees with the indefinite suspension of a regularly scheduled pay increase and vacation pay pending the results of the union election; and (5), on or about February 3, threatening employees with plant closure, layoffs, loss of overtime benefits, and a stalemate in collective bargaining in the event that the Union won the election.[23]

The Respondent contends that the three memoranda distributed to the services employees did not contain threats, but rather, articulated an objective and truthful basis for the comparison of what the Respondent paid its employees and what the Union provides in its collective-bargaining agreements. Furthermore, the Respondent contends that its assertion in the January 17 memorandum, that wages were frozen during collective bargaining, was not coercive when considered in connection with Carlson's statement that everything was negotiable. With respect to Leadley's comments to Lightfoot that the latter should not expect a pay increase pending the union election, the Respondent contends that it is appropriate for an employer to defer an expected pay increase in order to avoid the appearance of interfering with a pending election. As to the February 3 meeting with Lightfoot, the Respondent denies any threats of plant closure, layoffs, loss of overtime benefits, and an intent to cause delay of any future collective bargaining. Finally, the Respondent asserts that Lightfoot was a conduit for the Union, who was attempting to retaliate against the Respondent for the latter's refusal to voluntarily expand the bargaining unit to include the service employees.

The record reveals that the Respondent had a practice of granting annual wage increases based on merit.[24] The increases were discretionary as to amount. However, other than Lightfoot, no employee has been denied this wage increase since 2001. Carlson's statements that wages would be frozen until the conclusion of collective bargaining threatened to discontinue these customary annual increases if the Union prevailed in the election. It is well settled that an employer must maintain the status quo regarding benefits to unrepresented employees during the pendency of a union election. Recently, in *Jensen Enterprises, Inc.*, 339 NLRB 877 (2003), the Board held that an employer "violated Section 8(a)(1) by informing employees that, if the Union was voted in, wages would be 'frozen' during negotiations and they 'shouldn't expect to get any increases in wages or benefits until collective bargaining has concluded.' We agree with the judge that [the statement of the Respondent's agent] amounted to a threat of loss of benefits if the employees selected the Union as their bargaining representative."

Carlson's initial preelection campaign memorandum of January 17 warned service employees that, if the Union prevailed, collective bargaining could last for months or years and, during that time, wage increases would be suspended. Leadley augmented the scope of that warning when, at or around the end of January or the beginning of February, he told Lightfoot that all wage increases were frozen until after the election and that employees might not be paid a salary during their scheduled vacation. The statements by Carlson and Leadley threatened to suspend the Respondent's custom and practice of granting salary increases on or about an employee's anniversary date and effectively blamed the Union for the withholding. Accordingly, the January 17 memorandum distributed to service employees by Carlson violated Section 8(a)(1) by threatening to suspend their annual wage increases for an indefinite period in order to discourage them from selecting the Union as their collective-bargaining representative. *Earthgrains Co.*, 336 NLRB 1119, 1126–1127 (2001); G*rouse Mountain Lodge*, 333 NLRB 1322, 1323–1324 (2001); *Parma Industries*, 292 NLRB 90, 91 (1988); *Atlantic Forest Products*, 282 NLRB 855, 858–859 (1987).

Memoranda distributed by Carlson to the employees on January 27 and 30, warned the service employees that a union election victory would result in the loss of benefits. The January 27 memorandum specifically threatened the loss of vacation, sick, personal, and holiday leave, while the January 30 memorandum referred to the loss of opportunity to perform overtime work and receive monetary bonuses. The Respondent explained in each memorandum that it was basing its estimates on its current contract involving a different unit of its employees, but failed to inform the service employees that any change in their benefits must be negotiated with the Union. Accordingly, the Respondent's statements in the January 27 and 30 memoranda violated Section 8(a)(1) of the Act by threatening the loss of existing benefits in order to discourage employees from selecting the Union as their collective-bargaining representative. *Climatrol,* 329 NLRB 946, 948 (1999).

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tardiness. Dan Follet was discharged after the relevant dates in the charge, in June 2003, due to customer complaints and insubordination. Tr. 596; GC Exhs. 25, 26. The only other employee, Jim Jessen, had been counseled by Horbus in October 2000 for numerous problems, including time and attendance violations, excessive travel times to job assignments, and bad driving. Contrary to the Respondent's assertion, there was no indication on the written list of deficiencies provided to Jensen at that time that he was placed on probation. However, Jessen was discharged in March 2001 after experiencing serious problems with three different customers within 1 month of his termination. GC Exhs. 52–54.

[23] GC Exh. 1(g), par. V.

[24] This practice was conceded by the Respondent's counsel in his March 6 letter to the General Counsel and is properly chargeable to the Respondent as an admission. *Riverwoods Chappaqua Corp. v. Marine Midland Bank*, 30 F.3d 339 (2d Cir. 1994); *U.S. v. McKeon*, 738 F.2d 26 (2d Cir. 1984); *Packaging Techniques*, 317 NLRB 1252 (1995).

The Respondent supplemented the aforementioned memoranda with group and individual meetings with the service employees. In the January 30 group meeting, Carlson and Leadley told the service employees that unions were useless, no longer necessary and a waste of time. Other than expressing their general dislike for unions, they made no comments of a threatening nature in that meeting. However, in the individual meeting that Carlson and Leadley held with Lightfoot on February 3, Carlson threatened to close the business if the Union won the election or delay collective bargaining and lay off employees.

Under the test established by the Supreme Court in *Gissel Packing Co,* 395 U.S. 575, 618 (1969), an employer may tell employees the effects he believes unionization will have upon the company. His statement must be "carefully phrased on the basis of objective facts to convey an employer's belief as to demonstrably probable consequences beyond his control." However, the right of an employer to convey such a belief does not permit him "to jump from the unstated or unproven premise that a union's wage scale is fixed and immutable to a conclusion that he may have to shut down in the event of unionization, and convey this ultimate conclusion to employees." *Debber Electric*, 313 NLRB 1094, 1097 (1994). Carlson certainly took such a leap by dangling the threats of plant closure and layoffs allegedly due to overtime wage scales. Furthermore, his threat to unduly delay collective bargaining if the Union prevailed in the election effectively told the service employees that their "efforts to organize would be an exercise in futility." *Kona 60 Minute Photo*, 277 NLRB 867, 869 (1985). Accordingly, I find that Carlson's threat to close the business, delay collective bargaining or lay off employees if the Union won the election, was coercive in nature and violated Section 8(a)(1) of the Act.

Furthermore, Leadley's statement to Lightfoot in late January or early February, informing the latter that all wage increases were suspended until after the election and suggesting that employees might not receive paid vacations, was also coercive in nature. That statement, which came shortly before the union election, also violated Section 8(a)(1) of the Act by threatening an employee with the loss of benefits in order to discourage him from selecting the Union as his bargaining representative.

II. THE 8(A)(3) AND (4) VIOLATIONS

Under W*right Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel has the initial burden to establish that the employee engaged in concerted protected activity, the employer had knowledge of the employee's protected activities, the employer took adverse action against the employee, and there is a nexus or link between the protected concerted activities and the adverse action. Once these four elements have been established, the burden shifts to the Respondent to prove, by a preponderance of the evidence, that it took the adverse action for a legitimate nondiscriminatory reason.

The General Counsel alleges that the Respondent, motivated by Lightfoot's support for the Union, violated Section 8(a)(3) in several respects: (1) by failing to issue an annual wage increase to Lightfoot in late January 2003 or at any time thereafter; (2) by issuing a written warning to Lightfoot on March 11 and placing him on probation; and (3) by discharging Lightfoot on March 25. The General Counsel further alleges that the aforementioned conduct subsequent to March 11 violated Section 8(a)(4), as it was motivated by the Respondent's knowledge that Lightfoot was assisting the Union in a Board investigation involving unfair labor practice charges pending against the Respondent.[25]

The Respondent contends that Leadley decided to deny a wage increase to Lightfoot before he knew anything about the latter's support for the Union and, in any event, that Carlson informed the service employees on January 17 that all wage increases were frozen pending the February 11 election. It also contends that Lightfoot was placed on probation on March 11 due to continued problems with time and attendance on scheduled workdays. Finally, he was discharged on March 25 because he overslept and reported to work late on March 17, and failed to report minor damage to his company vehicle on or about March 18. The Respondent further contends that Lightfoot's probation and discharge were consistent with its disciplinary policies and practices.

The first three factors of a W*right Line* analysis clearly exist. The facts demonstrate the Respondent's awareness of the Union's effort to organize its service employees. Lightfoot engaged in concerted protected activity by advocating for the Union during the January 30 group meeting and in his individual meeting with Carlson and Leadley on February 3. In addition, the Respondent, through its position statement of March 6, was aware of Lightfoot's cooperation with the General Counsel. The Respondent's union animus is established by the aforementioned violations of Section 8(a)(1) by Carlson, the owner of the company. Furthermore, Carlson openly opposed the Union's efforts to represent the service employees in statements made in three memoranda and two meetings. While there is no direct evidence that the Respondent harbored any animus toward Lightfoot for supporting the Union, the record as a whole supports an inference of union animus and discriminatory motivation. *Tabular Corp. of America*, 337 NLRB 99 (2001); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987), enfd. 837 F.2d 575 (2d Cir. 1988); *Pete's Pic-Pac Supermarkets*, 707 F.2d 236, 240 (6th Cir. 1983). The only remaining factor necessary in order for the General Counsel to make a prima facie case is to establish a link between the protected concerted activities and the adverse action.

The denial of Lightfoot's wage increase, the warning and probation on March 11, and Lightfoot's discharge on March 25 were all strikingly close in time to critical events relating to Lightfoot's support for the Union: Lightfoot spoke in support of the Union at meetings on January 30 and February 3, but was not provided the customary wage increase on or after his anniversary date of January 31; the warning and probationary meeting on March 11 occurred within 2 weeks after Lightfoot provided testimony to the Board; and his discharge on March 25 was 1 day after the Respondent received notice of unfair labor practice charges based on the threatened loss of benefits during the union campaign and the probationary action taken against

[25] GC Exh. 1(g), par. VI.

Lightfoot. Such timing strongly supports an inference that the Respondent's antiunion animus was a motivating factor in the actions. In re *TKC,* 340 NLRB 923 (2003); *Kankakee Valley Rural Electric Membership Corp.*, 338 NLRB 906 (2003); *Masland Industries*, 311 NLRB 184, 197 (1993); *Limestone Apparel Corp.*, 255 NLRB 722, 736 (1981).

Since the General Counsel established a prima facie case, the burden of persuasion shifted to the Respondent to prove, by a preponderance of the evidence, that it would have placed Lightfoot on probation or discharged him even in the absence of his union activity. *Monroe Mfg.*, 323 NLRB 24 (1997). To meet its burden of persuasion, the Respondent was required to do more than show that it had a legitimate reason for its actions. *Hicks Oil & Hiscksgas, Inc.*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991).

As previously discussed, Leadley's contention that he intended to deny Lightfoot's wage increase in January, due to unsatisfactory performance, was not credible. Leadley failed to mention anything about Lightfoot's performance in January and, again, in early February when Lightfoot asked him about a wage increase. Nor is it plausible for the Respondent to argue that Lightfoot's failure to receive his annual wage increase in his paycheck of January 31 was due to the Respondent's suspension of increases pending the union election and, therefore, subsumed within the scope of its violation of Section 8(a)(1). The Respondent prevailed in the election on February 11, and the Respondent could no longer rely on the uncertainties surrounding future collective bargaining as an excuse for suspending customary wage increases. Therefore, the only reasonable inference that may be drawn from the Respondent's failure to award Lightfoot a wage increase is that it chose to punish him for his support of the Union.

The Respondent's basis for placing Lightfoot on probation on March 11 was allegedly due to continued problems with time and attendance on scheduled workdays in January through March. Specifically, Lightfoot was late on several occasions and, on several other days, called the office to say that he was taking off, causing the Respondent to reschedule the work assignments for those days. However, the record also reveals that Lightfoot worked in excess of 40 hours every week on or after the week ending December 30, 2002, and there is no credible evidence that the Respondent spoke with Lightfoot about these dates prior to March 11, or 44 days after the expiration of the alleged 90-day probation on February 5. The Respondent's basis for discharging Lightfoot on March 25 was allegedly due to his reporting late to work on March 17, and causing minor physical damage to a company vehicle. Notably, tardiness was not one of the items listed on the probationary form. Furthermore, Lightfoot did not miss any scheduled days of work between March 11 and 25, and worked nearly 50 hours each of the 2 weeks during that time.[26]

As fully explained above at page 5 and footnotes 12, 13, and 20, the Respondent treated Lightfoot more harshly than the rest of its employees. As such, the disciplinary taken by the Respondent was a departure from past practices, in which it tolerated violations of time and attendance rules by other employees without placing them on probation or discharging them. In re *Whirlpool Corp.*, 337 NLRB 726, 748 (2002); *Adco Electric,* 307 NLRB 1113, 1123 (1992), enfg. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *In-Terminal Service Co.*, 309 NLRB 23 (1992).

Based on the foregoing, I find that the Respondent failed to meet its burden of proving that Lightfoot would have been denied a wage increase, placed on probation and then discharged. The reasons asserted by the Respondent for its conduct were not relied upon and were a pretext to hide the real reason, which was to punish Lightfoot for engaging in protected concerted activity. Accordingly, I further find that the Respondent violated Section 8(a)(1), (3), and (4) by denying Richard Lightfoot a wage increase on or after January 31, placing him on probation on March 11, and discharging him on March 25.

CONCLUSIONS OF LAW

1. W. E. Carlson Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Millwrights and Machinery Erectors Local Union No. 1693, an affiliate of United Brotherhood of Carpenters and Joiners of America is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening to suspend wage increases, threatening plant closure and layoffs, threatening the loss of benefits and threatening the futility of collective bargaining if the Union came in, the Respondent violated Section 8(a)(1) of the Act.

4. By denying Richard Lightfoot a wage increase, placing him on probation, and discharging him due to his support for the Union and cooperation with the Board investigation, the Respondent violated Section 8(a)(1), (3), and (4).

5. By engaging in the conduct described above, the Respondent has committed unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found the Respondent has engaged in the above violations of the Act, it shall be recommended that the Respondent cease and desist from such actions and take certain affirmative actions designed to effectuate the purposes and policies of the Act and post the appropriate notices. It is recommended that the Respondent offer immediate reinstatement to employee Richard Lightfoot, who was unlawfully discharged. He shall be reinstated to his prior position or to a substantially equivalent one if his prior position no longer exists. He shall be made whole for all loss of backpay and benefits sustained by him as a result of the Respondent's unfair labor practices. These amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

[26] GC Exh. 13.

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